

Briefing for the Public Petitions Committee

Petition Number: [PE 01667](#)

Main Petitioner: W. Hunter Watson

Subject: Review of Mental Health and Incapacity legislation

Calls on the Parliament to urge the Scottish Government to conduct a wide review of Scottish mental health and incapacity legislation and, when doing so, to take due account of recent developments in international human rights law.

Background

The Petitioner has submitted two previous petitions ([PE867](#) and [PE01494](#)) on the issue of surreptitious treatment of individuals, such as those in a care home with advanced dementia. Both of these were concerned that current legislation was not sufficient to protect the rights of the individual in refusing treatment.

The first petition was closed in April 2008. It was deemed 'that an adequate framework with a revised Code of Practice under the Adults with Incapacity Act 2003' now existed'. This Code has been updated twice, in 2007 and most recently [in April 2010](#).

The second petition focused on the Mental Health (Care and Treatment) (Scotland) Act 2003, asking that it be amended to be compatible with the European Convention on Human Rights (ECHR). This was closed in March 2014 on the basis that 'the 2003 Act is compliant with human rights legislation and does not require amending in the way sought in the petition.' The decision to close the petition also anticipated the introduction of the Mental Health (Scotland) Bill in June 2014.

The Petitioner believes that this latest legislation, passed in 2015, was narrow in scope, and did not address the requirement to be compliant with ECHR and the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

The Petitioner makes reference to a report published in May 2017, '[Scotland's Mental Health and Capacity Law: the case for reform](#)' (referred to below as the Report with relevant page numbers.). The Report was prepared and published by the [Centre for Mental Health and Capacity Law](#), based in Edinburgh Napier University and the [Mental Welfare Commission](#), a statutory independent body, accountable to Scottish Ministers.

The Report argues that, while the legislation of 2000 and 2003 was world leading in terms of principles and rights based mental health and capacity law (p8), international human rights law and practices... ha(ve) developed further(p.8). This has called into question the fundamental assumptions that underpin current Scottish legislation (p3). The Report makes particular reference to the two conventions, noted above and highlighted by the Petitioner. The Report as a whole provides useful background to the complex issues raised by the Petitioner

Legal Framework

Adults with Incapacity (AWI) – [Key principles](#)

The Act aims to protect people who lack capacity to make particular decisions, but also to support their involvement in making decisions about their own lives as far as they are able to do so.

Five key principles, focusing on the freedom and wishes of the individual, underpin the legislation. Anyone authorised to make decisions made on behalf of someone with impaired capacity must apply the following principles:

Principle 1 - benefit

Any action or decision taken must benefit the person and only be taken when that benefit cannot reasonably be achieved without it.

Principle 2 - least restrictive option

Any action or decision taken should be the minimum necessary to achieve the purpose. It should be the option that restricts the person's freedom as little as possible.

Principle 3 - take account of the wishes of the person

In deciding if an action is to be taken or decision made, and what these should be, account must be taken of the present and past wishes and feelings of the person, as far as this may be ascertained. Some adults will be able to express their wishes and feelings clearly, even although they would not be capable of taking the action or decision which you are considering.

The person must be offered help to communicate his or her views. This might mean using memory aids, pictures, non-verbal communication, advice from a speech and language therapist or support from an independent advocate. A [Guide to Communication and Assessing Capacity](#) is available.

Principle 4 - consultation with relevant others

Take account of the views of others with an interest in the person's welfare. The Act lists those who should be consulted whenever practicable and reasonable. It includes the person's primary carer, nearest relative, named person, attorney or guardian (if there is one).

Principle 5 - encourage the person to use existing skills and develop new skills

Under the Act, four public bodies are involved in the regulation and supervision of those authorised to make decisions on behalf of a person with incapacity. These are: the Office of the Public Guardian (Scotland), the Mental Welfare Commission for Scotland, the courts and local authorities.

Mental Health (Care and Treatment) (Scotland) Act 2003 - key principles

The ten principles of the Act (known as the 'Millan Principles') are a set of guidelines for how professionals should work when providing treatment and care under the Act. They are:

1. Take your past and present wishes into account
2. Make sure you get the information and support you need to take part in decisions
3. Take the views of your carer, named person, guardian or welfare attorney into account
4. Look at the full range of options for your care
5. Give you treatment that provides maximum benefit
6. Take account of your background, beliefs and abilities
7. Make sure that any restrictions on your freedom should be the 'minimum necessary in the circumstances'
8. Make sure that you are not being treated less favourably than other patients
9. Your carers' needs are taken into account and they get the information and support they need to help them care for you
10. Take special care of your welfare if you are under 18 years of age

Adult Support and Protection (Scotland) Act 2007

This Act can apply to anyone over 16, not only those who may have a disability, a mental disorder.

[According to the Mental Welfare Commission:](#)

The Adult Support and Protection (Scotland) Act 2007 was introduced to identify and protect individuals who fall into the category of adults at risk. Measures in the Act include:

- requiring councils to make the necessary enquiries and investigations to see if action is needed to stop or prevent harm happening;

- requiring specific organisations to co-operate with councils and each other about adult protection investigations;
- the introduction of a range of protection orders including assessment orders, removal orders and banning orders; and
- a legislative framework for the establishment of local multi-agency Adult Protection Committees across Scotland.

The Act defines adults at risk as people aged 16 years or over who:

- may be unable to safeguard their well-being, rights, interests, or their property
- may be harmed by other people;
- because of a disability, illness or mental disorder, are more at risk of being harmed than others who are not so affected.

Having a particular condition such as a learning disability or a mental illness does not automatically mean an adult is at risk. For an adult to be considered at risk, all three parts of the definition must be met.'

Possible challenges for current legislation

The principles underlying all three pieces of legislation are aligned with each other, but the 2000 and 2003 Acts are based on a rebuttable presumption of capacity, which has to be assessed. It is this, the Report argues, that raises 'questions about the extent to which the principles regarding respect for an individual's wishes and feelings, benefit, and least restrictive options, are truly reflected in decisions concerning interventions and non-consensual care and treatment in practice.

- The use of mental health and incapacity legislation has increased, (such as the use of compulsion) as has the use of guardianship under AWI.
- 'Critics have suggested that the Acts were characterised as promoting and protecting the rights of people with psychosocial or intellectual impairments but, in practice, operate to provide legal protection for professionals to take decisions which the person may not agree with.'(p12)...the rights of the state to impose treatment on the person are clearly articulated and can be given direct effect, while the rights of the individual to support are set out in ways which are difficult to enforce, and which have had limited practical effect. (p13)
- The [Scottish Government's Mental Health Strategy 2017-27](#) is based around a human rights approach, which is aligned with the ECHR and the UNCRPD. However, it is argued that this is not the case for the current Scottish mental health and incapacity legislation.

- EHCR – under current constitutional arrangements, the actions of Scottish Ministers and public bodies must be compatible with EHCR rights, and can be enforced under the Scotland Act 1998 and the Human Rights Act 1998.
- UNCRPD – these rights are not enforceable in the same way, although the UK is bound under international law to comply with the Convention. It is a higher source of international law, and the Scotland Act 1998 states that actions of the Scottish Ministers can be prevented by the UK Government if such rights are contravened.(p14)

The Report explains that when the 2000 and 2003 Acts were passed they were aligned with ECHR, but [a judgement in the UK Supreme Court](#)¹, and a [‘General Comment’ by the UN Committee on the Rights of Persons with Disabilities](#)² bring the Acts’ compliance into question (p14).

[The Millan Report, ‘New Directions’](#) reviewed the 1984 Mental Health (Scotland) Act in 2001 and recommended that, in due course, mental health and incapacity legislation should be brought together into a single act, to ensure there was a consistent, principled and complete legislative framework for non-consensual care and treatment.

At the moment, there are a number of areas of doubt and uncertainty; for example, over when a physical condition is sufficiently linked to a mental disorder to authorise use of the 2003 Act, the lack of emergency provisions in the AWI Act, and the extent to which incapacity legislation authorises forcible treatment against a person’s will. The situation was further complicated by adult protection legislation, which introduces another framework which allows non-consensual health and social care interventions on vulnerable people, including those with mental disorders.

Scottish Government Action

The Scottish Government conducted a [consultation on the ‘Scottish Law Commission’s Review of Adults with Incapacity’](#) in December 2015, and published an [analysis of responses in June 2016](#).

The Scottish Government have undertaken to reform Adults With Incapacity (AWI) legislation in their latest Mental Health Strategy 2017-27(see above).

[Limited Review of the Mental Health \(Care and Treatment\) \(Scotland\) Act 2003: Report](#) (2009)

Scottish Parliament Action

Previous petitions – [PE 867](#) and [PE01494](#)

¹ [The ‘Cheshire West’ Judgement 2014](#)

² [Committee on the Rights of Persons with Disabilities, ‘General Comment No 1 \(2014\) Article 12 Equal Recognition before the Law’ \(CRPD/C/GC/1, 19 May 2014\)](#)

The Scottish Parliament passed the [Mental Health \(Scotland\) Bill](#) in June 2015 and it received Royal Assent on 4 August 2015.

[All Parliamentary material for 2015](#) Bill.

[Question S5W-03033: Miles Briggs, Lothian, Scottish Conservative and Unionist Party, Date Lodged: 21/09/2016](#)

To ask the Scottish Government what plans it has to amend Scottish mental health and incapacity legislation in line with the general principles set out in Article 3 of the Convention on the Rights of Persons with Disabilities, including "Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons".

Answered by Maureen Watt (29/09/2016):

The Scottish Parliament recently passed the Mental Health (Scotland) Act 2015. The 2015 Act is currently being implemented and contains several measures which strengthen the provisions in the Mental Health (Care and Treatment) (Scotland) Act 2003 that promote and protect service users' rights. This includes giving service users more control over their representation and strengthening the position of advance statements and advocacy which help service users express their will and preferences.

The Scottish Government is engaging with stakeholders about how the work to implement the 2015 Act can be used to further promote the rights of service users, including those in the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

As part of the draft plan on implementation of UNCRPD, the Scottish Government committed to consulting on the Scottish Law Commission's review of Adults With Incapacity (AWI) legislation with particular reference to issues around deprivation of liberty and thereafter to carry out a scoping exercise in relation to a wider review of AWI legislation. That consultation has concluded and the Scottish Government is now actively engaging with service users and stakeholders to determine the focus for areas of reform.

[Question S5W-04703: Ross Thomson, North East Scotland, Scottish Conservative and Unionist Party, Date Lodged: 15/11/2016](#)

To ask the Scottish Government what its position is on whether legislative reform is required to bring its mental health and incapacity legislation into line with human rights law.

Answered by Maureen Watt (23/11/2016):

Scottish mental health and incapacity legislation is based on rights and principles.

The Scottish Government is working with partners including the Mental Welfare Commission, the Office of the Public Guardian and professional and human rights bodies to develop changes to the Adults with Incapacity Act, in

relation to deprivation of liberty, and to assess compliance with UN Convention on the Rights of Persons with Disabilities by 2018.

The most recent reform of mental health legislation was through the Mental Health (Scotland) Act 2015, which was passed by the Scottish Parliament last year. The 2015 Act strengthened measures in the Mental Health (Care and Treatment)(Scotland) Act 2003 that promote support for decision making, including those for independent advocacy, advance statements and named persons. The 2015 Act is currently being implemented and we are looking at ways to further promote rights-based practice under the 2003 Act, including when updating the statutory guidance in the Code of Practice. Alongside this, we are committed to a review which will consider whether the provisions in the 2003 Act fulfil the needs of people with Learning Disabilities and Autism.

Anne Jepson
Senior Researcher
23 August 2017

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