

Response to Scottish Mental Health and Incapacity Law Review



Summary

The group welcomed the proposals on the principles and purposes set out in the Scottish Mental Health Law Review, commending its breadth and ambition. It was agreed that this legislation is a move in the right direction, where the law has the potential to help empower people to make as many decisions as possible, fostering greater protection of service users' rights.

However, whilst the changes to the laws are welcomed, it was recommended that there should be more focus on how they are implemented in practice. For example, issues that have arisen in the execution of 'supported decision making' have been cited as the result of poor practice and not necessarily inadequate legal frameworks. It has been repeatedly emphasised that, for the law to be effective, resources and appropriate staff training must be in place to ensure that the law is being adhered to in the delivery of support services.

The group suggested that the application of any new principles should be flexible to suit the needs of the individuals and the various settings in which they are supported. It was noted that mental health illness is complex, and individuals can have multiple and diverse needs, which makes the application of laws that protect their rights challenging.

The group was pleased to see the proposals on Human Rights Enablement and agreed with the framework set out in the consultation. The participants agreed that an accurate and comprehensive understanding of people's situations, needs and values will aid in the protection of their rights. However, concerns were raised as to whether the Ministry of Justice's proposals to repeal the Human Rights Act and replace it with a Bill of Rights has the potential to conflict with the proposals set out in this Law Review.

The development of a robust accountability framework will be crucial for a human rights-based approach to be successfully implemented. People must understand their rights and have a clear route to seek justice when their rights have been violated.

The participants fully support mandatory training for both paid and unpaid carers. It was noted that this would not only be helpful for carers to improve their practice but could foster an awareness of when they require mental health support themselves.

It was suggested that, in order to foster a more effective and meaningful complaints process, it needs to be more accessible, transparent, and independent for people who wish to challenge decisions. It was also recommended that more work should be done to understand the complainant's lived experience and perspective in order to design a more effective process

Introduction

1. The Royal Society of Edinburgh (RSE), Scotland's National Academy, welcomes the opportunity to respond to the Scottish Government's Executive Team on the Scottish Mental Health and Incapacity Law Review. Our response was facilitated by a group consisting of RSE Fellows, Young Academy of Scotland (YAS) members, and representatives from leading Mental Health Organisations, Advocacy Groups, Legal Groups and Private Mental Health Practices. The group discussion aimed to provide expertise from varied perspectives in the mental health field to produce a well-rounded response to this consultation. The participants attending the Roundtable included those with expertise in mental health legislation, clinical psychology, healthcare, advocacy, and stakeholders from various organisations that specialise in Alzheimer's disease, eating disorders, autism and learning disabilities, and a generic mental health organisation.

2. The evidence for this response was collected during a two-hour session with stakeholders and supplemented by additional written comments received after the roundtable discussion. As opposed to answering each specific consultation question, in turn, this response reflects on the broader themes of the consultation. The sections we have covered include the purpose of the laws, supported decision making, the role and rights of carers, human rights enablement, reduction of coercion, accountability and children and young people. These views are not necessarily those of the RSE but rather the views of those present at the roundtable event we facilitated.

The purpose of the laws

3. The group welcomed the proposals on the principles and purposes of Scottish Mental Health law, commending the breadth and ambition of the review. It was agreed that this legislation is a move in the right direction, where the law has the potential to help empower the patient to make as many decisions as possible, fostering greater protection of service users' rights. Participants praised the intention to adopt the four core principles from the United Nations Convention on the Rights of Person with Disabilities (UNCRPD) within the legislation, and the overall move to the provision of human-rights based mental health and incapacity legislation. The evidence for this response was collected during a two-

hour session with stakeholders and supplemented by additional written comments received after the roundtable discussion. As opposed to answering each specific consultation question, in turn, this response reflects on the broader themes of the consultation. The sections we have covered include the purpose of the laws, supported decision making, the role and rights of carers, human rights enablement, reduction of coercion, accountability and children and young people.

Adequate income, housing, and independent living

4. Participants welcomed the proposals around adequate income, housing, and independent living, noting the potential to enshrine a sense of greater autonomy for service users in the law. However, concerns were raised about the resources needed to facilitate the changes, particularly with the current pressure on mental health services. One example was the right to independent living. This was remarked upon as a critical feature within the review and a potentially fundamental shift in mental health law. However, addressing this will not be without its challenges, with the main barriers to discharge being cited as a lack of accommodation and suitable service providers.¹ Without a commitment from the government to improve access to such services, it is unlikely that the potential positive impact of the mental health law changes will be fully realised.

5. Roundtable participants fully support the review's endeavours to assure adequate income. However, alongside the issues with benefit assessors 'failure to recognise mental health conditions,' as stated in the consultation paper, there are other issues where a person's right to choose their treatment can be limited by their financial support terms. During the Roundtable, participants were presented with a case study. It was disclosed that there had been an incident where a service user was penalised for using their self-directed support fund benefit to pay for private treatment. It was noted that the patient was suffering from comorbid conditions, neurodiversity and a binge eating disorder. The service user ultimately used the money to fund their eating disorder treatment. Despite feeling that it helped them live independently, they were told it failed to meet their criteria for using the money to assist with independent living. It was noted that the service user had difficulty accessing this service through the

¹ Scottish Government (2018) Coming Home: A Report on Out-of-Area Placements and Delayed Discharge for People with Learning Disabilities and Complex Needs [online] Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2018/11/coming-home-complex-care-needs-out-area-placements-report-2018/documents/00543272-pdf/00543272-pdf/govscot%3Adocument/00543272.pdf>

NHS. It was therefore recommended that the review group consider other factors that could potentially limit a person's rights, such as the benefits system, and seek to provide support with appropriate flexibility that takes into account the wide diversity of individuals' needs and context. Criteria for financial and other independent living resources may be a potential barrier to implementing human rights-based mental health laws.

Implementation informed by lived experience

6. Whilst the changes to the laws are welcomed, it was recommended that a focus needs to be given to how they work in practice. For example, under the Mental Health (Care and Treatment) (Scotland) Act 2003, patients are protected by principles such as the right to participate in all areas of their care and treatment as far as possible.² However, according to the Scottish Association for Mental Health (SAMH), the qualitative evidence indicates service users in hospitals and other secure facilities report feeling a loss of 'control' over small everyday decisions in their lives.³ The ability of the laws to protect these rights is questionable with evidence that it fails to be enacted in care facilities. It was argued that more data on service users' experiences of the system is needed to understand the best methods for implementing the legalisation and how best to support organisations to adopt the principles and monitor their impact to inform future legislation changes.

7. The group also suggested that the application of any new principles should be flexible to suit the needs of the individuals and the various settings in which they are supported. It was noted that mental health illness is complex, and individuals can have multiple and diverse needs, which makes the application of laws that protect their rights difficult. For example, people with temporary cognitive impairment can face the challenge of suddenly becoming subject to mental health legislation, under a temporary application of Adults with Incapacity legislation or Emergency Detention Certificate. Due to the rapid nature of the emergency deprivation of liberty, and other rights, it is

also essential that regular mental health assessments be available to measure capacity, as the capacity to make decisions can change rapidly and can apply to some decisions and not others. Related to this, regular training and support for relevant professional teams is needed to ensure that the staff involved have sufficient knowledge and skills to implement the legal framework in a way that reflects the changing needs of individuals.

Supported decision making

8. It was noted that many of the issues in areas linked to 'supported decision making' are the result of poor practice and not necessarily inadequate legal frameworks. It was noted that the UN Convention on the Rights of Persons with Disabilities does not mention supported decision making; rather, it states that 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.'⁴ In contrast, Scottish law already makes some allowance for the concept of supported decision-making. The legislation states that consideration of 'the present and past wishes and feelings of the adult so far as they can be ascertained' should be taken into account when considering any intervention.⁵ The problem appears to lie within its application in practice. For example, in advance statements, one of the issues highlighted in the consultation paper is that people feel they are often 'ignored by professionals.' It has been repeatedly emphasised that, for the law to be effective, resources and appropriate staff training must be in place to ensure that the law is being adhered to in the delivery of support services as detailed in the paragraph below. However, the Roundtable participants still welcome the application of the disability convention principles; they only seek to point out that the law in itself is not necessarily a barrier to upholding a person's rights.

² Scottish Government (2004) Mental Health Act- What's it all about? Introduction. [online] Available at: <https://www.gov.scot/publications/new-mental-health-act-whats-short-introduction>

³ SAMH (not dated) Scottish Mental Health Law Review Call for evidence – SAMH submission [online] Available at: https://www.samh.org.uk/documents/Scottish_Mental_Health_Law_Review_-_SAMH_Response.pdf

⁴ United Nations (UN) Convention on the Rights of Persons with Disabilities Article 12 – Equal recognition before the law [online] Available at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html>

⁵ Adults with Incapacity (Scotland) Act 2000 [online] Available at: <https://www.legislation.gov.uk/asp/2000/4/section/1>

9. The Roundtable participants generally agreed that mental health and capacity training for staff supporting individuals who lack capacity would be beneficial in ensuring the rights of these individuals to make decisions are upheld. According to the Scottish Social Services Council (SSSC), there is currently no requirement for care or support workers to be trained in mental health awareness, nor to acquire any qualifications to start their careers. Whilst this may be acceptable in the first stages of employment, there does not appear to be any specific requirement for mental health training throughout a support worker/carers career.⁶ Capacity is not static; at times, a person who is deemed to lack capacity can still have the ability to make decisions about their care and treatment. Having a workforce equipped to recognise changes in a person's ability to make decisions is absolutely vital if we want to ensure that their rights are being protected. It would also aid in ensuring the law is applied in a person-centred and flexible way, particularly if the workforce understand the legalisation as guidelines for their practice.

10. Commentators in the group reported that people who attempt to access support could often find themselves confused with the number of agencies linked to the mental health support landscape. It was recommended that a centre of excellence on supported decision making should be considered to improve access to information and support.

11. The group welcomed the proposals for opt-out independent advocacy and agreed that this would help protect the rights of those who require support to make decisions. We were pleased that this recommendation from the Rome Review will be extended to all people subject to Mental Health and Capacity laws.

The role and rights of carers

Mandatory training

12. The participants fully support mandatory training for both paid and unpaid carers. One participant who works for an organisation that employs carers mentioned that they asked carers who work for them about their thoughts on mandatory mental health awareness training during group support discussions, with many appearing to support the idea. It was noted that this would not only be helpful for carers to improve their practice but could foster an awareness of when they require mental health support themselves. Around 55% of carers surveyed across the UK in 2015 reported suffering from depression due to their caring role.⁷

Ensuring carers are respected and value

13. The group agreed with the finding set out in the consultation paper that carers often feel 'excluded' from the care and treatment of their relatives. Organisational representatives noted that many carers they had spoken to had felt their opinions on their relatives' care and treatment were seldom listened to despite them having an intimate knowledge of the person they support. Section 27 of the Carers (Scotland) Act 2016 states that carers should be 'involved' in carer services.⁸ This again suggests that many of the problems in mental health services are related to the poor practice of the law and not necessarily inadequate protection within the law itself.

14. It was also conveyed that it is important to remember that the term 'carers' is broad; they are not a homogenous group of people. We, therefore, need to respect and value the group's diversity when offering training or support. For example, the support for young carers should be different from that of an adult carer who works within a service. The cultural backgrounds of carers should also be considered, with reports suggesting that the concept of 'young carer' is not understood by many BAME communities and there is often a stigma attached to seeking support for mental health issues.⁹ We therefore must ensure we do not misjudge the support that is needed, and that we are sensitive to cultural differences when we develop policy.

⁶ For further information on qualification requirements see: <https://www.sssc.uk.com/careers-and-education/qualifications>

⁷ Mental Health Foundation. (2016). Fundamental Facts About Mental Health 2016 [online] Available at: <https://www.mentalhealth.org.uk/sites/default/files/fundamental-facts-about-mental-health-2016.pdf>

⁸ Carers (Scotland) Act 2016 [online] Available at: <https://www.legislation.gov.uk/asp/2016/9/section/27/enacted>

⁹ Barnardo's (2019) Caring Alone Report: Why Black, Asian and Minority Ethnic young carers continue to struggle to access support [online] Available at: <https://www.barnardos.org.uk/sites/default/files/uploads/Barnardos%20Caring%20Alone%20report.pdf>

Other comments

15. The discussion emphasised the importance of ensuring that services have the resources to fully implement policy related to meeting the needs of carers. It was argued that funding would be an important consideration in order for mandatory training and adequate support to be implemented.

Human rights enablement

16. The group was pleased to see the proposals on Human Rights Enablement and agreed with the framework set out in the consultation. The participants agreed that an accurate and comprehensive understanding of people's situations, needs and values will aid in the protection of their rights.

17. However, concerns were raised as to whether the Ministry of Justice's proposals to repeal the Human Rights Act and replace it with a Bill of Rights has the potential to conflict with the proposals set out in this Law Review. The House of Commons Committee on Human Rights has recently issued a report warning that the UK Government's proposals to reform the Human Rights Act will be a 'weakening' of people's rights.¹⁰ In addition, with healthcare being primarily an area of law under the devolved government's remit, it is worth noting that the RSE has also warned that the reforms to the Human Rights Act (1998) have the potential to conflict with devolution.¹¹

18. Furthermore, the group expressed their concern about the overall impact the potential weakening of human rights may have on people who lack capacity. Notably, the context of recent reports suggests that there may have been breaches of human rights during the Covid-19 pandemic when patients who lacked capacity were discharged from the hospital to care facilities. It has been reported that the question remains as to whether the correct legal procedures were followed to gain consent for the transfers.¹²

Reduction of coercion

19. The proposals in the consultation paper regarding the reduction of coercion were widely accepted across the group. In particular, we were pleased that the proposal accounts for forms of involuntary care and support and not just involuntary treatment.

20. It was noted that the poor decision-making practice that can lead to harmful coercion might be linked to staff cultures in care settings. Therefore, we agree with the consultation paper's statement of it being a 'systemic issue' that needs addressing. It was argued that more Mental Health Officers (MHO) should be on hand to help tackle this issue. According to current legislation, local authorities should have a 'sufficient' number of officers.¹³ However, reports suggest there are still not enough to carry out the work required to protect people's rights.¹⁴ This echoes the previous point above that often the problem does not lie in a lack of legislation but inadequate implementation due to lack of resources and/ or poor practice.

21. In addition, there should be a comprehensive review of hospital wards/care homes to understand what decisions are being made for people. This will help to address workplace cultures where staff limit a person's autonomy with no clear guidance on when deprivation of liberty is justifiable.

Accountability

22. The group agreed with the consultation paper's statement that a robust accountability framework is crucial for a human rights-based approach. People must understand their rights and have a clear route to seek justice when their rights have been violated.

¹⁰ Joint Committee on Human Rights (2022) Human Rights Act Reform [online] Available at: <https://committees.parliament.uk/publications/9597/documents/162420/default/>

¹¹ The Royal Society of Edinburgh (2022) Human Rights Act Reform: A Modern Bill of Rights: Royal Society of Edinburgh Response [online] Available at: <https://rse.org.uk/wp-content/uploads/2022/04/RSE-AP-Human-Rights-Act-reform-2022.pdf>

¹² Law Society of Scotland (2020) Evidence required to show lockdown hospital discharges were lawful [online] Available at: <https://www.lawscot.org.uk/news-and-events/law-society-news/evidence-required-to-show-lockdown-hospital-discharges-were-lawful/>

¹³ Mental Health (Care and Treatment) (Scotland) Act 2003 [online] Available at: <https://www.legislation.gov.uk/asp/2003/13/section/32>

¹⁴ The Improvement Service (2018) ELECTED MEMBER BRIEFING NOTE Scottish Mental Health Strategy [online] Available at: https://www.improvementservice.org.uk/_data/assets/pdf_file/0017/8333/em-briefing-mental-health-strategy.pdf

Increased powers for the Mental Health Tribunal

23. Within the group, there was more of a nuanced view around strengthening the powers in the Mental Health Tribunal to order specific care or support. Whilst some agreed it would be a welcome change, others questioned the culture that characterises such tribunals. It was argued that the tribunals do not always get it 'right,' and users have reported a failure to understand the views of those who access their service. This appears to be an issue mirrored across the international landscape of mental health tribunals. A 2019 international literature review questioned whether tribunals are operating in compliance with international human rights standards.¹⁵ Although this is not specific to Scotland, it calls the creation of greater powers into question when regarded alongside the findings from this roundtable. There is therefore a need for reassurance that the Tribunal's culture will not impede effective decision making nor infringe on service users' rights.

Complaints process

24. It was suggested that, in order to foster a more effective and meaningful complaints process, it needs to be more accessible, transparent, and independent for people who wish to challenge decisions. It was noted that complaints made to local authorities are often addressed internally in the first instance, even in cases where the complaint is against the local authority itself. It was noted that although the decision can be appealed and the case taken to the ombudsman, this is often a painful experience for those who submit a complaint. Given that the individuals involved are often those whose capacity may be reduced due to mental health and health difficulties, the barriers to pursue complaints are significant.

25. It is imperative that more work be done to understand the complainant's lived experience and perspective in order to design a more effective process.

Collective advocacy

26. The group welcomed the proposals on collective advocacy. It was conveyed by commentators from an advocacy organisation that they often come across people who find it difficult to speak up for themselves when they do it alone. In contrast, a collective voice can improve their confidence and likelihood of speaking up. However, it was suggested that the approach towards this needs to protect the independence of advocacy organisations.

Further comments

27. The importance of a Mental Health Commissioner was emphasised, with this being seen as a clear line of accountability. However, it was also argued that there should be a clear line of accountability established for people with autism and learning disabilities. It was recommended that the government take a closer look at the recommendation of a dedicated commissioner, as suggested during the 'Our Voice Our Rights' campaign.¹⁶

Children and young people

28. The group agreed with the consultation paper's assessment of children's mental health services. It was the view of participants that the services are indeed under a significant amount of pressure and are not meeting the support needs of children who access their services. They recommended that there needs to be more support in schools and within the health system to address the diverse needs of children with mental health issues which the group hopes will be established with the proposals of a human rights-based approach. It is important to understand that children and young people have specific developmental needs and as such the legislation and practice need to consider these carefully. Related to this, regular staff training in relevant departments/ services supporting young people needs to be adequate and resourced.

¹⁵ Macgregor, A. Brown, M. Savert, J. (2019) Are mental health tribunals operating in accordance with international human rights standards? A systematic review of the international literature. [online] Available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/hsc.12749>

¹⁶ For more information on the 'Our Voice Our Rights' campaign: <https://www.autism.org.uk/what-we-do/news/scotland-urges-for-commissioner#:~:text=National%20Autistic%20Society%20Scotland%2C%20ENABLE,the%20forthcoming%20Scottish%20Parliamentary%20election>



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