

Scottish Mental Health Law Review: Our Response

June 2023

Scottish Mental Health Law Review: Our Response

A response to the independent review of mental health, capacity and adult support and protection legislation, chaired by Lord John Scott KC.

28 June 2023

Ministerial Foreword



Foreword from the Minister for Social Care, Mental Wellbeing and Sport

Back in 2019, the then Minister for Mental Health commissioned an independent review, chaired by Lord Scott KC. Its purpose was to look at where we are and to help us to do better at enhancing the rights and protections of people subject to mental health, incapacity or adult support and protection legislation, in line with developments in international human rights standards. At the time of their enactment, this legislation was recognised as world-leading, but time moves on, and it is right that we look again, in line with our wider commitments to reducing inequality and advancing the human rights of everyone in Scotland.

I would like to take this opportunity to thank John Scott and his team for their hard work, dedication, and commitment to this process over a period of three years. I am especially grateful for the efforts that were taken to adapt to the challenges presented by the Covid-19 pandemic and to continue to engage with so many stakeholders, particularly those with lived and learned experience of our mental health and capacity laws, to ensure that the report reflects their views and experiences. The final report is a substantial contribution to our understanding of human rights within the mental health system. It sets out an ambitious vision for change, a vision where the individual is firmly at the centre with a

Scottish Mental Health Law Review: Our Response

renewed emphasis on decision-making, autonomy, and support, when needed.

The Review recognised that taking forward its recommendations would be a considerable task. While some of the recommendations could be achieved without legislative reform and could start in the short term, some of the changes envisaged will require years to develop detailed legislation and address the culture change needed. Some of the proposals require further in-depth consideration about how they could work in practice. We agree that it will be a sizeable task, but we are not starting from scratch. The Review's recommendations are strongly aligned with many existing Scottish Government commitments to advance human rights in Scotland; to change the way we provide for and meet the needs of our communities and, importantly, with the aims of our new Mental Health and Wellbeing Strategy with its focus on the principles of prevention and early intervention in mental health support. There are substantial opportunities to bring about the transformation that is needed. Taken together, these developments provide us with a solid foundation for change.

In responding to the Review, the Scottish Government intends to establish a new Mental Health and Capacity Reform Programme to coordinate and drive further change and improvement over time in line with the Review ambitions. This necessarily long-term programme will modernise our legislation to better reflect international human rights standards, particularly the United Nations Convention on the Rights of Persons with Disabilities. It will also seek to bring about improvements across mental health services and strengthen accountability for upholding and fulfilling human rights.

Giving people a voice and control over their own lives, will be at the heart of this work. Alongside efforts to strengthen legislation over time, our initial priorities will include a focus on supporting decision-making and reducing non-consensual treatment and practices, including seclusion and restraint over time. As well as supporting improvements in policy and practice to further embed a human rights culture across mental health services.

The Review has provided us with a strong starting point, and I look forward to working, in partnership, to deliver on the aspirations it set out and to ensure that our mental health and capacity legislation continues

Scottish Mental Health Law Review: Our Response

to lead the way in respecting and fulfilling human rights while providing the necessary care and support to those who need it.

A handwritten signature in grey ink, appearing to read 'Maree Todd'.

Maree Todd MSP
Minister for Social Care, Mental Wellbeing and Sport

Scottish Mental Health Law Review: Our Response

Introduction

The Scottish Mental Health Law Review (SMHLR) was commissioned in 2019. It was tasked with considering ways to better realise and protect human rights through our mental health, incapacity and adult support and protection legislation. The Review also looked at ways to remove barriers to care and support for people currently covered by the legislation. The Review's final report was published in September 2022 and recommends a series of changes to legislation. It also proposes a range of changes to policy and practice in the short, medium, and longer term. The Review's final report can be accessed here: [Scottish Mental Health Law Review](#).

The Scottish Government has considered the report and listened to stakeholder views on its recommendations. We now intend to establish a long-term programme of improvement and reform. This initial response describes our vision for change and outlines our priorities for reform. It provides a high-level response to the main conclusions of the Review and sets out our intended approach to delivery, as well as an indication of our intended timescales for implementation.

This response is the start of a process of broader engagement to develop the programme, which will commence over the coming months. This will help us to progress and refine the detail of our plans and to support progress in putting these into action.

A note on terminology

We refer to the term 'mental disorder' throughout this response, as it is the current legal definition used within the Mental Health Act. However, we recognise that this language is regarded by many as stigmatising and offensive. It is likely that the use of this term in legislation will change as part of our future plans for reform.

Background – the Review and its recommendations

The SMHLR was an overarching review of the mental health and capacity legislative framework. The principal aim was to enhance rights and protections for people who may be subject to the existing provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003; Adults with Incapacity (Scotland) Act 2000 and Adult Support and Protection

Scottish Mental Health Law Review: Our Response

(Scotland) Act 2007, as well as to remove barriers to support for those caring for their health and welfare.

It is right that these laws should be kept under periodic review, and the Review noted that in the years since the legislation was passed there have been a number of developments in culture, thinking and the classification of mental health and human rights law. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) has been a catalyst in promoting the rights of people with disabilities, both mental and physical, alongside the European Convention on Human Rights (ECHR). The Review considered what is required to achieve the highest standards of mental health and to ensure the legislative framework reflects people's social, economic, and cultural rights, as well as UNCRPD and ECHR requirements.

The Review follows from, and builds on, previous work in this area, including the Scottish Law Commission Report on Adults with Incapacity (2014); the 2018 Scottish Government consultation on the Adults with Incapacity (Scotland) Act 2000; the independent review of learning disability and autism in the Mental Health Act (Rome Review); and the independent review into the Delivery of Forensic Mental Health Services (Barron Review).

In its widest sense, the Review sets out an agenda for enabling the greater realisation of human rights across mental health services. In doing that, the recommendations centre around three main themes:

- Strengthening the voice of people who use services and those who care for them.
- Reducing the need for coercion in the system
- Securing rights to the help and support needed to live a good life.

The Scottish Government supports these broad aspirations. However, the final recommendations range in scope from aspirational proposals for whole-system change to calls for specific technical or operational changes to existing legislation. Many of the proposals will require further detailed consideration and policy development to clarify a way forward.

The final report set out over 200 recommendations for the law, policy, and practice. This includes:

Scottish Mental Health Law Review: Our Response

A new purpose for the law:

- A new purpose for mental health and capacity law to ensure that the human rights of those covered by the legislation are respected, protected, and fulfilled.
- Replacing the definition of mental disorder within mental health and capacity law
- A long-term aim is to fuse mental health and incapacity legislation, with a short-term focus on aligning human rights principles.

Progressive realisation of human rights:

- New legal duties and minimum core obligations on public bodies providing mental health and associated services.
- Accessible, affordable, timely and effective remedies and routes to redress where rights are not upheld.
- A new framework for human rights (Human Rights Enablement); supported decision-making (SDM) and tests of autonomous decision-making (ADM)
- A new legislative framework for when people are deprived of their liberty.
- Specific rights protections and improvements for children and young people; people within the forensic mental health system and adults with incapacity.
- Training for our workforce(s) and development and promotion of best practice engagement frameworks
Provision of trauma-informed and recovery-focused community based and peer support, and wider reform to reduce non-consensual treatment and practices.

Improved Accountability and Scrutiny:

- A systematic improvement programme to reduce coercive treatment.
- Strengthened regulation and scrutiny of mental health services.
- Improved data collection

The Case for Change

The Scottish Government supports the broad aspirations of the SMHLR. Whilst our mental health and incapacity laws are built on human rights

Scottish Mental Health Law Review: Our Response

principles, we recognise that there is a need to update these if they are to keep pace with developments in international human rights standards. The Review also makes the case for improvements to bring wider policy and practice more closely in line with current human rights standards.

The Review shows that, without the right support at the right time, people can struggle to express or make an informed decision about how they want to live and manage their own affairs: whether that be where they live, how they manage their money or access any care or treatment they might need. We need to address these challenges for the future. We know that, across our population, many people are now living with more complex and enduring mental health needs. This is alongside rising rates of dementia and other conditions that impact on people's ability to live independently and safely. We agree that more can be done to ensure that rights are respected, protected, and fulfilled in these circumstances.

The Review proposed a shift in the focus of the law towards greater support for individual autonomy and the realisation of rights as its primary purpose. It also recognised the tension between the interpretation of some aspects of human rights set out in the UNCRPD and the ECHR. Whilst the former emphasises the right to independent living and autonomy for the individual, the Review concludes that there will still be times when it will be necessary to act without a person's consent, including: to prevent harm; to act for someone's wellbeing or to give effect to a person's will and preferences, as they have previously stated but can no longer independently express.

The Review was clear, however, that such measures should be a last resort and makes a case for greater focus on strategies to avoid circumstances where non-consensual care and treatment may be required. We agree that there are times where it may be necessary to intervene in a person's life without their consent, but only as a last resort and with appropriate support and safeguards in place.

It is also recognised that greater priority should be given to people's feelings and preferences in decisions about their life care and treatment. The Review makes a strong argument to further the development of supported decision-making in Scotland to try to achieve this and secure the best outcomes for people who lack capacity. We agree that the

Scottish Mental Health Law Review: Our Response

voice of those using services should be strengthened and will consider how that can be best achieved and embedded going forward.

The Review notes that further co-ordinated work is needed across government to bring about positive improvement, and particularly to reduce as far as possible the need for non-consensual care and treatment. We agree that we need to better understand the increases in the use of mental health and capacity legislation and support the use of alternatives as far as possible.

It also highlights weaknesses in how existing equalities and human rights commitments are being upheld, particularly in circumstances where people face multiple disadvantages. The report brought forward new evidence that a person's individual and protected characteristics continue to have a significant effect on their mental health and wellbeing; how they might be treated as well as what services and support might be available within their home and communities. The report highlighted factors including a person's race and ethnicity, their age, sex or gender identity, whether or not they have a disability as well as whether or they live in a rural, island or urban community as particular risks. We agree that there is a need for even greater focus and effort to reduce inequalities in how people experience our systems and access their rights.

Given the scope and scale of the final recommendations, the Review ultimately proposed an incremental approach to reform, suggesting changes over the short, medium, and long term. In terms of legislative reform, it recommended that, while fusion of mental health and capacity law could be considered as a long-term aim, there may be value in delivering greater alignment of the legislation as an initial step. It recommends achieving this through introducing shared human rights principles and through the adoption of a Human Rights Enablement (HRE), Supported Decision-Making (SDM) and Autonomous Decision-Making (ADM) framework, whilst also delivering more immediate, shorter term, improvements that do not require legal reform or more complex policy change to implement. We agree that a staged approach to reform is necessary given the scope, complexity, and inter-related nature of the recommendations with other significant ongoing policy developments.

What are the opportunities for change?

Scottish Mental Health Law Review: Our Response

The Review's recommendations are already strongly aligned with existing commitments to advance human rights in Scotland and to change the way we provide for and meet the needs of our communities. Despite resource constraints, there are significant efforts already underway at national level to achieve many of the aspirations set out in the final report. The timing of the Review is beneficial and provides opportunities to support and deliver change, through influencing ongoing policy development, as well as considering new options for reform. We will ensure that the strategic links across all these areas of policy are made on an ongoing basis.

The Scottish Government is [consulting](#) on a new Human Rights Bill for Scotland. Proposals include the incorporation of economic, social and cultural rights - alongside specific protections for women, disabled people and people experiencing racism - and the introduction of a right to a healthy environment into Scots law, within the limits of devolved competence. That Bill proposes to build on the civil and political rights already protected through the Human Rights Act 1998 and the ECHR, as well as the children's rights to be incorporated through the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill.

The development of the National Care Service is also a bold commitment to make sure that everyone has access to high-quality community health, social work, and social care support when they need it. Crucially, the service is being co-designed with people who access community health, social work and social care support, their families, and carers as well as our workforce and third sector organisations. It provides significant scope for meaningful reform in the way people access their rights.

Our new Mental Health and Wellbeing Strategy sets out a long-term vision for change, building on the previous work to support recovery and renewal and strengthen mental health services, post-pandemic, through the actions set out in our Transition and Recovery Plan. The Strategy lays out our long-term approach to improving the mental health and wellbeing of everyone in Scotland. We will publish an initial Delivery Plan to complement the Strategy, which will be refreshed regularly.

Through our strategic approach to workforce planning, our aim is also to achieve a mental health and wellbeing workforce which is diverse,

Scottish Mental Health Law Review: Our Response

skilled, supported, and sustainable. This will ensure service delivery meets the mental health needs of the people of Scotland and supports the Strategy's vision.

The Adult Support and Protection Improvement Plan continues to undertake activities focused on assurance, governance, data & information, legislation, policy and guidance, practice improvement and prevention to improve support and protection for adults at risk of harm. Work includes the development and roll out of a revised minimum data set to inform improvement at local and national level, undertaking evidence reviews on key processes, and development of online training and resources for practitioners.

As part of the Plan, the Scottish Government published a revised Code of Practice, along with guidance for General Practice and for Adult Protection Committees, in July 2022. These documents reflect changes in legislation and practice and provide enhanced information to aid practitioners in supporting and protecting adults at risk of harm. A National Implementation Group has been formed to develop and support practical application of the guidance. This Group has members from a wide range of organisations who all work together to drive and support improvement nationally within the adult support and protection community.

The SMHLR follows wider related policy developments including broad cross-government work to address systemic issues for people with complex care and learning disabilities through the Coming Home Implementation plan. This plan sets out measures to reduce complex delayed discharge and provide care closer to home for people with a learning disability and complex needs. It also comes alongside work to develop proposed legislation to enhance and protect the specific rights of autistic people, people with a learning disability and other neurodivergent conditions.

The Independent Inquiry of Mental Health Services in Tayside previously noted that at a national level, there is limited scrutiny and oversight of mental health services in Scotland and recommended that the Scottish Government undertake a review of scrutiny and assurance. We have responded to that recommendation by commissioning a Review of Mental Health Scrutiny and Assurance, which will publish in Summer 2023. The findings from that Review will be considered alongside the

Scottish Mental Health Law Review: Our Response

SMHLR and the ongoing Independent Review of Inspection, Scrutiny and Regulation led by Dame Sue Bruce (due to publish in September 2023), to develop a strategic action plan to strengthen the collective scrutiny of mental health services.

There is also a wide range of work underway to improve mental health support including a programme of improvement to child and adolescent mental health services (CAMHS); the development of Mental Health Pathways for people experiencing crisis and distress and the ongoing implementation of the Suicide Prevention Strategy.

Significant progress is being made to improve unplanned and emergency mental health care. Through the Redesign of Urgent Care Programme, the Scottish Government is working with partners, including Health Boards, Police Scotland, and the Scottish Ambulance Service, on improving unplanned access to urgent mental health assessments.

The Enhanced Mental Health (EMH) pathway for those in distress or in need of mental health support who come into contact with Police Scotland, or the Scottish Ambulance Service is now well established. This pathway enables emergency calls received by emergency responders, where callers are identified as requiring mental health advice to be directed to a dedicated Mental Health Hub within the NHS 24 111 service. The Hub is staffed by Mental Health Practitioners and operates on a 24/7 basis, improving and simplifying the care pathway for people experiencing mental illness/distress and poor mental health and well-being who present to either the Scottish Ambulance Service or Police Scotland.

In addition, each Health Board is providing access to a mental health clinician, accessible to police officers, 24 hours a day, 7 days a week for those who require urgent mental health assessment or urgent referral to local mental health services. The aim is to support Police Scotland's Community Police Officers and Police Custody Officers with presentations where a person is experiencing distress or a mental health crisis and may need specialist assessment or intervention. Similar pathways have been established for the Scottish Ambulance Service in some Health Boards and are in development for the others.

Police Scotland have also been key national partners in the development and implementation of the Scottish Government Distress

Scottish Mental Health Law Review: Our Response

Brief Intervention (DBI) programme. This can provide up to two weeks of personalised, compassionate support to people who present to the police and other frontline services in emotional distress but who do not require emergency clinical intervention. In addition to referrals by officers working in communities, it is now possible for police call handling centres to refer people to DBI, via the NHS24 Mental Health Pathway. This is being supported through an active programme of DBI briefings and awareness raising, which enables Police Scotland staff to play an important part in helping those in distress; future training plans, which are in development, will enhance this further.

There are also wider strategic and policy developments underway which support the rights of people covered by the current legislation. Our Vision for Justice in Scotland further sets out that justice services must be person centred and trauma informed. We are also working to reduce the numbers of people experiencing crisis and distress coming into contact with the police or entering police custody centres when they could be more appropriately supported within the community.

A Cross-Portfolio Ministerial Working Group on improving the healthcare for our prison population is being established with health and justice Ministers. Its work will cover the mental health, physical health, substance use, and social care needs of this population.

We have published a new Dementia Strategy, which sets a vision where people living with dementia have their strengths recognised, rights upheld, and are supported to live an independent life.

Work is ongoing to make improvements to the forensic mental health system and the way in which we are upholding human rights for patients, including in response to the Barron Review.

Additionally, we are introducing new standards and specifications for mental health services and psychological therapies, supported by a longer-term focus on recovery and embedding trauma-informed practices.

The SMHLR recommendations have, in many cases, already informed and influenced the development of ongoing policy in these and wider areas of policy development. We will also continue to consider the

Scottish Mental Health Law Review: Our Response

recommendations alongside proposals set out in previous reviews, particularly the Rome Review and Barron Review.

What we learned from our listening exercises

To shape this high-level response to the SMHLR, we met with a range of stakeholders, including those representing lived and learned experience of the system. These meetings were designed to hear views on the final report, its recommendations and identify priorities for change. We also attended wider stakeholder meetings and network events to hear people's views about the SMHLR final report.

In general, we heard strong support for the ambition and overall direction of travel set out by the SMHLR and a desire to see progress towards this, together with meaningful lived experience involvement. Stakeholders noted a particular need for AWI and guardianship reform. This was almost universally identified as the priority for legislative reform, and for embedding of human rights-based approaches. There was also recognition of the need to strengthen accountability across the system with concerns about the perceived fragmentation of the current approach to regulation and scrutiny of services. There was also agreement on the importance of supporting carers' role and rights, including the potential for families, friends and wider support networks to enhance our approach to early intervention and prevention and to whilst balancing with the rights of the individual and their autonomy. In addition to these points, a broader range of views were also expressed on some of the more specific technical and policy reforms proposed in the final report.

A number of people with experience of caring for or supporting people with dementia and other similar conditions and human rights organisations, highlighted concerns about the way that the Adults with Incapacity Act currently operates. The absence of a Deprivation of Liberty framework within Scots law was highlighted as a particular concern, with many stakeholders wanting action to progress recommendations in these areas as a priority.

People with a learning disability, autistic people and many organisations who advocate for or on behalf of them, raised concerns that the SMHLR recommendations would mean that people with a learning disability or autistic people could still be subject to detention and non-consensual

Scottish Mental Health Law Review: Our Response

care and treatment under reformed mental health law. This is because the Review recommends their continued inclusion within the group of people who the Mental Health Act would apply to. There was strong support amongst these groups for the removal of learning disability and autism from any definition that replaces 'mental disorder' as part of any future reform to ensure that they are no longer within the scope of the Mental Health Act.

We recognise these concerns and note that the SMHLR has taken a different approach on this issue from that of the Rome Review which preceded it. As a result, there was a strong desire for the recommendations of the Rome Review to be considered alongside the SMHLR recommendations and for Scottish Government to work with people with lived as well as learned experience of the system.

In contrast, others supported the SMHLR recommendations to change the purpose and scope of the law and they supported the proposed new approach to human rights. They felt this would create a more effective human rights basis for our legislation, in line with the UNCRPD. It was also unclear what the implications of alternative options would be or what legislative framework people with a learning disability or autistic people who require care and support would prefer or find most effective for upholding their rights in the future.

Some of those with lived experience felt that the SMHLR did not go far enough in recommending the end to all forms of non-consensual or compulsory care and treatment. They felt that this was not in line with human rights standards. In contrast, others with lived experience felt that there are times where non-consensual care and treatment can be necessary and that the recommendations would help to strengthen safeguards, whilst retaining provisions to provide non-consensual care and treatment where this was deemed to be necessary or beneficial for the safety of themselves or others.

There were also questions about the level of investment required to fully deliver on the ambition set out in the Review, at a time when resources are constrained.

Concerns were additionally raised about the implications of the recommendations for the diverse workforces who deliver our mental health and social care support and services. It was recognised that

Scottish Mental Health Law Review: Our Response

many of the proposed changes would place additional pressure or demands on their capacity or require further training, support, and skills development to deliver effectively. People were particularly concerned about how this would be achieved in practice and what the resource implications would be.

We also heard concerns about introducing significant further change at a time when there is already wider transformation underway across our health and social care systems. It was felt that some of the proposals and a focus on further reform at this time could increase pressure on service delivery. Stakeholders were also keen to understand how the Review recommendations would fit within developments across the wider health and social care landscape, some of which have been noted earlier, and sought assurance that appropriate links will be made across government to ensure coherent and well-managed change.

Equally, stakeholders recognised that a long-term programme of reform will be needed, and that legislative reform will necessarily take time. There was support for a staged approach, working in partnership. There were also concerns about the potential for unnecessary delay in some areas and calls to make progress in the shorter term on areas of reform that have broad stakeholder support and do not require substantial change to the law.

We will build on this early engagement and continue to work with stakeholders to scope and agree a way forward. What is clear is that there are areas where change and reform is more pressing, coupled with a strong consensus to see early progress made. While other areas need further work and detailed consideration before reaching a decision about whether, or how, to proceed.

A Programme for Reform

Since the publication of the Review, the Scottish Government has considered the SMHLR proposals in detail. Our internal analysis has looked at factors, including: how far the proposed reforms will support alignment with international human rights standards; the potential contribution to our National Outcomes and public sector equality duties; the rationale and strength of evidence base provided for specific policy options and resource required to implement. This analysis, together with

Scottish Mental Health Law Review: Our Response

our early engagement with stakeholders, has informed our approach. There is also further work to do to better understand how we can best deliver the transformation needed, and the pace of change.

Summary of what we heard.

Some of the areas where there is a high level of consensus on the need for change include:

- The need to embed human rights within domestic law to better fulfil human rights.
- The need to strengthen practice and the importance of human rights-based approaches to care and support.
- The need to reform legislation to better protect the rights of adults who lack capacity including their financial and welfare rights and to support legal capacity.
- The desire to see more investment in community-based supports and services that enable people to live independent lives and to exercise autonomy and control.
- The need to strengthen access to independent advocacy.
- The need for better recognition and support for the role of families, unpaid carers, and wider networks
- The need for stronger systems of scrutiny and accountability

Some of the areas where our engagement suggests further work is needed include:

- To consider the need for a revised definition of ‘mental disorder’ and replacement of the Significantly Impaired Decision Making (SIDMA) and capacity tests in current law with an autonomous decision-making (ADM) test
- Work to better fulfil the rights of people with a learning disability, autistic people, and people with other neurodivergent conditions within our developing legal frameworks.
- Consideration of the benefit of fusion versus alignment of legislation
- Work to better regulate and scrutinise the use of non-consensual care and treatment.
- Consideration of how far someone can be supported to have legal capacity and express their will and preference when they are unable to make or express an autonomous decision.

Scottish Mental Health Law Review: Our Response

In response to the ambition set out in the Review, we propose to establish a new Mental Health and Capacity Reform Programme to drive further change and improvement in the system.

The Programme will aim to transform the way in which our laws, policies and practices improve people's lives and help to better realise human rights. Its aims are based on our analysis of the SMHLR recommendations and feedback from stakeholders. The Programme will particularly seek to provide more effective human rights safeguards where non-consensual care and treatment and other restrictive practices are in use and work with others to improve the legislative framework to realise these aims.

The Vision for Change

Our proposed vision for change will direct our work under the Programme and is as follows:

The vision

Our vision is that our mental health system* upholds human rights and enables people to live well, with choice and control over their own lives, as well as any care, treatment, or wider assistance they might need.

This means...

- Our laws, policies and practices are designed to give effect to the rights of people with mental illness and those who lack capacity.
- That anyone who receives mental health support must be treated fairly, with dignity and in line with their rights.
- People are supported to express what they need and to receive any care or treatment in line with their will and preferences.
- People receive support in the right way at the right time and using the least restrictive practices.
- There are strong mechanisms for accountability and effective safeguards in place to oversee the use of our legislation and delivery of mental health services.

Scottish Mental Health Law Review: Our Response

- We are demonstrating continuous improvement, underpinned by strong governance of the system.

*Our definition of the 'mental health system' is the laws, policies and practices that support people's mental health and wellbeing in Scotland. It includes the wider family and community-based networks and supports, as well as clinical services that assist people to live well and realise their rights and access any care or treatment they might require.

Proposed Programme Scope

The proposed scope of the Programme is as follows:

- Enhancing rights protections broadly for people who are experiencing mental illness and adults who lack capacity.
- A focus on reforming mental health and capacity law to better respect and uphold rights for people with a learning disability and autistic people.
- A focus on children and young people as well as older adults, and people within the forensic system.
- A focus on those at highest risks of marginalisation and exclusion including minority ethnic communities; women and girls, LGBT+ communities.

Taking the Review as a starting point for reform, we will:

1. Improve rights protections within mental health and capacity law to better align with international human rights standards.
2. Help to further embed a human rights culture across our policies and wider practices.
3. Ensure that there are clear legal safeguards and strong systems of accountability.

Scottish Mental Health Law Review: Our Response

What is our proposed approach?

We envision the development of a Reform Programme based on the following principles:

- A staged approach to law reform
- Whole system change approach.
- As far as possible, early action to address urgent issues.
- Co-ordinated across government and strong partnership working to address complex areas of change and reform.
- Lived experience voice and participation.
- Focusing resources on delivery and service transformation
- Enabling the workforce to embed and drive change.
- Focused on implementation and sustainable delivery.
- Monitoring our impact and capturing learning

Our approach will be to take forward a staged programme of legislative reform. Following the structure of the Review, the timescales for workstreams will be separated into short-, medium- and longer-term activity to support implementation over the next decade. We will work closely across adult support and protection, mental health, and adults with incapacity policy to ensure coherent reform across the legislative framework in response to the SMHLR.

At present there is insufficient information to fully assess the resource implications required to deliver on the ambitions set out in the SMHLR and to fully progress our early priorities. Our approach will therefore be managed, coherent and incremental and will support our developing understanding of how to deliver improvements over time. We will do this through establishing associated workstreams to improve policy, guidance, and best practice across the programme. Assessing the resource implications will be central to this.

We will work to meaningfully bring together those with lived experience of the system with those who lead, deliver, and oversee services along with legal experts, academics, and wider community organisations in pursuit of the transformations rights-holders want to see. To support effective progress and delivery we will focus on a number of core building blocks for change and reform that will underpin our work and support successful implementation.

Scottish Mental Health Law Review: Our Response

The Building Blocks for Change are:

- Human Rights culture
- Transforming services
- Skilled and supported workforce
- World leading legislation
- Participation and co-design
- Sustainable investment
- Governance and leadership

This approach and more detailed implementation plans will be developed over the coming months, in line with our identified priorities for inclusion within the programme.

What are our identified priorities?

There is clear stakeholder support for an approach that focuses on the most urgent priorities first. Our intention is to introduce progressive reform over time, in line with available resource and the capacity of mental health and care services to deliver safely and successfully.

Our high-level priorities for inclusion in a Reform Programme are as follows:

1. Adults with Incapacity Law Reform

We will work towards addressing long-standing gaps in the law to ensure stronger rights protections and safeguards. We will look at updating powers of attorney and the section 47 Certificate for medical treatment scheme. We will also aim to introduce wider technical changes to the legislation and consider opportunities to revise the principles, particularly so that they more clearly reflect the requirements of the UNCRPD.

Additionally, we will consider making smaller but significant amendments to the process of Guardianship to improve its efficiency. This will be a precursor to more wide-ranging changes that may be developed in the future. Within the AWI reforms we will develop a suite of options to address the Deprivation of Liberty in circumstances where people require non-consensual care and support but are unable to make

Scottish Mental Health Law Review: Our Response

decisions for themselves. Further consultation will be taken forward in the short term.

2. Supporting Decision-Making

Supported Decision-Making is an important part of shifting the way in which the system fulfils people's rights. Early work will review and build on existing practices, working with partners to support the development and roll-out of effective supported decision-making approaches. Based on learning and evaluation from this work we will consider whether a national framework or approach is needed.

We will also work with the Scottish Independent Advocacy Alliance, its members and organisations providing advocacy services as well people with lived experience of accessing services to help identify and address gaps and improvements in provision. This will identify how best to strengthen rights and access to provision. In addition, we will look to develop a consistent definition of 'Independent Advocacy'. Cross-government work in advocacy will be taken forward driven by the development of the National Care Service and consideration of the proposed Human Rights Bill.

3. Mental Health Law Reform

We will consider how best to reform the Mental Health Act to better align with developments in international human rights standards. Initial cross-government work will seek to ensure that our developing domestic human rights laws in Scotland effectively protect the specific rights of people with disabilities including those with mental illness and people who lack capacity. We will also consider whether specific changes are required to mental health law.

As an early priority we will work with partners to consider the definition of 'mental disorder' and reach a position on who should be within the scope of any future reformed Mental Health Act. This work will be undertaken alongside the development of proposed legislation to enhance and protect the specific rights of people with a learning disability, autistic people and people with other neurodivergent conditions, to ensure that our legislative framework provides effective rights protections for these communities. We will also consider whether there are changes that can be made over the shorter term to improve the current operation of the

Scottish Mental Health Law Review: Our Response

Mental Health Act and to strengthen safeguards when it is considered necessary to provide non-consensual care or treatment. This could, for example, include the consideration of improvements to provisions around named persons and advance statements.

In the medium to longer term, we will consider the implications of the developing Human Rights Bill. As part of this work, we will reach a position on whether or not to expand the purpose of the Mental Health Act to also provide a broader gateway to human rights, including social, economic, and cultural rights, as recommended by the SMHLR. In addition, we will consider the impact and practical implications of moving towards an autonomous decision-making (ADM) test in place of the current SIDMA test whenever a non-consensual measure is being considered.

4. Human Rights Enablement

We will commence early work to support improvements to the implementation of rights, including through supporting our health and social care workforces to understand and apply rights-based approaches in practice.

This will initially explore how the concept of 'Human Rights Enablement' could be practically implemented across the mental health system. This work will consider how this might be included as part of our broader approach to human rights implementation, for example, through the development of the Human Rights Bill and the National Care Service.

We will also explore how a HRE approach might support wider practice reforms within health and social care, such as the development of Getting it Right for Everyone (GIRFE) as well as be better embedded within pre-existing practice models.

5. Enhancing carers' rights and role

We will work with partners to strengthen the role of unpaid carers in supporting people to maintain independence and access their rights. An early priority will be to include a focus on carers in our work on Human Rights Enablement as well as within Supported Decision Making. We will also work to advance the rights of carers in practice.

Scottish Mental Health Law Review: Our Response

We are providing funding for NHS Education for Scotland to enhance the existing EPiC learning resource and to explore what further development of this training might be needed to meet the recommendations in the SMHLR to develop Carer Awareness Training in order to raise awareness of carers' rights among all staff working with people with mental or intellectual disability across health and social care settings. This will be considered as an option for early delivery.

6. Reducing Coercion across the system

As an initial step we will scope a programme of work with the aim of reducing the use of coercion and restrictive practices, such as seclusion and restraint, over time. This will be broad and cross-cutting work bringing people together across the system and including consideration of the role of legislative reform, the development of regulation and scrutiny as well as opportunities for improved data collection and monitoring.

The scoping exercise will also look at the role of community-based services and strategies to enhance early intervention, prevention and crisis and distress interventions along with changes in practice to support recovery. We will consider what is required to inform our decision-making in the first instance and to collate insights and analysis that can inform our policy development in the medium term.

7. Strengthening Accountability, and Scrutiny in the mental health system

We will consider the SMHLR recommendations in relation to strengthening accountability alongside the findings and recommendations from the Mental Health Scrutiny and Assurance Review (due to publish in Summer 2023), and the Independent Review of Inspection, Scrutiny and Regulation led by Dame Sue Bruce (due to publish in September 2023).

We will develop a strategic action plan to strengthen the collective scrutiny of mental health services, in response to the findings of these reviews. The development of the proposed Human Rights Bill may further help to ensure that there are routes to remedy available in situations where human rights have potentially been breached. Work is

Scottish Mental Health Law Review: Our Response

already under way exploring the potential role of complaints handling bodies and wider scrutiny bodies in this changing landscape.

Initial Timescales for Delivery

Below are our starting points for delivery under these seven priorities, with an indicative timescale for when initial work will be delivered. More detailed delivery and implementation plans will be produced to support the roll-out of the Programme.

Initial Activity	2023-26	2026-29	2029+
Work to consider how long-standing gaps in the law might be addressed to ensure stronger rights protections and safeguards for adults with incapacity.	X		
Identifying and supporting the roll-out of effective Supported Decision-Making approaches	X		
Testing how the concept of ‘Human Rights Enablement’ can be practically implemented.	X		
Scoping and developing potential reforms to mental health law, including consideration of replacement for ‘mental disorder’.	X	X	X

Scottish Mental Health Law Review: Our Response

Identifying and addressing gaps in provision of independent advocacy	X	X	
Developing Carer Awareness Training and supporting the role of carers	X		
Developing a strategic action plan to strengthen the collective scrutiny of mental health services.	x	x	

How will we deliver?

The next phase of our work will support the development of the programme approach, including our proposed ways of working within government and with external partners to drive successful implementation. Initial work to deliver the priorities of the programme will be driven forward under three cross-cutting themes. These will help us to organise our approach to implementation.

Proposed Workstreams

1. Law Reform

This workstream will consider how best to amend and update legislation to give better and further effect to international human rights standards.

Scottish Mental Health Law Review: Our Response

It will also drive work to ensure that we have a co-ordinated approach to legislative reform across government.

2. Improving Services

This workstream will take forward our commitments to support the implementation of human rights in practice and to drive wider improvements to mental health services and services supporting adults who lack capacity.

3. Accountability

This workstream will focus on delivery of reforms to improve accountability within the system including work focused on data collection, monitoring and scrutiny and regulation.

Action at a national level will particularly be supported through the Mental Health and Wellbeing strategy, Delivery plan and Workforce Action Plan, the development of the proposed Human Rights Bill and the National Care Service as well as other connected programmes of reform within health and social care and government more widely.

We will work to deliver as far as possible through a shared programme approach across the mental health system. We will also need to work in partnership at national and local level to address the strategic challenges we face in delivering the objectives of this programme. This will include work to agree the best approach to delivery as well as to develop mechanisms for participation and engagement to reach consensus on the best options for future reform.

How will we know if we have been successful?

The programme objectives will be developed with stakeholders over the coming months. This will include work to look at how we can understand and measure the impacts of reform. Any reforms we introduce must demonstrate tangible improvements over time. They must ensure better outcomes for people, and show that our mental health and capacity laws, policies and practices are increasingly based on, and further advancing, recognised human rights standards. At the same time, we must ensure that people who require support receive this at the right time and in the right way.

Scottish Mental Health Law Review: Our Response

A goal for this programme will be to ensure that we know when non-consensual treatment and other restrictive practices are being used and progress is being made in reducing these approaches. We will also be working to demonstrate that our regulation and scrutiny bodies are identifying human rights issues and that services at national and local level are demonstrating effective action to address concerns quickly.

Success will mean that individuals will have a greater knowledge and understanding of their rights and what to do if they feel their rights are not being upheld; they will be supported to make or express their choices about any treatment, care or support they might need.

An ultimate aspiration will be that there is greater trust in our mental health system and a broader understanding of the system, extending beyond clinical services and encompassing broader supports in the community.

What are the next steps?

Work will continue at pace to establish this approach and to work in partnership to support successful implementation. Initial work will develop the delivery plans and 'route-maps' to reform for our early priorities and will support implementation of the approach.

Work will also commence to further consider proposals that are more complex in nature to develop suitable policy options for reform that can be progressed by this programme.

Our intention is to further refine and develop the programme aims, objectives and outcomes with partners and to develop a theory of change for mental health and capacity reform. We will also agree our governance approach. This will need to provide strategic oversight and leadership.



© Crown copyright 2023

OGL

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80525-956-5 (web only)

Published by The Scottish Government, June 2023

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1304782 (06/23)

W W W . g o v . s c o t