mental welfare commission for scotland

Investigating deaths occurring during compulsory care and treatment under mental health legislation in Scotland – List of consultation questions

Question 1: Do you agree that the Commission should be responsible for initiating, directing and quality assuring the process of investigating deaths during compulsory treatment in all cases?

☐ Yes ☒ No ☐ Not sure

I have already submitted one response to this consultation. I am submitting this further one in order to emphasise that I do not agree with what might be the premise of the consultation: that an investigation of deaths that have occurred during the compulsory treatment of mental health patients could lead to action which would result in a significant reduction in the number of deaths and hence to a weakening of the case for Scottish mental health law being changed to comply with the ECHR and the UNCRPD. Since I responded to most of the questions in my previous submission, I am not responding to any here other than question 1.

For a variety of reasons, I do not believe that the Mental Welfare Commission (the MWC) is a suitable body to be responsible for the process of investigating deaths during compulsory treatment under mental health legislation in Scotland. I could write at length to explain why this is, but will limit myself here to drawing attention to the following two facts:

1. In 2013, the MWC was asked to provide information about the number of deaths of individuals who were subject to compulsory treatment at the time of their deaths. The MWC response revealed that there had been 78 such deaths during the previous 12 months. The MWC later offered an assurance that each of those deaths was due to natural causes. That assurance should be treated with scepticism as the following example should make clear.
2. In March 2010, an 82-year-old woman with mild dementia was detained in a mental hospital. She was physically healthy at that time, but her health deteriorated in an obvious way after she began to be administered psychiatric drugs. Initially she was given the antipsychotic Olanzapine along with several other drugs. Latterly she was given only the antipsychotic Clopixol. She was given this by depot injection. She continued to be administered Clopixol until shortly before her death in December 2011.

   A daughter produced a full and detailed account of her late mother's treatment in a report entitled "**The Tragic Case of the Treatment of an Elderly Woman in the 21st Century NHS".** Among other matters, the report reveals that the treatment was contrary to the advice in the BNF regarding

> the use of antipsychotics in elderly patients with dementia. However, I gather that there was no hint on the death certificate that this treatment might have hastened the woman's death. For this reason, I am not prepared to accept any assurance that all of the deaths of persons subjected to compulsory treatment in the year 2012-13 were due to natural causes. That certainly could not be deduced from the reported causes of deaths since such reports do not identify inappropriate treatment as a possible cause.

It should be recognised that there is a general failure to properly investigate the deaths of persons subject to compulsory measures under mental health legislation. That can be deduced by studying the following reports:

"Hundreds die in 'hidden world' of mental hospitals", The Observer, 12 July 2009; and

NHS trust "failed to investigate hundreds of deaths" BBC, 16 December, 2015.

These reports refer to failures found to have occurred in England, but it is safe to assume that the situation is similar in Scotland.

The fact is that all medicines have side-effects which can harm patients. There can be little doubt that this fact must help to account for a finding that medical errors are the third leading cause of death in the USA after heart disease and cancer. Unsurprisingly, health professionals in Scotland also make medical errors which can lead to the deaths of their patients. As can be confirmed from the internet, there are different types of medical error, but one which should be of particular concern is a failure to follow prescribing advice in the BNF: I have represented a man whose mother died only 18 days after entering a care home as a consequence of a doctor failing to adhere to that advice, the most basic part of which is:

"Medicines should be prescribed only when they are necessary, and in all cases the benefit of administering the medicine should be considered in relation to the risk involved".

Article 2 ECHR states that "Everyone's life shall be protected by law". Given that the administration of psychiatric drugs, particularly antipsychotics, increases the risk of premature death, mental health law which permits those drugs to be administered against the will of a patient would appear to be not compliant with Article 2. It should be noted that, although Article 5 ECHR makes reference to "the lawful detention of persons of unsound mind," it makes no reference to any requirement for treatment to be provided. It should also be noted that Scottish mental health law permits forced treatment to begin before the patient has had an opportunity to appeal, in violation of Article 6 ECHR. That is not the situation in Germany.

To respect the human rights of mental health patients, the Scottish Government should amend Scottish mental health law to make it compliant with the UNCRPD and also take note of what happens in places such as Heidenheim in Germany. In Heidenheim, there is virtually no treatment given against the will of a mental health patient. Further, if it is thought necessary to resort to forced treatment then, as in the rest of Germany, there would have to be an application to a court. John Scott QC, the chair of the Scottish mental health law review, is well aware of the situation in Heidenheim and there are indications that he will

suggest that Sottish mental health patients be treated in a similar way. That is not surprising, since his terms of reference include:
"*making recommendations that gives* (sic) *effect to the rights, will and preferences of the individual by ensuring that mental health, incapacity and adult support and protection legislation reflects people's social, economic and cultural rights including UNCRPD and EHCR requirements"*

If the Scottish mental health law review does indeed make such a recommendation, then it is a near certainty that there will be a powerful psychiatric lobby arguing against it on the grounds that psychiatrists should continue to be permitted to continue treating patients against their will. On this occasion, it is to be hoped that the Scottish Parliament will take full account of human rights when it debates reforming Scottish mental health law and not permit psychiatrists to continue to treat patients against their will without applying to the courts for the authority to do so. A study of the transcripts reveals that it failed to take account of human rights during the debates that preceded the passage of the 2003 Act. Regrettably, in spite of section 57(2) of the Scotland Act, there have been other occasions when the Scottish Government, if not the Scottish Parliament, has failed to take full account of human rights. That can be deduced from the fact that the Scottish Government failed to seek legal advice about the use of chemical restraint, something to which there is uncritical reference in the Health and Social Care Standards: in a letter dated 8 November 2021, I asked the Scottish Ministers whether legal advice had been sought about this matter. From the evasive reply dated 20 December 2021, it was clear that no such legal advice had been sought.

The use of chemical restraint commonly involves the giving of antipsychotics to elderly care home residents, but can also involve the giving of those drugs to persons with learning difficulties and autism who are housed in learning disability wards in mental hospitals. It is also likely that some of the drugs given to patients detained in mental hospitals are given as chemical restraint, especially those given against the will of patients before they have had an opportunity to appeal against their detention. As was noted above, information was sought in 2013 about the number of deaths of individuals who were subject to compulsory measures at the time of their death. The response revealed that of the 78 deaths in the preceding 12 months, eleven had occurred to individuals who were detained on the basis of a short-term detention certificate and who would almost certainly therefore be subject to compulsory medication before they had an opportunity to appeal against their detention. It would be wrong to assume that this forced medication with antipsychotic and probably other psychiatric drugs was not a contributory factor to these deaths.

Question 1a: Do you foresee any difficulties with this arrangement?

Question 1b: How could such difficulties be addressed?

Question 2: Do you agree that the Commission should be responsible for producing and disseminating an annual report on the results of the investigations as described in paragraph 30 above?

☐ Yes ☐ No ☒ Not sure

Question 2a: Do you foresee any difficulties with this arrangement?

Question 2b: How could such difficulties be addressed?

Question 3: Do you agree that the Commission should develop guidance and standards for use by local services when undertaking investigations into deaths during compulsory treatment?

☐ Yes ☐ No ☐ Not sure

Question 3a: Do you foresee any difficulties with this arrangement?

Question 3b: How could such difficulties be addressed?

Question 4: Do you have any comments on the revised process as set out above?

Question 4a: Do you foresee any difficulties with this process?

Question 4b: How could such difficulties be addressed?

Question 5: Do you think that the role of Commission Liaison Officer, as set out above, will help to improve the involvement of, and communication with, families and carers during investigations of deaths?

☐ Yes ☐ No ☐ Not sure

Question 5a: Do you have any concerns about this type of arrangement?

Question 5b: How could your concerns be addressed?

Question 6: Do you agree that the revised process, as described in Section 2, will meet the values and principles set out in paragraph 50 above?

☐ Yes ☐ No ☐ Not sure

Question 6a: Please explain your answer.

Question 7: Do you have any comments on the potential impacts of the revised process on those with protected characteristics?

Question 7a: Please explain what you think could be done to minimise any negative impacts on people with protected characteristics.

Question 8: Do you have any comments on the potential impacts of the revised process on children and young people?

Question 8a: Please explain what you think could be done to minimise any negative impacts on children and young people.

Question 9: Do you agree that the revised process for investigating deaths during compulsory treatment is human rights compliant?

☐ Yes ☐ No ☐ Not sure

Question 9a: Please explain what you think could be done to ensure that the new process fully complies with human rights standards.

Question 10: Do you have concerns in relation to any financial or administrative impacts the revised process may have, especially for local services?

Question 10a: Please explain what you think could be done to minimise any negative financial or administrative impacts.

Question 11: Do you have any other comments or concerns in relation to the revised process?

If you are unable to respond online, please complete and return a Word version of the Respondent Information Form (download the form here). The form should be sent to Dawn Griesbach, Griesbach & Associates together with a copy of your response in Word or PDF format. If you ask for your response not to be published, it will still be included in the analysis, but will not be available to be viewed publicly. Please be aware that the Mental Welfare Commission is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.