SMHLR

SCOTTISH MENTAL HEALTH LAW REVIEW

Executive Summary of the Interim Report

July 2021

Contents

Scottish Mental Health Law Review – Interim Report July 2021

Executive summary

Introduction

This is the third interim report of the Scottish Mental Health Law Review. We are due to complete our work in September 2022.

We have worked back from that endpoint and plotted additional stages to allow more time for discussion and targeted consultation.

In this report, we outline the progress we have made since our last report in December 2020. We share our thinking on the purpose and principles of the three pieces of mental health law we are reviewing.[1] We also make suggestions as to how the purpose and principles of mental health law might look if recast with particular regard to the United Nations Convention on Rights of Persons with Disabilities (UNCRPD). These sections on Purpose and Principles are a key part of this report which should be considered by those who wish to understand our current thinking and offer feedback.

We include a summary of some of the developing implications for our work on human rights principles in economic, social and cultural rights as well as civil and political rights.

The report provides updates on the work of our Advisory Groups which have played such a key role in getting us to this stage.[2] Some of them are nearing the end of their work, while others have more to do. The intention is to pause most of their work just now and reconvene after the summer period as required.

To achieve our demanding timetable, we have decided to intensify the work of the Executive Team over the summer. We will come back to the continuing advisory and other groups as we start shaping possible conclusions, recommendations and foundational proposals.

[1] Meaning mental health (authorising and regulating psychiatric care and treatment), incapacity and adult support and protection law.
[2] The Review's Advisory Groups are: Children and Young People; Communication and Engagement; Compulsion; Capacity and Support for Decision-Making; and, Economic, Social and Cultural Rights.

It is important to observe that what we come up with over the summer will not be final recommendations. We hope that this work will provide greater transparency around our thinking, stimulating further discussions and contributions in an increasingly focussed manner.

This will also allow us to better reflect on the question of fusion of the three pieces of legislation and its viability and desirability in the immediate or longer term future.

Lived Experience

Alison Rankin joined the Executive Team in 2021. Alison is Chair of the Royal Edinburgh Hospital's Patients Council. This means the team includes three members with lived experience.

Karen Martin and Graham Morgan continue to share the role of Vice-Chair of the Executive Team, in addition to their work on Advisory Groups and the Lived Experience Reference Group.

Reference Groups

We have established two Reference Groups, one for practitioners and one for people with lived experience. These Groups are looking at some of the more developed ideas, after they have been considered by the Executive Team.

Overview of Human Rights and Ethical Requirements for Scots Law for Persons with Mental Disability

> "Transformation of mental health service provision must, however, be accompanied by significant changes in the social sector. Until that happens, the discrimination that prevents people with mental health conditions from leading full and productive lives will continue."
>
> Gerard Quinn, UN Special Rapporteur on the Rights of Persons with Disabilities.[3]

Gerard Quinn reminds us that rewriting mental health law will be pointless if done in isolation. For full and effective participation in society on an equal basis, changes in mental health law must be accompanied by wider changes in society. This includes, but is not limited to, developments in health and social care and the removal of the "attitudinal and environmental barriers" that help to create "disability"[4].

For our purposes, we refer to a 'human rights model' of disability which can incorporate the best of other models (e.g. medical, social), ideally directing and reflecting practice.

Following publication of the Leadership Report by the National Taskforce for Human Rights, the Scottish Government has committed to a new Human Rights Bill.[5] This will include specific rights, subject to devolved competence, from UNCRPD and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (which includes the right to 'the enjoyment of the highest attainable standard of physical and mental health').

The question as to *whether* to incorporate additional human rights treaties in a manner equivalent to the European Convention on Human Rights (ECHR) (through the Human Rights Act 1998 and Scotland Act 1998) and United Nations Convention on the Rights of the Child

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[3] Gerard Quinn made this comment in response to the launch of the WHO guidance and technical packages on community mental health. See WHO's website at: https://www.who.int/news/item/10-06-2021-new-who-guidance-seeks-to-put-an-end-to-human-rights-violations-in-mental-health-care

[4] See Article 5 of the Preamble of the United Nations Convention on the Rights of Persons with Disabilities available at: Convention on the Rights of Persons with Disabilities – Articles | United Nations Enable

[5] The National Taskforce for Human Rights Leadership's final report can be found at: National Taskforce for Human Rights: leadership report - gov.scot (www.gov.scot)

(UNCRC) (through the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill), has therefore become a question of *how* to do so.

Our work is part of the process of making this a reality. It involves improved awareness (for the public and practitioners), participation by those with all types of relevant lived experience, dissemination of good practice (not requiring changes in the law) and improved and shared vocabulary (continuing to move away from the language of deficit and discrimination). Finally, it will require changes in the law.

Once the significant foundational issues have been addressed, progressive realisation is an acknowledged and accepted way of proceeding when it comes to fulfilling international human rights obligations. Our work may well lead to significant change, but it is also likely to require some changes to be made in stages, not least for practical reasons relating to allocation of resources and shortage of key personnel in some areas, both of geography and practice.

While some people wish to see an immediate and outright ban on non-consensual interventions, our discussions at this stage in Advisory Groups have come round repeatedly to the acceptance of some exceptions, even by those with lived experience. We will continue to consider this supported by robust data and other evidence collection. This will include whether achieving a complete removal of compulsion will have to be progressively realised whilst at the same time taking serious steps to give effect to an individual's rights, will and preferences increase in a non-discriminatory way.

Purpose and Principles of Mental Health and Capacity Legislation

This section of the report sets out the *preliminary* views of the Review on the core questions of:

- what and who mental health law should be for; and,
- what principles should underpin the operation of mental health law?

We believe that the human rights-based approach we have adopted means that mental health law should in future have a significantly wider scope, and that this has an important impact on the principles which should govern the legislation.

The Purpose of Mental Health Law

The current legal framework

We feel that the current purposes are too narrow. Our terms of reference push us in a more ambitious direction, suggesting a wider focus on securing all human rights for all people who may currently fall within the category of 'mental disorder'. We agree with this, and we believe our reform agenda should aim high.

What should mental health law be for?

We believe the purpose of the law should be to **ensure that all the human rights of people with mental disabilities are respected**.

Our approach reflects three key insights, drawn from human rights principles and the evidence we have received.

First, human rights are indivisible.[6]

[6] See the Vienna Declaration of 1993: "All human rights are universal, indivisible and interdependent and interrelated… it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." Available at: OHCHR | Vienna Declaration and Programme of Action

Second, current legislation focuses too strongly on binary choices which determine what services can and should do and on authorising and placing limits on non-consensual interventions.
Finally, reducing the use of non-consensual interventions is likely to depend in large part on improving prevention and early support and intervention. Rights need to make a difference when they can be meaningful and effective, not when the harm has already been caused.

Moreover, existing mental health law currently has little to say about the economic, social, and cultural rights which we believe need to be part of the legal framework.

Our approach to non-consensual treatment

Alongside this wider focus, strengthening the rights and protections of those who *are* subject to non-consensual treatment remains a vital part of our work.

We do not believe we should recommend that all mental health and incapacity law be abolished but that it should be reframed to ensure that it gives effect to an individual's rights, will and preferences in a non-discriminatory way. We have received compelling evidence, including from those with lived experience, that a framework for non-consensual interventions can be life-saving and can promote the rights and interests of people subject to it. As stated above, we are giving further consideration to this.

We believe it should be possible to reform mental health and capacity law so that it is compliant with the UNCRPD, although this is not straightforward. A commitment to equality and non-discrimination can be hard to reconcile with laws which depend, at least in part, on having an identifiable mental disorder.

The solution is therefore likely to be rather different to that which currently exists, in giving more weight to understanding and reflecting what a person's will and preferences really are in given situations, through supported decision-making if necessary.

Our aim is that non-consensual interventions will only occur where this is non-discriminatory and to fully protect an individual's rights. Further, that, through supported decision-making, a person's will and preferences are

always made known and respected even where non-consensual interventions take place and only not followed where it is not discriminatory to do so.

We are seeking to move away from a notion of non-consensual interventions as a punitive or limiting action to ensuring it is a protective action. This may include considerations of earlier intervention in appropriate cases. We are considering if we can make mental health law more clearly and effectively reflect an approach of Support, Protection and (where possible) Recovery.

We believe embedding supported decision-making will be an important part of shifting the balance towards more empowering mental health/capacity law which genuinely maximises autonomy.

We do not see autonomy simply as a negative value, understood as a duty to leave a person to make their own decisions. We would frame support for autonomy as a positive duty - to create the conditions which maximise the ability of a person to have control over their own choices. This principle should apply as much to people who have capacity as those who may be felt to lack it.

We also want to see a stronger articulation of the rights of families and carers.

Reciprocity

One of the issues we are considering is whether reciprocity should remain as a feature of mental health law.

On balance, we feel that the principle is still valuable, but we need to look closely at how to ensure it is effective, proportionate, and non-discriminatory. In particular, we need to consider how a tribunal can effectively use it to ensure appropriate support is provided

Principles of Mental Health Law

The current position

Mental Health (Care and Treatment) (Scotland) Act 2003 (2003 Act), the Adults with Incapacity (Scotland) Act 2000 (AWIA), and the Adult Support and Protection (Scotland) Act 2007 (ASPA) all contain principles. People acting under this legislation are required to have regard to these principles.[7]

The principles from the 2003 Act derive from the 'Millan Principles' set out in the report of the Millan Committee review of mental health law.[8] Work has been done to cross-refer these with equivalent provisions in AWIA and ASPA.

Why do we need to change the principles?

The principles have been widely supported and remain popular. There is a broad area of common ground across the three Acts, and it would not be difficult to produce a synthesis of these principles. We do not believe this would be enough, for two reasons.

Firstly, the principles which should govern mental health law depend to a significant extent on the purpose of the law. There is a tension between principles directed at protecting people from undue interference in their lives, and principles reflecting positive duties on the state to promote health and wellbeing.

As we set out above, we are minded to recommend a new legal framework which incorporates the right to the highest attainable standard of physical and mental health.

[7] The wording of the AWIA seems slightly stronger, in stating that the principles "shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act" (s1)
[8] The final report of the Millan Committee on its Review of the Mental Health (Scotland) 1984 can be found at: https://www.mhtscotland.gov.uk/mhts/files/Millan_Report_New_Directions.pdf .Chapter 3 sets out the principles. These are: Non-discrimination; Equality; Respect for diversity; Reciprocity; Informal care; Participation; Respect for carers; Least restrictive alternative; Benefit; and, Child welfare.

In short, we want legislation to be more about helping people with a mental disability to live and enjoy their lives without stigma or prejudice. The principles of this new framework need to reflect this wider aim.

Second, we need to address the impact of the UNCRPD in relation to non-consensual treatment. Previous work found that insufficient priority was given in its principles to the importance of respect for the 'rights, will and preferences' of the adult.[9] We will consider this in relation to the 2003 Act, AWIA and ASPA.

As well as affecting the emphasis of the principles, this wider scope will affect *who is expected to follow the principles.* Under the wider framework we propose, the principles would need to bite on a wider category – including government and public bodies, regulatory agencies, and those delivering support and care under the aegis of public services.

Our suggested approach

We believe that this shift can be achieved by basing the principles for reformed mental health law on principles already established in human rights instruments, particularly Article 3 of the UNCRPD. There is already overlap between these principles and the Millan principles.

This fits with our remit to ensure that the law reflects human rights and will also assist in ensuring that reformed legislation is consistent with the planned incorporation of additional human rights.

We are aiming for a small set of core principles which can be expanded upon in the legislation itself and in guidance. That implies some streamlining of the eight principles in Article 3.

Our initial suggestion for core principles is:

- Respect for dignity
- Respect for autonomy
- Non-discrimination and equality
- Inclusion.

[9] See the Essex Autonomy Project's *Three Jurisdictions Report* available at: Three Jurisdictions Report: Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK - Essex Autonomy Project

These principles need to be considered together. In some situations, they will pull in different directions, and will need to be balanced against each other. The principles are discussed in more detail in the full report.

Work of the Executive Team and the Review's Groups

The Executive Team continue to meet regularly. At these meetings they discuss the ongoing direction of the Review, as well as associated administrative issues. They look at the work of the Advisory Groups and evidence gathered from online meetings with lived experience groups and individuals, practitioners and other stakeholders. They also consider work being done by others on mental health reform and human rights-based approaches.

The Review's five Advisory Groups also continued to meet regularly during the first half of 2021. This has included ongoing consultation with people with lived experience, practitioners, unpaid carers and other experts working in the areas of mental health and human rights. Summaries of their work are given below. Notes of meetings can be found on the Resources page of the Review website at www.mentalhealthlawreview.scot.

The Review has also set up a Practitioners' Reference Group and a Lived Experience Reference Group since the last report.

Children and Young People Advisory Group

Group members have met with people who have had experience of child and adolescence mental health services. The issues they raised included not being aware of their rights and their parents' being consulted rather than them. Members also met with families. Parents spoke about not being consulted enough. Young carers felt they were not recognised or valued, and described the impact that caring had on their education.

The Group are working with the Children and Young People's Commissioner Scotland and the Scottish Youth Parliament to ensure the voices of young people continue to be heard. They are also co-hosting an event in September with the Child and Adolescent Faculty of the Royal College of Psychiatrists in Scotland. This will look at issues with

the operation of the current mental health legislation and identify possible reforms. The Review will then consider and consult on these.

Since the last report, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill has been passed by the Scottish Parliament. The Group will consider current mental health legislation and the implications for children with disabilities (including mental disabilities) of this and the paradigm shift implied by the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD).

The Group believes that there needs to be a national conversation about how changes in the law and support for children and young people with mental health problems can be joined up with wider reforms. They have been meeting with Scottish Government officials to look at what the next steps could be.

Economic, Social and Cultural Rights Advisory Group

Group members have met with a number of peer and advocacy groups for people with lived experience, including carers. While the majority of the groups focus on mental illness, the views of autistic people and people with experience of homelessness, addiction and mental illness have also been heard. The views heard at these meetings are currently being collected into a report.

A sub-group is doing a separate piece of work on collective advocacy. They will seek views on how collective advocacy should develop in the future, be sustained and protected.

Members met with the Equality and Human Rights Commission. This reiterated the significant data gap that exists around mental health provision. This means it is extremely difficult to measure and address the differential impact of mental health law and policy on people with different protected characteristics, such as age, gender, physical disability, race and sexuality. The next step is to work with the Mental Welfare Commission and Public Health Scotland to establish what can be identified from current data sources.

Since the last report, the National Taskforce for Human Rights Leadership has recommended that the International Covenant on Economic, Social and Cultural Rights and the UNCRPD should be

directly incorporated into Scots Law.[10] The Review will consider how well our current mental health law meets the range of requirements which apply through these treaties and any changes that may be needed.

Capacity and Support for Decision-Making Advisory Group

Group members have been considering the purpose of mental health and capacity law and principles to support that purpose. The aim is to provide potential recommendations for the Review's Executive Team and Reference Groups to consider and consult on further. The separate sub-group for supported-decision making referred to in the last report, was not established given the interest in this area across the whole membership of the group,

Members have looked at capacity and SIDMA[11] assessments and human rights assessments (as recommended by the Independent Review of Learning Disability and Autism in the Mental Health Act).[12] They have also started to look at supported decision making. Consideration has been given to the extent to which each of these achieve, or assist to achieve, the purpose of mental health and capacity law. Discussion has also taken into account the concerns of the Committee on the Rights of Persons with Disabilities about capacity assessments. To assist their discussions, the Group has held evidence sessions with experts in these different areas. The Group has also looked at aspects of advance planning and deprivation of liberty.

The Group has recognised that they may not reach unanimous agreement on the issues being considered. They also appreciate recommendations for legislative change arising from this Group might be challenging for some. This means that careful consideration must also be to how we may bring about any necessary attitudinal change.

[10] See the National Taskforce's report at: National Taskforce for Human Rights: leadership report - gov.scot (www.gov.scot)
[11] Significantly impaired decision-making ability because of the patient's mental disorder (SIDMA) is the 'capacity test' required for civil compulsion under the Mental Health (Care and Treatment)(Scotland) Act 2003.
[12] See the final report of the Independent Review of Learning and Disability in the Mental Health Act at: IRMHA-Final-report-18-12-19-2.pdf (nrscotland.gov.uk)

Communication and Engagement Advisory Group

Since the last report, the Group has extended its membership. It now has representatives from advocacy, Scottish Human Rights Commission, Royal College of Psychiatrists, unpaid carers and people with lived experience. It continues to ensure that clear communication runs throughout the work of the Review. It will oversee further public engagement work around the various recommendations from Review.

In February, the Group sent out a survey to practitioners to hear their views on how they engaged with carers. This followed on from responses from carers to the Review's initial consultation in 2020 that commonly suggested poor levels of engagement. The Group concluded that there remains significant work to be done around the role of carers. Responses raised concerns about a lack of awareness and training among mental health practitioners. They also suggested that practitioners' perspectives on their confidence in identifying carers and involving them in care and decision-making may be different from the perspectives of carers.[13]

The Group has identified further issues that it wants to consider, with a view to making recommendations. These include concerns around the accessibility of information, interactions between the Department of Work and Pensions and mental health services, and the best ways that the rights of people with lived experience and unpaid carers can be upheld.

The Group is working with the Health and Social Care Alliance (the ALLIANCE) to host two online events in the autumn. These are awareness raising events for the public on human rights, with a focus on the incorporation of UNCPRD into mental health law and what that may mean in practice.

Compulsion Advisory Group

Group members have raised and considered a number of issues since the last report around the pros and cons of compulsion.

[13] The report of the full results of the survey and further thoughts of the Group can be found on the Review's website at: The Triangle of Care – A Professional Perspective – Summary of Responses | Scottish Mental Health Law Review

The Group has considered how getting care at the right time may avoid the need for compulsion and whether there is currently a perverse incentive to use compulsory measure to ensure people get services. This links to other issues they have discussed around resources and access to alternative early interventions. They have considered the pros and cons surrounding the use of capacity and diagnosis as grounds for compulsion. They have reiterated that experiences of compulsion vary. Some people feel they have benefitted from compulsory interventions. For other people, it has been traumatic and alienated them further from services. How the views of carers need to be sought and respected, and situations where there appears to be no option but to treat someone against their will have also been discussed.

At its last meeting, the Group agreed the broad thrust of the purpose of mental health legislation as proposed by the Executive Team and outlined earlier in this report.

The Group's plan for future work is:

- A study of the ethical and human rights basis for compulsory measures of care and treatments.
- Further exploration of the reasons behind increase in the use of compulsory measures.
- Assessing how well compulsory measures of care and treatment are working at present.
- Considering alternatives to compulsory measures of care and treatment.

The Reference Groups

The Review now has two Reference Groups. One is for people with lived experience of mental health and incapacity law, either personally or as a carer, and one is for practitioners.

These Groups have been formed to consider and comment on some of the ideas for change and issues identified by the Executive Team and Advisory Groups before wider stakeholder consultation and final recommendations are made.

There is no expectation for the Reference Groups to agree with the views of the Executive Team. Equally, there is no expectation that clear

agreement between members of the Reference Groups is reached on each point. All final recommendations lie with the Review.

The Practitioners Reference Group is chaired by Colin McKay and Jill Stavert. Its members have a range of knowledge and experience working with people who have mental health issues, learning disability, personality disorder, autism, dementia, or working with the carers of such individuals.

The Lived Experience Reference Group is chaired by Karen Martin and Graham Morgan. The Lived Experience Reference Group comprises people with lived experience, including experience as unpaid carers of people with mental health issues, learning disability, autism and dementia.

Adults with Incapacity and Adult Support and Protection Legislation

We have set up a new Adults with Incapacity Advisory Group to consider those elements of the AWIA on which the Review may wish to make recommendations. This will be co-ordinated with ongoing work within the Scottish Government in this area.

Planned Future Workstreams

We are setting up new workstreams to look at Accountability and Forensic Mental Health Law.

Reports Published in the Last Six Months

Since our last report, the Independent Review into the Delivery of Forensic Mental Health Services, The Independent Review of Adult Social Care in Scotland and the National Taskforce for Human Rights Leadership Report have all reported and made recommendations. [14] We are taking these into account in our work.

[14] The Independent Review into the Delivery of Forensic Mental Health Services final report can be found at: Independent Forensic Mental Health Review: final report - gov.scot (www.gov.scot). The Independent Review of Social Care's final report can be found at: Independent Review of Adult Social Care - gov.scot (www.gov.scot) The National Taskforce for Human Rights Leadership's final report can be found at: National Taskforce for Human Rights: leadership report - gov.scot (www.gov.scot)