

UN Working Group on Arbitrary Detention Press conference

Verbatim: Regarding detention of persons with mental and intellectual disabilities.

Mads Adernas (Chairperson, UN Working Group on Arbitrary Detention):

New Zealand has a robust legislative framework governing the detention of persons with mental disabilities under the Mental Health Act of 1992. The act sets out processes whereby a person maybe made subject to a compulsory treatment order, the rights of persons who are under going compulsory assessment or compulsory treatment order and the processes by which they may seek review through district inspectors and by the mental health review tribunal, of which we also interviewed.

However, it is a concern to the working group that the legislative framework is not effectively implemented to ensure that arbitrary deprivation of liberty does not occur. In practice compulsory treatment orders are clinical decisions and it is difficult to effectively challenge such orders. We are concerned with the provision of legal advice, which the Mental Health Act guarantees, but we are concerned about how this operates in practice.

The working group further expresses it's concern in this report related to the widespread practice of seclusion in psychiatric units. While we recognise the government's achievement in reducing the incidents of seclusion since 2009, we urge authorities to eliminate this practice.

We also have comments about persons who were found unfit to stand trial and how they may be detained in forensic facilities for a long period of time. One concern relates to the determination of the fitness to stand trial. We are concerned in this whole area, when we are looking at persons who are unfit to stand trial. What is the evidential standard applied for keeping them in detention. And we are worried that the standard of proof which clearly is not the same as the one applied in the criminal justice system is unclear. It's unclear on what that standard is, but it is argued that it is a balance of probability, of civil standard of proof, and if so that's a concern for us.

Another concern is that people who are then in such forensic facilities, after they have served their maximum term of sentence may be detained for over and beyond what that term was and we're again concerned about the terms of that.

Questions

Mary O'Hagan (Civil Society and Advocate):

I come with an interest in psychiatric detention. I have been following the UN commentary on the Convention for the Rights of Person's with Disabilities. And this commentary suggests that the presence of legislation to restrict people's freedom on the basis of their disability is illegal under International law.

And in fact if you read some of the country reports that the committee have been in to, they call for an end to compulsory detention and an end to seclusion. I wonder why this view is not reflected fully in your report. The view that actually there may be a robust Mental Health Act in New Zealand, but there is increasing commentary that suggests that the act itself is in violation of the Convention and any detention in a psychiatric facility could be seen to constitute arbitrary detention.

Response, Mads Adernas:

Your point is well taken we haven't looked at the practice, the implementation of the legislation and we acknowledge that the legislation has been a major step forward to what we had before, and there are rigorous procedures. Our concern, which may not be completely different from yours, is how these procedures are implemented. And there we have a number of issues.

Mary O'Hagan:

My concern is that the mental health legislation itself, when you interpret the Disability Convention, that, that itself is a violation of International law

Mads Adernas:

We are very grateful for any submissions. We are very grateful for you to engage with us in the work we know have in the next month and a half in finalising the report. We will leave you our details, and we can have some email correspondence.

Jak Wild (Civil Society):

I'm also from civil society and interested in the area of mental health. I commend your work, and particularly the statement around seclusion that the group has put into the report. My concern is about the process of engaging individuals, families, representatives, as part of your work.

I have been arbitrarily detained, both under the Mental Health Act, legally and illegally, so I have an interest in this area because of that. In terms of how to engage, talking to your secretary yesterday, although it is commendable you talked to people in psychiatric institutions, I know I wouldn't talk to someone in that setting. The worse the story the more closed the response I believe.

So my question is how can you engage with civil society effectively, both this time and hopefully next time.

Mads Adernas:

Of course there are limitations in how effective we can be. We are only us here, for a fixed period of time and we do our very best to reach as very widely as we can. And we are very grateful of you. I wasn't at the meeting you had yesterday with one of my colleagues (between End Seclusion Now members and working group secretary) and I know that was very useful and brought up many very relevant points for our work.

Now of course it is a problem for this kind of enquiry that you can't cover the ground effectively 100%. We have many different areas so there are limitations, but we really want to engage and we are very grateful to have established contact with you. And for any help you can give us in the next period of time in working with this. So again when we are looking at arbitrary detention in the prison system or relating to migrants, it's the same issue we are facing there to a certain extent. Getting out, getting the relevant information in place, we fully recognise in psychiatric institutions there are very particular challenges which can make it particularly difficult.

We're trying to build up a methodology to work with this, in a way which makes it possible for us to assess arbitrary detention in that context but of course we are aware of our limitations. So again, it's civil society contributions coming to us, that is the best way for us. Not for us to go out and find the primary facts.

Because of course we have the world as our area, it's obvious that it's not going to work very well. We completely rely on civil society and civil society organisations.