PE1786/D
W. Hunter Watson submission of 13 March 2020

On 10 March 2020 there was held in Edinburgh a meeting which focused on the work, roles and responsibilities of the Mental Welfare Commission for Scotland (the MWC). Section 5 of the 2003 Mental Health Act requires the MWC to monitor the operation of the Act and promote best practice while section 11 empowers it to carry out investigations and make recommendations. I had previously been informed by some who had approached the MWC for help regarding their concerns that it had not been of any real assistance. The three carers in my discussion group were similarly dissatisfied, one profoundly so. It was suggested that their dissatisfaction may have been, in part at least, due to the lack of powers of the MWC to require psychiatrists responsible for the treatment of involuntary mental patients to change their care plans.

When we were asked what might be done by the MWC in the future, one carer in my group suggested that it should place a greater emphasis on human rights. She made reference to a report by the Care Quality Commission (CQC), "Monitoring the Mental Health Act in 2018/19". That should be contrasted with a report with a similar title from the MWC: "MHA monitoring report 2018-19 - Mental Welfare Commission". The Scott Review Group should compare and contrast those two reports. While the CQC report draws attention to the distress that can be caused to patients by being detained and subjected to treatment against their will, the MWC report is purely of a statistical nature. While the CQC report explicitly makes clear that some involuntary patients have their human rights violated, the MHA in neither this report nor any other so far as I am aware, makes any reference to such a concern. To be fair, however, to the MWC a former Chief Executive produced jointly with Professor Jill Stavert a paper in which it was acknowledged that there is a need to review Scottish mental health law to take account of recent developments in international human rights law.

At the event on 20 March the psychiatrist in my group observed that involuntary mental health patients have a right to independent advocacy. Unfortunately this right does not constitute a sufficient safeguard to satisfy the ruling made by European Court of Human Rights in the case of X v Finland.

My group agreed that the significantly impaired decision making ability test (the SIDMA test) is an unsatisfactory one to use when it came to determining whether a patient has the capacity to withhold consent to treatment. One of those in the group from the MWC said that the Commission was well aware of this and that this would be looked at. Nevertheless, I formed the impression that the group accepted that some patients did lack the capacity to make decisions about their own treatment, in particular decisions to withhold consent. There was within the group an awareness that patients who wished support to make decisions should be provided with that support but there was insufficient time to explore the implications for reformed Scottish mental health law of supported decision-making. In connection with the assessment of capacity, I mentioned that the European Court of Human Rights had made a ruling which might imply that only a court could deprive an adult of his or her right under common law to withhold consent to medical treatment.

(In the Salontaji-Drobnajak v Serbia case the Court ruled that "*there had been a violation of Article 6(1) of the Convention as regards the fairness of the proceedings resulting in the partial deprivation of the applicant's legal capacity".*)

The psychiatrist in the group stated that it would take far too long for courts to determine whether each of the thousands of mental health patients who are detained each year lack the capacity to withhold consent to treatment. He apparently overlooked the fact that each of those patients has the right to appeal to the Tribunal against their detention in hospital and that, in theory at least, the Tribunal should determine whether each patient lacks capacity and, if not, it should revoke the applicant's compulsory treatment order. The reality, of course, is that the Tribunal never does properly determine whether the applicant lacks capacity.

Those who reject the suggestion that only a court should determine whether a patient lacks capacity, as per the situation in Common Law, should note that this need not require the patient to appear in court. That is clear from how a court concluded that a chronic, paranoid schizophrenic should be permitted to refuse his gangrenous foot to be amputated even though that amputation was considered necessary to save his life: having visited Mr B in hospital to get a clearer understanding of his needs and wishes, as well as to explain to him the consequences of foregoing the surgery, the judge concluded that the operation would not be lawful. More information can be obtained by googling "Court of Protection upholds the right of a confused lonely old man to refuse treatment".

It is not known how many people have died because they been given antipsychotics against their will but details can be obtained about some cases by googling:

- *Southmead Hospital doctor's 'arrogance' killed our son, heartbroken Bristol family tells court;*
- *24 year old dies in Cygnet after 11 forced injections in 10 days;*
- *'She was unrecognisable' - families warn of antipsychotic drug effects.*

The lives of those individuals would almost certainly have been spared had non-consensual treatment been unlawful without the approval of a court.

Mental health law in Scotland and elsewhere gives psychiatrists too much power to deprive their patients of their right to refuse treatment. The four examples given in those three reports should make that clear.

At some point during the discussion on 10 March I expressed the belief that reformed Scottish mental health law would not permit the forced treatment of a mental health patient detained in hospital to begin prior to that individual's appeal to the Tribunal for the revocation of the short-term detention certificate. A trainee psychiatrist once told me why she believed that it could be necessary to begin forced treatment prior to an appeal to the Tribunal. Her reason was that the detained patient might not be willing to take the drugs prescribed! If the Scott Review Group fails to reform Scottish mental health law in a way

that makes forced treatment unlawful prior to an appeal then it will have failed to take due account of the ruling of the European Court of Human Rights in the X v Finland case.

The Scott Review Group should also note that in my group on 10 March there was a mental health officer who alleged that some individuals who are detained on the basis of an emergency detention certificate are subjected to forced treatment without a short-term detention certificate having been granted. Such action is unlawful and should be declared an offence.

The final point I wish to make is that one carer in my group confirmed that adults who are certified as incapable under the Adults with Incapacity Act are not informed of that fact. This means that they cannot avail themselves of that section of the Act which allows for an appeal to the sheriff against a decision as to incapacity. The same carer pointed out that the Act does not require the medical practitioner primarily responsible for the medical treatment of an "incapable" adult to take account of the views of the carer or even to keep the carer informed about the treatment in question. There is clearly a lack of sufficient safeguards in this Act and no doubt the Scott Review Group will seek to reform the law accordingly.