



THE LAW SOCIETY
of SCOTLAND
www.lawscot.org.uk

Call for Views - Response

PE1494/I

Public Petition No. PEO1494

**The Law Society of Scotland's response
January 2014**

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interest of solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Mental Health and Disability Sub-Committee has had the opportunity to consider the Public Petitions Committee's request for views on Public Petition No PEO1494 (Mental Health Legislation) and has the following comments to put forward:

European Convention on Human Rights (ECHR)

The petitioner refers to article 6 ECHR when it appears that the focus of his petition is in relation to articles 5 (right to liberty and security) and 8 (right to respect for private and family life) ECHR.

Article 5 allows for the detention of persons reliably found to be of "unsound mind" by medical practitioners if there is a legal basis for the detention, if the detention is a proportionate response¹ and if article 5 procedural requirements are followed (e.g. the ability to have the detention reviewed by an independent court or tribunal within a reasonable time and timely release if the detention is found to be unlawful/no longer necessary). The Society considers that the *Mental Health (Care and Treatment) (Scotland) Act 2003* ("the 2003 Act") fulfils all these criteria.

Whilst subject to detention, a patient can only be treated involuntarily provided there is a lawful and proportionate justification for this (namely, protection of health) under article 8(2) ECHR, failing which there is a violation of the individual's right to private life/autonomy

¹ See *Winterwerp-v-Netherlands* (1979) 24 EHRR CD 45, *Bournewood (HL-v-United Kingdom* [2004] All ER (D) 39 (Oct)) - etc.

under article 8(1) ECHR². If a patient is treated in violation of article 8(1) it might also amount to inhuman or degrading treatment³. The Society is of the view that the 2003 Act and in particular the statutory principles regarding interventions take this into account.

Anyone discharging a function acting under the 2003 Act must act in compliance with the ECHR⁴ and all Scottish Parliament legislation must comply with the ECHR⁵. Given that the 2003 Act appears to be ECHR compliant it therefore seems that any ECHR violations are likely to be related to the implementation of the 2003 Act which, in the Society's view, requires to be addressed through the provision of information and training.

Short term detention certificate

Section 44 of the 2003 Act sets out the circumstances where a short term detention certificate ("the certificate") may be granted in respect of a patient with a mental disorder. One of the conditions which has to be met is that *"..because of the patient's mental disorder, the patient's ability to make decisions about the provision of medical treatment is significantly impaired;"*⁶ The certificate, once granted, provides the authority to detain the patient in hospital for the period of 28 days. The approved medical practitioner who grants the certificate is discharging a function under the 2003 Act and is therefore obliged to have regard to the statutory principles set out in sections 1 and 2 of the 2003 Act. This includes *"the importance of providing the maximum benefit to the patient;"*⁷

The petitioner remarks that *"...it is common for the individual to have to wait for three weeks for an opportunity to appeal against his or her detention."* Section 50 of the 2003 Act provides the patient or the patient's named person with a right to apply to the Mental Health Tribunal for Scotland ("the Tribunal") for the revocation of the short term detention certificate (or an extension certificate, where this applies). This right of appeal is available

² See *Herczegflavy-v-Austria (1992) 15 EHRR 437*; and beyond

³ Article 3 ECHR - although admittedly the European Court of Human Rights has tended to be a bit reticent in finding violations here

⁴ As a 'public authority' under section 6 of *the Human Rights Act 1998*

⁵ Section 29(2)(d) *Scotland Act 1998*

⁶ Section 44(4)(b)

⁷ Section 1(3)(f)

as soon as the certificate is granted. There is no requirement for a period of time to have elapsed before an appeal may be made.

The Scottish Tribunals Service (“STS”) provides administrative support to the Tribunal. The STS employ a range of case management schemes and performance indicators in order to discharge their statutory duties in an effective and efficient manner. This includes a key performance indicator in relation to the hearing of applications made under section 50 of the 2003 Act. The Society is informed that on the receipt of such an application the STS will endeavour to schedule a hearing within 5 working days, unless there is a motion made by a party to extend the hearing date beyond this period. From time to time the STS will alter the hearing date by one working day to accommodate the availability of parties. On rarer occasions a motion may be made after intimation, to extend the hearing date beyond 5 to 6 working days from receipt, which will be considered and decided by an In-house Convener. The Society understands that the majority of such motions are presented by the patient’s legal representative and are usually for short periods beyond the 5 to 6 working days from receipt. The STS maintain key performance indicator statistics which demonstrate consistently high adherence to this timescale for section 50 hearings.

The Society acknowledges that prior to the introduction of this key performance indicator there were concerning and unacceptable delays in fixing a hearing date for patients who wished to appeal their short term detention. The Society publicly expressed concern on this between the periods of 2005 and 2008. The scheduling timescale and key performance indicator were introduced early in 2009. Those solicitors who regularly appear before tribunals were informed of its nature and intent. Since that time the Society has had no cause to express concern around hearing delays in section 50 applications.

Absence of fair hearings

The petitioner remarks that a tribunal is “..liable to assume.. “ that “*the approved medical practitioner was not mistaken when he or she considered it likely that an individual had a detainable mental disorder*” Tribunal panels are constituted of three Tribunal members who are appointed by Scottish Ministers. The medical, general and legal members require to

discharge their functions in their capacity as judicial officers, in an objective and impartial manner, after considering written and oral evidence and after hearing legal argument and submissions. Section 50(4) of the 2003 Act specifies that the tribunal shall revoke the certificate if not satisfied that the conditions mentioned in paragraphs (a), (b) and (d) of section 44(4) of the Act continue to be met in respect of the patient⁸; but also specifies - which the petitioner does not remark upon – an alternative which is “[or] that it continues to be necessary for the detention in hospital of the patient to be authorised by the certificate”⁹.

In addition to the right to make an application under section 50 of the 2003 Act, the patient¹⁰ also has the right to make an application under section 291 to the Tribunal, where she or he considers they have been unlawfully detained, for an order requiring the managers of the hospital to cease to detain the patient.

The petitioner remarks that witnesses are not required to give evidence on oath and “hence the evidence is not always properly tested.” Rule 63(6) of *The Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005* (“the Rules”) makes provision for the Tribunal to require any witness to give evidence on oath or affirmation. Rule 63 of the Rules also specifies that the Tribunal may, in accordance with the overriding objective, (which is to secure that proceedings are handled as fairly, expeditiously and efficiently as possible) conduct the hearing as informally as the circumstances of the case permit and in the manner the Tribunal considers to be just and most suitable to the clarification and determination of the matters before it. In the Society’s view this is inkeeping with the importance of the patient participating as fully as possible in the hearing process, which is one of the statutory principles¹¹. The informality of the process, where this is introduced, does not remove the formality of the event and legal nature of the decision.

The Society supported the introduction of a Mental Health Tribunal during the reviews of the *Mental Health (Scotland) Act 1984* as a specialist legal forum, which would be preferable to the sheriff court, for deciding applications etc. for patients with a severe and enduring mental disorder who will require compulsory measures of treatment. The Society continues

⁸ Section 50(4)(a)

⁹ Section 50(4)(b)

¹⁰ And those others specified in section 291(4) of the 2003 Act

¹¹ Section 1(3)(c)

to recognise the benefits of the Mental Health Tribunal for Scotland. The Society is satisfied that the provisions of the 2003 Act and in particular the provisions in relation to the appointment of members and tribunal panels is sufficient to ensure that tribunal applications etc. are considered objectively and decided in an impartial manner.

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