PE1667/H
Petitioner submission of 18 February 2018

Both the MWC (PE1667/E) and the SHRC (PE1667/F) made reference to a decision of the European Court of Human Rights which has relevance the 2003 Mental Health Act, namely that in the 2012 case of X v Finland. The Court found that the forced administration of medication was a serious interference with people's physical integrity, something protected under Article 8 ECHR. Another relevant judgment is that in the 2012 case of Gorobet v Moldova: forced treatment which had not been shown to be a medical necessity could amount to at least degrading treatment, something **prohibited** under Article 3 ECHR. In this connection, there should be concern that, under the 2003 Act, individuals who have been detained on the basis of a short-term detention certificate can be subjected to forced treatment before they have had an opportunity to appeal and hence before it had been established that the forced treatment was a medical necessity. It should be noted that both the MWC and the SHRC draw attention to the lack of sufficient safeguards covering short-term detention

It should be further noted that the MWC and the SHRC are both of the opinion that the 2003 Act is not fully compliant with the Convention on the Rights of Persons with Disabilities (CRPD). This is a matter which deserves careful scrutiny since the Scotland Act requires Scotland to observe and implement the UK's international treaty obligations of which the CRPD is one. Further, the SHRC has pointed out that the UK, including Scotland, was reviewed by the CRPD Committee in August 2017 and that this Committee recommended the adoption of "**new legislation in line with the Convention to initiate new policies in both mental capacity and mental health laws**".

Although the Scottish Government has given an undertaking to assess the compliance of the Adults with Incapacity Act with the CRPD it has given no such undertaking with respect to the 2003 Act. It is obvious, however, that the 2003 Act completely fails to give the concept of legal capacity the importance now required by virtue of Article 12 CRPD: the SIDMA test of capacity in the 2003 Act is totally inadequate in this respect.

The Scottish Government in its submission (PE1667/G) ignores the relevance of the CRPD to mental health legislation. Instead it provides some details of the principles upon which the 2003 Act is based, no doubt trying to give the impression that this Act contains adequate safeguards against human rights violations. However, the submission makes no reference to recent and relevant case-law of the European Court of Human Rights. Nor does the submission acknowledge that the 2003 Act is not always implemented in accordance with the principles set out in Part 1. Some of the evidence

that this is so is contained within submissions PE1667/B,C and D: each of those submissions describes involuntary treatment which certainly breached Article 8 ECHR and probably breached Article 3 also. (A definition of inhuman and degrading treatment was provided by the European Court of Human Rights in the 2002 case of Pretty v U.K.) There can be little doubt that the way in which the three individuals in question were treated not only caused them great distress and suffering but also was a major factor in causing them to die as early as they did.

Note should also be taken of Anne Greig's submission PE1667/A even though this refers to her experience when she was forcibly injected with drugs under the provisions the 1984 Act. The circumstances were such that there can be little doubt that this action breached Articles 3 and 8 ECHR. In addition, note should be taken of the fact that her life was endangered when prescribing guidelines were ignored when she was forcibly injected with those drugs. Regrettably not all psychiatrists began to take greater care when the 2003 Act was implemented. The Scottish Government should note that Article 1 ECHR requires it to secure to everyone within its jurisdiction the rights and freedoms defined in Section 1 ECHR. **The safeguards in the 2003 Act, even as amended in 2015, are insufficient to ensure that the Convention rights of involuntary patients, including the right to life, are protected.**

Another noteworthy point in Anne Greig's submission is her observation that, because of a lack of objective tests, the diagnoses of mental disorders can be incorrect. This fact is borne out by the evidence provided by Judith Gilliland in submisssion PE1667/C. In this it is stated that after the death of her son, Joe, an independent psychiatrist reported that he was not satisfied with the diagnosis of schizophrenia that had led to Joe being subjected to the forced treatment which he had found intolerable. It should be noted that the 2003 Act is based on the false premise that approved medical practitioners are never mistaken in their diagnosis of a mental disorder or in their judgment of whether forced treatment is a medical necessity. In my submission PE01667/B I made reference to the case of Mrs A. In this case the diagnosis of a psychotic symptom seemed to be correct, but the assumption that the forced treatment to which she was subsequently subjected was a medical necessity was undoubtedly mistaken. The fact that mental health tribunals authorised this treatment merely demonstrates that these do not provide an effective safeguard for involuntary mental health patients.

Although the Scottish Government's submission makes no explicit reference to the CRPD it does state that "*The 2015 Act strengthens measures in the 2003 Act which promote support for decision making*". This statement might be intended to give the impression that the 2003 Act, as amended, now provides the support which persons with disabilities may require in exercising their legal capacity as per Article 12.3 CRPD.

However in practice, involuntary patients being treated under the provisions of the 2003 Act cannot exercise their legal capacity since any of their attempts to refuse treatment are normally ignored. Further, section 242 of the 2003 Act explicitly permits the responsible medical officer to forcibly treat an involuntary patient who is capable of consenting but who does not consent! The MWC suggests that such action might breach Article 8 ECHR.

In order to provide more effective safeguards, Scottish mental health and incapacity legislation should be amended in line with the CRPD. The desirability of replacing substitute decision-making by supported decision-making is clear from the evidence contained in submissions PE1667/B, C and D. Had the patients to which reference has been made in those submissions been permitted to decide, with support if requested, whether to consent to the treatment considered necessary by the health professionals then they and their close relatives would have been spared much distress. It should also be noted that the much vaunted basic principles of the 2003 Act were disregarded when decisions were made about the treatment of those patients: account was clearly not taken of their wishes or feelings nor of the views of relevant others; the patients were not provided with the information and support that would enable them to make decisions about their care; the decisions made about their care were clearly not those which would be of the maximum benefit to them. In spite of the passage of the 2003 Act, many psychiatrists seem to have continued acting as they had done under the 1984 Act.

If it were agreed that Scottish mental health and incapacity legislation should be amended in line with the CRPD then the Mental Capacity Act (Northern Ireland) 2016 should be studied since account was taken of the CRPD when that Act was formulated. Further, that Act goes some way towards removing the stigma associated with having a mental disorder by putting the treatment of mental disorders on a par with the treatment of physical disorders.

The Scottish Government might not be implacably opposed to there being a wide review of Scottish mental health and incapacity legislation, but does seem to be reluctant to agree to one being carried out in the near future. However under present legislation, numerous individuals are being subjected to treatment which is at least degrading and some individuals are dying prematurely as a result. Given this situation, it is desirable that a wide review be carried out at the earliest possible opportunity. Perhaps the Health and Sport Committee should be invited to consider whether the review of the place of learning disability and autism in the 2003 Act should be widened as suggested in section 6.11 of the findings from the scoping exercise carried out by the MWC and the SCLD in 2016. There it is observed that "*It was not within the remit of this scoping study to consider whether there should be a wider review of all mental health and incapacity*

law, as this study was focused on the Ministerial commitment given in June 2015. However, it is striking how often the issue was raised. The Mental Welfare Commission is on record as saying that the entire legislative framework for non-consensual care requires a comprehensive review. Whether a wider review happens is a matter for the Scottish Government; however, the Government has now proposed a review of incapacity legislation in 2016-2018, as well as the review in relation to learning disability and autism in the 2003 Act. We believe these two reviews need to be part of a coherent and joined up process, since any change in one Act is bound to impact on the other".

Concluding remarks

1. In its submission, PE1667/G, the Scottish Government stated that it would be "*inappropriate to consider wider changes to legislation*" until the two reviews referred to above "*have reached conclusions*". On the contrary, it might be inappropriate not to incorporate these two reviews into the wider review which so many are calling for.
2. In the Guardian of 22 January 2018 there appeared an article entitled "Law Society urges end to enforced medical treatment of vulnerable people". According to the article, the submission by the Law Society was in response to a review of the (English) Mental Health Act launched by Theresa May in a recent party conference speech.
3. The Law Commission has produced 47 recommendations concerning the reform of mental health legislation in England. Recommendation 39 is
"The UK Government and the Welsh Government should review mental health law in England and Wales with a view to the introduction of a single legislative scheme governing non-consensual care or treatment of both physical and mental disorders, whereby such care or treatment may only be given if the person lacks the capacity to consent."

It is to be hoped that the Scottish Parliament will take due note of this and the other 46 recommendations of the Law Commission and that it will also agree that the appropriate test of capacity should be either that recognised by the courts or that contained within the BMA consent guidance.