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On the obligation to disclose information covered by medical confidentiality in prisons

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Recommendation

Acknowledging:
– the legitimate concern to protect the public, particularly from acts of violent crime;
– the need to assess the danger posed by detainees so as to ensure that the most appropriate sentences and measures are adopted;
– the need to continuously improve such assessment;
– the importance of collaboration based on trust among all actors within the penal system;

bearing in mind that:
– an obligation to disclose information does not facilitate assessment of the danger posed and thus does not represent a means of improving public safety;
– on the contrary, such an obligation may well adversely affect public safety since, having served their sentence, detainees will return to society without having had the benefit of appropriate care, particularly as regards their mental health;
– the obligation to disclose information will tend to discourage physicians from exercising their profession in prisons;
– this obligation violates detainees' right to privacy and runs counter to internationally recognized ethical principles;

the Commission unanimously recommends that the current system – based on optional disclosure – should be maintained.

Introduction

A number of French-speaking cantons are currently considering the possibility of imposing on health professionals an obligation to disclose information relating to the danger posed by detainees. Three cantons – Geneva, Valais and Vaud (see Annex) – are planning to amend their legislation. More generally, the Conference of Heads of Departments of Justice and Police in French- and Italian-speaking Switzerland (CLDJP) has issued a recommendation[1] on this topic, advocating an obligation to disclose information relating to the potential danger posed by detainees [2]. The question of health professionals being obliged to communicate certain facts or opinions to the competent authorities thus arises in a concrete form in Switzerland.

The need to protect the interests of society and public safety is invoked to justify such a legal obligation on the part of health professionals. The proponents of this obligation take the view that, if there is any conflict with the rights of detainees, the interests of the public should take precedence. The Commission is aware that this issue is highly sensitive, given the tragic recent events in the cantons of Vaud and Geneva in particular; it fully recognizes the legitimacy and importance of the authorities' concern to ensure the protection of members of society and of their rights to life, health and safety. Nonetheless, it takes the view that the decision to impose on medical staff an obligation to disclose information is ethically indefensible. Firstly, this obligation violates the fundamental rights of detainees; in addition, it is detrimental to the interests of the public, insofar as it increases the risk that detainees will return to society without having had their medical (specifically, mental health) problems appropriately managed. Finally, it has not been established that – compared with the existing system based on optional disclosure – an obligation to disclose information actually facilitates assessment of the danger posed.

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1 Article 2 - Exception to medical and official confidentiality

1 In cases where a detainee has been ordered to undergo inpatient treatment (Art. 59 Criminal Code/CC), outpatient treatment (Art. 63 CC) or indefinite incarceration (Art. 64 CC), or is recognized to pose a danger, or is subject to probation assistance (Art. 93 CC) or conduct orders of a medical nature (Art. 94 CC), the cantonal and communal authorities, physicians, psychologists and any other therapists responsible for the detainee shall be relieved of their duty of official or medical confidentiality if there is a need to inform the competent authority of important facts which could have a bearing on ongoing measures or on the relaxation of the execution thereof or, in a general way, on the assessment of the danger posed by the person concerned.

2 In any case, persons bound by professional confidentiality can be released from this duty, either at their own request by the competent authority, or by the detainee himself.

In the unanimous view of the Commission, the arguments presented below provide a clear case against any obligation to disclose information on the part of health professionals working with detainees.

1. Abandoning a system in which provision is already made for exceptions

Under the current system, it is already possible for crimes to be prevented in situations where a health professional concludes that the interests of third parties – e.g. potential victims – should take precedence over the patient's right to medical confidentiality. In the expert reports prepared on the two recent affairs, medical confidentiality was not called into question [3]. Moreover, it has not been established that a change in the system could have prevented the crimes which gave rise to the legislative efforts now underway in French-speaking Switzerland. It is regrettable that the political authorities should be proposing a serious infringement of a fundamental right without first having demonstrated the need for and the proportionality of this measure. Any infringement of a fundamental right should be based on a careful analysis of the necessity and proportionality of the measure with regard to the public interest to be safeguarded. In the present case, to the knowledge of the Commission, such an analysis is lacking.

Today, a health professional can already be released from the duty of medical confidentiality in essentially two situations. Firstly, he may make such a request to an authority when he considers this necessary for the protection of overriding interests. The interests in question may be those of the patient – e.g. a patient who poses a danger to himself – or those of third parties. In such cases, the cantonal authority will decide whether to grant or refuse the request on the basis of its assessment of the interests at stake [4]. Secondly, faced with an emergency in which it is not possible to obtain a decision from the cantonal authority in good time, the health professional may breach confidentiality in order to defend a right which is imminently threatened [5]. In this second scenario, the health professional may then directly alert the penal authorities or law enforcement officials [6].

Finally, in the course of day-to-day collaboration, information of various kinds may be communicated to prison staff by health professionals if it is formulated in a manner sufficiently general to ensure that confidentiality is maintained [7].

2. Confusing or mixing care and expert medical assessment

Provision is made in cantonal legislation for the function of a medical expert precisely to contribute to the assessment of the danger posed by prisoners or persons undergoing measures. The medical expert receives a specific mandate from a judicial penal authority and answers the questions defined by this authority. The expert report today already provides a basis for risk assessments in a variety of situations, ranging from the reduction of sentences to the termination, continuation or extension of measures. Medical experts are specially trained and acquire specific experience. Given the difficulties involved in risk assessment, training and experience are indispensable.

The provision of care (preventive, diagnostic and therapeutic activities) should be strictly distinguished from the work of a medical expert. Clear separation of these two roles makes it possible to preserve the specific characteristics of the two functions [8]. Firstly, it ensures that suitably trained and experienced experts can deliver an impartial and independent judgement, without being influenced or biased by relationships established with patients. At the same time, it ensures in particular that those providing medical care can treat the patient-detainee effectively, establishing a therapeutic relationship based as far as possible on trust and dialogue. This means that health professionals are not turned into legal auxiliaries – a task for which they have neither the training nor the necessary skills.

3. Harming the interests of society

Confidentiality is not merely a matter of defending the interests of an individual (the patient who is detained or at liberty, by respecting the right to autonomy), or those of a professional group (health professionals, by establishing an appropriate framework for the exercise of preventive, diagnostic or therapeutic activities). Prison health should be seen as an integral part of public health [9], i.e. as a public health issue. Provision of care for individuals –detainees, in particular – also contributes (directly or indirectly) to the well-being and safety of the public. Society benefits from prison health services, especially those designed to improve mental health, because detainees who are released, having served their sentence, will have gained greater mental stability and will thus present a lower risk of recidivism. Even prior to release, improvements in mental health arising from prison care services reduce the risk of acts of violence committed against prison staff or other inmates.[2] In either case, quality care provided during detention is beneficial to society as a whole, and not just for the patient concerned. This is also the reason why provision is made in the Criminal Code for the imposition of therapeutic measures: "1. A measure is ordered if: a. a penalty alone is not sufficient to counter the risk of reoffending; b. the offender requires treatment or treatment is required in the interest of public safety" [11].

4. Eliminating the confidentiality which is essential to the practice of medicine

Medical experience shows that confidentiality is indispensable if a therapeutic relationship is to be established. Trust and openness are central to an effective physician-patient relationship [12]. Health professionals are under an obligation to inform the detainee, at the start of any consultation or treatment, of any restrictions imposed on medical confidentiality. Thus, if they are legally bound to communicate certain facts, the detainee must be duly informed. This is a fundamental ethical requirement. In the absence of con-

2 According to Art. 75 para. 1 of the Swiss Criminal Code, "The execution of sentences must encourage an improvement in the social behaviour of prison inmates, and in particular their ability to live their lives without reoffending. The conditions under which sentences are served must correspond as far as possible to those of normal life, provide inmates with the necessary assistance, counteract the harmful effects of custody and take appropriate account of the need to protect the general public, staff and other inmates" [10].

fidentiality, detainees will legitimately hesitate to reveal their weaknesses and problems, communicating only those facts or feelings which can safely be disclosed. They will do their utmost to protect their privacy – something to which the greatest importance is universally and rightly attached. There is a risk that treatment will be confined to somatic and pharmacotherapeutic approaches. In summary, without the basis for a genuine relationship, such treatment will tend to harm rather than improve the patient's health.

Mental illness is known to be common in prisoners [13], before, during and after their detention. The prison environment may even aggravate certain mental disorders, especially when the conditions of prison life are arduous. It is therefore particularly important that they should be appropriately managed. The treatment of these disorders is seriously compromised by a lack of confidentiality.

5. Failing to comply with the principles of non-discrimination and equivalence

The obligation to respect the fundamental rights of detainees is enshrined in numerous international agreements, such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [14], to which Switzerland is a party. Detainees enjoy fundamental rights on the same basis as persons at liberty. While their right to personal liberty is indeed restricted on account of the sentence imposed, it would be wrong to conclude that their fundamental personal rights are curtailed overall. For this reason, among others, it is important to respect the principles of non-discrimination and equivalence.

– The principle of non-discrimination entails that any differences in the medical treatment received by detainees, compared to the general population, should be based on proportionate and non-arbitrary considerations; here, however, there is an obvious difference in treatment, but the underlying reasons are not sufficient, as explained above.

– The principle of equivalence demands that detainees should benefit from health services similar to those available to the community, without discrimination on the grounds of their legal situation [15]. It is, however, indisputable that, should the obligation to disclose information come into force, detainees would no longer receive equivalent care.

The obligation to disclose information on the part of health professionals working with detainees thus contravenes these two principles. The European Prison Rules – which are accorded a degree of binding force by the Federal Supreme Court [16] – clearly state that the normal rules of medical confidentiality are to be observed in prisons. An obligation to disclose information manifestly contravenes these rules, underlining the arbitrary and disproportionate nature of this provision.

6. Shifting, without resolving, the issue of relevant information

If health professionals are under an obligation to disclose any "important" information or facts having some bearing on the assessment of the danger posed by a detainee, they will have to choose what course to adopt. At one end of the spectrum, they may decide to minimize their own legal risk by communicating extensively, even if they have only minor suspicions; the authorities may then be overwhelmed by the volume of information to be dealt with. At the other end of the spectrum, health professionals may decide to disclose only information which they consider to indicate a manifest danger [17]. In the event of misjudgement, they then face a risk of being subjected to an administrative – or even a legal – investigation.

With this second option, the authorities will not receive any more information than in the current situation, where health professionals already have the option of disclosure. A health professional who chooses to steer a middle course will require legal advice to clarify the obligation. But it is difficult to provide a clear definition of an obligation to disclose information – reference will inevitably be made to vague terms such as "degree of danger". In any case, evaluating, in advance, information "which is required, in a general way, to assess the danger posed by the person concerned" (Art. 5A, para. 2) [18] will remain a difficult undertaking. It is not clear at present what authorities could guide prison health staff seeking in good faith to determine what has to be disclosed.

7. Inappropriately targeting a single professional group

Health professionals are not alone in being privy to important information which could have a bearing on the assessment of the danger posed by a detainee. Lawyers and chaplains, though their roles are not identical to that of health personnel, also have access to information of this kind. Nobody, however, would suggest that the lawyer's professional confidentiality should be restricted by imposing an obligation to report the danger a client is suspected to pose. By imposing this duty solely on health professionals, legislators create the impression that the right to medical care – including the opportunity to reduce the danger posed – is less important than the right to legal defence.

Equally, if the declared aim is to protect the public against violent crime, then why confine oneself to prisoners or persons undergoing therapeutic measures? To be completely consistent, the obligation to disclose suspicions of potential danger would have to be extended to health professionals caring for patients in the community. At present, psychiatrists who are entrusted with information which leads them to believe that a patient (non-detainee) may be dangerous are not essentially required to report this to the authorities – although they do have the option of doing so. The same would apply if the patient was a former detainee who had served his sentence.

8. Contravening health professionals' ethical principles and code of conduct

In the prison environment, respect for medical confidentiality involves particular chal-

lenges, due in particular to the crowded conditions, the dependence on other people for everyday activities, the frequent need to wait for a medical appointment, increased vulnerability, etc. [19].

In spite of these difficulties, the right to respect for privacy is recognized in various national [20] and international [21] laws and conventions; accordingly, the right to confidentiality does not stop at the prison gates. For health professionals, medical confidentiality is a requirement of their professional code [22].

In addition, medical confidentiality is an ethical principle taught from the outset to students in faculties of medicine and other healthcare education institutions. It is also covered in continuing professional education. It thus constitutes one of the fundamental values underlying the work of all health professionals. To depart from this principle by imposing an obligation to disclose information – even for a small section of the prison population – is to undermine the foundations of the healthcare professions.

9. Discouraging health professionals from practising prison medicine

There is a serious risk that the practice of prison medicine will become less attractive as a result of the obligation to disclose information. Professionals working in this environment will feel that they are practising an inferior type of medicine with less stringent ethical demands. It is already difficult to recruit staff of good quality who are prepared to specialize and then work in this sector over the long term. An obligation to disclose suspicions of potential danger will make it even more complicated to recruit and retain staff. It would be regrettable if, in future, healthcare personnel had to be recruited from the pool of non-Swiss physicians who, for economic reasons, would have little choice but to pursue this specialty.

In addition, health professionals working in a (non-prison) practice or hospital setting will also be reluctant to treat prisoners, as the proposed obligation to disclose information will probably also apply to them – a group which currently accounts for a significant proportion of the care provided for detainees.

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Annex

Draft law of Canton Geneva PL 11404. *Draft law amending the law on the application of the Swiss Criminal Code and other federal legislation on penal matters (LaCP) (E 4 10)*, 19 March 2014.

Art. 5A Health professionals working in prisons (new)
2 Health professionals shall disclose any information which is required, in a general way, to assess the danger posed by the person concerned, which could affect ongoing sentences or measures, or which would allow a decision to be made on possible relaxation of the execution of a sentence or measure.

The Commission did not have at its disposal either the draft law of Canton Valais *(Draft law amending the law on the application of the Swiss Criminal Code (LACP) – Articles 28a and 28b (new) – physicians' obligation to provide information and duty to report)* or the draft law of Canton Vaud.