Review of Mental Health and Incapacity legislation in Scotland

Background

On 19th March 2019, the Minister for Mental Health, Claire Haughey, announced an overarching review of the mental health legislative framework. John Scott QC will chair this independent review.

Terms of Reference

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 give 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:

- 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.

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