

Scottish Council on Human Bioethics

15 Morningside Road, Edinburgh EH10 4DP, SCOTLAND, UK

Date: 29 June 2004 - Scottish Executive - Health Department

Consultation Paper on the Mental Health (Care and Treatment) (Scotland) Act 2003: Regulations

General Remarks:

The Scottish Council on Human Bioethics (SCHB) is of the view that the Scottish government should ensure that it respects the following international legislation. In addition, it should ensure that the language and expressions used in these international texts are similar to those of any future Scottish legislation in order to avoid misunderstandings and confusion:

United nations

Declaration on the Rights of Mentally Retarded Persons¹

Adopted and proclaimed on 20 December 1971

Principles for the protection of persons with mental illness and the improvement of mental health care²

Adopted on 17 December 1991

Declaration on the Rights of Disabled Persons³

Adopted and proclaimed on 9 December 1975

Council of Europe

Draft Recommendation on the protection of the human rights and dignity of persons with mental disorder⁴

Forthcoming

Draft Protocol on Biomedical Research⁵

Forthcoming

¹ Declaration on the Rights of Mentally Retarded Persons: http://193.194.138.190/html/menu3/b/m_mental.htm

² Principles for the protection of persons with mental illness and the improvement of mental health care: <http://193.194.138.190/html/menu3/b/68.htm>

³ Declaration on the Rights of Disabled Persons: <http://193.194.138.190/html/menu3/b/72.htm>

⁴ Draft Recommendation on the protection of the human rights and dignity of persons with mental disorder http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Bioethics/Activities/Psychiatry_and_human_rights/INF_2004_5e%20psychiatrie%20projet%20rec%20&%20ER.pdf

⁵ Draft Protocol on Biomedical Research [http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Bioethics/Activities/Biomedical_research/CDBI-INF\(2003\)6eREV.pdf](http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Bioethics/Activities/Biomedical_research/CDBI-INF(2003)6eREV.pdf)

Draft consultation response on behalf of the Scottish Council on Human Bioethics:

Note: Not all questions will be addressed

Certain surgical operations (section 234(2)(b))

58. The Act provides for safeguards for certain surgical operations, specifically those for destroying brain tissue or the functioning of brain tissue, commonly known as neurosurgery for mental disorder (NMD) or psychosurgery.

59. Where the patient is capable of consenting, s/he must consent in writing to the treatment, and two lay persons appointed by the Mental Welfare Commission must certify that the patient is able to consent and has done so. In addition, a designated medical practitioner (DMP) must confirm both that the patient has consented and that the treatment is in the patient's best interests. The patient can withdraw consent to the treatment at any time.

No person who opposes the treatment, either by stating opposition or by resisting treatment, may be given such treatment.

60. For patients who are incapable of consenting, a designated medical practitioner must certify that this is the case; that the patient does not object to the treatment; and that the treatment is in the patient's best interests. Two lay persons appointed by the Mental Welfare Commission must certify that the patient is incapable of consenting and that the patient does not object to the treatment. In addition, the responsible medical officer must apply to the Court of Session, and the Court must make an order authorising the treatment specified. The Court of Session may only authorise the treatment if satisfied that, having regard to the likelihood of the treatment alleviating or preventing a deterioration in the patient's condition, it is in the best interests of the patient, and the patient does not object.

61. Where the patient is aged under 16, either the RMO in charge of the treatment, or the DMP who approves the treatment, must be a specialist in child psychiatry.

62. NMD is a rare procedure, carried out at only one location in Scotland (Dundee). Section 234(2)(b) allows for other kinds of medical treatments to be included through regulations and to attract this level of safeguard which currently applied only to NMD.

63. We are not proposing any other medical treatments for mental disorder should attract this level of safeguard and therefore should be regulated.

What are your views on this proposal? Do you think there are medical treatments for mental disorder which should attract this level of safeguard and which should be included in regulations under section 234(2)(b)?

Scottish Council on Human Bioethics Response:

The SCHB is of the view that patients who are incapable of consenting should never be subject to neurosurgery. This is in conformity with Article 28 (Specific treatments) of the forthcoming Council of Europe Recommendation on the protection of the human rights and dignity of persons with mental disorder. Such a treatment should only be carried out if the person concerned has given free, informed and specific consent in writing. Moreover, neurosurgery should not be used in the context of a person being placed into a medical institution without his or her consent because of the difficulty of ensuring that he or she has given consent to such an intervention in those circumstances. If informed consent is given by the patient, then the treatment should be fully documented and recorded in a register.

Electro-convulsive therapy (section 237(3)(b))

64. The Act provides for safeguards for electro-convulsive therapy (ECT) and for regulations to specify other treatments which should also carry the same level of safeguards.

65. ECT (and any further treatments regulated under section 237) may only be given to a patient who is subject to compulsion if:

- the patient can and does consent and that consent is given in writing; or
- the patient is incapable of consenting and the treatment is authorised by a designated medical practitioner.

66. Section 243(5) of the Act provides that it is not possible to give ECT to a patient who is capable of making a treatment decision and refuses the treatment, even where the treatment is to be given urgently for the purposes laid out in section 243.

67. Where a patient who is liable to compulsory medical treatment can and does consent in writing to the treatment, then either the patient's RMO or a designated medical practitioner must certify that this 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. The patient can withdraw consent to the treatment at any time. Any further treatment would not be authorised on the basis of the earlier consent.

68. Where a patient who is liable to compulsory treatment is incapable of consenting, a DMP 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 a deterioration in the patient's condition.

69. If the patient resists or objects to the treatment, the treatment can only be given if the DMP certifies that the patient is incapable of making a decision, that the patient resists or objects, and that the treatment is necessary under the urgent medical treatment provisions of section 243(3): that is, to save the patient's life, to prevent serious deterioration of the patient's condition, to alleviate suffering or to prevent harm to the patient or others.

70. Where the patient is aged under 16, either the RMO in charge of the treatment, or the DMP who approves the treatment, must be a specialist in child psychiatry.

71. The provisions of section 243(5) of the Act with respect to urgent medical treatment specify that the right for a patient with capacity to refuse ECT cannot be overridden even in an emergency, even to save the patient's life. It is significant to note that ECT is specifically named in this regard; if other treatments were added to have the same safeguards as ECT under 237(3)(b), those treatments would not have the same limits as ECT does under 243(5).

72. We do not have any specific proposals of future treatments which should attract the same level of safeguards. We would welcome views on any treatment which might be considered for these regulations.

What are your views on these policy proposals? Do you think there are medical treatments for mental disorder which should attract this level of safeguard and which should be included in regulations under section 237(3)(b)?

Scottish Council on Human Bioethics Response:

The SCHB notes that Electro-convulsive therapy treatment should be fully documented and recorded in a register.