



PE1494/L

Public Petition PEC1494 – Mental Health Legislation

SAMH thanks the Public Petitions Committee for the invitation to respond to this petition.

SAMH was involved in the development of the Mental Health (Care and Treatment) (Scotland) Act 2003, and believes it to be a progressive piece of legislation. However, it is not perfect, and we welcome the chance to demonstrate where improvements could be made, both in our submission to the Public Petitions Committee, and when the draft Mental Health Bill reaches the Scottish Parliament in 2014.

Short term detention certificates

SAMH believes that the conditions which must be met for a Short Term Detention Certificate to be issued are compliant with human rights standards. Part 16 of the Mental Health (Care and Treatment) (Scotland) Act 2003 sets out the rules under which someone who is subject to short-term detention or a compulsory treatment order may receive treatment. 'Medical treatment' as defined under the Act is quite broad; as well as medical treatments like drug treatments and electro-convulsive therapy (ECT), it also covers nursing, care, psychological interventions, habilitation and rehabilitation. ('Habilitation' and 'rehabilitation' cover things like education and training in work, social and independent living skills.)¹

As a recovery-focused organisation, SAMH would not want to see the denial or delay of medical treatment to an individual who was unwell, given that this could extend their suffering and potentially lengthen their time in hospital, going against the Millan principles. We would not want to support a situation, such as in the Netherlands, whereby a judicial review was required before someone can be treated; in those circumstances, the individual would still be denied their liberty, breaching article 5 of the ECHR, and would not receive relief or support for their illness. They could also be subject to exclusion or restraint whilst not undergoing treatment. We believe this could be a breach of the individual's human rights and would be an extremely retrograde approach.

Stigma

SAMH knows that people with mental health problems are amongst the most discriminated against within society. We have been involved in the delivery of the See Me campaign since its inception in 2002, and are now partners with the Mental Health Foundation in the re-founded See Me programme. As the evaluation² of the

¹ <http://www.scotland.gov.uk/Publications/2004/01/18753/31686>

² <http://www.scotland.gov.uk/Resource/0041/00418385.pdf>

See Me campaign found in 2012, while much progress has been achieved in the past decade to raise awareness of mental health problems, unfortunately stigma and discrimination, especially against people with severe and enduring mental health problems, persist in Scottish society.

In terms of the petitioner's assertion about whether detention under mental health legislation specifically contributes to societal stigma, or self-stigma, we would welcome further investigation in this area due to a dearth of research to back up this claim. One study³ does demonstrate that people with a history of psychiatric treatment were subject to more scrutiny in applying for visas. There is evidence that people who have experience of mental health problems, especially severe and enduring mental health problems, remain excluded from community life and can be discriminated against in the fields of employment, education, welfare and justice.

SAMH believes more research is required to determine whether the act of detention, or psychiatric treatment, contributes to this wider societal stigma; and depending on the findings of the research, possibly more awareness and education about mental health treatment, as well as better enforcement of laws to prevent disability discrimination could be required.

The Millan principles underpinning the Act should be a catalyst for improving practice and promoting better care and treatment of people with mental health problems.

Absence of fair hearings

The petitioner states a breach of Article 6 under the grounds that the hearing is unfair and not compliant with Article 6 of the ECHR. The petitioner is applying a criminal test to this civil hearing; we note, however, that Article 6 also encompasses civil rights.

SAMH supports the human rights based principle within the tribunal system that the approved medical practitioner must demonstrate why the individual continues to need treatment, rather than place the onus, as has happened historically, on the individual to prove that they are well.

SAMH does not agree with the assertions made in the petition and in the oral evidence provided to the Committee, that the psychiatrist on the tribunal would not challenge the RMO; nor that other members of the tribunal would necessarily defer to the psychiatrist. We are not aware of any evidence which backs up the petitioner's assertions on these matters.

SAMH supports the informality of tribunal hearings. Prior to the formation of the Mental Health Tribunal for Scotland, sheriff courts were used for such hearings, and the formality of such proceedings added to the stress of the situation, and service users seem to prefer the current approach. SAMH notes that McManus also commented on this matter; we would not support formalising the process as we agreed with the original Millan Committee's expectation that less legality in the

³ <http://m.pb.rcpsych.org/content/35/1/5.full>

approach and manner would improve the tribunal process for patients and service users.

Greater access to advocacy services, more support for named persons and more mental health training for solicitors could further improve the tribunal process, as well as ensure patient confidence in the Tribunal's impartiality. Much greater promotion of advance statements and clarity and training for practitioners of the need to adhere to them as far as possible could reduce the number of people appealing their treatment. Many of these issues were highlighted in the McManus review and we note that there will be the opportunity for the Scottish Parliament to debate the Mental Health Bill during this parliamentary session. We were disappointed to see the omission of some of McManus's recommendations from the consultation on the Mental Health Bill, especially in terms of advocacy provision and advance statement promotion, and will be submitting a response on this draft legislation in due course.

Council of Europe recommendations

While it should be noted that recommendations from the Council of Europe are not legally binding, we do take them extremely seriously. Indeed, SAMH used evidence from the Council of Europe in formulating our position ahead of the passage of the Act in 2002. However, we believe that provided the conditions outlined for the authorisation of a short term detention certificate (or compulsory treatment orders) within the Mental Health Care and Treatment (Scotland) Act 2003 are met, then there is no breach of an individual's human rights. We have already set out above some ways to improve the tribunal experience for patients, which involve better implementation of the Act and greater awareness by all parties of their rights under the Act.

Further necessary changes

SAMH notes that Scotland complies with the WHO recommendation for the use of modified ECT, but the Mental Health Act allows for ECT to be used in situations where patients do not or cannot consent but where it is deemed clinically necessary. We also note the petitioner's proposals that non-consensual ECT equates to a breach of article 3 of ECHR, but we are not aware of any international case law which 'proves' this claim; whether this is an adequate position to be in, this is for the Committee and the Government to decide. We have analysed the views of the Special Rapporteur to the UN Committee Against Torture on non-consensual ECT as being a breach of article 3, and also note that he is against the principle of guardianship and detention laws, an opinion which SAMH does not support.

Much of the evidence presented during the petitioner's hearing related to the use of ECT. SAMH was referred to by the petitioner in support of his position, and we would like to set out our position on ECT below.

In our 2002 evidence ahead of the passage of the Mental Health Act, SAMH made the following statement :

"SAMH believes that in all cases where patients are asked to consent to treatment, including ECT they must be advised of the nature of the treatment, its purpose and

possible side effects. Patients should also be advised that even though ECT can alleviate the symptoms of particular episodes of ill-health, it is not a long term cure and does not tackle the underlying causes of mental distress.

Some mental health service users have complained to SAMH that they were given insufficient information about ECT or felt pressured into giving consent, or were not offered alternative treatments. In order to improve this situation and provide better safeguards for patients, SAMH believes that a second medical opinion should be required in all cases where ECT is being considered and that all patients should have access to an independent advocacy service.

SAMH supports the work of the Scottish ECT Audit Network (SEAN) and participates in its reference group. However there is still a need for statistically robust user based research - SAMH hopes to do joint research in this area with SEAN and user groups in the future. We also believe that further research needs to be undertaken into the appropriateness and levels of use of ECT as an emergency treatment.⁴

This petition has led SAMH to explore, eight years after the enactment of the Mental Health Act, whether we needed to revise our views on non-consensual ECT. We have investigated the statistics outlined by SEAN and also the Mental Welfare Commission, on the general use and regulation of ECT in Scotland, and note the NICE guideline on this treatment. We have looked at alternative legal systems regulating mental health in the UK and internationally. We recognise that the evidence shows that ECT provides an effective intervention for individuals with depressive conditions which are resistant to medication, and that the outcomes for patients who do not consent are consistently better than for those who do. We recognise that compared with similarly sized countries, such as New Zealand, the practice of ECT in Scotland is used to a lesser extent and with arguably better safeguards.

We have held discussions with representatives from the Mental Welfare Commission, the Royal College of Psychiatrists in Scotland, the Scottish Human Rights Commission, and the Centre for Mental Health and Incapacity Law, Rights and Policy at Napier University. We have also spoken to SAMH staff and SAMH service users who had been given ECT, in some cases against their wishes when they were deemed not to have capacity to make this decision. Some SAMH service users retrospectively agreed and supported their treatment, as it had had a positive impact on their recovery; others held an opposing viewpoint. Other service users who had been given ECT against their wishes did not wish to speak to us about this part of their treatment. This evidence of patient experience, based on the small number of service users we spoke to, is necessarily anecdotal; as is the evidence presented to the Committee by the petitioner. It is not good practice to make laws or change laws based on the experiences of a small number of people. We need more robust evidence.

Taking this in the round, SAMH continues to believe that consent should be sought for the delivery of ECT, and that the requirements which we set out eleven years ago still stand. The Millan principles highlight the need for participation, taking past and

⁴ <http://archive.scottish.parliament.uk/business/committees/historic/health/reports-02/her02-18-vol02-02.htm#16> Health Committee Stage 1 Report on the Mental Health (Scotland) Bill, Volume 2, 2002

present wishes of the patient into account, and this ideal should drive legislation, process and practice. We believe that it would be timely and helpful if the Scottish Government commissioned an independent research review to determine the longitudinal effects and outcomes of ECT on individuals in Scotland, whether the treatment was consensual or not. This review would help to improve practice, if necessary; to improve the law, if necessary; and to improve patient confidence in and public awareness of the mental health system in Scotland.

SAMH does not support the assertions within this petition and the oral evidence which denigrate the actions and values of psychiatrists. SAMH believes that clinicians who work in mental health are committed to providing the best treatment available to patients, but we also recognise that a minority of patients can feel disempowered when a treatment is administered 'in their best interests' but without their consent, as permitted by part 16, 241 (1) (c) of the Mental Health Act. This part of the Act could be viewed as paternalistic and should be reviewed, given the commitments and rights accorded to patient involvement in the treatment of physical health conditions. We believe that many concerns about the Act expressed by patients could be resolved by better implementation of the Act and greater understanding of the Millan principles, both by clinicians and by patients and their carers.

We also urge the Scottish Government to hold a review as it could help to demonstrate whether the legislation is human rights compliant in this regard. The General Comment on Article 12 of the UNCRPD, prepared by the Committee on the Rights of Persons with Disabilities will need a proper response from the Scottish Government, given its potential impact on mental health and incapacity legislation. Adrian Ward's initial rebuttal of the statement has been helpful, but greater evidence about how the human rights of people with mental health problems are upheld in Scotland is also necessary.

The recent launch of the Scottish National Action Plan on Human Rights⁵ should also act as a catalyst for Scottish Government action on this issue. The actions outlined by SNAP, on the promotion of a human rights culture within Scotland, improving lives through human rights in healthcare delivery, and meeting our international obligations at home and abroad are all crucial in the delivery of mental health legislation. This reinforces the commitment within the Scottish Government's Mental Health Strategy to focus on rights as a key component of mental health care in Scotland.

As we have noted earlier in this response, a greater use of advance statements by patients, and demonstration by clinicians of how all avenues to deliver the treatment within those statements are explored, would lead to higher patient satisfaction that their views were taken into account in their treatment. Greater awareness and use of advance statements could also alleviate the burden placed on families, carers and named persons to make difficult choices if their loved one was incapacitated.

⁵ <http://www.scottishhumanrights.com/application/resources/documents/SNAP/SNAPpdfWeb.pdf>

Summary

The people SAMH support often come to us from the acute mental health system. How they feel they were treated can have an impact on their views of acute care, on rehabilitation, and on the community support available; all this can have an impact on the length of their recovery journey. Scotland and the rest of the UK are committed to ensuring that all members of our society can enjoy the highest attainable standards of physical and mental health, through our commitment to the UN Convention on Economic, Social and Cultural Rights. Ensuring that the human rights of individuals with mental health problems are upheld at every stage of their treatment and ongoing support must be a priority for us all.