Managing dangerous people with severe personality disorder

Proposals for Policy Development

Executive Summary

The challenge to public safety presented by the minority of people with severe personality disorder, who because of their disorder pose a risk of serious offending, has been recognised by successive administrations. Dealing with this problem brings together criminal justice and health and social policy and raises complex and sensitive ethical questions. The paper sets out the Government's policy objectives for tackling these issues. It describes the range of service and legislative options that we are considering.

Personality disorder is a term used to describe a number of different conditions. The great majority of people with personality disorder cause at most some distress to themselves or to their family or friends - for example by their obsessive or compulsive behaviour. But at the other end of the spectrum is a small group of people who are very seriously disordered and who pose a very high risk to the public. This paper is concerned with the problems presented by this small group.

There are estimated to be just over 2,000 people who would fall into this group in England and Wales. Over 98% of these people are men, and at any time most are in prison or in secure hospitals. But the law as it stands fails to protect the public from the danger these people represent because in many cases they have to be allowed to return to the community even though they remain dangerous. Under existing arrangements, although there are pockets of good practice, the kind of therapeutic treatment needed to ensure that they are not released back into society whilst they still present a significant risk is not generally available. Research into the causes of severe personality disorder, and into how best to address the associated risks, has been inconclusive. New research has been commissioned but will take time to complete. Decisions on the direction of policy development for managing this group cannot be delayed until the outcomes of the research are known.

The Government intends to develop a co-ordinated package of arrangements to address these challenges, that achieves better protection for the public, is consistent with human rights law and;

- strikes the right balance between the interests of individuals and of society;
- meets the needs of this group of people better than the present patchy provision;
- is firmly grounded in evidence from research, and capable of adapting over time as new research evidence comes forward;
- provides better value for money than the present arrangements;
- leads in time to a reduction in the level of the most serious offending by people with severe personality disorder, as better preventive measures are identified and implemented, and through the early identification and detention of those who are dangerous.

The paper sets out proposals for change designed to achieve the objective of providing better protection for the public from dangerous severely personality disordered people. There are two components to this. First, ensuring that dangerous severely personality disordered people are kept in detention for as long as they pose a high risk. Second managing them in a way that provides better opportunities to deal with the consequences of their disorder.

The proposals are based on the results of extensive informal discussions over the past two years involving managers and practitioners from the criminal justice system, health and social services, and the voluntary sector.

Two options are put forward for discussion and comment. Both rely on the development of new, more rigorous, procedures for assessing risk associated with presence of severe personality disorder. Under either option a specific aim would be to ensure that the arrangements for detention and management focus on reducing such risks.

The first option would rely on introducing measures within the present framework of criminal and mental health law and is based on improving arrangements in both prisons and the health service. It would strengthen existing legislation so that dangerous severely personality disordered people would not be released from prison or hospital whilst they continued to present a risk to the public. Any individual who had been convicted of a criminal offence and who was subject to a sentence of imprisonment would be held in prison. Anyone else would be held in a health service facility. Although services would continue to be managed separately, commissioning could be centrally co-ordinated.

Under the second option a new legal framework would be introduced to provide powers for the indeterminate detention of dangerous severely personality disordered people in both criminal and civil proceedings. Those detained under the new orders would be managed in facilities run separately from prison and health service provision. The location for detention would be based on the risk that the person represented and their therapeutic needs rather than whether they had been convicted of an offence.

Changes in legislation and organisation of services will need to be accompanied by initiatives to develop a better trained and supervised workforce, better communication and close working arrangements across criminal justice, health and social services, national standards for managing services, and new monitoring arrangements. These will build on developments that have already begun in the prison and health services. A crucial task for the Government is to work with, and support, those dealing with dangerous severely personality disordered people in prisons, hospitals and the community to ensure that the services they provide are as safe and effective as possible. This will be particularly important during the preliminary phases of developing and implementing a new strategy.

The Government welcomes views on the analysis in this document, and in particular the options it sets out for the future shape of legislation and service delivery in this area.

Managing dangerous people with severe personality disorder

Paul Boateng MP explains why the Government published the consultation document.

Introduction

Finding a solution to the problem of how to manage dangerous people with severe personality disorders is a difficult and serious task. I hope it is also clear from the consultation document published jointly by the Home Office and the Department of Health in July that we fully recognise the complexity of what we are attempting to do.

This is a problem which raises challenging questions of human rights, of ethics, of clinical practice, and of definitions. Many of these have been aired here over the last two days. We want to put in place a new system with the capacity to develop as our understanding of this area develops. We want to create a system which will genuinely meet the need, in legal and organisational terms, for many years to come. That is why we are seeking the views of informed specialists on our ideas, and why we have allowed nearly six months for responses to the consultation document.

But in looking at these challenging questions we must not lose sight of the fundamental point. That is that what we have at the moment - it can hardly be called a 'system' - fails on all counts. It fails, crucially, to provide the protection the public rightly expects. It fails to provide the kind of treatment people with personality disorders need. It fails even to give us reliable information about the kind of treatment we should be offering to these people. It fails to provide adequate support to members of local services - the police, the probation service, the health and social services - who are left to cope as best they can with the challenge of dangerous severely personality disordered people present in the community. It fails on all these counts, and it does so very expensively.

We must find a better way for the future, and we are determined to do so. Frank Dobson said when he and Jack Straw launched the consultation document on 19 July that we wanted to hear all the views anyone wished to offer on the problems raised in the document. But he also said then that the one group of people we would not be willing to listen to would be those who said it was all too difficult and we should leave matters as they are.

So it is not a question of whether we should act, but what form that action should take. We are firmly commited to putting in place far more effective arrangements for dealing with dangerous severely personality disordered people than we have at the moment, and to doing so in a way which gets the right balance between the civil liberties of those who may be detained and those who might otherwise become victims.

We are not alone internationally in trying to tackle this problem more effectively. In Holland, the TBS system has been in place for some 70 years. The Dutch would be the first to admit that their system is not perfect, but there is a great deal we can learn from the structures they have built up. Some imaginative new approaches are being developed elsewhere, for example in the Duren clinic in Germany, based on the idea that positive therapeutic benefit can best be gained in an institutional environment which is as much like home as possible. I have seen for myself something of the commited and effective work being carried out in some parts of the United States in the specialist facilities set up to deal with what they call 'sexually violent predators'. Those facilities - providing the kind of therapeutic approach we associate with the health service, within the kind of security arrangements the Prison Service provies - may be a very useful model on which we can build.

We have already learned a lot from overseas experience in developing our thinking. And the process of talking to them about this problem which we all share has helped us to see the scope for further international cooperation. Already, through the use of the internet, we have forged links with practitioners and experts in Holland, Germany, Sweden, Finland, Belgium, Ireland, the USA and Canada. They in turn are taking a keen interest in what we are doing, and some have already made it clear that they will be looking to follow our leadership in the shape of the modern and flexible system we are aiming to set up here.

The consultation process

The consultation document outlines two possible forms a system for the future might take. It is a high-level document, leaving much of the detail of how a new system would work to be filled in. We deliberately chose to present our ideas in this way. Partly this was to leave room to incorporate

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practical suggestions from those with experience in this area. And we also realised as the drafting process went on that the more detail it included the more difficult it was to see the underlying principles we were being guided by. Getting the right balance was not easy. It was a very difficult document to write, as you may gather when I tell you that the published version was the 23rd draft! In response to the document a number of people have asked questions about how a new service as set out in Option B might come into being, if that is the option we eventually choose. I want to say a little about that. And I want to say something about a few of the comments which have been made in the media and elsewhere about our proposals since Jack Straw first made his statement in the House of Commons in February.

Transition to Option B

First, Option B. This involves creating new powers in both civil and criminal proceedings allowing for the detention indefinitely if necessary - of dangerous severely personality disordered individuals. Those subject to these powers would be held in a new service separate from both the Prison Service and the NHS. Such a service could not, of course, spring into being fully-fledged overnight. We are well aware that the group of people we are concerned with are difficult to manage and present particular challenges. It would be absurd of us to set out to create a system which offers better protection to the public, only then to do the very opposite by rushing to set up a new service in a hurry and without proper planning and testing. So any new service of that kind would have to be eased in gradually, probably over a period of as much as ten years. In the early stages, for example, there might be no need for it to take in existing life sentence prisoners, or patients receiving treatment in hospital. The intake for the new service would be made up of those newly-admitted through the courts or the civil route, including those severely disordered people coming to the end of determinate prison sentences but judged too dangerous because of their disorder to be allowed back into the community.

The population of a new service would therefore only build up gradually, at a rate of a few hundred a year. This would allow plenty of time for new staff to be identified and trained, and for new facilities to be set up. During the transitional period prisons and hospitals would continue to hold numbers of DSPD people. These numbers would decline as time went on, but only at a pace that was consistent with the new service's ability to expand in safety.

I do not know whether this option will be the one the Government decides to implement. The balance between the two options set out in the consultation document is a fine one. It may be that what we will end up with is the creation of a new service along these lines as the end destination, but achieved through a route which involves much of Option A, and the development of closer partnerships between the health and prison services. This would allow for a transition towards the creation of a new service on the basis of the development of shared expertise and commonly-managed facilities.

Detention on basis of risk a new departure?

Let me now turn to some of the claims I have read in the newspapers or seen made on television about what we are doing. The first thing to say is that to judge from many of those claims you would think that the problem we are facing had only just developed for the first time, and that our plans for detention of DSPD people on the basis of the risk they present somehow broke new ground in terms of principle. The fact is that there is already provision in mental health legislation for people of the kind we are concerned with to be detained, without the need for them to have committed a criminal offence. It is true that, at present, those detained on this basis are not liable from the outset to be detained indefinitely. In this respect our proposals do have more serious implications for the people they would apply to than the present law. But we have recognised this, and we propose to build into the processes a corresponding battery of safeguards for the rights of the individuals concerned. The point is, though, that while there may be room for debate as to whether our proposals are the right solution to the problem, it really is not possible to argue seriously that they involve any major new principle.

Sweeping people off the streets?

The other impression many people will have gained from the media coverage of our proposals is that they somehow involve sweeping large numbers of inoffensive people with a low degree of personality disorder off the streets, at the whim of some official, and locking them up indefinitely. Any such suggestion is frankly absurd, and would almost be funny if it were not for the real concern and anxiety raised in the minds of large numbers of people that they may be subject to the new detention powers we are planning. Let me put that concern totally at rest.

The consultation document makes it very clear who our proposals are aimed at. We are only concerned with a tiny group of a few thousand people who are severely disordered and who represent the most extreme threat to other people. Those of you here today from the prison, probation, police and health services who are used to dealing with this group of people will recognise the group I am describing. In their very nature, most of them will already at any one time be in prison or hospital. The screening and assessment processes we intend to put in place, together with the range of safeguards to be built into the new arrangements, will be designed to ensure that the totally harmless people with a degree of personality disorder we will all have seen in the television coverage come nowhere near being detained.

"What we are saying is that society has both a right and a need to protect itself from the actions of this small group of people who, because of their disordered personality, pose an unacceptable level of risk of causing serious harm to others."

Detention of 'non-offenders'

Similarly, much of the coverage of the consultation document said that what we were aiming to do was to lock up many people who have committed no crime. Again, this is a serious misunderstanding of what we are suggesting. What we have proposed is that we should move away from a system in which whether someone known to be a danger and to have a severe personality disorder is detained or not depends on whether they commit an offence or on whether a psychiatrist thinks they are treatable. Instead, we are proposing a system based on the risk that person presents. To make this system work, we have enlisted the help of some 70 national and international experts from the health and criminal justice systems. They are working to develop a battery of risk assessment tools which we intend should be as accurate as we can get them in terms of predicting the threat someone presents.

But it is well known that what someone has done in their past life is by far the best indicator of what they are likely to do in the future. So our assessment processes will not amount to some kind of crystal-ball gazing. Instead, they will rely very heavily on an analysis of what the person being assessed has done in their past life. And if that person has never offended before, it is almost inconceivable that any risk assessment process devised would say they were so dangerous as to meet the very high level of risk needed to come within these proposals.

In practice, the great majority of people detained under the new

system will come into it through the criminal justice system, following the commission of a serious violent or sexual offence. And the small minority of people drawn into the system other than following the commission of a serious offence will in practice almost certainly have a long track record of increasingly serious previous offending. They will be well known to local services. Indeed, one idea we are considering is that local multi-agency public protection panels or risk panels should be able to trigger the process of having such people assessed. Any decision to detain such a person will however be a matter for the courts or, in civil cases, perhaps some other kind of medico-legal tribunal, not for individual psychiatrists or other professionals.

Conclusion

There is a great deal more that I could say about all this, and the complex issues our plans raise, but there is not enough time to do them anything like justice. Let me just finish by saying that, whatever detailed arrangements we put in place for the future, we are determined to get the right balance between the human rights of individuals and the right of the public to be protected from these very dangerous people. We will ensure that the arrangements we put in place are fully compatible with the European Convention on Human Rights. And we will ensure that the assessment and detention processes of the future are open to legal challenge and review.

What we are saying is that society has both a right and a need to protect itself from the actions of this small group of people who because of their disordered personality, pose an unacceptable level of risk of causing serious harm to others. But in return for taking action to protect itself by detaining these people, possibly indefinitely, society incurs an obligation to provide effective services to these people. Services designed to help them make the changes they need to so that they can return to the community safely. That is the deal, and we are ready to face up to it.

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The Human Rights implications of the consultation paper

Introduction to Human Rights law

The European Convention for the Protection of Human Rights and Fundamental Freedoms is a treaty agreed by governments which are members of the Council of Europe and was signed on 4 November 1949 and came into force on 3 September 1953. The United Kingdom ratified the Convention in 1951 but, unlike many of the other signatories did not set about incorporating the Convention rights in to domestic law. In 1966 the United Kingdom granted the right of individual petition. This has meant that, even before its incorporation into domestic law, the Convention has offered individual litigants in Britain the possibility of redress in international law where their civil liberties have been infringed by the state and where no adequate remedy can be provided by domestic courts.

The Labour Party in their last election manifesto promised to increase the protection of human rights in the by incorporating the European Convention on Human Rights in English law. *The Human Rights Act* 1998 achieves this aim. Incorporation of the European Convention enables individuals to rely on the Convention articles in British Courts rather than having to resort to the cumbersome, expensive and slow process of petitioning the European Court in Strasbourg. The vast majority of *Human Rights Act* 1998 will come into force in October 2000. I do not intend to discuss the contents of the *Human Rights Act 1998* in detail. However, Section 19 *Human Rights Act 1998* is of interest because it requires a Minister of the Crown in charge of any Bill, before the second reading, either to make or publish a 'statement of compatibility' or state that the legislation is not compatible with Convention rights.

The Articles of the European Convention relevant to the mental health field include;

a) Article 2 - the right to life;
b) Article 3- the right to be free from torture inhuman or degrading treatment or punishment;
c) Article 5 - the right to liberty;
d) Article 6- the right to a fair trial;
e) Article 8- the right to respect for private life;
f) Article 14 - the right not to be discriminated against (not an autonomous right, but only available in conjunction with other Convention Rights)

Article 5 ECHR is by far the most relevant to the Home Office's Consultation Paper and therefore I have outlined the case law of the European Court on this Article as far as it relates to individuals with mental health problems.

Human Rights law on the right to liberty of 'persons of unsound mind' Article 5 ECHR[1]

Article 5 is by far the most important article in the mental health field. It is the only Article that explicitly refers to mental patients or, in the language of the Convention, 'persons of unsound mind'. Article 5 provides:

'1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(e) the lawful detention of persons for the prevention of the spread of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

4 Everyone who is deprived of his liberty by arrest or his detention shall 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.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.'

Article 5(1) (e)

The rationale for Article 5 (1) (e) permitting the detention of persons of 'unsound mind':

'is not only that they have to be considered as occasionally dangerous for public safety but also that their interests may necessitate their detention.'[2]

a) *Meaning of 'persons of unsound mind'*

The meaning of 'persons of unsound mind' was considered by the European Court in Winterwerp v Netherlands.[3] The Court decided that the term has an autonomous Convention meaning but they refused to give the term a 'definitive interpretation' because 'it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitudes to mental illness change, in particular so that a greater understanding of the problems of mental patients is becoming more widespread'[4]

The Commission further elaborated on the meaning in X v United Kingdom where they stated that it means a person who 'by definition . . cannot be held fully responsible for his actions.'[5] Lawful detention requires 'the existence of a specific condition of mental health'[6]. However the Court has made it clear that detention under Article 5 (1) (e) cannot be justified 'simply because his views or behaviour deviate from the norms prevailing in a particular society.'[7] The Court has in practice deferred to domestic law on this issue and will only intervene in the most extreme situations.

b) *Meaning of 'detention'*

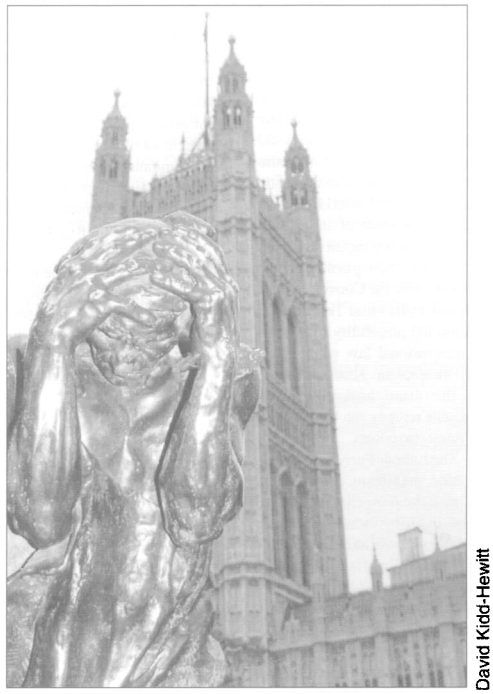
The Court have adopted a broad definition of 'detention' for the purposes of Article 5 (1). Whilst it clearly includes the classic case of a person securely locked up in a room or cell, it also includes any extreme form of restriction on a person's freedom of movement. Less severe

restrictions on freedom of movement will be subject to scrutiny under Article 2 of the Fourth Protocol of the Convention.[8] In relation to the detention of 'persons of unsound mind' the Court has evinced a rather inconsistent approach adopting a relatively wide definition of 'detention' in relation to adults but failing to scrutinize the detention of children which is in accordance with their parent's wishes. In Ashingdane v UK[9] the Court held that the applicant who was the subject of a restriction order and thus detained compulsorily in a mental hospital was protected by Article 5, even though he was in an 'open' prison and was able to leave the hospital unaccompanied occasionally during the day and at weekends. The Court held that this was detention both in law and in fact. If, although still subject to a detention order, the person had been provisionally released, Article 5 would not be applicable.[10]

However, Ashingdane can be contrasted with Neilsen v Denmark[11] which concerned the Article 5 rights of a minor who had been placed in a closed psychiatric ward of a state hospital at the request of his mother who had sole parental custody for the treatment of a neurotic condition The Court characterised the detention as one of exercise of parental rights rather than detention by the state. The former was an element of 'family life', respect for which is protected by Article 8. The Court concluded that Article 5 was not applicable to detention by parents as long as it was for a 'proper purpose' such as the health of the minor.

d) *Lawfulness of the detention*

Winterwerp v Netherlands[12] was the first case in which the European Court addressed the rights of mentally ill patients under Article 5 (1). The detention must be 'lawful' to comply with Article 5 (1) (e). This requires that the detention conforms with both the domestic law as well as Convention jurisprudence. Conformity with domestic law requires that the State complies with both procedural and substantive laws. Unusually, the Court will scrutinize the conformity with domestic law rather than leaving this issue solely to domestic courts. However, the Court acknowledged that the national authorities, including domestic courts will have a certain discretion on this issue because they are better placed to evaluate the evidence adduced before them in a particular case. One example of a violation of Article 5 (1) (e), because of the State's failure to conform with domestic procedural law, is Van der Leer v Netherlands.[13] The Court concluded that a patient's detention was unlawful and therefore was contrary to Article 5 (1) (e) because the patient had not been given an opportunity to be heard in person, as required by Dutch law.



David Kidd-Hewitt

To be 'lawful' a detention must not be arbitrary. The Court in Winterwerp stated that three minimum conditions must be met to avoid a finding of arbitrariness:

1 except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'- this requires objective medical expertise;
2 the mental disorder must be of a kind or degree warranting compulsory confinement;
3 the disorder must continue throughout the period of detention.[14]

Some degree of deference will be shown to national decision making, particularly in emergency situations. The Court has, at times, unfortunately, adopted an overly wide view of emergency situations. One such example of this deference is Winterwerp itself. The applicant had been committed to a psychiatric hospital by the local burgomaster after his arrest for theft. At the time Dutch law did not require that a medical opinion was obtained before committal. The Court concluded that the 'emergency' detention was lawful, although they did express some hesitation because the 'emergency' detention lasted six weeks before being replaced by detention which had been authorised after obtaining a medical opinion. Winterwerp was decided in 1979 and today the European Court may well not adopt such a deferential approach.[15]

The Court elaborated on this jurisprudence in X v United Kingdom.[16] In 1968, X had been convicted of wounding with intent to cause grievous bodily harm and had been sent to a secure mental hospital. He was conditionally discharged in 1971. As a result of information received from the applicant's wife the Home Secretary issued a warrant for his recall to the mental hospital in April 1974 in accordance with section 66 *Mental Health Act 1959*. X complained that the recall constituted an unlawful deprivation of liberty contrary to Article 5 (1) because recall pursuant section 66 *Mental Health Act 1959* did not comply with the principles outlined in Winterwerp as no objective medical evidence was needed and the unfettered discretion of the Home Secretary meant that the recall decision was arbitrary. The Court invoked their judgement in Winterwerp and concluded that there had been no violation of Article 5 (1) (e) because this was an emergency situation and therefore no objective medical opinion was necessary prior to detention. Given that the Home Secretary's information included a statement from the applicant's wife that he was deluded and threatening, this conclusion seems correct. As the Court put it:

'the interests of the protection of the public prevail over the individual's right to liberty to the extent of justifying an emergency confinement in the absence of the usual guarantees implied in Article S (1) (e).'17

Such an emergency detention should be for a short duration.[18] The requirement under Article 5 (1) (e) that the detention should not be arbitrary does not extend to the conditions of detention except that if a person of unsound mind is detained, the detention must be in a 'hospital, clinic or other appropriate institution authorised for' the detention of mental patients.[19] Neither does it concern the provision of suitable treatment[20] to ensure that the person is not detained longer than absolutely necessary. A lack of suitable treatment may well however amount to 'inhuman treatment' under Article 3.[21]

Article 5 (4)

Article 5 (4) has been described as 'the *habeas corpus* provision of the Convention'.[22] It provides procedural guarantees to those lawfully detained. It was held in De Wilde Ooms and Versyp v Belgium[23] that the Court is required to examine a complaint under Article 5 (4) even where no infringement of Article 5 (1) has been found. In other words, it need not be established that detention was unlawful or arbitrary for the Court to

consider or hold that the procedural safeguards were lacking. Indeed, the Court has found violations of Article 5 (4) without finding a violation of Article 5 (1) in a number of the leading mental health cases.[24] Article 5 (4) confers a two-fold procedural safeguard: firstly, the detainee must be able to test the legality of the decision to detain and secondly, the detainee must be able to obtain release if the detention is found to be unlawful.

The Court in Winterwerp stated that to comply with Article 5 (4) the judicial proceedings did not need to 'always be attended by the same guarantees as those required under Article 6 (1) for civil or criminal litigation'[25] However, what is required was that the validity of the detention can be tested by a body of 'judicial character' which is 'independent both of the executive and the parties to the case.'[26] In X v UK both the responsible medical officer and the Home Secretary were found not to meet this requirement.[27]

The person of unsound mind detained must be able to obtain a review of the lawfulness of the detention at reasonable intervals.[28] The reason for this requirement is the possibility that the person's mental condition might improve so as to no longer require detention.[29] If there is clear evidence of a change in the detainee's mental condition, Article 5 (4) may require a hearing within a short period of time.[30]

The regularity of review was examined in Silva Rocha v Portugal.[31] The applicant was detained in a psychiatric hospital for a minimum of three years after being convicted of homicide and found not to be criminally responsible on account of his mental disturbance.

The substance of the procedural safeguards is that the person detained must be given an opportunity to be heard in person or through a representative. In Winterwerp the Court stated:

'It is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded the 'fundamental guarantees of procedure applied in matters of deprivation of liberty'. Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.'[32]

Article 5 (4) does not require that persons committed to hospital under the head of 'unsound mind' should themselves take the initiative in obtaining legal representation before having recourse to a court. Persons of 'unsound mind' should:

'unless there are special circumstances- receive legal assistance in proceedings relation to the continuation, suspension or termination of his detention. The importance of what is at stake for him personal liberty- taken together with the very nature of his affliction- diminished mental capacity compels this conclusion.'[33]

If the person is unable to pay for the legal representation, it must be provided by the State. The hearing should be oral and adversarial. However, there is no requirement that it should be public.[34] The person should also have the opportunity to challenge the evidence which led to his or her detention. The Court in Winterwerp, following the Commission, stated:

'The absolute minimum for a judicial procedure is the right of the individual concerned to present his own case and to challenge the medical and social evidence adduced in support of his detention.'[35]

Therefore Article 5 (4) requires both substantive and procedural review of the decision although there are some limits to the scope of review necessary. These limits were discussed by the Court in E v Norway.[36] The Court stated:

'Article 5 (4) does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision making authority. The review should, however, be wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to Article 5 (1).'

Article 5 (4) also requires that the 'court is competent to take a legally binding decision leading to the person's release.' Such a competency was lacking under the *Mental Health Act 1959*, because the Mental Health Review Tribunal was only able to make advisory recommendations to the Home Secretary. This lack of competency was successfully challenged in X v UK which lead to a change in the law now consolidated in the *Mental Health Act 1983*.

Article 5 (4) further requires that the decision be taken 'speedily'. In X the remedy available to the mental health patient was before a Mental Health Review Tribunal which could only be sought after he had been recalled for six months. This was not considered a 'speedy remedy'.[37]

The Human Rights implications of the Home Office Consultation Paper

The consultation paper, in the Executive Summary states:

'The Government intends to develop a co-ordinated package of arrangements to address these challenges, that achieves better protection for the public, is consistent with human rights law....'

This is a significant improvement of the attitude of the Government when examining what was to become the *Mental Health Act 1983*. The Bill was not examined to see if it was in accordance with the European Convention. Instead the Government decided to react to any judicial decisions as and when they were made. Lord Wallace, a Labour spokesman characterised the Government's position as of:

'an avid pupil awaiting instruction from the headmaster in Strasbourg'[38]

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Notes:

1 This section is adapted from a chapter on the European Convention and Mental Health by C Booth QC and A Sharland, which will appear in *A Practitioners Guide to the Human Rights Act 1998* (forthcoming)
2 Guzzardi v Italy A 39 para 98 (1980)
3 Winterwerp v The Netherlands (1979-80) 2 EHRR 387
4 Ibid at para 37
5 X v United Kingdom (1981) 4 E.H.R.R 181 at para 82.
6 X at para79
7 Winterwerp at para 37
8 See Engel v Netherlands (1979-80)1 EHRR 647 at paras 58-59
9 Series A 93 (1985), [1985] 7 E.H.R.R. 528
10 See L v Sweden No 10801/84,61 DR62 (1988) and W v Sweden No 12778/87,59 DR 158 (1988
11 Series A 144 (1988)
12 Winterwerp v The Netherlands (1979-80) 2 EHRR 387
13 Series A 170 A (1990)12 E.H.R.R. 567
14 Winterwerp at para 39
15 In O'Reilly v Ireland 24196/94, 84-A D.R. 72 the Commission held that a complaint was admissible when the basis for the emergency detention was a complaint by the Applicant's spouse and a visual examination by a GP from the end of the garden. This case was settled and therefore the Court did not have the opportunity to consider the case. In Kay v United Kingdom 17821/91 the Secretary of State ordered the recall to hospital of a prisoner whose prison sentence had ended without first obtaining an up-to-date medical report of his state of mental health. The Commission concluded that as there was no emergency the failure to obtain a medical report lead to a violation of Article 5.
16 (1981) 4 EHRR 188
17 Ibid at para 4s.
18 Ibid at para 46, cf Winterwerp
19 Ashingdane at para 44
20 See Ashingdane & Winterwerp
21 See below at text accompanying notes
22 See, Law of the European Convention on Human Rights, by DJ Harris, M O'Boyle and C Warbrick, (Butterworths),1995 at p 145
23 (1979)1 EHRR 373 at para 73
24 See eg, Herczegfalvy v Austria, Winterwerp v Netherlands and X v UK
25 Winterwerp at para 60
26 De Wilde, Ooms and Versyp v Belgium A 12 para 76 (1971)
27 Winterwerp at para 61
28 Winterwerp at para 55.
29 See X v UK at para 58
30 Mv FRG No 10272/83, 38 DR 104 (1984)
31 European Court on Human Rights, Judgement of 15 November 1996
32 Winterwerp at para 60
33 Megyeri v Germany (1992)15 EHRR 584 at para 23
34 Winterwerp at para 60 and Dhoest v Belgium No 10448/83 DR 5 at 26 (1987)
35 At paras 8
36 (1990)17 EHRR 3O
37 X v UK B 41 para 138 (1980) Commission Report. See, Law of the European Convention on Human Rights, by DJ Harris, M O'Boyle and C Warbrick, (Butterworths),1995 at p 155-8 for a detailed account on the case law on the requirement to take the decision 'speedily'.