

Human Rights Bill for Scotland Consultation – RCPsych in Scotland Response

Submission date: Thursday 5 October 2023

1. What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?

- **Allow**
- Don't allow

The Royal College of Psychiatrists in Scotland believes that it is a core duty of medical practitioners to treat patients as possessing inherent dignity. This proposal is welcome as it is the articulation of this core duty into Scottish law.

However, a definition of dignity is not given in the consultation paper provided. A clear definition of the Scottish Government's understanding of dignity is required for this proposal to be practicable.

Furthermore, the RCPsych in Scotland would also warn of potential practical difficulties which could emerge as a result of this proposal. It would be desirable to clarify the definition of 'dignity' and the scope of potential actions allowable using this consideration. If the interpretation of breaches of dignity is too wide there is the potential for vastly increased number of legal cases, some resting on alleged incompatibilities between the European Court of Human Rights (ECHR) and some aspects of the UN conventions which might in future be incorporated into domestic law in Scotland.

2. What are your views on our proposal to allow for dignity to be a key threshold for defining the content of minimum core obligation (MCOs)?

- **Allow**
- Don't allow

Audit Scotland's recent [Adult Mental Health report](#) presented a bleak account of the barriers people face when trying to access mental health services. Action is required to overcome these barriers.

The Scottish Government's Quality Standards for Adult Secondary Mental Health Services are still only aspirational. At the moment, health boards do not need to demonstrate that they have met these standards, only that they are working towards them.

The RCPsych in Scotland would recommend that the existing service specifications for CAMHS and adult secondary mental health services are operationalised, and that these clearly define what people can expect from services. In doing so, the dignity of those who require support from mental health services will be protected.

Any minimum core obligations must provide real, tangible benefits to patients, particularly those from more vulnerable groups.

3. What are your views on the types of international law, materials and mechanisms to be included within the proposed interpretative provision?

4. What are your views on the proposed model of incorporation?

Any incompatibilities between international conventions and the practical application of domestic law need to be carefully considered.

For example, Article 5 of the European Convention on Human Rights (ECHR) allows for 'lawful detention' in the case of mental disorder and provides for safeguards against unlawful detention. Mental Health law in Scotland has been developed in line with this Convention. However, Article 14 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) states that 'the existence of a disability shall in no case justify a deprivation of liberty.' This could not therefore be fully incorporated into Scots Law without severely challenging our existing mental health legislation.

The RCPsych in Scotland believes that the proposal to incorporate the 'general comments' of UN Committees is particularly problematic. Incorporating these general comments as well as the text of the Conventions would potentially invalidate all forms of proxy decision making under the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003.

5. Are there any rights in the equality treaties which you think should be treated differently?

- Yes
- No

6. Do you agree or disagree with our proposed basis for defining the environment?

- **Agree**
- Disagree

7. If you disagree, please explain why

Whilst we do not disagree, the RCPsych in Scotland believe that there should be appropriate consideration of psychological wellbeing and the maintenance of safety and stability as part of the definition of a healthy environment.

8. What are your views on the proposed formulation of the substantive and procedural aspects of the right to a healthy environment?

9. Do you agree or disagree with our proposed approach to the protection of healthy and sustainable food as part of the incorporation of the right to adequate food in International Covenant on Economic, Social and Cultural Rights (ICESCR), rather than inclusion as a substantive aspect of the right to a healthy environment?

- **Agree**
- Disagree

10. Do you agree or disagree with our proposed approach to including safe and sufficient water as a substantive aspect of the right to a healthy environment?

- **Agree**
- Disagree

11. Are there any other substantive or procedural elements you think should be understood as aspects of the right?

- Yes
- No

12. Given that the Human Rights Act 1998 is protected from modification under the Scotland Act 1998, how do you think we can best signal that the Human Rights Act (and civil and political rights) form a core pillar of human rights law in Scotland?

The RCPsych in Scotland believes that the best way to signal that the Human Rights Act, and civil and political rights, form a core pillar of human rights law in Scotland is to address the current implementation gap.

Rather than legally embedding further conventions, more should first be done to ensure the delivery of existing rights on the ground in Scotland.

13. How can we best embed participation in the framework of the Bill?

The RCPsych in Scotland believes that the inclusion of participation in the framework of this Bill is crucial. However, participation in service design requires both coordination and resources. Ensuring this participation takes place should not be the sole responsibility of those delivering pressured frontline services.

Furthermore, people with lived experience who take part in service design should be supported to do so. Consideration should also be given to how people with lived experience are compensated for their time.

The RCPsych in Scotland would suggest that a principles section be added to the Bill, where participation is included as one of the principles.

We would also recommend that bodies which are charged with scrutinising the delivery of the Bill have lived experience representation on their boards. The recruitment of these roles should be subject to the same scrutiny as is the case for professional roles.

14. What are your views on the proposed approach to including an equality provision to ensure everyone is able to access rights, in the Bill?

15. How do you think we should define the groups to be protected by the equality provision?

16. Do you agree or disagree that the use of 'other status' in the equality provision would sufficiently protect the rights of LGBTI and older people?

- **Agree**
- Disagree

The RCPsych in Scotland agree that particular consideration should be given to the rights of LGBTI and older people, as these two groups are known to have greater needs with regard to mental health.

17. If you disagree, please provide comments to support your answer.

18. Do you think the Bill Framework needs to do anything additionally for LGBTI or older people?

- **Yes**
- No

The Bill Framework should include consideration of decision making, including proxy decision making, which disproportionately affects older people.

19. What is your view on who the duties in the Bill should apply to?

Consideration of the duties should not just be on the direct care provider, but on those with both managerial and financial responsibilities for the provider.

However, the RCPsych in Scotland would warn against these duties being so onerous that we facilitate the further drive of people towards the private sector which may not be subject to the same expectations.

We would also welcome clarification in terms of whether duties will apply to carers, as doing so could place a huge obligation on them.

20. What is your view on the proposed initial procedural duty intended to embed rights in decision making?

The RCPsych in Scotland agrees with the proposed initial procedural duty and appreciates that this proposal acknowledges the need for time. However, it must also be understood that financial resources and training are also required to enable services to become compliant.

The significant pressure on mental health service resources must also be acknowledged as this, in turn, makes it difficult to meet people's rights.

21. What is your view on the proposed duty to comply?

The RCPsych in Scotland supports the duty to comply and would propose that this is linked to the minimum core obligations. However, it must be recognised that failure to comply is sometimes due not to a lack of awareness or a lack of caring, but a lack of appropriate resources and managerial authorisation. With this in mind, those at managerial level should also be subject to the duty to comply, not just those delivering services on the ground.

To support this proposal, the RCPsych in Scotland would recommend the development of a register of noncompliance. Themes could then be tracked to assess the most common causes of noncompliance. Where there is repeated noncompliance, this could then be referred to the Scottish Human Rights Commission (SHRC), or other relevant scrutiny body, to pursue in court.

22. Do you think certain public authorities should be required to report on what actions they are planning to take, and what actions they have taken, to meet the duties set out in the Bill?

There should be a duty and a responsibility on the scrutiny bodies to identify the noncompliance and make recommendations in a way that leads to meaningful change.

Recommendations must be made at the right level to the right organisations to provide the resources, and therefore the ability, for services on the ground to meet the duties set out in the Bill.

23. How could the proposed duty to report best align with existing reporting obligations on public authorities?

24. What are your views on the need to demonstrate compliance with economic, social and cultural rights, as well as the right to a healthy environment, via minimum core obligations (MCOs) and progressive realisation?

The RCPsych in Scotland wholeheartedly support the promotion of economic, social and cultural rights, as well as the right to a healthy

environment. As we have outlined in our response to question 7, these rights are crucial in the promotion of both psychological and physical safety.

25. What are your views on the right to a healthy environment falling under the same duties as economic, social and cultural rights?

Whilst the RCPsych in Scotland support the right to a healthy environment, we would welcome clarification with regard to who will monitor this right and who will deliver the minimum core obligations.

26. What is your view on the proposed duty to publish a Human Rights Scheme?

The RCPsych in Scotland agree with this proposal in principle. However, further detail is required in terms of how this will be realised on the ground, particularly in financial terms.

27. What are your views on the most effective ways of supporting advocacy and/or advice services to help rights-holders realise their rights under the Bill?

The RCPsych in Scotland is concerned that current proposals only cover rights holders who are advocating for their own rights. Currently, there is no provision in terms of advocacy for people who are not able to self-advocate. Well supported, well-funded, well-resourced and available advocacy services are required for those who are less able to realise their own rights.

The distinction between advocacy and other advice services should be made clear.

And any provisions for advocacy and other advice services should align with the accountability recommendations made in Scottish Mental Health Law Review.

28. What are your views on our proposals in relation to front-line complaints handling mechanisms of public bodies?

The complaints process should be made as accessible and inclusive as possible, including for those people who, for whatever reason, may not be able to submit a written complaint.

29. What are your views in relation to our proposed changes to the Scottish Public Services Ombudsman's remit?

The RCPsych in Scotland has some concerns about the proposed changes to the Scottish Public Services Ombudsman's remit.

We believe that human rights should be universal and have concerns that these proposed changes may lead to some groups obtaining rights that are not practically available to everyone. This risks unintended and undesirable consequences. For example, mandating specific rights for people who have been detained under the Mental Health Act might provide a paradoxical incentive to detention to obtain these rights for individuals.

30. What are your views on our proposals in relation to scrutiny bodies?

The RCPsych in Scotland would warn against weakening the role of the Mental Welfare Commission for Scotland. Clarity is necessary with regard to the roles and responsibilities of the Scottish Human Rights Commission and the Mental Welfare Commission for Scotland, as well as how these commissions will interact.

31. What are your views on additional powers for the Scottish Human Rights Commission?

The RCPsych in Scotland does not oppose additional powers for the Scottish Human Rights Commission. However, given the importance of the role of the Mental Welfare Commission for Scotland, we would stress again that clarity is required in terms of what these additional powers will include. As we stated in our response to question 30, there should be no diminution of the role of the Mental Welfare Commission for Scotland or overlap between the functions of the two commissions.

32. What are your views on potentially mirroring these powers for the Children and Young People's Commissioner Scotland where needed?

33. What are your views on our proposed approach to 'standing' under the Human Rights Bill?

34. What should the approach be to assessing 'reasonableness' under the Human Rights Bill?

In making decisions about unreasonableness, account must be taken not just of the decision, but of the financial, staffing and other limitations of a service.

It should be noted here that individuals and services may make what are apparently unreasonable decisions which are understandable in the context of financial and other limitations on the availability of provision.

35. Do you agree or disagree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders?

- Agree
- **Disagree**

36. If you do not agree that existing judicial remedies are sufficient in delivering effective remedy for rightsholders, what additional remedies would help to do this?

Existing judicial remedies do not always deliver on people's rights, often as a result of a lack of resources.

It is important that remedies take into account existing resources. Service delivery issues should only be considered within the context of a pre-agreed resource. For example, if rights have not been upheld within a service which has not been resourced to a predefined minimum level, that should be seen as a resourcing failure and not a service failure.

37. What are your views on the most appropriate remedy in the event a court finds legislation is incompatible with the rights in the Bill?

38. What are your views on our proposals for bringing the legislation into force?

The RCPsych in Scotland would agree that a staged approach is necessary, as long as this staged approach is not unduly long.

39. What are your views on our proposals to establish minimum core obligations (MCOs) through a participatory process?

The RCPsych in Scotland, in principle, support the development of minimum core obligations and would like to be consulted on their development.

However, we are concerned that if these are not carefully considered they may, in a resource constrained environment, lead to services aiming for only minimum standards of care.

It is unarguable that there should be minimum standards of care, however there should be aspiration beyond these minimum standards.

The RCPsych in Scotland would recommend that, to encourage a more aspirational outlook, three standards of service are assessed:

- Minimum standards.
- Practical or expected standards.
- And aspirational standards.

To prevent a potential 'race to the bottom' following the introduction of minimum core obligations, we would suggest a focus on reaching the second and third tier of these standards.

40. What are your views on our proposals for a Human Rights Scheme?

The RCPsych in Scotland, in principle, agree with the proposals for a Human Rights Scheme. However, we are not able to comment further until more detail is available.

41. What are your views on enhancing the assessment and scrutiny of legislation introduced to the Scottish Parliament in relation to the rights in the Human Rights Bill?

Following the introduction of this Human Rights Act, all Scottish Parliament legislation will need to be compatible with included conventions and international obligations. The passage of any Human Rights Act will therefore inevitably be required to include additional scrutiny to ensure future statute is HRA compatible.

42. How can the Scottish Government and partners effectively build capacity across the public sector to ensure the rights in the Bill are delivered?

The view of clinicians on the ground is that a focus particularly on **staff retention** should be a key aspect of the Scottish Government and partners'

efforts in workforce planning and in building capacity across the public sector.

43. How can the Scottish Government and partners provide effective information and raise awareness of the rights for rights-holders?

The RCPsych in Scotland would recommend that the Scottish Government and other partners ensure that the information they provide is as accessible as possible. This should include easy read versions being issued as standard alongside Scottish Government publications.

However, balance is also required in this respect, as some groups have reported that they have found these versions insulting. To accommodate different audiences, we would recommend that a quick read or summary is also made available alongside easy read versions.

Information should also be provided in different languages, as well as in formats which are accessible for people with learning disabilities, people with hearing impairments and people with visual impairments. For the latter group, the Scottish Government and other partners should ensure that their websites are formatted in a way that is accessible for screen readers.

44. What are your views on monitoring and reporting?

The RCPsych in Scotland would recommend that both monitoring and reporting include assessment of quality of service, rather than waiting times alone.

Furthermore, the burden of data collection should not fall as an additional duty on frontline staff who are focused on delivering services.