LEGAL MATTERS

W. Hunter Watson April 2015

Scotland Act 1998

Section 29 of the Scotland Act 1998 states

"(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as any of the following paragraphs apply – …

(d) it is incompatible with any of the Convention rights or with Community law."

In this connection, the Minister should seek legal advice regarding a number of matters including the following:

- Would an amended mental health Act be law if any of its provisions is outside the legislative competence of the Parliament?
- Might an amended Act be incompatible with Convention rights if it is not compatible with a judgment of the European Court of Human Rights?
- What constitutes Community law?

Ibrahim GurkanvTurkey (para 14)

In 2012 the European Court of Human Rights ruled that a tribunal must be "***impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in that respect".***

Unfortunately, mental health tribunals cannot be regarded as impartial for a variety of reasons including the following:

- One of the three tribunal members is a psychiatrist who is liable to be reluctant to disagree with any fellow psychiatrist who wishes the patient to continue to be subject to compulsory measures.
- The sufficient guarantees of impartiality are lacking not only because of the composition of the Tribunal but also because of its remit: section 50 of the 2003 Act requires the Tribunal to determine whether the criteria that would justify compulsory measures "continue to be met". Thus the Tribunal is expected to assume that an approved medical practitioner had not been mistaken when he or she considered it likely that the criteria had been met when a short-term detention certificate was granted and also that no previous tribunal had been mistaken when it had found that the criteria had been met. That is clearly unsatisfactory.

- Tribunal hearings are of an informal nature and witnesses are not required to give evidence on oath. This means that the evidence is not properly tested.

There is, in fact, empirical evidence that patients often do not have a fair hearing when they appear before a mental health tribunal. There have been repeated complaints that it does not matter what patients or their supporters say: the decision of the Tribunal is almost invariably based upon the evidence from the responsible medical officer. Also a study of tribunal transcripts has revealed that tribunals do not always base their decisions on "cogent medical evidence" as has been implied: the study revealed that mental health professionals sometimes give false evidence and that tribunals wrongly accept this as fact since they regard such people as "credible witnesses".

Article 6 ECHR

Article 6 ECHR states that "***In the determination of his civil rights … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."***

Mental health tribunals may be independent but they are clearly not impartial. The Minister should seek legal advice, therefore, as to whether it might be a violation of their right to a fair hearing under Article 6 ECHR if appeals by patients are heard by mental health tribunals.

Salontaji-Drobnjak v Serbia

In 2009 the European Court of Human Rights ruled that

- There had been "***a violation of Article 6.1 of the Convention as regards the fairness of the proceedings resulting in the partial deprivation of the applicant's legal capacity",*** and
- There had also been ***"a violation of Article 6.1 of the Convention as regards the applicant's right of access to a court concerning the restoration of his full legal capacity".***

In view of these rulings the Minister should seek legal advice about the following:

- Should the 2003 Act be amended in order to ensure that greater care is taken before a person is deprived of his or her legal capacity with respect to making decisions about medical treatment?
- Should the 2003 Act be amended to provide for an appeal against a decision as to incapacity?

Supreme Court judgment

In March 2015 the Supreme Court in London awarded the mother of a brain damaged son £5.2 million on the grounds that there had been medical negligence: there had been a

failure to inform the mother of the risks of natural delivery when the baby is large and there had also been a failure to discuss the alternatives with her. Lord Reed, who delivered the Supreme Court judgment, said ***"An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken".***

In view of this decision, it would seem prudent for the Minister to seek legal advice regarding the provision within the 2003 Act for involuntary treatment to be provided before it has been established that the individual is of unsound mind which, in this context, presumably means no more than that the individual lacks the legal capacity to make a decision about the treatment in question. It should be noted that, according to the GMC consent guidance, there must be a presumption of the capacity to consent to, or to refuse medical treatment.

The Minister should also seek legal advice about section 242 of the 2003 Act since this authorises the giving of treatment to an unwilling competent patient. This section appears to be incompatible with the judgment of the Supreme Court to which reference was made above.

<u>Convention on the Rights of Persons with Disabilities</u>

The Minister should seek legal advice as to whether the Convention on the Rights of Persons with Disabilities and the General Comment on Article 12 issued by the UN Committee on the Rights of Persons with Disabilities require that significant amendments be made to the 2003 Mental Health Act.

<u>Concluding remarks</u>

The Minister should not offer Parliament his assurance that an amended 2003 Act is compatible with Convention rights unless he has sought legal advice about all matters about which there might be some doubt. It is to be hoped that he will not offer such an assurance unless he has received legal advice which would justify his confidence in the ECHR compatibility of the amended Act. It is also to be hoped that the Health and Sport Committee and, indeed, Parliament as a whole, will take a keen interest in the human rights aspects of mental Scottish mental health legislation. There should be no doubt that many people who have been subjected to compulsory treatment have had their human rights violated and, in some cases, have died prematurely. It would appear to be necessary to do much more than to amend the 2003 Act in line with the proposals emanating from the limited McManus review.