



Briefing for the Public Petitions Committee

Petition Number: [PE01494](#)

Main Petitioner: W. Hunter Watson

Subject: Mental Health (Care and Treatment) (Scotland) Act 2003

Calls on the Parliament to urge the Scottish Government to amend the Mental Health (Care and Treatment) (Scotland) Act 2003 to ensure that it is compatible with the European Convention on Human Rights.

Background

The petitioner's main argument is that the short-term detention provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("2003 Act") are not compatible with the following provisions of the European Convention on Human Rights ("ECHR"):

- Article 5 (the right to liberty and security of person); and
- Article 6 which provides that, "in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal."

The petitioner also argues that the 2003 Act's provisions on electro-convulsive therapy (ECT) do not comply with the ECHR, since they amount to "inhuman or degrading treatment" (i.e. they breach Article 3 of the ECHR).

Mental Health (Care and Treatment) (Scotland) Act 2003

Short-term detention

The relevant provisions are contained in Part 6 of the 2003 Act. In essence these allow individuals to be detained for a period of up to 28 days under a so-called short-term detention certificate if an approved medical practitioner¹ carries out a medical examination and takes the view that each of the following conditions is likely to be met:

¹ I.e. someone approved by the relevant Health Board/State Hospitals Board as having the requisite qualifications, experience, and training in the diagnosis and treatment of mental disorders (in practice a psychiatrist) – see s 22 of the 2003 Act

- “(a) that the patient has a mental disorder;²
- (b) that, because of the mental disorder, the patient’s ability to make decisions about the provision of medical treatment is significantly impaired;
- (c) that it is necessary to detain the patient in hospital for the purpose of—
- (i) determining what medical treatment should be given to the patient; or
 - (ii) giving medical treatment to the patient;
- (d) that if the patient were not detained in hospital there would be a significant risk—
- (i) to the health, safety or welfare of the patient; or
 - (ii) to the safety of any other person; and
- (e) that the granting of a short-term detention certificate is necessary.”³

The approved medical practitioner is also required to consult the patient’s mental health officer⁴ who must consent to the short-term detention (s 44(3(c) and (d)). Before deciding whether to consent, the patient’s mental health officer must (s 45(1)(a)–(d)): interview the patient; ascertain the name and address of the patient’s named person;⁵ inform the patient of the availability of independent advocacy services; and take appropriate steps to ensure that the patient has the opportunity of making use of those services. Unless impracticable, the approved medical practitioner must also consult the patient’s named person before a short-term detention certificate is granted and must have regard to any views expressed by the named person (section 44(10)). According to research carried out by the Mental Welfare Commission (“MWC”), in practice 56% of named persons were consulted in 2012–2013.⁶

The hospital’s managers must also give notice as soon as practicable after the granting of the certificate to: the patient; the patient’s named person; any guardian of the patient; and any welfare attorney of the patient (s 46(2)). They are also obliged to notify the Mental Health Tribunal for Scotland (the Tribunal) and the MWC (s 46(3)).

Therefore, the key point to note about the system is that, unlike compulsory treatment orders (i.e. orders requiring more long term treatment/detention), which have to be approved by the Tribunal in advance, short-term detention certificates can enter into force without direct input from the Tribunal.

² The 2013 Act defines “mental disorder” as “mental illness, learning disability or personality disorder”. See s 328(1)

³ See s 44(4)

⁴ I.e. a specially trained social worker who has the skills to work with people who have a mental disorder. See the [Scottish Government’s guide to the role of the mental health officer](#)

⁵ I.e. a person chosen by or appointed to a patient to represent and help protect their interests should they become subject to compulsory measures under the 2003 Act. For details see the [Scottish Government’s Guide supporting the role of the named person](#)

⁶ [Mental Health Act Monitoring](#) 2012/13 - page 21

Options do, however, exist for revoking short-term certificates. In particular, the patient, or the patient's named person, may apply to the Tribunal for revocation (s 50(1)). The MWC also has a separate power of revocation (s 51)⁷ and, under section 49, the responsible medical officer has a duty to consider from time to time whether the conditions for short-term detention "continue to be met" (if not the certificate can be revoked).

For more information see: [Volume 2 of the Scottish Government's Code of Practice for the Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#).⁸

ECT

The key elements of the legislation regulating the administration of ECT in hospitals are as follows:

- If a patient consents in writing, then either the patient's responsible medical officer or designated medical practitioner⁹ must certify that consent has been given and that the treatment is in the patient's best interests, having regard to the likelihood of the treatment alleviating or preventing a deterioration in the patient's condition (s 238).
- If a patient is incapable of consenting, a designated medical practitioner must certify that the patient is incapable of making a decision and that the treatment is in the patient's best interests having regard to the likelihood of the treatment alleviating or preventing deterioration in the patient's condition (s 239(1)).
- If a patient is incapable of consenting, but resists or objects to treatment, treatment is only permitted (s 239(2)) under certain of the urgent medical treatment provisions in the Act; i.e. where the purpose of the treatment is to: save the patient's life; prevent serious deterioration in the patient's condition; or alleviate serious suffering.¹⁰ If ECT is given on these grounds, the MWC must be notified. The MWC can revoke the decision to give ECT by notifying the patient's medical practitioner (s 248). The urgent medical treatment provisions may not be used to give ECT to someone who is capable of consenting, but does not consent (s 243(5)).

Treatment would also have to take into account any advance statements made by the patient (i.e. written statements, signed when the patient is well, which set out how he/she would prefer to be treated/not treated if he/she were to become ill in the future).¹¹

⁷ In both these cases, the grounds for revocation are that the conditions in sections 44(4)(a), (b) and (d) no longer continue to be met, or that the detention is no longer necessary

⁸ See pages 22–55 for information on short-term detention certificates

⁹ "Designated medical practitioner" is defined in s 233(2)

¹⁰ See section 243(3)(a)–(c) of the 2003 Act

¹¹ For details see the [MWC's Good Practice Guide on Advance Statements](#)

For details see: Chapter 10 of [Volume 1 of the Scottish Government's Code of Practice for the Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#).

ECHR

The ECHR is relevant to mental health services in Scotland since:

- Cases can be brought directly to the European Court of Human Rights in Strasbourg alleging a breach of the ECHR.
- Under the Human Rights Act 1998, all legislation (including the 2003 Act) must be interpreted in a manner compatible with the ECHR.
- Under section 29(2)(d) of the Scotland Act 1998, an Act of the Scottish Parliament which is incompatible with the ECHR is not law.

Short-term detention and ECHR

SPICe is not aware of a human rights case relating to the 2003 Act's short-term detention provisions and, ultimately, it would be for the UK courts, or the European Court of Human Rights, to assess the issue in the context of a specific case.

The provisions in Article 5 of the ECHR are likely to be most relevant since these provide for an exception to the right to liberty and security of person as regards "the lawful detention of persons of unsound mind" (Article 5(1)(e)). However, anyone detained on this basis must be "entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful" (Article 5(4)).

In a recent UK case – [M.H v UK](#) – the court summarised the case law on Article 5(4) of the ECHR as follows:

- An initial period of detention may be authorised by an administrative authority as an emergency measure provided it is of short duration and the individual can bring judicial proceedings "speedily" to challenge it.
- Following this initial period, a person detained for an indefinite/lengthy period is entitled to take court proceedings "at reasonable intervals".
- The procedure should have a judicial character and include guarantees appropriate to the kind of deprivation of liberty in question.
- Judicial proceedings need not always include the same guarantees as required under Article 6(1) for civil/criminal litigation. However, the person concerned should have access to a court and the opportunity to be heard either in person or through some form of representation.

- Special procedural safeguards may be needed to protect the interests of persons who are not fully capable of acting for themselves.¹²

A key question would, therefore, be whether the procedures for granting short-term detention certificates (and also the powers to revoke them under sections 49, 50 and 51 of the 2003 Act), comply with these rules. In addition, the perception of access to legal rights (and the workings of any special procedural safeguards) may also be relevant as, according to [recent research commissioned by the MWC](#), there would appear to be a lack of awareness by people with mental health problems of the specific legal rights of redress open to them (i.e. even if legal rights of redress exist, the report suggests that there is a question mark as to how they are used in practice).¹³

The petitioner also argues that the 2003 Act does not comply with Article 6 of the ECHR (i.e. the right to a fair and public hearing), on the grounds that:

- In considering whether to revoke a short-term detention certificate, the Tribunal is only required to consider whether or not the conditions for detention “continue to be met” (according to the petitioner this means that the Tribunal cannot be impartial since an assumption is made that the patient already has a detainable mental disorder).
- The Tribunal is not impartial as one of its members is a psychiatrist who is liable to be reluctant to challenge the initial psychiatrist’s decision to issue the short-term detention certificate.
- Tribunal hearings are informal and witnesses are not required to give evidence under oath (hence evidence is not properly tested).

There is large body of case law from the European Court of Human Rights on the issue of the impartiality of tribunals. Relevant issues include: the manner of appointment of tribunal members; their security of tenure, freedom from government intervention and the institution they are meant to regulate, and the appearance of independence.¹⁴ Issues of whether evidence is correctly tested would also be relevant in the context of the principle of “equality of arms” – i.e. whether the parties to civil proceedings have knowledge of and the ability to comment on all evidence adduced. The question would, therefore, be whether the composition and working of the Tribunal fulfils these principles.

ECT and ECHR

The application of ECT to a patient who resists or objects could potentially fall within the terms of Article 3 of the ECHR which prevents torture or “inhuman or degrading treatment or punishment”. However, the general approach of the

¹² See paragraph 77. For a discussion of some of these principles in a Scottish context see the Court of Session case of [Black v Mental Health Tribunal for Scotland and the Scottish Ministers](#)

¹³ See page 9

¹⁴ See, for example, the case of [Campbell and Fell v UK](#), paragraph 78

European Court of Human Rights on the use of compulsory psychiatric treatment would appear to be that Article 3 will not be breached when it can be shown that the treatment in question was “medically necessary” according to the “established principles of medicine”.¹⁵ Consequently, it seems that there is no blanket prohibition of ECT under the ECHR. Instead, whether ECT breaches Article 3 of the ECHR would seem to depend on the circumstances in which it is used. In this respect, it is worth noting that, in a [report from 2002](#), the European Committee for the Prevention of Torture (part of the Council of Europe) indicated that, ECT “is a recognised form of treatment for psychiatric patients suffering from some particular disorders.” The report also noted though that care must be taken that ECT fits into a patient’s treatment plan and that there are appropriate safeguards.¹⁶ It also recommended that ECT not be used in “unmodified form” – i.e. without anaesthetic and muscle relaxants.

Scottish Government Action

In January 2008, the then Minister for Public Health, Shona Robison MSP, [announced](#) the establishment of a group, headed by Professor Jim McManus, to undertake a limited review of the 2003 Act.

The review presented its [report](#) to Ministers in March 2009, and it included a number of recommendations on advance statements, independent advocacy, named persons, medical matters and tribunals. The report was then made the subject of a consultation, which ended in November 2009. An [analysis](#) of the consultation responses received was published in March 2010. The main findings of this can be accessed in a separate document [here](#). As noted by the Scottish Government,¹⁷ the subject of Tribunals was the one which caused most debate in the consultation. Three key issues arose from the McManus report itself and the consultation:

- 50% of cases are estimated to take more than one hearing to reach a disposal. This clogs up the system increasing the conclusion time for all users and results in further expenditure.
- There are still issues of perception of excessive formality and legality in tribunal hearings identified to the Review group.
- Concern was also expressed at the lack of legal expertise in solicitors in the area of mental health law. The McManus review made a number of recommendations in an attempt to remedy these issues and make Tribunals more efficient and effective in their functions.

The Scottish Government published its [response](#) to the McManus Review in October 2010. This made note of those areas that would require amendments to the 2003 Act, which in turn would require the introduction of a Bill. In paragraph 23 of the Scottish Government’s [Programme for Scotland 2012-2013](#), it was stated that a draft Mental Health Bill would be published for consultation by the end of 2013. This remains the Scottish Government’s

¹⁵ [Herczegfalvy v Austria](#), para 82

¹⁶ Paragraph 39

¹⁷ Scottish Government (Online) [Review of the 2003 Act](#).

position,¹⁸ though paragraph 63 of the [Programme for Scotland 2013-2014](#) notes the Scottish Government's plans to introduce a Mental Health and Adults with Incapacity Amendment Bill during this Parliamentary year. The likely content of the Bill is discussed on the Scottish Government website.⁵

Scottish Parliament Action

Since the coming into force of the 2003 Act, Parliamentary Committees do not appear to have conducted investigations into the specific issues raised by the petitioner.

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Senior Research Specialists

15 November 2013

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¹⁸ Personal communication, 12 November 2013.