

# **MEDICAL WHISTLEBLOWER ADVOCACY NETWORK**

Follow Up Report to the

**United Nations Human Rights Committee**

Concerning the implementation of obligations of

**The United States of America**

Pertaining to the

**International Covenant on Civil and Political Rights**

**As March 26, 2015**

NGO ASSESSMENT OF ACTIONS GOVERNMENT HAS TAKEN ON ISSUE SINCE REVIEW

**CCPR/C/USA/CO/4**

**March 26, 2014 (adoption of the Concluding Observations)**

**March 26, 2015 (Deadline for the State follow-up report)**

**Current Status: Report of the State still pending**

REPORTING ORGANIZATION

**Medical Whistleblower Advocacy Network**

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Medical Whistleblower Advocacy Network (MWAN) acts as a grassroots advocate for human rights for disabled persons and other individuals within the U.S.A. and abroad. MWAN human rights cases often involve issues with medical implications, such as protection of mandated reporters, medical abuse, medical fraud, psychiatric abuse, prisoner mistreatment, sexual assault, domestic violence and stalking.

## RECOMMENDATION BY THE ICCPR COMMITTEE

*“The State party should ensure that all cases of unlawful killing, torture or other ill-treatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies. The responsibility of those who provided legal pretexts for manifestly illegal behavior should also be established.”*

## FOLLOW-UP RECOMMENDATION REPORT WILL ASSESS

Paragraph 5 (Accountability for past human rights violations) Articles 2, 6, 7, 9, 10 and 14

## ASSESSMENT GRADE

**Reply/Action of the State party not satisfactory**  
**C1: Response received but actions taken do not implement the recommendation**

## RELATED REPORTS BY MEDICAL WHISTLEBLOWER ADVOCACY NETWORK (MWAN)

1) Medical Whistleblower Advocacy Network CAT report, *Voiceless Victims: Wards of the Court*, 9/22/14 to the 53rd Session in Geneva on November 12 and 13, 2014.

2) Medical Whistleblower Advocacy Network (MWAN), *Voiceless Victims: Wards of the Court*, Report March 16, 2015. MWAN is providing this report to address in greater detail the assessment of the U.S.A actions in response to the Committee’s recommendation Paragraph 5 (Accountability for past human rights violations) Articles 2, 6, 7, 9, 10 and 14.

MWAN was not in a position to provide a report prior to the adoption of the List of Issues, and thus is submitting this contribution in the hopes that it will be taken into account during the interactive dialogue. ICCPR Articles related to the *Voiceless Victims: Wards of the Court* report are:

Article 2 Ensure rights without discrimination.

Article 4 Derogation of rights to be limited to specific circumstances, certain rights may not be derogated from and derogation must be consistent with certain rules.

Article 6 The right to life, which shall be protected in law.

Article 7 The right to be free from inhuman or degrading treatment or punishment.

Article 9 The right to liberty and freedom from arbitrary arrest or detention.

Article 10 People deprived of their liberty shall be treated with humanity.

Article 12 The right to liberty and freedom of movement

Article 14 The right to equality before the law; the right to be presumed innocent until proven guilty and to have a fair and public hearing.

Article 16 The right to be recognised as a person before the law.

Article 17 The right privacy and its protection by the law.

Article 18 The freedom of thought, conscience and religion.

Article 19 The freedom of opinion and expression.

Article 21 The right to peaceful assembly.

Article 24 The rights for children (status as minors, nationality, registration and name).

Article 25 The right to participate in public affairs, to vote and to be elected and access to public service.

Article 26 Everyone is equal before the law and has a right to legal protection “of the law” without discrimination

## ACTIONS TAKEN BY THE STATE PARTY

The US government also states that it is the US policy that, “medical care that will be provided to those in state custody must be made with due regard for an individual’s medical needs and the medical judgment of qualified health care providers.” (US statement CCPR/C/USA/4 paragraph 217) The US states “When the actual practice of detention in the United States does not meet constitutional standards, individuals are held accountable.” (CCPR/C/USA/4 paragraph 217)

The U.S.A. states that there are three ways to hold individuals accountable: 1) The Civil Rights of Institutionalized Persons Act (CRIPA) 42 U.S.C. 1997(a), 2) Possible criminal action under 18 U.S.C. 242, and 3) Civil remedies against state authorities under 42 U.S.C. 1983.

These have been stated as adequate remedies for those who, while wards of the court, are mistreated in psychiatric detention or treatment. However, wards of the court have been stripped of their legal rights and thus cannot take legal action in civil court under 42 U.S.C. 1983. They are effectively prohibited from advocating for themselves, or even prevented from asking for assistance from their elected officials in the U.S. Congress. Psychiatric torture survivors have great difficulty convincing DOJ officials to open a criminal investigation against a psychiatric hospital or facility. Because of their mental health disability, their account of what happened to them is not believed and criminal investigations under U.S.C. 242 rarely if ever opened.

## CURRENT SITUATION / UPDATE OF THE ISSUE

Since March 26, 2014, there has been little action that has effectively changed the situation for those who were abused as wards of the court. Mental health patients and those with a mental disability are very vulnerable to abuse and mistreatment. Effective monitoring of complaints of torture, inhumane treatment and abuse is necessary to ensure accountability, yet there is no effective monitoring of guardianship cases and the treatment of wards of the court. Domestic mechanisms of accountability and redress, must be accessible, transparent and effective but in the U.S.A. the court system does not even know exactly how many persons are currently wards of the court and in guardianship. Wards of the court are clearly persons in detention who were deprived liberty by state action.

There remains little accurate information of who is in guardianship and the quality and nature of their medical care. There are approximately 1.5 million active pending adult guardianship cases in the United States, according to the 2011 National Center for State Courts report *Adult*

Guardianships: A "Best Guess" National Estimate and the Momentum for Reform. However numerous reports have shown that many state court administrative offices did not receive complete information on guardianship from trial courts. Some states cannot distinguish between guardianships granted to children, incapacitated young adults, and elders. There were major difficulties tracking caseloads, as these cases can remain open for years and sometimes decades.

Medical Whistleblower Advocacy Network (MWAN) points out that the substituted decision makers, the “qualified health care providers,” are not chosen by the patient, but instead assigned to the patient by those in a position of power and authority. Medical practitioners sometimes treat persons with disabilities as objects of treatment rather than rights-holders and do not always seek their free and informed consent when it comes to treatments. These “qualified health care providers” are often directly chosen by those who are directly financially benefiting from the selected medical treatment and aligned with the abusers. The “qualified health care providers” are given quasi-governmental immunity for their health care decisions and protected under special insurance for medical malpractice liability. In addition, since most current mental health treatment is considered the administration of psychiatric drugs, these “qualified health care providers” are often financially and politically aligned with the pharmaceutical industry. Qualified health care providers are often deceived by pharmaceutical marketing representatives into believing drug therapy is safer and more effective than it really is. Psychiatric drugs are often used off-label for uses that the FDA has not approved –using the wards as scientific guinea pigs. The medical care by “qualified health care providers” is often profit driven and is often done with little regard to human rights and civil liberties. The goal of such care is often coercion and control of the disabled person.

Medical Whistleblower Advocacy Network (MWAN) notes that there is no mention in CCPR/C/USA/4 of the US obligations under the Declaration of Helsinki and the Nuremberg Code (which are codified in US law as the Common Rule) and which clearly state that patients have the right to informed consent to medical treatment. Wards of the court are forced into treatment against their wishes and without informed consent. Forced drugging can be considered a form of torture and yet it is widely practiced in the U.S.A. Psychiatric interventions can be enforced disappearances, often under the guise of emergency medical care where the victim is kept incognito from family and friends, while mental health staff forces signatures on paperwork which effectively removes the right of others to legally intervene in what the medical establishment has planned.

## WHAT IS PSYCHIATRIC TORTURE?

The Committee against Torture stated in its general comment No. 2 (2008), the prohibition of torture must be enforced in all sorts of institutions and States have to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.

UN Special Rapporteur on Torture, Manfred Nowak stated in the Interim report A/63/150. 28. July 2008.

*“Torture, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation of powerlessness, whereby the victim is under the total control of another*

*person. Persons with disabilities often find themselves in such situations, for instance when they are deprived of their liberty in prisons or other places, or when they are under the control of their caregivers or legal guardians. In a given context, the particular disability of an individual may render him or her more likely to be in a dependent situation and make him or her an easier target of abuse. However, it is often circumstances external to the individual that render them “powerless” such as when one’s exercise of decision-making and legal capacity is taken away by discriminatory laws or practices and given to others.”*

Manfred Nowak stated:

*“Medical treatments of an intrusive and irreversible nature, when they aim at correcting or alleviating a disability, may constitute torture and ill-treatment if enforced or administered without the free and informed consent of the person concerned.” ... “The administration in detention and psychiatric institutions of drugs, including neuroleptics that cause trembling, shivering and contractions and make the subject apathetic and dull his or her intelligence, has been recognized as a form of torture.” “The Special Rapporteur notes that forced and non-consensual administration of psychiatric drugs, and in particular of neuroleptics, for the treatment of a mental condition needs to be closely scrutinized. Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual’s health may constitute a form of torture or ill-treatment.”*

SRT (2008) UN Special Rapporteur on Torture. Interim report A/63/150. 28. July 2008.

#### LACK OF EFFECTIVE, INDEPENDENT AND IMPARTIAL INVESTIGATIONS

Medical Whistleblower Advocacy Network (MWAN) was unable to identify any federal monitoring of complaints by wards of the court, regarding alleged incidents of psychiatric torture, cruel, inhumane treatment and abuse. MWAN is not aware of any cases of alleged psychiatric torture or forced drugging or involuntary electroshock treatment that were litigated under The Civil Rights of Institutionalized Persons Act (CRIPA). The Civil Rights of Institutionalized Persons Act (CRIPA) of 1980 is a United States federal law intended to protect the rights of people in state or local correctional facilities, nursing homes, mental health facilities and institutions for people with intellectual and developmental disabilities. CRIPA is enforced by the Special Litigation Section in the United States Department of Justice Civil Rights Division, which investigates and prosecutes complaints in terms of this legislation. The Special Litigation Section is allowed to investigate state or locally operated institutions in order to ascertain if there is a ***pattern or a practice of violations*** of a residents' federal rights. The section is ***not allowed to investigate private facilities***. They are also ***not allowed to represent individuals or address specific individual cases***, but they are able to file lawsuits against facilities as a whole. After the DOJ has received the information of a possible violation, the Civil Rights Division (CRD) of the DOJ must determine if it has the authority to conduct an investigation. Usually, the first question they ask is whether the institution in question is a public institution or not. To qualify as a public institution, there are two requirements that must be satisfied:

1. an institution must be owned, operated or managed by or provides services on behalf of any state or political subdivision of the state.
2. an institution must be one of the five types of facilities described in the statute.

Once a facility is determined to have met the requirements, the Civil Rights Division reviews all complaints to determine whether the allegations merit a more extensive investigation. The attorney general has delegated the Assistant Attorney General to have the final decision on whether an investigation is warranted. The DOJ must wait 49 days after issuing a findings letter before they can file a suit against an institution. The DOJ, within the 49 day period, must make a good faith effort to work with the facility and ensure that it has had reasonable time to take corrective action. This is to ensure that every effort has been exhausted before filing a complaint. Some investigations and negotiations can last for years, meanwhile the institutionalized person's situation may be critical. CRIPA does not investigate *individual* allegations of torture, cruel, inhumane and degrading treatment. In 2014 DOJ Disability Rights Cases (CRIPA) that are published on their website involved primarily cases of community integration or disability access under Title II of ADA. The emphasis is the ADA rights of individuals with disabilities to receive services in their communities, rather than in institutions. These are some of the issues with U.S. investigations of *individual* allegations torture, cruel, inhuman and degrading treatment:

1. The Human Rights And Special Prosecutions Section (HRSP) Doesn't do domestic torture investigations
2. The Civil Rights Of Institutionalized Persons Act (CRIPA) Does not investigate private facilities
3. CRIPA Does not investigate individual complaints of abuse and mistreatment
4. Under-Reporting of Abuse
5. Intimidation of Victims
6. Difficulty Proving Psychiatric Torture Allegations
7. Lack of Human Rights Training of Institution Staff
8. Victim Compliance With Abusers (Medical Providers)
9. CRIPA - Lengthy Investigations
10. Lack of Cooperation of Institutional Staff
11. CRIPA Conciliation Rather Than Litigation

## BARRIERS TO ACCOUNTABILITY AND REDRESS

The reality of available legal redress and reparations is quite different than the stated US governmental policy. Medical Whistleblower Advocacy Network (MWAN) has spoken to numerous individuals who were mistreated in psychiatric care and who have never received an impartial review of the conditions of their detention, nor any apology or redress for torture, inhumane treatment or abuse. Neither has appropriate rehabilitation been provided to victims of psychiatric abuse, instead perpetrators are protected by quasi-governmental immunity for their actions which protects them from criminal investigation as well as civil liability.

These are some of the problems:

1. Lack of Judicial Review of Guardianship Cases
2. Lack of Command Responsibility
3. CRIPA -Lack of Communication to the U.S. Congress
4. Lack of Coordination between Federal Agencies
5. CRIPA -Lack of Public Publication of DOJ Findings

## LACK OF APPROPRIATE REHABILITATION PROGRAMS FOR VICTIMS OF TORTURE AND ILL-TREATMENT

The National Consortium of Torture Treatment Programs (NCTTP), has currently established 24 torture rehabilitation programs in 17 states that serve persons tortured by foreign governments. These NGO programs serve refugees, asylum seekers and those who were granted asylum in the U.S.A. Current torture survivor programs run primarily with pro-bono legal and medical services and do not provide services to U.S. citizens. There are no established rehabilitation programs for victims of torture and ill-treatment that are U.S. citizens and who were abused on U.S. soil. U.S. victims of psychiatric torture and abuse still need safe havens in which to obtain needed medical and psychological assistance. Most established U.S. mental health programs emphasize forced drugging with psychiatric drugs and in some states even support the use of electroshock and psychosurgery. Survivors of psychiatric torture therefore avoid the U.S. mental health system and have established a network of those willing to provide help and assistance to those traumatized by forced drugging and electroshock therapy. These services are sparse and inadequate for the needs of these much traumatized individuals and sympathetic MD doctors and experienced social workers are critically needed by psychiatric abuse survivors.

## IMPACT OF THE ACTION OF THE STATE PARTY (IF ANY)

There has been very little impact of any action taken by the U.S.A. on those who are abused within mental health facilities or while wards of the court.

## SUGGESTED RECOMMENDATIONS FOR THE U.S. GOVERNMENT

Ratify the CRPD, CRC and ICESCR without any reservations, understandings or declarations, and without further delay in order to be in compliance of international recognized standards regarding the human right of informed consent.

Establish a federal database tracking system to facilitate tracking of complaints received by HHS, FDA or the DOJ regarding complaints of psychiatric abuse in psychiatric facilities, psychiatric nursing homes and in outpatient treatment and record and process allegations of misconduct which have been lodged by the wards against their court assigned guardian or medical treatment team.

Include persons with disabilities in the review policies at both the federal and state

levels, to abolish all laws and mechanisms that restrict the legal capacity of any person (especially those with disabilities) and to create supportive measures for the exercise of legal capacity that respect the will and preferences of the person.

Evaluate all guardianship cases in the State Court system to see if they are in compliance with the Declaration of Helsinki and the Nuremberg Code in regards to the conduct of medical, social and behavioral research.

Provide specific education on Istanbul Protocol and training in how to identify signs of torture, cruel, inhuman or degrading treatment and punishment to all physicians, staff and personnel of psychiatric institutions, mental health facilities and all other places of psychiatric detention and instruct them on how to report such incidents.

Provide training regarding Istanbul Protocol and in how to identify signs of torture, cruel, inhuman or degrading treatment and punishment to DOJ investigators, law enforcement personnel and prison staff, and investigate individual allegations of torture, cruel, inhuman or degrading treatment made by wards of the court, in all U.S.A. jurisdictions.

#### RECOMMENDED QUESTIONS

- What measures will the U.S.A. take to ensure the human rights protections for wards of the court and investigate allegations of torture, cruel, inhuman and degrading treatment?
- Why has the U.S. government not taken steps to curtail the wholesale use of “off-label” use of psychiatric medications in violation of The Declaration of Helsinki and The Nuremberg Code?
- What will the federal government do to supervise the state courts guardianship system?