

PE1667/B

Petitioner submission of 8 August 2017

In May 2015 the General Assembly of the Church of Scotland unanimously accepted a report entitled "Human rights and mental health". The authors of the report, the Church and Society Council, called for a wider review of Scottish mental health legislation than the limited review which was being considered by the Scottish Parliament's Health and Sport Committee at the time the report was being written. It urged that "*the views of service users and their carers should be a significant part of that review*". Should account be taken of the views of such people then the unsatisfactory nature of the current legislation and the way in which it is being implemented would become apparent.

There is a pressing need for that wider review: the lives of some mental health patients have been lost as a consequence of the forced treatment to which they were subjected, the lives of others have been put at risk and the lives of some remain at risk. The following is only one of several examples which could be used to illustrate this fact:

According to the report written by a daughter, Mrs A had been "*fit, strong and healthy*" prior to her detention in hospital. However, she had developed dementia and "*after dark she became fearful and even panic-stricken by the belief that someone was threatening her, hiding in her house or watching her from outside. She called the police repeatedly and it was through their persistence*" that she was detained in hospital.

Because of the risks which antipsychotic drugs pose to elderly people with dementia, the BNF advises that "*Antipsychotic drugs should not be used in elderly patients to treat mild to moderate psychotic symptoms*". In the case of Mrs A, it might have been sufficient to deal with her night time fears simply by moving her into a care home. It would be difficult to argue that she had displayed a psychotic symptom that was more than mild to moderate. However, in spite of this the responsible medical officer decided that Mrs A should be given depot injections of an antipsychotic drug; regrettably, in Scotland there is an assumption that anyone detained under the provisions of the 2003 Act must be given "treatment", by force if necessary. However, in 2012 the European Court of Human Rights in the case of X v Finland ruled that the forced administration of medication was a serious interference with people's physical integrity, something protected under Article 8 ECHR, and accordingly had to be based on a law that guaranteed proper safeguards. In the same year, the European Court of Human Rights, in the case of Gorobet v Moldova, found that forced treatment which had not been found to be a medical necessity "*could amount to at least degrading treatment within the meaning of Article 3 of the Convention*". This finding further emphasises the need for a mental health legislation which contains proper safeguards.

Given the details provided in the report written by the daughter, it is clear that the forced treatment to which Mrs A was subjected caused her great distress and also hastened her death. In that well written and well researched report it is emphasised that there is a complete lack of proper safeguards within the 2003 Mental Health Act. Several others

who have had direct experience of this Act have expressed the same view.

There is, therefore, clearly a need for the Scottish Government to consider carefully the implications of the two rulings of the European Court of Human Rights to which reference was made above.

If, as has been recommended by the Mental Welfare Commission for Scotland and other highly respected bodies, the Scottish Government does conduct a wide review of Scottish mental health and incapacity legislation then an important part of that review would also be to assess the implications of the ratification by the UK of the Convention on the Rights of Persons with Disabilities. It should note that in a submission to the Health and Sport Committee, when that Committee was discussing the Mental Health (Scotland) Bill, the Scottish Commission for Human Rights stated that the Scotland Act requires the Scottish Ministers to observe and implement the international human rights treaties which the UK has ratified. These include the Convention on the Rights of Persons with Disabilities. Although this human rights treaty was ratified by the UK in 2009, and hence after the passage of the 2003 Mental Health Act, the Scottish Parliament did not discuss its implications when debating limited amendments to that Act in spite of the submission from the Scottish Human Rights Commission. It should not fail to do so when the Act is next reviewed.

Given the ratification by the UK of this human rights treaty, the Scottish Government should study carefully the report presented by the UN High Commissioner for Human Rights to the UN's Human Rights Council in March 2017. In that report he made reference to *"rights recognised under human rights law, including the rights enshrined in the Convention on the Rights of Persons with Disabilities"*. He also stated that *"Guaranteeing informed consent is a fundamental feature of respecting an individual's autonomy, self-determination and human dignity"* and that *"States should repeal legal frameworks allowing substitute decision makers to provide consent on behalf of persons with disabilities and introduce supported decision-making, ensuring its availability for those who request it. Health service providers should seek the free and informed consent of the person concerned by all possible means"*.

If the Scottish mental health and incapacity legislation were put on the basis recommended by that UN High Commissioner then mental health patients would not be subjected to the inhuman and degrading treatment that many have been in the past. That reform would not only afford protection to those with mental health problems but would also afford it to persons with disabilities, particularly to older people with dementia.

In 2009 the Care Commission and the Mental Welfare Commission jointly produced a report (**Remember, I'm still me**) based upon visits made to a sample of 30 care homes.

The report noted that:

- Around 70% of people living in the care homes visited had varying degrees and

types of dementia;

- 33% of people in the care homes were taking antipsychotic medication.

Given the known risks to elderly people with dementia that are associated with the taking of antipsychotic medication, it is a near certainty that the health of a many of those residents would have suffered as a consequence of taking it and, indeed, that a significant number would have died prematurely.

There are those who claim that the use of antipsychotics is justified in homes that "care" for elderly people with dementia because of the "challenging behaviour" which such people can exhibit. Such apologists are no doubt unaware of the report (**Always a last resort**) produced in 2008 by the All Party Parliamentary Group on Dementia. In section 25 of that report it is stated that "*The Royal College of Nursing estimates that only 10% of challenging behaviours occur as a consequence of dementia with 90% occurring in response to care practices or environmental factors*". It is also unlikely that those who defend the use of antipsychotics in care homes will have studied the transcript of the Panorama programme broadcast on 3 December 2007 (**Please look after Dad**). Interviewed was the owner of a care home called Spring Mount. This care home charged higher fees than average and hence was able to afford a higher staffing ratio. The owner claimed that Spring Mount took in residents that other homes couldn't manage and that, when they arrived, they were weaned of antipsychotics. That suggests that if greater resources were allocated to care homes so that they could afford to employ more and better qualified staff then it would be possible to care for elderly residents with dementia without sedating them. The Scottish Government should not avoid its obligation to protect the human rights of those vulnerable people because of the likelihood that it would require a greater contribution from the public purse.

The UN Commissioner for Human Rights in his report stated that "*In order for consent to be valid, it should be given voluntarily and on the basis of complete information on the nature, consequences, benefits and risks of the treatment, on any harm associated with it and on the availability of alternatives. Involuntary treatment refers to the administration of medical or therapeutic procedures without the consent of the individual*". Given the opposition of that Commissioner to involuntary treatment, it can be safely assumed that he would not approve of the current National Care Standards for Care Homes for Older People since these authorise the covert medication of residents and also the use of medication as restraint. Both imply that the involuntary treatment of elderly care home residents is permissible in Scotland. This is a proposition that should be carefully scrutinised in the context of Scotland's obligation to comply with the Convention on the Rights of Persons with Disabilities.

The Scottish Government has made a commitment to carry out limited reviews of Scottish mental health and incapacity legislation. Several members of the Health and Sport Committee are aware of the need for a wide review and do not seem to be opposed to such a review taking place. Given the harm that is being done to individuals under the current legislation it is to be hoped that not only will the Public Petitions Committee recommend that there be a wide review but that it will take place at the

earliest possible opportunity. The Committee should also recommend that there be explored the possibility of making a few simple amendments to existing legislation in advance of the production of entirely new unified health legislation. Whatever happens, it is important that the intolerable treatment to which many people are currently subjected be ended as soon as possible.