

PE1667/L

Petitioner submission of 23 July 2018

The Scottish Government, in its response of 13 July 2018 to a query from the Public Petitions Committee, does provide answers to the likely timescales required to complete work related to mental health and incapacity legislation. Regrettably, however, the response indicates that it is unwilling to initiate the wide review for which I call prior to the completion of that work even though, as I made clear to the Minister on 11 July, there are good reasons for beginning that review without delay.

My petition makes reference to international human rights law as does Article 12.4 of the Convention on the Rights of Persons with Disabilities. When I met the Minister I stated that international human rights law includes the case-law of the European Court of Human Rights. It is to be hoped that the Scottish Government agrees with that assertion. If it is any doubt about its validity then it should study the Human Rights Act: section 2(1) requires a court determining a question which has arisen in connection with a Convention right to take into account any relevant judgment of the European Court of Human Rights.

Given that courts are required to take account of relevant judgments of the European Court of Human Rights, the Scottish Government should do so likewise when reviewing mental health and incapacity legislation. It is, perhaps, noteworthy that the Government team which has been tasked with reforming the Adults with Incapacity Act has apparently failed to do this even though there is at least one relevant judgment, namely that in the 2009 *Salontaji-Drobnajak* case: the plaintiff had raised the action because he had been partially deprived of his legal capacity. In its judgment the European Court of Human Rights stated 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 way in which adults in Scotland can be deprived of their legal capacity to withhold consent to medical treatment does not meet the standards of fairness required by that judgment. That 2009 judgment, therefore, is relevant to both the Adults with Incapacity Act and the 2015 Mental Health Act. There are several other judgments of the European Court of Human Rights of which account should be taken when mental health and incapacity legislation is reviewed. There is reference to two of these in my submission PE1667/B.

It would be remiss of the Scottish Government to fail to take account of such judgments since people who believe that their Convention rights have been violated can raise an action for damages under section 7(1) of the Human Rights Act and, as noted above, a court hearing such an action must take account of any relevant judgment of the European Court of Human Rights. Given the non-consensual treatment that takes place

in care homes and in mental health hospitals there are many thousands of people who would have grounds for raising an action on the grounds that their Convention rights have been violated. One such successful action would inevitably be followed by numerous others as happened in the 2004 case of *Napier v The Scottish Ministers*: on the basis of the definition of inhuman and degrading treatment provided by the European Court of Human Rights in the 2002 *Pretty v UK* case, a judge at the Court of Session decided that forcing Robert Napier to slop out while in Barlinnie prison amounted to degrading treatment and awarded him £2400 compensation since, under the European Convention on Human Rights, degrading treatment is absolutely prohibited. Others who had been obliged to slop out while in prison made similar claims and by 2009 a total of £11 million had been paid out. Unsurprisingly the Scottish Government took the necessary action to end "slopping out".

The Scottish Government should take steps to suitably amend Scottish mental health and incapacity legislation before a successful claim for compensation leads to a total of many millions of pounds being paid out to those who have had their Convention rights violated as a consequence of the non-consensual treatment to which they had been subjected under the provisions of that legislation. The Scottish Government should not wait until the horse has bolted before closing the stable door; there should be set up at the earliest possible opportunity a broadly based and independent committee of experts to conduct a wide review of Scottish mental health and incapacity legislation and to make recommendations.