

TERMS OF REFERENCE

Updated 15 January 2020

The principal aim of the review is to improve the rights and protections of persons who may be subject to the existing provisions of mental health, incapacity or adult support and protection legislation as a consequence of having a mental disorder, and remove barriers to those caring for their health and welfare. It will do so by:

- reviewing the developments in mental health law and practice on compulsory detention and care and treatment since the Mental Health (Care and Treatment) (Scotland) Act 2003 came into force;
- making recommendations that gives 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 ECHR requirements; and
- Considering the need for the convergence of incapacity, mental health and adult support and protection legislation.

The review will involve consideration of what is required to achieve the highest attainable standard of mental health. This will include the following, as well as such other matters as may be relevant:

- how equal and non-discriminatory enjoyment of rights can be achieved
- maximising decision-making autonomy whenever interventions are being considered under all 3 pieces of legislation, including a focus on alternatives to coercion, supported decision-making and the roles of named persons, guardians, nearest relatives, listed initiators, mental health officers, council officers, independent advocates and others
- patients' experiences of care and treatment whilst subject to compulsion
- why there has been an increase in compulsory detention and treatment and the reasons for variation in compulsory orders across Scotland
- the gateway to compulsion - how far capacity might be an appropriate and universal threshold for compulsory measures in both mental health and incapacity legislation
- how 'capacity' and 'significantly impaired decision-making ability' is assessed by clinicians and practitioners, across both mental health and incapacity legislation
- the overlaps in legislation and practice between the mental health, incapacity and adult support and protection legislation

Previous and ongoing work around mental health and incapacity law

The review will consider previous and ongoing work in this field , including:

- 'Scotland's Mental Health and Capacity Law: The Case for Reform', the Centre for Mental Health and Capacity Law, Napier University and the Mental Welfare Commission, May 2017.
- 'New Directions: Report on the Review of the Mental Health (Scotland) Act 1984', 2001
- The findings of the review of learning disability and autism under the Mental Health (Care and Treatment) (Scotland) Act 2003 – due December 2019
- The findings of the review of the Adults with Incapacity (Scotland) Act 2000
- The (emerging) findings of the Review of the Delivery of Forensic Mental Health Services in Scotland – due June 2020

- The findings from relevant reviews in the rest of the UK, and other jurisdictions.

Review outcomes

The review will produce an interim report by May 2020, which will identify priorities and an overall timeline for the next stage of the review. We anticipate that a final report will:

- Make recommendations for changes or improvements to mental health legislation as well as to incapacity or adult support and protection legislation (if appropriate) including change or improvements in compulsory care and treatment practice;
- Make recommendations as to the desirability, or not, of the convergence of mental health, incapacity and adult support and protection legislation;
- Make such other recommendations as the Chair considers appropriate.

The Chair has overall responsibility for the report but the review will ensure that persons with lived experience are at the centre of the review and fully involved in making recommendations for the final report.

The Law

The principal aim of the review is to improve the rights and protections of persons who may be subject to the existing provisions of mental health, incapacity or adult support and protection legislation as a consequence of having a mental disorder.

When we talk about mental health legislation we are referring to;

The Mental Health Act (MHA)

This means the law called the Mental Health (Care and Treatment) (Scotland) Act 2003. This law applies to anyone who may be suffering from a mental disorder. That can include people with mental illness, personality disorder or learning disability

The Adults with Incapacity (Scotland) Act 2000 (AWI)

The review will also have to consider the AWI Act. This means the law called the Adults with Incapacity (Scotland) Act 2000. This law can put in place procedures and safeguards to enable decisions to be made for people who are unable to make decisions about their lives for themselves. That can include people with mental illness, personality disorder or learning disability. It can also include other people who have lost the ability to make decisions for themselves because of a brain injury or other accident or illness that affects their ability to make decisions.

The Adult Support and Protection (Scotland) Act 2007 (ASP)

The review can also talk about the ASPA. This means the Adult Support and Protection (Scotland) Act 2007. This law can put in place measures to protect people who may be vulnerable because of illness, disability or some other reason and therefore may be more at risk of harm, from their own behaviour or the behaviour of other people.

Mental Disorder

As part of the review we describe people as having a mental disorder. The Mental Health Act describes someone who has a mental disorder as being someone who has a mental illness, a personality disorder or a learning disability. We know that

some people are uncomfortable with this description. However it is the definition used in the law just now and is therefore the definition we have to use for now.

What will the review do?

The Review is looking at the Mental Health Act to see if it needs to change. The Review has to follow the Terms of Reference.

The purpose of the Review is

- To improve the rights and protections of persons, who may be affected by the Mental Health Act, the AWI Act or ASPA, because they have a mental disorder.
- To remove any barriers that carers who look after and support persons with a mental disorder might have in their caring role.

The Review will carry this out by -

- Looking at the changes that have happened in mental health law and practice since the Mental Health Act came into force in 2005
- Recommending changes that mean peoples' rights, will and preferences are fully respected in the Mental Health Act, the AWI Act and ASPA, as required by the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).
- Thinking about whether the Mental Health Act, the AWI Act and ASPA should be replaced by 1 law instead of 3

The review will look at what is required to achieve the highest achievable standard of mental health.

What are human rights?

Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death.

They apply no matter where you are from, what you believe or how you choose to live your life.

They can never be taken away. They can sometimes be restricted –for example if a person breaks the law. However, if they are restricted the same rules must apply to everyone.

What is the UN Convention on the Rights of Persons with Disabilities?

This is a human rights treaty that promotes and protects the rights of people with a disability. It is known as the UNCRPD. People who have a mental disorder are considered to have a disability. There is a benefit of being defined as having a disability. This benefit is that the UNCRPD places lots of requirements on the Scottish Government to promote and protect people's rights.

How will the review work?

The Review will seek evidence that helps us to find out how well the Mental Health Act is working just now, what changes have happened since the Act first came into force, and how well the Mental Health Act and the AWI Act and ASPA work together

to protect and respect the human rights of people with a mental disorder who may be subject to these laws.

It will seek evidence that helps us to find out how well the Mental Health Act, AWI and ASPA are respecting people's rights, will and preferences as required by the UNCRPD and the ECHR.

What we plan to do

We plan to run three stages to the Review

These are the outcomes that we plan for each stage of the Review:

Stage 1: What happens now?

In this stage we will obtain evidence on people's experiences of the 2003 Act. In May 2020, which will be towards the end of stage 1, we will publish an interim report which will tell the public what has been done so far in the Review.

Stage 2: What could happen differently?

In this stage we will obtain evidence on possible approaches to addressing any issues that have arisen from evidence gathered at stage 1

Stage 3: What we think should happen

In this stage we will obtain opinions on our recommendations for change to mental health law and practice before publishing a report. It might be that further investigation and reports follow this.