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HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS

Principles and guarantees for the protection of persons detained on grounds of mental ill-health or suffering from mental disorder

Report of the Secretary-General

Addendum

GE.90-10013/1420B

AUSTRALIA

[Original: English]
[4 December 1989]

Gender-neutral terminology

1. The draft principles at present are not in consistently gender-neutral form. In accordance with standard United Nations usage all references to "he", "him" or "his" should be amended to include "she" or "her" or otherwise re-drafted to be gender neutral. In this respect the following provisions require attention: Articles 3.4 (b), 3.4 (c), 3.5, 4, 5.2, 5.2 (a), 5.2 (d), 5.3 (c), 6.3, 7.1, 7.2, 12.1, 12.2, 12.3 (a), 12.7, 12.8, 14, 15.1 (a), 15.3, 16.3, 16.6, 17.1, 17.2, 17.3, 17.4, 17.5, 17.6, 17.7, 18, and 21.2; and Guidelines I.3, IV, V.2, VI, VII.1, VII.2, VIII.1, X.

Title of the principles

2. In current documentation available to Australia, the title of the draft principles and guarantees does not appear to be settled. Australia seeks an indication as to the currently preferred title (specifically, whether the words "and for the improvement of Mental Health Care" are included).

Article 1: Application without discrimination

3. The article lists a number of impermissible grounds of discrimination in the application of recognized rights. This list includes all the specific grounds of discrimination mentioned in the equivalent article of the International Covenant on Civil and Political Rights (art. 2.1), and "age". Australia doubts that the phrase "or other status" in such a non-discrimination clause is an effective catch-all so as to cover all grounds of invidious discrimination not specifically listed. Thus the approach taken in this article of the draft principles may be seen to result in a purportedly exhaustive list of prohibited grounds of discrimination, i.e., "without discrimination on grounds of ...". Article 2.1 of the Covenant by contrast, makes clear that the list of specific grounds is not exhaustive and that there is a general requirement of non-discrimination in the application of recognized rights, i.e., "without distinction of any kind, such as ...". In Australia's view, this approach is to be preferred. The relevant part of this article should therefore read:

> "without discrimination of any kind, including on grounds of race (etc.) ...".

4. Article 1 also states that the principles and guarantees are to be applied to "all mentally ill persons". However, article 6 deals with protection of persons from unjustified classification as mentally ill. The intended application of the draft is therefore <u>not</u> entirely restricted to people who are in fact "mentally ill persons". This problem could be dealt with either by omitting the words "to all mentally ill persons" so that the article reads:

> "These Principles and Guarantees shall be applied without discrimination ..."

or by adding words to extend the application of the Principles, e.g.:

> "These Principles and Guarantees shall be applied to all mentally ill persons and in all cases concerning mental illness or mental health, without discrimination ...".

Article 2: Definitions

5. The note on the definition of mental illness does not make clear whether the "more detailed definitions ... to be developed in collaboration with multidisciplinary experts concerned with mental health" are to be elaborated at the international level, and if so whether this is envisaged as occurring within the United Nations system, or whether the reference is to development of definitions for the purposes of national legislation.

6. The list of persons included in the definition of "mental health practitioner", although admittedly non-exhaustive, could usefully include a specific reference to psychiatrists.

Article 3: Fundamental freedoms and basic rights

7. In Australia's view, it would be preferable for this article to contain, and preferably begin with, a clear statement that mentally ill persons have the same fundamental rights as all other human beings. (The provision in article 3.4 on capacity to exercise rights is regarded as having a distinct purpose.) The Declaration on the Rights of Disabled Persons and the Declaration on the Rights of Mentally Retarded Persons contain similar provisions (principle 3 and principle 1 respectively). Opening this article with such a provision would avoid the danger which may arise from the present drafting that the particular rights set out may be emphasized at the expense of the rights which mentally ill persons have in common with all other human beings, including those recognized in the United Nations human rights Covenants.

8. Article 3.3 states simply that "There shall be no discrimination on the grounds of mental illness". Existing United Nations instruments address the issue of discrimination in more detail. In particular, they specify both an obligation for States themselves to refrain from discrimination, and an obligation to provide protection against discrimination - e.g., articles 2.1 and 26 of the International Covenant on Civil and Political Rights. Principle 10 of the Declaration on the Rights of Disabled Persons similarly contains a positive requirement of protection against discriminatory treatment, rather than simply stating that "there shall be no discrimination". This article of the draft principles should therefore, in addition to the existing statement, include specific provision that (a) States shall refrain from discrimination on the grounds of mental illness; and (b) States shall ensure effective protection against discrimination on the grounds of mental illness.

9. In relation to article 3.4, whilst it is necessary to provide the maximum protection against abuse of any provision for limitation of rights, the present form of this provision is not considered appropriate and seriously limits the applicability of the draft principles to Australian circumstances. For example, the statement that a decision as to any incapacity must be made by a court appears unnecessarily restrictive. In particular, it appears

inconsistent with recent legislative initiatives in some Australian States which make provision for decisions to be made by specialist non-judicial tribunals. These initiatives appear to offer more accessible and effective protection than reliance on the courts alone.

10. In addition, no definition of "incapacity" in this context is provided in the current text.

11. The relation between article 3.5 providing for appointment of a guardian, and other articles dealing with treatment and hospitalization, is not clear - e.g., what matters are envisaged as being within the authority of a guardian?

Article 4: Information on rights

12. This article refers to information being in a form and language which the person "can understand". Article 14.3 (a) of the International Covenant on Civil and Political Rights dealing with the right of an accused person to be informed of the charges refers to a language the person "understands". The United Nations "Nettel" Principles for the Protection of Persons under Any Form of Detention or Imprisonment similarly requires information to be given in a language which the person "understands" (principle 14). Using the word "understands" appears preferable since it implies an obligation on the authorities to ensure that the information is actually understood.

13. The Nettel Principles also require that any person subjected to any form of detention should be provided at the commencement of detention or promptly thereafter with "information on and an explanation of his rights and how to avail himself of such rights" (principle 13). Although the present principles require information on rights to be given in an understandable form, in Australia's view this may not be as effective as an explicit requirement of an explanation of those rights and how they may be availed of. It is suggested that the article should therefore be amended to include the words underlined above. This article could also usefully include express provision for the provision of an interpreter or other communications specialist if warranted by the circumstances.

14. Australia also notes that there is no definition of which "authorities" are responsible for providing the information to the patient.

15. This article refers to information on rights being provided only in the situation where a person is a patient in a mental health facility. Some other human rights instruments contain more general provisions on dissemination of information. The Declaration on the Rights of Disabled Persons (principle 13) states that:

> "Disabled persons, their families and communities shall be fully informed, by all appropriate means, of the rights contained in this Declaration."

16. A comparable provision would be appropriate in these principles, particularly in view of the statement in the introduction (E/CN.4/Sub.2/1988/23, p. 4) that:

> "These Principles and Guarantees are intended to serve, inter alia, as a guide to Governments, specialized agencies, national, regional and international organizations, competent non-governmental organizations and

individuals and to stimulate a constant endeavour to overcome economic and other practical difficulties in the way of their adoption and application".

17. Australia proposes that a general dissemination provision should be made the subject of an additional provision separate from the present article 4.

Article 5: Rights of patients in mental health facilities

18. Article 5.3 states in subparagraphs (a) and (b) that facilities for reading, recreation, sport, education, and vocational training are to be enjoyed "where possible".

19. The International Covenant on Economic, Social and Cultural Rights requires each party to take steps "to the maximum of its available resources" for the progressive realization of these rights (art. 2.1). Australia suggests that this latter formulation would be the more appropriate means of recognizing resource constraints without lowering existing standards, where it is deemed desirable to give such recognition.

20. Limitations on access to facilities which are necessary due to a person's condition could be related to more definite criteria than simply what is "possible". The limitation clause used in the preceding paragraph may be appropriate. Paragraph 3 might thus be reworded to begin as follows:

"Limited only as strictly necessary in the interests of the health or safety of the patient or others, ...".

21. The right to be adequately remunerated for any work done is not subject in the present draft to the limitation to what is "possible". To avoid this right being subjected to any limitation clause inserted as discussed above, Ausralia proposes that this right be relocated as a separate subparagraph in article 5.4.

22. Article 5.4 states that "every patient, subject to paragraph 3 (c) above and to the Forced Labour Convention, shall be free from forced labour". In Australia's view, this provision should be redrafted.

23. The words "subject to paragraph 3 (c) above and to the Forced Labour Convention" threaten to undermine the protection against forced labour which this article is presumably intended to provide, and instead may suggest that some forms of forced labour for mentally ill persons are legitimate or even recommended.

24. The words "subject to paragraph 3 (c) above" imply that the encouragement to be given to "active occupation", "training" and "work" referred to in paragraph 3 (c) may include forced labour.

25. The Forced Labour Convention provides that all forced labour is to be abolished, but permits certain forms as a transitional measure. Given that this Convention is now some 60 years old, Australia takes the view that any current standard setting should proceed on the basis that the transitional period is not to be further prolonged. The effect of making the prohibition of forced labour for mentally ill persons "subject to the Forced Labour Convention", however, may give some legitimacy to the application of these "transitional" measures to mentally ill persons.

26. The Forced Labour Convention excludes certain categories of forced labour from its definition of forced labour. The effect of making the prohibition of forced labour for mentally ill persons "subject to the Forced Labour Convention" will be to incorporate these exclusions into the definition of forced labour for the purposes of the principles. These exclusions include military service, and work or service exacted pursuant to a conviction in a court of law.

27. The United Nations Standard Minimum Rules for the Treatment of Prisoners state that requirement of prisoners to work is to be subject to an assessment of mental fitness (rule 71.1). While the Standard Minimum Rules do not explicitly provide that mentally ill persons are not to be required to work, they do require that such persons shall be treated in specialized institutions under medical management (rule 82.2), i.e., that general prison conditions, including general provisions as to work, are not applicable. If the draft principles are to endorse the application of enforced work for prisoners with mental illnesses, Australia takes the position that much more detailed regulation would be required than is provided in the present draft.

28. For the foregoing reasons, Australia proposes that the reference to the Forced Labour Convention should be deleted. It is suggested that the principles should simply state in this respect that "no mentally ill person shall be subjected to forced labour".

Article 6: Principles for diagnosis

29. Australia reserves the right to provide detailed criticism and comment on article 6 following a review being undertaken by its medical experts. While endorsing the intent of articles 6.3 and 6.4, Australia may propose an alternative formulation in the light of the aforementioned review.

Article 7: Treatment

30. It is suggested that article 7.1 should read "Every patient has the right to be ..." rather than "Every patient shall ..." in order to indicate that there is an option to be exercised by the patient.

Article 8: Standards of care

31. Article 8 refers to the right of mentally ill persons to equality with persons having other illnesses, but this is only with reference to standards of treatment, rather than to availability of treatment, which also needs to be guaranteed for mentally ill persons equally with persons with other illnesses.

32. The review by Australian medical experts may provide further material to be considered in the drafting of this provision.

Article 9: Standards of facilities and treatment

33. The requirement in article 9.1, that mental health facilities should have access to the same resources as any other health establishment "wherever possible", does not appear sufficiently definite (see Australia's comments on art. 5.3 above). It is assumed that article 8 (1)(a) prohibits lower standards of care for persons with mental illnesses than those available to persons with other illnesses. Further, article 9.1 could be inconsistent with

the non-discrimination requirements of the Covenant on Economic, Social and Cultural Rights, and, in the case of services provided by Government, with article 26 of the Covenant on Civil and Political Rights.

34. The review by Australian medical experts may provide further material to be considered in the drafting of this provision.

Article 10

35. The review by Australian medical experts may provide further material to be considered in the drafting of this provision.

Article 11

36. The review by Australian medical experts may provide further material to be considered in the drafting of this provision.

Article 12

37. Australia considers that the drafting of article 12.2 would be improved by reference to discussion "concerning the nature of his mental illness ...". The reference should also be to discussion with "other persons" of the patient's choice rather than "others", to avoid any implication that the "others" may only be other patients.

38. The reference in paragraph 12.3 (b) to review and approval of treatment by an "independent specialist authority as prescribed by law", would, in Australia's view, benefit from an express requirement that this authority be satisfied that the requirements of informed consent are fulfilled.

39. The review by Australian medical experts may provide further material to be considered in the drafting of this provision.

Article 13: Voluntary admission

40. Australia requests clarification of the level of obligation envisaged by the requirement in article 13.1 that "every effort" shall be made to enable persons with mental illness to be admitted voluntarily to mental health facilities. It is noted that the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to the highest attainable standard of mental health as a right (art. 12.1), albeit one to be realized progressively to the maximum of available resources (art. 2.1). Australia views voluntary admission for persons needing care as being, within this limitation, an internationally recognized right (see also Australia's comments on art. 8).

41. In some legal systems, including some Australian jurisdictions, "voluntary" admission is presently regarded as including admission without the person's own consent but with the consent of a guardian. Australia seeks clarification whether this approach is regarded as permissible, and, if so, with what safeguards.

42. With regard to article 13.2, Australia proposes that the phrase "in the same way as access for any other illness" should read "in the same way as access for any other facility for any other illness".

43. The review by Australian medical experts may provide further material to be considered in the drafting of this provision.

Article 15: Involuntary admission

44. Article 15.1 requires an immediate or imminent likelihood that a person will cause harm to self or others, and that this be due to a "severe" mental illness. This requirement is to be applied to persons who either refuse or are unable to consent to being admitted voluntarily for treatment.

45. In the case of persons capable of refusing treatment, these restrictive conditions on involuntary admission are consistent with, and in Australia's view required by, the right to liberty of the person and to freedom from arbitrary detention (art. 9.1 of the Covenant on Civil and Political Rights).

46. Australia proposes, however, that the position of persons lacking capacity either to consent or to refuse should be addressed separately. While these persons also have the right to liberty of the person and freedom from arbitrary detention, they equally have the right to "the highest attainable standard of physical and mental health" (art 12.1 of the Covenant on Economic, Social and Cultural Rights). It is necessary that effective enjoyment of both these rights should be protected and should not be prevented by a person's lack of capacity.

47. The provisions as presently drafted do not appear to give adequate protection to either of these rights. Requiring an imminent likelihood of "serious" harm to self or others, as a result of "severe" mental illness (neither standard being defined) appears to exclude the possibility of treatment in other circumstances for people lacking capacity to make their own decision - so that a person who suffers significantly diminished quality of life because of a mental illness, but is not likely to cause imminent "serious" harm to self or others, and lacks capacity to consent to treatment, will not be able to be treated. Conversely, the present draft of this provision gives inadequate attention to the question of capacity and how it is to be determined, which is crucial to the protection of the right to freedom from arbitrary detention. The phrase "is unable to consent" is not sufficiently precise. Explicit reference should be made in this provision to the standards referred to in articles 3.4 and 3.5. The relationship between the provision for guardianship and the provision for involuntary treatment also needs to be clarified.

48. Australia notes that article 15.2 refers to review of involuntary commitment to a mental health facility by a "review body" which will not necessarily be a judicial body. While non-judicial bodies have a valuable role in this area, the provision as drafted may fail to reflect the right of any person deprived of liberty "to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if that detention is not lawful" (art. 9.4 of the Covenant on Civil and Political Rights). Australia would reject any such lowering of existing standards.

Article 16

49. The right to appeal to a court contained in this article may be interpreted in some legal systems as only a right to a more limited review than is contemplated by article 9.4 of the Covenant on Civil and Political Rights. It is therefore suggested that this provision should also include a right of direct recourse to the courts, in similar terms to article 15.2.

Article 17: Procedural rights of the patient

50. Australia notes that article 17.3. provides that the review body may refuse access to records to a patient and his or her representative where it "considers that this would cause serious harm to the patient's health or put at risk the safety of others". This is acceptable in principle to Australia; however, such decisions should be reviewable. The matters specified as reviewable in article 16.6 do not appear to include procedural decisons such as decisions to refuse access to documents. Similarly, article 17.7 requires the review body to set out its findings and give reasons for its decision, but this may not be interpreted as including its findings and decision on whether to give access to records. These rights should be explicitly provided for.

Article 18

51. The comments made on article 17.3 are also applicable to article 18.1 with regard to any restrictions on access to information.

Article 19: Criminal proceedings

52. Refer to comments on guidelines on criminal proceedings below.

Article 20

53. Australia views the effect and purpose of this article, concerning persons who are not mentally ill, as being insufficiently defined, and notes that the present draft appears to give legitimacy to the admission of persons who are not mentally ill to mental health facilities.

Article 21: Remedies

54. Australia notes that the present drafting of this article 21.1 refers to an entitlement for "every mentally ill person", which may confine the entitlement to a remedy to persons who are in fact mentally ill: namely, it fails to state a similar entitlement for persons wrongly and unlawfully classified or treated as mentally ill.

Article 24

55. The reference to "existing rights" may be taken to mean only rights presently recognized in national law or rights presently enjoyed in practice. Australia proposes therefore that the phrase should read "existing rights, including rights recognized in applicable international or national law ...".

56. The present draft refers to rights of "patients". The ambit of the principles is wider than rights of persons who are presently "patients" and this article needs to be amended to reflect this.

Guidelines on criminal proceedings

57. Guideline V states that where a person is found incapable of understanding the nature or object of criminal proceedings, or conducting or taking part in his defence, the proceedings shall be suspended and the court is to declare that the person is unfit to stand trial. However, it is not specified what the consequence of such a finding is to be.

58. Australia notes that some legal systems permit indefinite detention in a mental health facility as a result, without the procedures and safeguards generally applicable to involuntary commitment. It is considered that in some cases at least this may constitute a breach of article 9 of the International Covenant on Civil and Political Rights.

59. Guideline VIII provides that patients confined to a mental health facility "under the criminal law and proceedings" shall have substantially the same appeal and review rights as patients confined under civil law proceedings. It is not clear, however, that a person found unfit to stand trial can be regarded as included in the term "under the criminal law and proceedings". Further, this guideline refers to the rights of persons once they are confined in a mental health facility. It does not indicate whether and when persons found unfit to stand trial should be so confined, by what procedure or with what safeguards.

60. The approach Australia would recommend, in order to give effect to the presumption of innocence (art. 14.2 of the Covenant on Civil and Political Rights), is that persons found unfit to stand trial by reason of mental illness should be confined in a mental health facility only if they meet the requirements for civil commitment. This would be consistent with the provision of guideline X which applies the same requirement in respect of convicted persons.

AUSTRIA

[Original: English]
[3 January 1990]

Article 2

1. The definition of a "mental health practitioner" - particularly in respect of the obligatory placing in a mental health facility under article 15, paragraph 1 - would appear to be unduly all-embracing.

2. The definition of "mental health facility" focuses on the care and treatment of patients as the principal function of such an establishment. Therefore, the question arises as to whether an establishment for mentally ill who infringe the law falls under this category.

3. Granted that medical treatment of the mentally ill is of vital importance, the primary objective of such an establishment is to prevent the lawbreaker from committing punishable offences on account of his mental or psychic abnormality. Thus the application of the principles elaborated to such an establishment could be excluded (in this sense see art. 1, para. 1 of Recommendation R (83) 2 of the Committee of Ministers of the Council of Europe, dated 22 February 1983, concerning the legal protection of persons suffering from mental disturbances and placed in establishments). Such an exception would be appropriate in the eyes of the Austrian authorities, since the draft amounts to treating mentally ill lawbreakers in an equal manner as others in the mentally ill category (see Annex A, guideline VIII).

4. It also catches one's eye that the definition is obviously used in different senses. Articles 9 and 13 seems to apply to establishments for outpatients as well as for inpatients (art. 7, para. 2, and art. 15, however, seem to apply only to establishments for inpatients). This is where some clarification is desirable.

5. Finally, no distinction should be made between "mental illness" and "severe mental illness" (this definition is apparently considered necessary with respect to art. 15, para. 1). Such a (unnecessary) distinction would only lead to problems of definition.

Article 3

6. The basic rights and freedoms of the mentally ill are set out in this article. According to paragraph 4, every mentally ill person shall have the right to exercise all his civil, political, economic, social and cultural rights unless the court decides otherwise in relation to disposing capacity. These rights of the mentally ill person include the right to vote, the right to manage his own economic affairs and to control the disposition of his assets, and the right to appoint a representative of his choice to protect his interests.

7. This is not to assume that each person suffering from mental disorder should have the right to exercise all these rights, since the legal system has an obligation to protect the mentally ill from their abnormal behaviour. Thus, under Austrian law, those unable to conduct their business, including certain persons suffering from mental disorder or under the influence of alcohol, are, in particular, prohibited from concluding contracts and from marrying. This provision is in no sense a discrimination but seeks to protect the interests of the person concerned. It would not correspond to the reality of life to make the effectiveness of such legal acts dependent on - possibly even prior - court decisions. It should be clearly stated that limitations for the protection of those concerned - naturally with the possibility of legal scrutiny (also at a later stage) - should be admissible.

8. Mentally ill persons should be given rights according to the degree of their mental disorder, and this should be the criteria. Limitations of the mentally ill person's rights, according to this principle, should be expressly made clear in national legislation.

9. The examples of paragraph 4 seem to be arbitrary and should rather appear in the explanatory report.

10. Paragraph 5 - according to which the court shall appoint for a mentally ill person - in general terms and without distinction - a guardian (legal representative), where that person is found to be incapable of managing his own affairs - is to be rejected. In this context, a solution should be sought, which provides for appropriate measures to be taken by the court on behalf of the mentally ill person. The restraints on mentally ill persons to manage their own affairs should be adjusted, according to the pre-conditions to be defined under national law, to the actual state of the mentally ill.

Articles 10 and 11

11. In articles 10 and 11, the link between the terms "treatment" and "medication" (see also para. 8 of art. 12) seems to require clarification in the sense that it should be stated clearly that "medication" is a form of "treatment".

Article 12

12. With regard to the stipulation in paragraph 9 that a second professional opinion should be sought, this should only be dispensed with under the more precise condition of immediate danger. The general obligation of a second professional opinion under the vague pre-condition "whenever possible" could then be dropped.

Article 13

13. As a preventive measure designed to ensure the voluntary nature of admission to a mental health facility dealt with in this article, a written certificate should be required in which the persons who have informed the patient and been given his approval, confirm that the conditions under paragraph 3 are met. Such an approach could establish a sort of responsibility to ensure that patients are admitted to mental health facilities only with their full understanding and approval, without enjoying the guarantees under article 15.

Article 15

14. This provision concerns the obligatory admission to a mental health facility. Under paragraph 1, the person shall be admitted only if a mental health practitioner considers that there is, because of severe mental illness, immediate, serious danger or risk of danger for the mentally ill or another person and that the mentally ill refuses voluntary admission or is incapable of agreeing to it, provided that the treatment can only be carried out in a mental health facility. Whenever possible, this opinion should be confirmed by a second mental health practitioner.

15. There are considerable reservations on this provision since, under article 2, "mental health practitioner" does not only mean a medical doctor, but also a (clinical) psychologist, nurse, social worker or other appropriately trained and qualified person with specific skills relevant to mental health care. It would seem that more restrictive terms of admission, as far as the person committing someone to a mental health facility is concerned, are called for. The specific conditions for a committed person should at least be determined by a qualified specialist in psychiatry and neurology or a public health officer. Furthermore, a compulsory commitment

should not only be provided for on account of "severe mental illness" since this would lead to problems of definition and since it would seem to be sufficient that an individual is suffering from psychic disorder and is thus a serious danger to himself or others (in this sense, see arts. 3 and 4 of Recommendation R (83) 2 of the Council of Europe mentioned in para. 3 above). The formula contained in paragraph 1 - "shall be admitted or retained" - should be clarified in terms of the intentions of article 14, i.e. that the opinion has to precede, in any case, the involuntary admission.

16. In paragraph 2, it should be stated that the involuntary patient or, when this is not feasible on account of his mental disorder, his representatives and relatives should be informed as soon as possible on the reasons for his admission.

Article 16

17. Under paragraph 6, each "interested person" has the right of appeal, but this goes much too far (see, however, art. 4, para. 2 of the above-mentioned Recommendation R (83) 2 of the Council of Europe, under which each "interested person" is also granted the right of appeal).

18. Finally, under article 16, each patient (whether voluntary or involuntary) should enjoy the right to complain of involuntary treatment to the "review body".

Article 17

19. In paragraph 1, it is stated that the patient shall be entitled to appoint a representative of his choice (stating that he is entitled to appoint a legal representative is illogical since a legal representative is available by virtue of the law or appointed by a court or other competent authorities). However, the independent authority (court) has to appoint a lawyer or other qualified representative (free of charge), if the mentally ill so wishes and unless he himself authorizes a freely chosen representative. Since the appointment of a lawyer is not indispensable, there are no objections to this provision as (also in Austria) the planned establishment of a lawyer for patients, equivalent to a "other qualified representative", would have to be viewed as adequate representation free of charge of the mentally ill person. Paragraph 1 should in any case ensure that a representative of an involuntary patient should be appointed officially where the patient is incapable of expressing his wishes on account of his condition. Only under these circumstances can the patients' rights under article 16, paragraph 6, be guaranteed so that, also from this point of view, there would be no need to grant a right of appeal to "interested persons".

20. Paragraph 3 is questionable inasmuch as the inspection of the patient's records can be refused also to the representative of the mentally ill, where the independent authority (court) considers that this could cause serious harm to the patient's health. This reservation should be limited solely to the mentally ill.

21. In paragraph 4, more emphasis should perhaps be given to the question of the mentally ill being given a personal hearing by the independent authority (court) in any case (in a mandatory sense; the present text states that the patient and his representative shall be entitled to attend, participate in the hearing and be heard personally).

22. In paragraph 6, it is stated that the hearing shall be in public if the patient or his representative so request. This would appear to be a questionable procedure in such a delicate situation. The presence of the confidants of the mentally ill, if he so requests, would seem to be sufficient. A general public hearing (with media exposure) would hardly be justified.

Article 19

23. The application of the proposed principles in the case of criminal proceedings concerning a mentally ill person, who is consigned to a public institution for the mentally ill, does not seem to be appropriate. To apply these principles would mean that the rules would even apply in the case of provisional committal to a public institution for the mentally ill (instead of detention pending trial), during the period of detention (pending trial) in such an institution and in the case of executing the committal to a public institution for the mentally ill. In particular, the principles foreseen under article 15, paragraph 3, and article 16, paragraph 5, cannot be upheld in such cases.

24. With respect to the admission to an establishment for mentally ill who break the law, reference is made to the comments on article 2.

WORLD ASSOCIATION FOR PSYCHOLOGICAL REHABILITATION

[Original: English]
[2 and 20 November 1989]

General comments

1. Despite decades of neglect, it is heartening to note that a major effort is underway by the United Nations Commission on Human Rights to draft a basic charter specifying in detail the rights of hospitalized mental patients. Our World Association has been in the forefront, together with other international mental health organizations, to provide valuable input to this document.

2. But, as we have informed the Sub-Commission charged with drafting the report, we do not deem it sufficient to limit the provisions of the document solely to the rights of hospitalized mental patients. Therefore, we recommended that subsequent to its adoption by the United Nations, work should begin to enunciate a much broader framework of rights, to include aspects of prevention and rehabilitation, intensified research, expansion of community-based services, training of parents and professionals, and most importantly, provision for housing, jobs and support services.

3. In short, we must press relentlessly forward for a truly comprehensive approach to the full living needs of the mentally ill. We are also keenly aware that while legislation expresses intent and commitment, legislation per se is not self-enforcing. It must be accompanied by adequate appropriations and a suitable service infrastructure.

4. We consider it desirable and essential that, while work goes forward to perfect and finalize the present mandate of the Sub-Commission until its final, hopeful, adoption by the United Nations, preliminary thinking and

planning be initiated in the interim to go beyond the parameters of the present mandate (rights of hospitalized mental patients) to tbe broader issues of prevention, services and psychosocial rehabilitation.

This effort perhaps can go forward with the aid of relevant NGOs, parent and patient advisory organizations, the WHO and ILO.

5. The clear distinction drawn between Principles and Guidelines suggests that specific Guidelines await Regional meetings during the next few months so that adequate consideration can be given to different cultures, social and economic conditions, etc., so that the objective realities in different countries can be carefully taken into account.

6. We particularly underscore the importance of article 22 (p. 13) of the Palley Report, calling for National mechanisms to monitor compliance with national laws and regulations.

To this, we would add suggestions that:

(a) Relevant United Nations Specialized Agencies - WHO, ILO, UNESCO, or the Centre for Human Rights, be authorized and mandated to maintain ongoing oversight of implementation of approved United Nations resolutions and, with the assistance of experts from NGOs, legal and other advocacy organizations, and staff of Specialized Agencies, be in a position to assist national governments and ministries in the drafting of legislation and regulations;

(b) Governments be urged to assist parent and consumer advocacy organizations to fulfil their mandates in serving the mentally ill;

(c) Governments be requested to submit to the United Nations Secretary-General Annual Reports on Legislation and other measures taken in fulfilment of relevant United Nations resolutions.

Specific comments

7. With regard to ECOSOC report (E/CN.4/Sub.2/1988/23) dated 26 August 1988 by the Sub-Commission (Palley Report), page 12, article 18, we suggest the following revision to paragraph 2:

> "2. All patients have a right to preservation of confidentiality of their medical records, subject only to exceptions made by a duly authorized court or by apprioriate legislation".

8. We attach for information the text of the Declaration of Barcelona on the Rehabilitation and Human Rights of the Mentally Ill which was unanimously approved at the plenary closing session (11 October 1989) of the Second World Congress of the World Association for the Psychosocially Disabled, held in Barcelona, Spain:

> "The World Rehabilitation Association for the Psychosocially Disabled,

Mindful of the fact that an estimated fifty (50) million human beings throughout the world, in both developed and developing nations, are afflicted by some form of serious mental disorder or disability,

Recognizing that the primary mission of the Association is to foster and encourage all effective measures designed to meet the basic human needs of the seriously mentally ill, especially the need for a comprehensive array of rehabilitation services to improve the personal, social and vocational functioning of these individuals,

Noting with concern that in many countries, including even those with a high level of industrial and financial capacity, a considerable proportion of the mentally ill populations fail to receive the human, informational data, technical training and financial support systems necessary to enable them to overcome their impaired functioning, reduce the possibility of relapse, thereby depriving them of the possibility of maximizing their potential to lead happy and productive lives or of contributing to the welfare, economic and social viability of their family, community and nation,

Further noting with approval the various Declarations, Resolutions, Conventions and Reports issued by the United Nations, its General Assembly, Specialized Agencies and and International Non-Governmental Organizations, including among others, those of the World Health Organization, the International Labour Organisation, the Economic and Social Council, the World Federation of Mental Health, the World Psychiatric Association, the World Association for Psychosocial Rehabilitation,

Singling out for special attention the instruments identified in the attached Appendix,

Aware that the implementation of the Rights and Principles specified in the actions taken by the aforementioned bodies urgently require all Governments to review and, where necessary, revise their national priorities, developments plans, legislation and expenditures to ensure an adequate level of psychosocial rehabilitation services to their mentally ill residents,

1. Declares that the mentally ill, as well as other vulnerable populations, have the right - and it shall be society's obligation to provide the resources and opportunities consistent with national capabilities - to enjoy a full life, economic security compatible with human dignity, as well as the right to share in the productive work of the community to the limits of their capabilities;

2. Pledges to marshall our utmost efforts to end the shameful conditions of homelessness of millions of mentally ill human beings cast adrift as a result of callous and indifferent public policies, or which stigmatize these human beings as being unworthy of the rights and benefits of a civilized society;

3. Further pledges to co-operate with, and call upon the United Nations, its Specialized Agencies, leaders of National Governments and relevant Ministries and Non-Governmental bodies to promote, approve and advocate policies consistent with the principles herein enunciated;

4. Instructs the Board of Directors of this Association to present this Declaration to the Secretary-General of the United Nations; the Secretaries-General of the Specialized United Nations Agencies; all Heads of State; Health, Finance and Development Ministries and delegates to the United Nations General Assembly."
