8 March 2018

Dear Alison

Post-legislative scrutiny of the Mental Health (Care and Treatment) (Scotland) Act 2003

You recently wrote to my colleague Peter Whitehouse regarding the work of the Public Audit and Post-legislative Scrutiny Committee.

You advised that the Committee sought views from the public on which Acts would benefit from post-legislative scrutiny. The Committee has asked that the Scottish Government take into account those responses regarding the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) as it implements the Mental Health Strategy.

The Mental Health Strategy 2017-2027 recognises as a theme the importance of human rights and as part of this, has committed to actions around reviewing various aspects of mental health and incapacity legislation use in Scotland. In order to address some of the topics raised, it may be helpful if I describe elements of the legislation in Scotland, specifically as it relates to compulsory treatment and the Mental Health Strategy.

Rights and Mental Health law
Our legislation is compliant with the European Convention on Human Rights and Fundamental Freedoms (“the Convention”) and has never been found, in part or in whole, by the European Court of Human Rights to be incompatible with the Convention. In addition, the Human Rights Act 1998 ensures that every public authority in Scotland is obliged to act compatibly with the Convention and enables human rights cases to be taken in domestic courts.

Scottish mental health legislation promotes patients’ rights and provides safeguards. The 2003 Act provides for support to patients in expressing their will and preferences. The principles include that any function should be carried out for the maximum benefit of the patient, with the minimum necessary restriction on the freedom of the patient and having regard to the views of the patient.
The bulk of provisions of the Mental Health (Scotland) Act 2015 ("the 2015 Act") came into force in 2017. The 2015 Act strengthens measures in the 2003 Act which promote support for decision making. For example, any person with a mental disorder has the right to support from an independent advocate, and the 2015 Act requires reporting from Local Authorities and Health Boards on how they are fulfilling their statutory duty to secure independent advocacy services. The 2015 Act also promotes support for decision making, amending the right to appoint a named person to represent interests and promoting the right to make an advance statement on treatment choices.

Compulsory Treatment

Most people who use mental health services receive treatment without being subject to an order or certificate under the 2003 Act. For some individuals however, compulsory treatment is used to provide the person with medical treatment to alleviate suffering and for the protection of both the person and others. Compulsory treatment is only allowed under mental health legislation in Scotland in very strict circumstances. It is governed by a range of safeguards which include a right to independent advocacy and an efficient and independent Mental Health Tribunal which grants and reviews orders for compulsory treatment.

Also, under the 2003 Act, any service user has the right to appoint a named person to represent their interests and the right to make an advance statement setting out how what treatment they would and would not like to receive when unwell. We have made changes to ensure that people with a mental disorder can access effective treatment quickly and improved legislation through the 2015 Act to strengthen support for decision making and promote rights.

We will continue to work with the Mental Welfare Commission and stakeholders both to ensure these orders are correctly used and to promote patients rights more generally. The Scottish Government is considering how best to use data in mental health and this includes the important information which the Mental Welfare Commission provide about the use of compulsion.

Mental Health Strategy

It may interest the committee to know about some work to review legislation which is already underway and included within the current Mental Health Strategy. 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 (2000) in relation to deprivation of liberty, and to assess compliance with UN Convention on the Rights of Persons with Disabilities. A full public consultation on reform of the AWI legislation, including changes around the use of guardianship orders, launched on 31 January 2018.

We are also taking forward a review to consider how the provisions of the 2003 Act fulfil the needs of people with learning disability and autism. There has been considerable debate and no clear consensus about the provisions of the 2003 Act in relation to people with learning disability and autism. There will be an emphasis on engaging widely, so that the real issues can be fleshed out and considered. This review will also look at the definition of mental disorder (in relation to learning disability and autism), the use of psychotropic medication and the role of psychologists.
Current Workstreams and Further Scrutiny
In addition, we are also looking at the arrangements for investigating deaths of people who are subject to the 2003 Act, or the Criminal Procedure (Scotland) Act 1995, or are in hospital voluntarily for treatment of mental disorder. This review is underway and is due to report at the end of this year.

It would be inappropriate to consider wider changes to legislation until these key pieces of work have reached conclusions given that some are interconnected and will address issues that are affecting the lives of those with incapacity and mental disorder. Only when the views, findings and recommendations arise from the current workstreams will we be able to consider the provisions contained within our mental health and incapacity legislation and determine how best to proceed.

I hope the above will reassure Committee that we are taking forward large important pieces of work which will take on board the views that have been submitted to the Committee.

Yours sincerely

Ruth Wilson
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