Module 8

REGULATORY AND REVIEW MECHANISMS

Overall Learning Objective

To understand the purpose, role, functions and responsibilities of regulatory and review mechanisms set up in legislation to protect human rights.

Module content

a. Appreciate the role and functions of Review Tribunals
b. Understand how Review Tribunals can be set up by legislation
c. Appreciate the role and functions of human rights "inspectorates"
d. Understand how inspectorates can be set up by legislation
e. Examine how human rights offences may be handled
f. The importance of including "offences and penalties" in legislation.

Expected outcomes

Students will understand what Review Mechanisms and Inspectorates are; why they are important; why they need to be included as an integral part of legislation; how they be set up; who they should consist of; how they can do their work and what powers they may have when transgressions are found.

Key issues to be aware of in module 8

- There are various different oversight functions that different bodies may play. Students need to understand the differences between them, why each is important and how they each enhance human rights.
- Human rights of people with mental disability may be monitored by international and regional oversight bodies and international as well as local non-governmental organizations. Nonetheless local independent oversight, set up through legislation, is indispensable

COURSE WORK NOTES

Introduction

Legislation that promotes human rights of people with mental disability through the identification and expansion of specific rights and that sets out procedures that ensures that due processes are followed is critical to improving the lives of people with mental disabilities. However without particular structures that ensure these rights are adhered to, it is possible that even rights that have been legislated can become mere tokens rather than tangible rights. Monitoring mechanisms are hence needed to ensure that people's rights are implemented in practice. Moreover, where people are admitted to facilities and treated without their informed consent, it is necessary that each case be individually considered and that decisions based on sound human rights principles are made. Mechanisms need to be set up in legislation to do this.

In addition, many countries have seen the need to set up structures to assist in planning, overseeing and ensuring implementation of mental health services and include this structure within their legislation. As seen in previous modules the right to available, accessible, acceptable and quality mental health services is an essential right in terms of everyone's right to health care. It is argued that without a legally constituted body that has a mandate to ensure that mental health services are provided, and provided in an efficient and effective way, mental health services may be neglected or provided within a framework that does not promote human rights. Furthermore it is often recognized by countries that good mental health requires an intersectoral approach but that unless structures to facilitate this are set up in legislation all sectors do not contribute in the manner that is needed. A 'Council' or "Committee" made up of different sectors is hence sometimes set up through legislation. This structure not only oversees the implementation of mental health services from the perspective of the health sector but ensures that all sectors commit themselves to joint intersectoral mental health objectives.

In this module we will primarily be focusing on two forms of human rights monitoring that needs to be included in legislation ie Human rights "inspectorates" that monitor human rights in mental health facilities and "mental health review Tribunals" that primarily oversee non-voluntary admission and treatment. In some countries, depending on the availability of resources, these two functions may be combined into the operation of a single Board.

OVERSIGHT AND MONITORING OF MENTAL HEALTH FACILITIES.

This section focuses mainly on monitoring bodies set up through national legislation to monitor human rights in facilities that provide mental health care. However it is important to take note of the fact that various other international, regional and local structures or organizations may also play an important monitoring role. These are outlined together with some country examples and certain strengths and weaknesses of each. Monitoring bodies set up in terms of local legislation should collaborate with such structures to obtain maximum rights for people living with mental disabilities.

1. International and regional oversight

1.1 International and Regional Human Rights Mechanisms

In module 3 it was seen that in terms of internationally and regionally binding standards, a wide range of rights must be applied directly to people living with mental disability. It was also observed in this module (module 3) that both international and regional conventions have set up monitoring bodies, made up of independent experts, to oversee and monitor compliance by States. Governments are obliged to report regularly on the steps that have been taken to implement the rights enshrined in the treaties to which they are signatories. These reports are considered by the relevant monitoring bodies, taking into account additional information that may have been submitted by NGOs and other competent bodies. Recommendations and suggestions are published in "concluding observations" suggesting ways in which governments can improve compliance with human rights standards. In addition, States are required to make their reports widely available within their countries, contributing to open debates about human rights and fostering a process of public scrutiny of governmental policies (WHO, 2002).

The treaty monitoring bodies may determine that a government has not met its obligations under the different instruments. Through "constructive dialogue" with governments and through the provision of recommendations these bodies help countries to live up to their human rights obligations (WHO 2002).

In 2006 the UN Human Rights Council was established to monitor international human rights abuses. The Council replaces the UN Human Rights Commission. The Human Rights Council will conduct periodic reviews of the human rights records of all UN Member States, beginning with those elected to the Council. It will have greater regional and local representation to facilitate stronger monitoring and there will be more systematic ongoing reporting by countries.

Two important additional international initiatives have also recently been agreed to. In June 2006 the Optional Protocol to the Convention against Torture and other Inhuman or Degrading Treatment or Punishment (OPCAT) came into force. The Protocol establishes a system of regular visits by independent and national bodies to places where people are deprived of their liberty. Importantly the definition of places of detention extends to places where people are kept under mental health legislation (UNHCHR 2006). Countries that have ratified the optional protocol are *required* in terms of the optional protocol to set up National mechanisms to monitor places of detention. Guidance documents to assist countries to do this have been developed (APT, 2006). OPCAT is an exceptionally important development for monitoring of human rights with regard to mental disability as there will *hav*e to be monitoring of torture, degrading treatment and punishment in *all* facilities where people are kept and treated without their consent in those countries that ratify the treaty.[1].

The Convention on the Rights of Persons with Disabilities (CRPD) also establishes a treaty monitoring body known as the Committee on the Rights of Persons with Disabilities. On the basis of reports prepared periodically by each State Party, often with the assistance of shadow reports prepared by non-governmental organizations, the Committee enters into a constructive dialogue with each State regarding implementation of the CRPD and the Committee provides conclusions and recommendations**.** Under an Optional Protocol to the CRPD, the Committee will also have authority to receive complaints of alleged abuses of the CRPD from individuals in countries that are parties to the Protocol. The Committee also has authority under the Protocol to undertake inquiries, including a country visit, upon receipt of reliable information of grave and systematic violations of the CRPD, with agreement of the State concerned. At the international level, the CRPD establishes a committee of independent experts to monitor States implementation.

[1] In terms of the OPCAT monitoring will concentrate on places where people have been specifically deprived of their liberty. Mental health monitoring, as promoted in this document, includes a range of mental health facilities where people may not be "detained".

In addition Regional bodies such as the African Committee on Human Rights and the newly established African Court on Human Rights; The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights and the European Court of Human Rights oversee regional human rights violations. As seen in module 3 this has included cases of abuses in mental health.

While there are a number of advantages in utilising international and regional human rights instruments and oversight bodies to advance the rights of people with mental disability, this in no way undermines the need for local and legal oversight. In fact, it is not the objective of international and regional human rights monitoring bodies to conduct monitoring in each and every country and certainly not in each and every psychiatric facility. National action is always the primary level of action and international monitoring should only come thereafter. The system is hence designed on the basis of the international mechanisms being a last resort - that is only after domestic remedies have been sought. On the other hand, national monitoring can be part of international oversight. For example, monitoring at a national level is an essential element of the OPCAT protocol and will be necessary for reporting to the Committee on the Rights of Persons with Disabilities as well.

One major benefit of utilizing international and regional human rights conventions and their monitoring mechanisms is that the standards are internationally or regionally determined and agreed upon. However a serious limitation is that there are numerous human rights abuses world-wide and mental health issues are rarely afforded priority by these bodies. Despite the fact that abuses against people with mental disabilities are indeed recognized as serious human rights violation and have, on occasion, been taken up by regional bodies (See Module 3), their ability to address the very widespread and broad spectrum of human rights violations occurring in the area of mental health worldwide is limited. Moreover, even when a mental health issue is addressed, given the limited resources of international or regional human rights bodies, their involvement is unlikely to be ongoing. The use of international instruments and bodies may hence be a very powerful "one off" strategy to instigate national level change in a country, but cannot be relied upon to maintain an ongoing monitoring of violations. Furthermore international and regional human rights processes may often focus on the "big picture" in a country and may not have the ability to investigate the numerous specific and local problems which need investigation. On the other hand, the fact that monitoring will be done at a national level and reported on at the international level in terms of the OPCAT and the CRPD ensures ongoing monitoring as well as international oversight.

To monitor specific and ongoing problems throughout a country, it is necessary to have monitoring and complaints mechanisms *within* the country and this is indeed recognized by key international documents. For example this has been called for by, *inter alia*, in the UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (MI Principles). The MI Principles state that "Every mental health facility shall be inspected by the competent authorities with sufficient frequency to ensure that the conditions, treatment and care of patients comply with these Principles" (Principle 14(2)). Furthermore, Principle 22 says that "States should ensure that appropriate mechanisms are in force to promote compliance with these principles, for the inspection of mental health facilities, for the submission, investigation and resolution of complaints and for the institution of appropriate disciplinary or judicial proceedings for professional misconduct or violation of the rights of a patient". Finally, Principle 23 states that "States should implement these principles through appropriate legislative, judicial, administrative, educational and other measures, which they shall review periodically".

In 2004 the UN Special Rapporteur on the Right to Health, reaffirmed the need for independent mechanisms for monitoring and oversight for mental health, including efficient mechanisms for receiving patient complaints and for independent, regular and systematic revision of cases of admission and involuntary treatment (Hunt, 2004).

1.2 Oversight by international non-governmental organizations

International NGOs and professional organization have been highly active in documenting violations of human rights in mental health for a number of years. For example investigations into mental health services in the Soviet block, particularly in the late 1970s and1980s, unveiled evidence of the abuse of psychiatry based on political belief as well as abusive conditions in mental health facilities (Geneva Initiative in Psychiatry). In South Africa, in the 1970's, a delegation from the American Psychiatric Association conducted visits to psychiatric institutions and the WHO compiled a report on Apartheid mental health care. Both produced damning reports on racial discrimination in services and conditions in facilities, especially for black people (APA, 1979; WHO, 1977). In both instances the relevant governments of the time denied such abuses. NGO's however continued to advocate and lobby for the "proper" use of psychiatry.

Over the past 10-15 years international and regional NGOs have been highly active (particularly in certain regions) in monitoring violations and working with local groups, including mental health service user, family and carer

groups and governments, in order to bring about positive changes in the area of mental health.

Examples of NGOs who have conducted inspections of facilities in countries with suspected violations of human rights

1)Mental Disability Rights International has investigated and documented human rights in 23 countries in Latin America, Eastern Europe and the Middle East.

Some of the documented achievements resulting from the MDRI's work include

- An abusive psychiatric facility was closed in Mexico, and the Mexican government created its first government-funded community based mental health programs
- New disability rights legislation was adopted in Hungary, including the formation of a human rights ombudsman
- The government of Paraguay has agreed to a plan, timetable and funding of a process of deinstitutionalisation and the establishment of community based mental health services.
- Following a report on conditions in psychiatric institutions the Peruvian Minister of health promised far-reaching mental health reform.

DRI (2005) http://www.mdri.org

2) The Mental Disability Advocacy Centre, an international organisation that promotes and protects human rights of people with mental health problems and intellectual disabilities conducted an investigation into the use of "Cage beds" in four Eastern European countries. Over the last few years, MDAC has made a number of recommendations to countries (such as the Czech Republic, Hungary, Slovakia and Slovenia) including:-

- Prohibition of the use of cage beds through legislative and administrative measures
- Provision of independent inspectorates to monitor human rights in institutions
- Mandatory human rights training in institutions
- Implementation of CPT guidelines on "means of restraint"

3)The Global Initiative on Psychiatry together with Lithuania's Human rights Monitoring Institute, The Lithuanian Welfare Society for person with Mental Disability and the Vilnius Center for Psychosocial Rehabilitation conducted an extensive investigation into residential institutions for people

with mental disabilities and psychiatric hospitals in 2004-2005. A number of violations of people's human rights were identified. The monitoring report emphasised though that the right of many patients to live in the community was being violated due to a lack of adequate community care facilities. The abuse was hence two-fold; that their rights were being violated in terms of the conditions and treatment in the facility and that they were there at all.

Mickevicius et al (2005)

2. *Oversight by national non-governmental organizations*

National non-governmental organizations within countries have also come to play an important role in exposing, protecting and advocating for rights of people with mental disabilities. Some governments co-operate and collaborate with such NGOs while others tend to restrict access and/or disregard their findings and inputs.

Examples of national NGOs working in the interest of people with mental disabilities

MIND (National Association for Mental Health) in England and Wales and NAMI (National Alliance for mental Illness) in the USA. These organizations, inter alia, take up complaints from users or carers and assist with investigations with regard to admissions, length of stay in hospitals, treatment and living conditions in facilities for people with mental disabilities, as well as other human rights violations. Where the authorities and services are not responsive to recommendations made, as an alternative strategy, legal processes are sometimes employed.

MIND (The national Association for Mental Health) **http://www.mind.org.uk**
NAMI (The Nation's Voice on Mental Health) **http://www.nami.org**

Action for Mental Illness (ACMI) in India, works for the protection of the interests of mental health service users and families. The organization has been taking legal action through the court, to get state level authorities in India to treat people with mental disabilities the same way they treat people with physical disabilities. They are also actively advocating for the national government to create a role for participation of the consumer and family lobbies in revising the country's essential drugs list.

Source: M. Funk et al. Advocacy for mental health: roles for consumer and family organizations and governments, Health Promotion International, December 12, 2005

The Bazelon Center for Mental Health Law in Washington provides technical support on mental health law issues and co-counsels selected lawsuits with private lawyers, legal services programmes and state protection and advocacy systems. Often when they take up cases the benefits may not just be to the individuals concerned but can also set precedents for action against further abuses of people's rights.

Bazelon Center for Mental Health Law http://bazelon.org

The Mental Health Users Network of Zambia (MHUNZA), is a mental health service user NGO which advocates for the development of mental health policies and laws that better promote and protect the rights of people with mental disabilities and participates in the formulation of these documents. Another core activity of MHUNZA is the organization nation-wide programmes to raise awareness on the rights of people with mental disabilities.

Source: Personal communication, Mr Sylvester Katontoka, President, *The Mental Health Users Network of Zambia (MHUNZA), 2005*

Moscow Helsinki Group/The Independent Psychiatric Association of Russia

As part of its work in Russia the Moscow Helsinki Group, in partnership with The Independent Psychiatric Association of Russia and other organisations undertook an extensive monitoring project funded by the European Commission. A total of 93 institutions were monitored. The initiative had the co-operation of the Russia Federation Ministry of Health and the Chief Psychiatrist of Russia.

Recommendations were made with respect to legal and practical human rights changes required, more effective implementation of the existing law as well as additional funding needed for mental health.

A significant advantage of monitoring by NGOs is their independence. Unlike bodies working for, or even appointed by, governments, non-governmental organizations are usually able to deeply probe into violations of rights without fear of losing position or favour. Staff and service users may also feel more free to interact and discuss human rights violations with NGOs due to their independence than with government or government appointed

officials. However some governments are reluctant to give NGOs free access to facilities, staff or service users to monitor and interview them and this can be a major limitation for NGOs. If an NGO decides to conduct investigations without the permission of the government this can put its members at risk of violence or detention.

In some countries governments and government linked services work closely with NGOs, take careful heed of observations and reports, including reports on human rights abuses, and act on the recommendations made to them. In such cases monitoring by NGOs can be extremely powerful in bringing about change. Some NGOs may work exclusively with governments and strategically decide that their ongoing ability to impact on human rights is through close collaboration with government - and by not alienating or embarrassing them. However this may lead to complacency by government who may then not act on the findings. This in turn becomes a serious limitation on the effectiveness of the monitoring by the NGO.

Most NGOs feel that their greatest impact is likely to results from advocacy (local and international) and public pressure either in addition to or instead of engagement with government. Monitoring thus becomes part of a comprehensive strategy which may involve such activities as exposure of abuses of rights through the media, publication of photographs and videos, training and mobilizing consumers to demand their rights and so on. Such activities may or may not bring about short-term changes to the lives of people with mental disabilities depending on the responses of government.

Many NGOs are made up entirely of, or have some members who are mental health service users or family members who have a direct insight into the experience of human rights abuses and are thereby able to identify problem areas and advocate for change.

A limitation of NGOs (especially in developing countries) is that they often run on a very small budget that makes it difficult to undertake the investigations, inspections and advocacy work required. Moreover while in some countries NGOs are taken very seriously and their recommendations are genuinely considered and implemented, in other countries NGOs are regarded merely as “trouble makers” trying to undermine government or as irrelevant. In some extreme situations NGOs may be banned if they advocate for human rights. In any event NGOs should complement rather than replace legal independent oversight.

3. Non- mental health specific monitoring and complaints mechanisms

Many countries have legally constituted or other formalized bodies for the protection of human rights (e.g. Human Rights Commissions, Healthcare Commissions, Ombudspersons). Though they do not focus specifically on mental health issues, such bodies can be important in protecting rights of people with mental disabilities.

Though often created by governments or by acts of parliament, monitoring bodies are usually independent of the government and indeed may act as "watchdogs" of government services themselves. As these bodies are not part of "normal" governmental functions they often account differently from the structures that provide services to the public. For example monitoring bodies may report directly to parliament or to the Minister responsible (e.g. UK, Australia). This is intended to ensure that any abuses found are not discounted, overlooked, "covered up" or dismissed and that recommendations can be taken up as quickly as possible, at the highest level possible.

3.1 Human Rights Commissions

A number of countries have set up Human Rights Commissions through their constitutions or through the implementation of specific legislation (for example Canada, India, Fiji, New Zealand). While the functions are likely to vary from country to country, some of the tasks assigned to a commission may include inquiring, on its own initiative or on petition, into violation of human rights or negligence in the prevention of such violation; intervention in proceedings involving violation of human rights in a court; visiting any jail or other institution, where persons are detained or lodged to study the living conditions and make recommendations; review the factors that inhibit the enjoyment of human rights; make recommendations on the effective implementation of international treaties or instruments and spread human rights literacy; monitor and assess observance of human rights, raise awareness of human rights issues and run education and training on human rights[2].

Examples of interventions by Human Rights Commissions in mental health

[2] These functions are based on the functions of the national Human Rights Commissions of India and South Africa.

In **India** in 1999, following the deaths of a number of people in a fire in a psychiatric institution the National Human Rights Commission conducted an empirical enquiry into mental hospitals in the country. The findings were a damning indictment and wide-ranging recommendations for change were made**.** (Sharma 2003)

In **South Africa** following a complaint in 2005 regarding conditions in one psychiatric hospital and a thorough investigation, the South African Human Rights Commission ordered the hospital to be closed and patients to be transferred with immediate effect. (Personal communication, Freeman, 2006)

3.2 Ombudsperson

Some countries have established the position of the ombudsperson. Those taking on this function are an official, usually (but not always) appointed by the government or by parliament, charged with representing the interests of the public by investigating and addressing complaints reported by individual citizens and with promoting and protecting people's rights, including the rights of people with mental disabilities and their families. An ombudsperson will often have the power to negotiate with government on behalf of citizens. Specific tasks of ombudspersons include the carrying out of investigations and the issuing of recommendations to the government on citizen's disputes with national, state or municipal public agencies; Looking into complaints about the effectiveness of the public service; taking up cases involving group rights and interests as well as cases involving violations of civil, political, economic, social and cultural rights and fundamental liberties (PAHO, 2006)

In **Peru** in 2006 the ombudsman reported on the right to the enjoyment of the highest standard of health in light of the State's obligation to provide health services without discrimination; the rights and liberties of people confined to mental health facilities; the current mental health situation in Peru and reported on an evaluation of eight psychiatric facilities. It is hoped that this will lead to changes in mental health care provision and particularly abuses of human rights in psychiatric hospitals.

Pan American health Organization (2006)

Monitoring mechanism for protection of human rights, which include mental health, have also been set up through the Ombudsperson's office in

other countries in the Americas such as **Panama, Costa Rica, Argentina and Guatemala.** In **Nicaragua** an office to protect the right s of persons with disabilities, including persons with mental disabilities, has been created. (Personal communication Javier Vasquez, 2006)

Structures such as human rights commissions and ombudspersons may either respond and act on specific complaints or conduct their own independent investigations into human rights abuses. An advantage of using a general formal human rights structure, rather than a specific mental health formation is that it "mainstreams" abuse against people with mental disabilities. In so doing it reinforces the fact that abuse against a person with mental disability is no different from abuse against any other person and that appropriate actions need to be taken regardless of who has been abused. It is possible that in some countries general human rights bodies may have more legal powers to act against human rights violators and ensure that preventive mechanisms are in place than more specific mental health bodies may have.

On the other hand unless a history and tradition of monitoring mental health is well established in a country and within the general human rights monitoring body, mental health issues may be neglected. Moreover if monitoring is left to non-specific human rights bodies, it is likely to be more sporadic and/or based on specific incidents or complaints rather than having a systematic and ongoing focus on mental health.

4. Specific mental health monitoring mechanisms within countries

There are three main monitoring mechanisms that countries tend to use to ensure that the well being of patients with mental disability is optimized. These are standards or quality assurance mechanisms, "mental health inspectorates" and mental health review Tribunals.

4.1 Standards, Quality Assurance and Accreditation

Standards for quality in mental health care outline acceptable and adequate service provision. They can be used as tools for determining the accreditation or non-accreditation of health facilities. They can also be used to improve care and treatment offered as part of an ongoing quality improvement process, particularly when integrated as part of managerial processes operating within health services, health systems or health authorities.

Accreditation is usually the official authorisation by a public body that asserts that certain criteria of quality have been met by a mental health facility or service (WHO, 2003). If the services fail to meet the standards on a continuing basis, they will not be entitled to render the services. Accreditation allows for comparisons with established organisations and between organisations.

Australia

The Commonwealth Department of Health and Aged Care have formal *National Standards for Mental Health Services*. These standards can be used as a blueprint for the development of new services or as a guide to service enhancement and continuous quality improvement. They can also be used as a tool to inform consumers and carers about what to expect from the mental health service and as a checklist on service quality (Whiteford, Chair of the Australian Health Minister's Advisory Council's National Mental Health Working Group, 1997).

The standards cover 11 domains which require monitoring i.e. 1)Rights 2)Safety 3)Consumer and carer participation 4)Promoting community acceptance 5)Privacy and confidentiality 6)prevention and mental health promotion 7)Cultural awareness 8)Integration 9)service development 10)Documentation 11)Delivery of Care.

National Standards for Mental Health Services. Commonwealth of Australia, Canberra, 1997.

United Kingdom

National Minimum Standards are set by government and facilities are expected to rate themselves according to these. From this, and from a site visit, issues are prioritised and an action plan for improving standards is drawn up. The main domains assessed are:- Safety; Clinical and cost effectiveness; Governance; Patient focus; Accessible and responsive care environment and amenities.

Health care Commission. Self Assessment: Mental Health Establishments (2005)

Ireland

In terms of the Mental health ACT (2001) a Mental Health Commission has been set up to promote, encourage and foster high standards and good practices of mental health services. To this end the commission conducted extensive consultations with stakeholders to ascertain their views of what constitutes quality mental health services. Following this standards for each of the key themes identified have been developed as well as defining criteria against which the outcomes are to be measured. The key identified themes that stakeholders identified were 1)respect and empathetic relationships between users and providers 2)services which empower users, families, parents and carers 3) holistic, seamless services encompassing the full continuum of care 4)services which are equitable and accessible 5)a high quality environment which respects a person's dignity and that of their carers 6)effective management and leadership 7)services delivered by highly skilled and multidisciplinary teams and 8)services that are based on best practice and incorporates systems for evaluation and review.

Mental health Commission Ireland. http://mhcirl.ie

The purpose of the quality assurance approach is usually to work with service providers in assessing whether key aspects of services meet acceptable standards and targets for achieving better quality of care; in better utilising

resources to achieve targets; in assisting with ensuring that management training is received; in motivating all levels of staff to achieve more human rights oriented care and treatment and in mobilising additional resources. This approach can be an important means of achieving better care and human rights particularly as it involves the active participation of the service provider in bringing about positive change rather than an external body "wielding a big stick" in order to promote such change. People feel part of the process and make changes not so much because they have to (though standards which must be achieved are set) but because they are partners in the process and want to bring about service level improvements.

A limitation of this approach is that it often lacks true independence from the health authorities and is hence less likely than, say, an inspectorate, to expose abuses to the media, to parliament or to other groups outside the Ministry.

4.2 Mental health inspectorates

Mental health inspectorates (also known as visiting bodies or commissions) are bodies that scrutinize all mental health facilities and any other place where mental health services are provided, and depending on the powers and functions given them by the law, may assess mental health policies and legislation and make recommendations for change on the basis of findings. Inspectorates may, for example, examine actual facilities, care pathways, referral systems, care planning, treatment interventions and discharge protocols and quality of care. They may also be responsible for monitoring and ensuring that the relevant legal provisions are being respected and implemented and that government policy and legislation meets international human rights standards. Service users, including former service users as well as their relatives, friends, family members and personal representatives must have the right to complain regarding any aspect of care and treatment provided. Inspectorates may utilize checklists, conduct interviews with staff and users of services as well as undertake observations to reach their conclusions. To be optimally effective mental health inspectorates should be independent of government in terms of the inspections they conduct, but at the same time have the authority to fundamentally impact on government services and policy. It is generally more useful when visits from inspectorates are undertaken at short notice or are unannounced.

The importance of having bodies, which *are required by law* to provide ongoing and independent oversight is fundamental to promoting human rights in mental health. By undertaking regular visits, conducting inspections, being available to hear complaints (and acting on these), and generally advancing and upholding the rights of people with mental disabilities, human rights can be genuinely promoted. The very existence of such bodies and the awareness by hospital staff or other service providers that they are being "watched" is alone likely to impact on care and the way service users are treated. Moreover, awareness that action can be taken if abuses are found, in all likelihood results in fewer abuses occurring.

In addition to providing the relevant establishments with a report, the findings and recommendations of inspectorates may be given to a higher service authority or directly to the political head concerned or to the legislative authority such as parliament. Some inspectorates have powers to act directly on services and may, for example, refuse accreditation to a facility, apply sanctions or even close down a hospital if abuses are found. Where they do not have this authority the inspectorate should make the appropriate recommendation to the authority that can act directly against a facility.

However when conducting inspections and acting on the findings it is important that sanctions are not simply taken against people, establishments or authorities without simultaneous consultation and collaboration with service providers and those who control budgets. If this is not done properly it is possible that the good intentions of sanctions could even prejudice service users care. For example if a decision is made by an independent monitoring body to close an institution because most of the people within it have no reason to be there, and that the conditions are extremely poor (both of which are common), the closure of this facility without ensuring that the service providers have made alternative arrangements for service users, could result in dire consequences for the people within the facility and would not necessarily be a positive move towards better human rights protection for people with mental disabilities.

Mental health inspectorates can also make use of the national legal system. For example if they find that a staff member at an establishment has abused a service user, they may facilitate or take legal action against such person. Moreover if they find that whole facilities are in violation of human rights due to poor living condition, lack of treatment and rehabilitation etc, the monitoring body or inspectorate may decide to litigate against the particular establishment or the Ministry itself rather than merely report such facts.

Formal inspectorates/monitoring mechanisms

New York, USA

The New York State Commission on Quality of Care and Advocacy for persons with Disabilities, set up under the New York Stare Mental Hygiene Law, provides independent oversight of the quality and cost-effectiveness of services delivered by the state's mental health, mental retardation and other related programmes.

The Commission: -

- Responds to complaints about care and treatment
- Investigates complaints of deficient conditions and rights violations in facilities
- Conducts unannounced site visits to examine programme operations
- Inspects facilities and licensed programs' safety, security and quality of care and treatment afforded residents and service users, and informs program managers of findings and recommendations
- Administers a statewide network of advocacy programs for children and adults with disabilities through case negotiation, administrative proceedings, litigation and legislation
- Performs systematic reviews and studies of the mental hygiene system and
- Issues reports to the Governor and Legislature, making recommendations for legislative, budgetary and administrative reforms.

Commission on Quality of care and Advocacy for persons with Disabilities. New York State. http://www.cqc.ny.us

England

The Mental Health Commission is responsible for carrying out the statutory functions of the Mental health Act as it relates to the detention and treatment of mental health service users.

Some of its functions are:-

- To keep under review the operation of the Mental Health Act of patients liable to be detained under the Act
- To visit and interview, in private, patients detained under the Act.
- To investigate complaints
- To appoint medical practitioners and others to give second opinions
- To publish and lay before parliament a report every two years
- To monitor the implementation of the Code of Practice.

Commissioners undertake visits to monitor compliance with the mental Health Act and Code of Practice. This involves interviewing service users in private, the scrutiny of all records and assessment of all factors which affect the care, treatment and quality of life provided to detained service users. This includes environmental and organizational matters, and equality and human rights issues. The main aim of the visit is to ensure the lawfulness of detention and to monitor the operation of the Act as it relates to detained service users. Visits are usually done at short notice or they are unannounced. Commissioners may visit at any time. The Commission visits every unit with detained service user at least once per annum; every ward with a detained service user, at least once every 18 months and interviews 20% of all detained service users every year.
Mental Health Commission United Kingdom http://www.mencap.org.uk

Lithuania

Psychiatric hospitals are monitored by the State medical audit inspection under the Ministry of Health. It is a state inspectorate institution financed from the state budget. Social care homes are monitored by the Social Institutions Supervision and Audit Department under the Ministry of Social Security and Labour also funded by the state.

(Personal communication 2006

Southwestern Virginia USA

The department of Mental health, Mental retardation and Substance Abuse was assigned a Human Rights Advocate to the Southwest Virginia Mental Health Institute (SWVMHI) to assist service users with resolving service-related complaints.

Every person who receives services at SWVMHI is assured protection to exercise his or her legal, civil and human rights; respect for basic human dignity; and services that are consistent with sound therapeutic practice. Service users are informed of these rights as soon as they enter care and treatment. If a user or carer feels that these rights are being violated they are encouraged to discuss these complaints with their unit and treatment team.

If complaints are not adequately resolved through "normal" management processes the
Human Rights Advocate will conduct an investigation.

Where an inspectorate has been set up by law or even by government commission and is allowed to operate independently it has the double advantage of being able to investigate without interference and has direct access to political and health authorities, service providers as well as the media and lobby groups.

However, a central question with regard to the effectiveness of independent inspectorates is what is done with the information collected and what enforcement powers do they have? Most inspectorates, in countries where they currently exist, publish reports on an annual basis or in relation to each visit or inquiry. However the "power" of such reports (and hence in some situations the power of the monitoring bodies themselves) appears to vary. In some circumstances the report is given, in the first instance, to the establishments or services themselves to act upon. Receiving such reports and recommendations can be highly effective in promoting human rights where there is a serious commitment to service delivery based on human rights. However in situations where there is less dedication to the principles of human rights, enforcement measures, sanctions or incentives may be required. Measures to ensure that the findings of the inspectorate is acted on is fundamental.

In order to fulfil the function of inspection it is useful to have a well conceived tool to guide inspections and assessments.

4.2.1 Setting up a mental health inspectorate in legislation

The specific roles and functions of the body should be described in the legislation. For example legislation may say that the monitoring mechanism must protect the rights of people with mental disabilities in mental health facilities (which will be defined) through undertaking regular inspections, hearing complaints from service users, staff or other interested parties, reviewing records and documents, observing care and treatment practices and interviewing relevant individuals. Some of the objectives that they may oversee may be to ensure that people with mental disabilities, in facilities:

- Enjoy the same human rights as any other citizen of a country in accordance with international human rights standards
- Receive the highest attainable standard of care possible within the resources available in the country and at least equal to other health services provided.

- Are not physically or mentally abused or subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- Are not arbitrarily deprived of liberty and autonomy
- Are treated with dignity and respect.
- Have the right to participate in civil, political, economic, social, cultural, and religious activities and to live life without undue interference.

It is advantageous to have monitoring bodies created by law as this puts a legal obligation on the country to carry out the assigned tasks and to report or take appropriate actions on the basis of findings. Moreover, if established through legislation, the monitoring body cannot simply be disbanded to make way for other priorities which may be competing for resources or because the body may be highlighting information which may be embarrassing the government.

If monitoring bodies have not been included within the law it is still possible and useful for Ministries of Health or other structures to set up such bodies. This may provide greater flexibility than a legally constituted body, for example with respect to the composition of the body and its terms of reference. For instance if a legal body does not make provision for the inclusion of a service user as one of its members it may be difficult to change this when it is later realized that such a person is needed. A less formal structure on the other hand, may be more responsive and adaptable to the need for change.

4.2.2 Composition and functioning of a monitoring body

There are four primary principles to be followed in setting up and overseeing the functioning of a monitoring body. Firstly the body must be independent of political and bureaucratic interference. Secondly, it should be able to monitor facilities in all parts of the country. Thirdly it should include a range of individuals with different experiences and skills to be able to carry out the mandate of the body and fourthly, the members of the body must have a clear understanding of human rights standards.

a) <u>Independence</u>: Governments are tasked with fulfilling political mandates. Human rights, on the other hand should transcend politics. Those appointed to the monitoring body need to carry out their functions on the basis of established international and regional human rights standards. The body must be allowed to carry out its work without government interference and without fear of negative repercussions for themselves or others who provide information to them no matter what their findings are. It is important that monitoring

bodies be allowed to visit and observe any mental health facility and to interview and question any person they believe to be relevant to their investigations in private. This must include service users themselves and staff at any facility. Moreover anyone wishing to talk to a member of the monitoring board must know that they can do so confidentially and that anything they say will be kept anonymous if they so wish. In conducting visits the monitoring body should have unrestricted access to all parts of the health facility and service users' medical records.

Results of all investigations should be available to the public and the media as well as to the facility or place concerned and the relevant authorities. However, any person, place or authority said to be abusing or infringing on human rights must also have the right to reply to the accusations made, before the information is publicly disclosed.

Independent monitoring bodies are only as powerful (and indeed as independent) as they are allowed to be. For example appointment of members onto a monitoring body by a Minister which reports directly to him or her elevates the status and potential power of the body but could also mean that the Minister appoints people who support him or her and who will not duly embarrass him or her. A Minister may also simply take a report and file it, as, for example, if there are no additional resources to deal with the matter. Reporting to the legislature may have some advantages over reporting to a Minister, but even in this model there is no guarantee that the legislature can or will do anything to address the findings. Moreover, in countries with many conflicting priorities, it is perhaps unlikely that the legislature would regard mental health and the rights of people with mental disabilities as such a priority to the extent that they would expect a monitoring body to report to them directly.

b) *Coverage:* Every mental health facility in the country must be monitored. In smaller countries it may be possible to have only a single monitoring body with an appointed set of individuals for the whole country that is able to conduct all the visits and investigations. However in larger countries (both geographically and/or in terms of population numbers) this would not be possible and various other options need to be considered. For example a country may decide to have a central monitoring committee with a number of subsidiary units that conduct the inspections and then report to the central committee, who would in turn be responsible for standardizing the inputs and reporting to the relevant authority. Another alternative is to have a relatively large pool of people available to conduct monitoring, a

certain number of whom can be called upon to serve on the body at different times as required. The country may decide that at least one central committee member goes on each facility visit with the rest of the team to maintain standardization. Alternatively the country may decide to have a number of discreet monitoring bodies all reporting independently to the (same) relevant authority. In this case the country will need to decide on the number of monitoring bodies they need for the country, how they will operate and how they will report.

Where the country, and the health system particularly, is more federally divided or where the geography or population numbers warrant it, there may be a number of separate monitoring bodies set up each with their own independent reporting structures and authorities. Such bodies too could function within a range of operational alternatives such as having the same people do all the visits; draw on a range of different people or have sub units which conduct the investigations and report to them. Any combination of these options may be chosen depending on the needs of the country and the resources available.

How frequently each facility should be visited will depend on the resources available in the country as well as the levels and extent of abuse found. As a general rule it is recommended that each facility should be inspected *at least* once per year. This visit should not always be at the same time of year, as this will take the "surprise" element out of the visit. The inspectorate will need to see the facility as it "normally" is rather than allowing the facility to prepare for the visit.

After each facility visit the inspectorate should produce a report, including recommendations on how to improve human rights where necessary. If violations of human rights are found, especially gross violations, these have to be closely monitored. Depending on the violation and resources available it may be possible to merely receive written reports on what has been done until the next routine visit to the facility is conducted, however where there are more serious violations annual inspections will be inadequate and it may be necessary for the inspectorate to visit the facility every month or even more regularly for a particular period. If no progress is made with implementing the recommendations then further actions need to be taken in accordance with the procedures and law of the country.

Additional visits to facilities and investigations may also be required where specific complaints are received from service users, their family members or other interested parties such as NGOs.

*c) Members of the monitoring body: I*n order to provide effective protection, minimum composition may include professionals (mental health, legal, social work), representatives of users of mental health facilities and services, members representing families of people with mental disabilities, advocates, and lay persons. Women and advocates should be represented on such a body. This combination allows for a mix of people who have experience from both a technical (mental health and legal) and personal perspective (users, family members, community members). In some countries it may be appropriate to include religious authorities. Women and minority groups should also receive adequate representation. The number of persons serving on the Body and the breadth of representation will largely depend on the resources available.

*d) Understanding of mental health and human rights: A*n important issue with regard to the effectiveness of independent monitoring bodies is the levels of understanding of mental health and human rights by the Board members themselves. The board members need to be very clear concerning the rights people with mental disabilities are entitled to and what constitutes an abuse of these rights. They also need to know under what circumstances such rights may be restricted. For example they need to ensure that every adult, including people with a mental disabilities, has a right to make financial transactions, but that if a person has been shown to lack capacity to make decisions and is actively making decisions against his or her own best interest, that any major financial transactions should be limited until the person regains his or her capacity.

Clear guidelines to inspectorate members regarding rights and what to look for, for example through interviews or observation, is critical. Providing training to members so that there is standardized agreement on what is acceptable practice and what constitutes an infringement on rights is very important. There also needs to be clear processes available which determine the competence and capacity of a person to make specific decisions or to take specific actions otherwise the monitoring body would find it very difficult to fulfill its role effectively.

4.2.2 Powers and authority of a monitoring body

The objectives of the monitoring body would be achieved through:-

- Unannounced visits to places where there are people with mental disabilities
- Confidential interviews with users, family members and staff at facilities
- Access to medical and other records needed for their investigations
- Unrestricted observation of places and processes involving people with mental disabilities.
- Receiving and entertaining complaints from users, family members and staff of facilities regarding human rights abuses.
- Examining and evaluating mental health policy, legislation, services and systems to ensure they comply with human rights standards.
- Monitoring the implementation of legal provisions (mental health and other laws) which promote the rights of people with mental disabilities.
- Making recommendations on measures and activities to be undertaken to ensure compliance with human rights standards.
- Working with the relevant government, non-governmental, user, family and other organization to enforce human rights.

There are various models that could be followed with regard to how the findings of a monitoring body can improve human rights. Alternatives (though not necessarily mutually exclusive alternatives) are that the monitoring body should:-

- Have direct access to key decision makers within the Ministry who are able to review recommendations and act in accordance with them. This should be regarded as a minimum requirement.
- Have access to and make reports available directly to the political head of health i.e. the Minister/Secretary concerned.
- Report to the legislative power such as parliament or congress. The Minister/Secretary would then be held responsible and would have to report back on progress made.
- Have direct powers to force compliance. For example the body may have the power to accredit facilities and to take away such accreditation. They may also have powers to impose administrative and financial penalties for violations of human rights and even have the power to close facilities which persistently violate human rights of persons with mental disabilities
- Be mandated to use the legal system to prosecute human rights offenders.

- Take legal actions as needed in terms of domestic and international law to ensure compliance with human rights standards.

4.3 Mental Health Review Tribunals

"Involuntary admission to a psychiatric facility involves a serious deprivation of a person's liberty and is therefore a potentially grave violation of human rights" (Gable et al, 2005[3])

Mental health Review Tribunals (sometimes also called mental health review boards or mental health Review Bodies) are judicial or quasi-judicial bodies, which have powers in terms of the law, to admit, review the cases of, and discharge people held involuntarily. Where hearings are conducted as part of formal court processes, for example by magistrates and judges sitting in courts of law, they are judicial processes. Where special Tribunals are constituted by law to make decisions regarding non-voluntary admission and treatment that include people other than legal appointees (for example medical professionals or lay people), and which may not convene within a court of law, they are referred to as quasi-judicial bodies. Both judicial and quasi-judicial Tribunals have powers to authorize or prohibit admission, treatment and discharge involuntary service users. Some tribunals also have the powers to transfer service users to more (or less) restrictive environments and to monitor intrusive treatments such as ECT or psycho-surgery. Tribunals may in some cases also deal with discharge of mentally ill offenders. The main functions of tribunals relate mainly to the human rights principles of liberty, freedom and autonomy of the person.

As discussed in module 7, interpretation of the CRPD's protection against involuntary admission is currently under debate. The approach of many countries has historically been to allow for the exceptional cases when individuals with mental disabilities need to be involuntarily detained and treated. However, there are some who say that this option is not available under the CRPD, rendering Review Bodies unnecessary.

However, to date involuntary admission and treatment continue to occur throughout the world. In many countries

people can have their liberties taken away without due judicial processes and without independent systems in place to "check" the necessity of involuntary

[3] Gable L., Vasquez J., Gostin L & Jimenez H. (2005) Mental health and due process in the Americas: protecting the human rights of persons involuntarily admitted to and detained in psychiatric institutions. *Pan Am J Public Health* 18(4/5) 366-373.

detention and treatment and ensure that all legal processes have been followed correctly. Moreover people can be detained and treated for prolonged periods (perhaps for life) without systems for reviewing their situation. Furthermore, in some countries once a person is an involuntary service user, in addition to facing human rights abuses (such as inhuman and degrading treatment practices, poor living conditions) they are also automatically stripped of certain rights such as the right to vote, to conduct financial transactions, to drive a motor vehicle among others. Tribunals protect people against such human rights abuses.

Nonetheless the existence of a tribunal does not in itself guarantee rights. Firstly unless the tribunal is guided by very clear criteria concerning when a person can be held or treated involuntarily, the tribunal may make judgments based on personal preferences, prejudices or beliefs rather than defined (preferably legal) criteria. Secondly a tribunal can easily become a simple "rubber stamp" to decisions taken elsewhere and merely be a façade of human rights rather than a real protector of rights. For example the tribunal can simply take the recommendation of the medical practitioner or practitioners, or the views of family or community members, as being the pertinent facts, without hearing the perspective of the individual or their legal representative or without doing additional investigations. In such circumstances the tribunal serves little purpose. On the other hand if the tribunal is well trained and well versed in human rights and takes its legal functions very seriously it is a critical part of ensuring human rights for people with mental disabilities.

The MI Principles emphasize the need for Review Bodies to be set up and provide guidance for their implementation. It is suggested that (Principle 17):

1. The Review body shall be a judicial or other independent and impartial body established by domestic law and functioning in accordance with procedures laid down by domestic law. It shall, in formulating its decisions, have the assistance of one or more qualified and independent mental health practitioners and take their advice into account.
2. The Review body's initial review …of a decision to admit or retain a person as an involuntary patient shall take place as soon as possible after that decision and shall be conducted in accordance with simple and expeditious procedures as specified in domestic law.
3. The review body shall periodically review the cases of involuntary patients at reasonable intervals as specified by domestic law.

4. An involuntary patient may apply to the review body for release or voluntary status, at reasonable intervals as specified by domestic law.
5. At each review, the review body shall consider whether the criteria for involuntary admission…are still satisfied, and if not, the patient shall be discharged as an involuntary patient.
6. If at any time the mental health practitioner responsible for the case is satisfied that the conditions for the retention of a person as an involuntary patient are no longer satisfied, he or she shall order the discharge of that person as such a patient.
7. A patient or his personal representative or any interested person shall have the right to appeal to a higher court against a decision that the patient be admitted to, or be retained in, a mental health facility.

Queensland, Australia

The Queensland Tribunal is an independent statutory authority established under the Mental Health Act 2000 to safeguard the rights of people receiving involuntary treatment. The tribunal's main role is to ensure that involuntary processes are appropriately applied. The Act is administered on the principle that a person's liberty and rights should be affected only if there is no less restrictive way to protect their health and safety and the health and safety of others. The tribunal also has the power to authorize or prohibit the use of Electro-Convulsive Treatment (ECT) if a person is not able to give informed consent.

Queensland Government. Mental health Tribunal http://www.mhrt.qid.gov.au

Scotland

A mental health Tribunal was set up within the framework of legislation (The Mental Health (Care and Treatment) Act 2003) which came into effect in October 2005. The tribunal is involved in considering care plans, deciding on compulsory treatment orders and carrying out reviews. If people want to challenge compulsory treatment orders they are allowed to do so through the tribunal.

Each tribunal has three members; a legally qualified person, a doctor with experience in mental health and a third person with other skills and

experience. It is possible that the third person could be a service user or carer.

Mental Health Tribunal of Scotland http://www.mhtscot.org

England and Wales

The mental health Tribunal reviews cases of people detained under the provisions of the Mental Health Act 1983. It reviews the cases of service users detained under the act and directs the discharge of any service users where the statutory criteria for discharge have been met. Each tribunal has a legally qualified President who sits with a consultant psychiatrist and a lay member.
Mental Health Review Tribunal for England and Wales http://www.mhrt.org.uk

South Africa

A Review Board is set up within the provisions of the Mental Health Care Act (2002). The main functions of the Review Board are to make decisions with regard to assisted and involuntary treatment and rehabilitation services, consider appeals, consider transfers to maximum security facilities and conduct periodic reports on people admitted or treated without consent.

Each Review Board (tribunal)consists of a mental health practitioner, a legal representative and a member of the community concerned.

Mental Health Care Act (2002) South Africa

4.3.1 Setting up a Mental Health Review Tribunal.

The four principles for setting up and overseeing the functioning of the mental health inspectorate also pertain to setting up a mental health review Tribunal, though there are obvious differences in the content of these principles. The four principles are that the Tribunal must be independent of political and bureaucratic interference; it should cover all parts of the country; it should include a range of individuals with different experiences and skills

to be able to carry out the mandate of the Tribunal and the members of the Tribunal must have a clear understanding of human rights standards.

a) Independence:As a judicial or quasi-judicial body the review Tribunal must be free to make decisions unfettered by any political, bureaucratic or other interference. As any court of law, to be credible the review board must not only be independent but be seen to be independent. The board should not be influenced in its decisions by for example pressure from the medical practitioners who recommended involuntary admission or treatment, by family members who may not want to have the person living with them for any reason, by threats from interested parties or by inducements that they may be offered to take particular decisions.

b) Coverage: The numbers of Review Tribunals in any country will depend on various geographical and resource issues. The size of the country, the accessibility to particular areas, the numbers of professionals in the country available to work on the Review Tribunal and the funding allocated are all important determinants of the number of Tribunals that will be set up. As with inspectorates there may be a single Tribunal that has members working around the country that report to it and that co-ordinates and takes responsibility for all cases, or there may be many Tribunals set up with separate reporting structures. The most important point though is that a review Tribunal must be accessible to anyone who is either summoned to appear before it or who wishes to appear before it. It is useless for example to give every person a right to appeal to a review Tribunal against involuntary admission or treatment in legislation, but it is too far for a person to get to the tribunal or they cannot afford to get there. In some instances it may be important to state in legislation that if a person is summonsed to appear before it or if a person wishes to make representation before the review Tribunal that their traveling expenses will be paid for.

In less resourced countries it may be difficult to fulfill the demands of a "truly" human rights oriented tribunal. For example in some poor resourced countries it may be difficult for the tribunal to convene as regularly as it might in a country with a higher level of resources. This may lead to delayed (and hence denied) justice. It may also be difficult in some countries, from a resource point of view, for the tribunal to have the (potential) involuntary service user appear personally before it in every instance. This may result in the tribunal considering only the documented facts before them. However it is important that tribunals

strive towards meeting as regularly as possible to avoid lengthy delays. It is also important that a tribunal have the person appear before it, and if this is not possible, that a legal representative be present to represent his or her interests. In addition tribunals need to ensure that they have *all* the information they require to make a decision. Fundamentally important also is the person's right to an appeal the tribunal's decision, and to be present, or legally represented, at the appeal hearing.

c) Membership:It is usually recommended that there should be at least three people with different skills and experience attending each review hearing. These three people should be a person with a mental health qualification and experience, a person with legal training and experience and a community member.

- Mental health practitioner:The mental health practitioner must provide insights based on their training and experience in mental health. For example they would need to clarify technical points regarding mental health and illness e.g. that only a minority of people with mental illness are likely to be dangerous, that starting treatment may fairly quickly lead to an improvement in mental functioning, that long-term treatment does not necessarily imply lack of capacity to make informed decisions. They must also highlight factors relating to the mental state of a particular user and their capacity to make informed decisions. They may conduct an examination of a user to clarify certain points.

- Legal practitioner: Legal practitioners are expected to bring to bear their knowledge of legal matters and of due process. They are responsible for ensuring that appeal and other hearings are run as judicial or quasi-judicial hearings. They need to ensure that, as far as possible, those present, including the user, are aware of their legal rights and that each person is afforded those rights. They must ensure that all legal processes prior to the person appearing before the Review Tribunal have been followed as laid down by legislation and that all relevant factors are taken into consideration in making a legal decision affecting a person’s liberty and autonomy.

- Community member: Community members are present as citizens to safeguard the rights of another citizen (the user). This means putting themselves in the place of users and considering

what they believe would be in the best interests of the user, respecting the user's rights as a citizen and member of the community. Community members are also expected to contribute knowledge of resources and attitudes at a community level which may affect users. Their role is to assist in decisions such as what would be appropriate as a least restrictive placement for a user. What does the user want and what options are available, bearing in mind the mental state of the user? What would the expectations and attitudes of family and community members be as regards various placement options? Which options would be most appropriate in providing for the best interests of the user, while minimizing any negative consequences for the user and the community? Representatives of service user and family organizations are in a good position to represent the best interests of service users and as such can play an important role as members of a review board.

Whether Review Tribunal members should be the same individuals each time, who are perhaps employed on a full or part time basis for this, or whether a larger number of individuals should from time to time be called to sit on the Review Tribunal is optional. The first option may be preferable in that members would develop extensive skills, experience and teamwork. On the other hand giving a range of people an opportunity to sit on the Review Tribunal spreads the work-load and highlights the importance of the work of the Review Board to a large range of people. In addition the work of the Board would not need to stop if a member is ill or on leave.

d) Understanding of human rights standards: The gravity of a decision to admit and treat any person without their consent, and even more so when a person specifically objects to admission and treatment, should never to be lost on Board members. If they do decide that involuntary admission and treatment should occur, they need to be very sure that this is necessary, in the best interest of the user, in the least restrictive environment and that all legal processes have been followed. All the criteria listed in the legislation for involuntary admission and treatment must be present. Review Tribunal members should be highly familiar not only with the local legislation but with international and regional standards. For example, they should be fully aware of the following provisions in the CRPD:

Article 5– all persons are equal before and under the law and are entitled without discrimination to the equal protection and equal benefit of the law.

Article 14 – Everyone has the right to liberty and security of person. No one shall be deprived of his liberty unlawfully or arbitrarily. Any deprivation of liberty must be in conformity with the law. The existence of a mental disorder shall in no case justify a deprivation of liberty. If persons with disabilities are deprived of their liberty, they are entitled to guarantees in accordance with international human rights law.

Article 22 – No persons with disabilities shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation.

Article 29 – Persons with disabilties must be able to effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected

*Similar provisions can be found in Articles 26, 17, 25, and 9 (respectively) of the ICECPR.

They must also be familiar with the relevant MI principles such as Principle 1 (Fundamantal freedoms and basic rights); principle 3 (life in the Community); principle 4 (determination of mental illness); principle 5 (medical examination); principle 6 (confidentiality); principle 7 (Role of community and culture); principle 8 (standards of care); principle 9 (Treatment); Principle 10 (Medication); principle 11 (Consent to treatment); principle 12 Notice of rights; principle 13 (Rights and conditions in mental health facilities); Principle 15 (admission principles); principle 16 9involuntary admission; principle 18 (procedural safeguards) and Principle 19 (access to information).

5. Offences And Penalties

Violation of the human rights of people with mental disabilities takes place in most spheres of life. Even in peoples' own homes and in the communities they live in, there is often abuse and discrimination. For example people with mental disabilities are sometimes isolated in dark rooms or chained to trees outside in the hot sun or cold by their own families and communities. People with mental disabilities are often discrimination against in gaining access to work and education and when they are able to find work or receive education people with mental disabilities are often discriminated against within these establishments. At times people are fired from their employment merely because they have a mental disability. People with mental disabilities frequently experience difficulties in gaining access to housing. Many people with mental disability experience problems in accessing mental health care and are discriminated against in receiving care for physical health problems. Laws are needed within countries to ensure that such discrimination and violation of human rights are forbidden and that there are penalties for violations of these human rights.

Depending on the specific powers and functions given to them within different countries bodies such as Human Rights Commissions, Ombudsbodies, monitoring committees set up in terms of OPCAT or the CRPD or bodies set up in countries specifically around mental health and human rights may perform a number of functions. For example they both receive complaints of violations of human rights, regularly monitor public and private institutions, facilities and communities in order to identify and rectify violations of human rights and they might undertake preventive programmes. In some instances bodies may only be able to act when complaints are received while in others they may be empowered to inspect and find problems. In some instances such bodies may be encouraged to engage in "primary prevention" of human rights whereas in other circumstances they may help with the prevention of future violations only once specific violations have been committed.

Human rights violations against people with mental disability are best prevented rather than having to deal with the consequences. Sometimes violations occur due to ignorance of international or national human rights standards or of better ways of caring for and treating people with mental disabilities. Human rights bodies such as those mentioned above may hence need to identify people who are likely to benefit from improved awareness, education or training and either conduct such interventions themselves or contract others to so. For example staff at mental health facilities or families of people with mental disabilities may benefit from such programmes. Increasing community awareness of what mental disability is and the rights of people with mental disability is another important means of preventing human rights violations. Media programmes on the radio and television, articles in newspapers or clearly written and understandable pamphlets are all useful for preventing human rights abuses.

Where violations are identified, these may be resolved through processes of engagement and negotiation between the human rights body and violators. Prevention of future violations may be prioritized and training such as that mentioned above may be required. Monitoring bodies may also assist in identifying those areas where change is required and propose solutions where they can. They may work together with the authorities at all levels to ensure that violations are not repeated. In section 2.2 various means by which monitoring bodies may impact on improving human rights has been outlined. When necessary other country specific legal processes, or reports to the international human rights committees or council, may be necessary. For example where gross violations of human rights such as rape or other assault have occurred, perpetrators should be charged in terms of local criminal law.

The fact that a victim had a mental disability cannot be considered a mitigating factor. In fact taking advantage of a vulnerable person only adds to the gravity of the crime committed.

Any law is written primarily to guide people in terms of what the representatives of the population, through a legislature, believe to be good practice behaviours to enhance the well-being of its citizens and the country as a whole. For example laws against murder or theft or in relation to the payment of tax are made so that the populace is guided around what is expected and acceptable behaviour from its citizens. Laws are critical for an ordered society. Notwithstanding this main objective of law, in every society there are people who transgress certain legal provisions and the State needs to have mechanisms to deal with offences. Legislation then also gives the state power to prosecute those who transgress it. This gives legislation a special position relative to, for example, policy (See Module 4).

Clearly though, not every offence of the law is equally damaging and hence penalties for offences need to be proportionate to the transgression. Murder and stealing a loaf of bread are both offences against the law, but the penalties plainly need to be different. In most countries the penalty that may be imposed for any particular offence of the law is set out in the law. The judiciary themselves need guidance regarding the actions that must or can be taken against offenders once they have been found guilty. While some discretion may be given to the magistrates and judges, the law needs to define the parameters of the penalties to be imposed for particular offences. For example the law may lay down minimum or maximum penalties for particular offences and leave some discretion to the judiciary. Nonetheless some guidance must be provided in the law.

In many countries, unless specific guidance is given regarding the level and extent of penalties to be awarded for particular offences, the courts may be unable to act effectively when the law is transgressed. As a result, the law's potential to promote mental health may not be fully realized. The law should therefore specify the appropriate punishment for different offences, and may indicate the severity of penalties to be handed out for particular transgressions, taking account of the fact that not all transgressions are equally serious.

In Japan, the Law concerning Mental Health and Welfare of the Mentally Disordered person (Law 94, 1995), outlines a range of different penalties that must be imposed for various transgressions. For example:-

- A person who comes under any of the following items shall be punished with penal servitude for not more than three (3) years or a fine of not more than one million yen. (i)A person who violates an order of discharge under paragraph 5 of Article 38.5; (ii)A person who violates an order under paragraph 2 of Article 38.7; (iii)a person who violates an order under paragraph 3 of Article 38.7.
- The administrator of a mental hospital, the designated physician, the member of the psychiatric review board (and various other people mentioned) shall be punished with penal servitude for not more than one year or a fine of not more than five thousand yen if he/she without due cause discloses a secret that has come to him/her in the course of execution of duties under this law.

In Kenya the Mental Health Act (Act No 7, 1989) lists a number of actions that are regarded as offences in terms of the Act. It then states:-
Any person who is guilty of an offence under this Act, or who contravenes any of the provisions of this Act or of any regulation made under this Act shall, where no other penalty is expressly provided, be liable on conviction to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding twelve months or both.

In New South Wales (Australia) a system of "penalty units" is used. This prevents having to regularly change every piece of legislation where a specific penalty is prescribed in order, for example to keep up with inflation or other economic fluctuations. For instance a maximum of 50 penalty units could be given for disclosure of information or refusing to obey or comply with an order, direction or decision of the Review Tribunal, a magistrate or the Psychosurgery Review Board, while a maximum penalty of 10 units is given to a person who operates a residential facility without a licence.

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