PE1494/H

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The Scottish Government
Riaghaltas na h-Alba

LEGACY 2014
XX COMMONWEALTH GAMES
SCOTLAND

Andrew Howlett
Assistant Clerk
Public Petitions Committee
Scottish Parliament
Edinburgh
EH99 1SP

By email: petitions@scottish.parliament.uk

21 January 2014

Dear Mr Howlett,

Thank you for your letter of 18 December 2013 regarding petition PE1494 lodged by Mr W Hunter Watson. It might be helpful if I say a few words about the Mental Health (Care & Treatment) (Scotland) Act 2003 before commenting on a number of specific issues.

The 2003 Act is the legislation for treating patients with a mental disorder in Scotland. When it came into force in October 2005 it was heralded for having an innovative new principles-based framework at its core. Underlying each decision medical professionals make is a set of principles which they must have regard to. These include taking into account present and past wishes of the patient, the views of carers and guardians, using the least restrictive alternative and the importance of providing maximum benefit to the patient.

Electroconvulsive Therapy ("ECT")
The petitioner has made a number of claims that ECT apparently breaches Article 3 of the ECHR. In fact there has been no ruling from the European Court of Human Rights that says ECT breaches any article. Rather each use has to be considered on its merits and the circumstances in which the treatment was delivered.

The approach of the Court on the use of compulsory psychiatric treatment, can be seen in the case of Herczegfalvy v Austria, where it was held that Article 3 will not be breached if it can be shown that the treatment in question is "medically necessary" according to the "established principles of medicine".

The 2003 Act contains various safeguards to protect patients. Patients can have a Named Person/Welfare Attorney/Guardian to look after their interests; recourse to the Mental Health Tribunal, the Mental Welfare Commission (MWC), free access to independent advocacy services, and a Mental Health Officer who must give consent before certain orders can be granted. However, there are some treatments for mental disorder where further safeguards are justified particularly, but not only, in the circumstances where the treatment is given without the patient's consent.

Part 16 of the 2003 Act puts in place a range of additional safeguards to ensure that people are given specialist treatments only where they have consented to it, or, if unable to consent/have refused consent, only where authorised by an independent designated medical practitioner (DMP) appointed by the MWC. ECT is one of these treatments, along with artificial nutrition, and neurosurgery for mental disorder. A person who is capable of consenting but refuses cannot be treated with ECT, even in an emergency. If, however a patient is incapable of consenting any such treatment must be authorised by a DMP.

The DMP is an independent experienced psychiatrist whom the MWC will send to give an opinion on the question of ECT. Where a patient who is liable to compulsory treatment is incapable of consenting, it is the DMP's function to certify that the patient is incapable of making a decision and that the ECT treatment is in the patient's best interests, having regard to the likelihood of the treatment alleviating or preventing deterioration in the patient's condition.

However, a further protection then applies if the patient resists or objects to the ECT treatment. Here, ECT can only be given if the DMP certifies that the patient is incapable of making a decision, that the patient resists or objects, and that the ECT is necessary under the urgent medical treatment provisions of the 2003 Act. S243(3) provides that the purpose of the ECT treatment is:

- saving the patient's life, or preventing serious deterioration in the patient's condition;
- alleviating serious suffering on the part of the patient; and
- preventing the patient from behaving violently or being a danger to him/herself or to others.

Oaths/Affirmations in Tribunal Hearings
The petitioner also raises some issues about the use of oaths in the Mental Health Tribunal for Scotland ("the Tribunal").

The Scottish Government has made the power to administer Oaths available to the Tribunal (Schedule 2 paragraph 12 of the 2003 Act, supplemented by Rule 63 of the Tribunal Rules,) and it is for the Tribunal to use that power as appropriate. In order to maintain the Tribunal's independence it would be inappropriate for Scottish Ministers to have any input in relation to day to day operational matters.

Proceedings in the Tribunal are held "informally" but still maintain a legal status and are therefore conducted with a degree of formality. A witness would be liable to prosecution for perjury, however, if the witness wilfully and unequivocally makes a false statement on oath or by affirmation in proceedings before the Tribunal.

S318 of the 2003 Act creates an offence of knowingly making a materially false entry or statement in any "relevant document", or, knowing such an entry or statement to be false, making use of it in order to deceive. A relevant document is any application, documentation accompanying such an application, or any required document under the 2003 Act. A person committing such an offence would still be liable to prosecution despite not having made an oath or affirmation.

Scottish Public Sector Ombudsman ("SPSO")
In terms of complaints to the SPSO, I can advise that the Tribunal, NHS and the MWC all fall under the SPSO's jurisdiction, although the matters that can be considered vary by circumstance.

Whilst a complaint can be made regarding the process and operation of the Tribunal, a matter pertaining to a judgement cannot be considered by the SPSO. The matter can be appealed to the relevant Sheriff Principal or Court of Session. As far as the NHS is concerned, the SPSO are able to look at issues arising from maladministration or service failure, including in relation to clinical decisions as they have access to advice from appropriately qualified clinicians in all medical areas covered by the NHS.

As regards the MWC, the SPSO can investigate matters of maladministration or service failure. The SPSO also has the power to investigate any complaint about the services delivered under either the Criminal Procedure (Scotland) Act 1995 or the 2003 Acts such as complaints about a failure to access information about availability of advocacy services.

Anti-psychotic medication for dementia

In respect of the prescribing of psychoactive medications (including anti-psychotics) to help manage symptoms of dementia, the Scottish Government's first Standards of Care for Dementia (2011) set out clear standards of care and treatment that people with dementia are entitled to in this area, regardless of care setting.

The standards state that if symptoms develop that cause distress or lead to behaviour that challenges, there will be an integrated assessment to establish the cause and a care plan developed to manage this, involving family carers and considering the balance of risks and benefits of non-pharmaceutical interventions. The prescribing doctor will need to be satisfied that there will be a clear benefit for the person with dementia and no reasonable alternative. The doctor will set a date to review its continued use and put in place a plan to ensure that carers and staff are aware of any potential side effects and where to report any concerns they have.

In addition, the standards state that a range of non-drug based interventions must be available, including evidence-based therapies, such as group based or individual cognitive stimulation, individual reality orientation therapy, art therapy, therapeutic activities and physical exercise programmes. If behavioural or psychiatric symptoms are on-going and distressing, referral must be available to a psychologist or suitably qualified therapist for assessment and tailored intervention.

The Scottish Government is taking more national action over the next few years on the issue of psychoactive medications and dementia. We have asked The Royal Pharmaceutical Society and The Royal College of Psychiatry Old Age Faculty to lead an expert group in developing a national commitment on reducing inappropriate prescribing of psychoactive medications (excluding cognitive enhancers) in all care settings. Their final recommendation will be made to the Scottish Government in the first quarter of 2014 and we expect that it will include action on key areas such as initiation and review of medication and on ensuring that all psychoactive medication is administered in accordance with the law.

I hope this letter is helpful in setting out the Scottish Government position, and I would be happy to provide the Committee with any further information they may require.

Yours sincerely

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