

## **Overarching Response from the RCPsych in Scotland to the Scottish Mental Health Law Review consultation (the Scott Review), endorsed by the Academy of Royal Medical Colleges & Faculties in Scotland**

### **Who we are**

The Royal College of Psychiatrists in Scotland is the professional medical body responsible for:

- setting standards and promoting excellence in specialist mental health care
- supporting and representing the psychiatry profession, including our 1,400 members in Scotland
- collective action to improve support, care, and treatment for people with mental ill health.

Our members:

- Provide specialist care for those with defined mental health conditions. This care can be lifesaving, facilitating and supporting a tremendous improvement in a person's condition, recovery and quality of life.
- This specialist care is delivered in a wide range of settings, and takes place alongside and in partnership with multidisciplinary teams from a clinical and non-clinical background in communities, primary and secondary care.

### **How we developed our response**

- We issued a call for evidence to all of our 1,400 members for written responses.
- This is supplemented by 7 workshops covering each of the chapters, with over 120 participants in these discussions. These participants represented wider collective groups by specialty, setting and geography.
- Our range of participants extended to lived experience representatives and across the different clinical specialisms of our membership.

## Our overarching response

The College welcomes and fully supports efforts to review mental health, incapacity, and adult support and protection legislation. We share the Scottish Mental Health Law Review's aim of improving the rights and protections for people subject to mental health law and to remove barriers to those caring for their health and welfare.

Human rights and the need to safeguard them is at the core of the professional duty of psychiatrists and clinicians as frontline professionals and medical experts. This extends to training, professional guidelines and standards of practice.

Throughout this process, we have urged an approach which builds on the already strong principles-based legislation in Scotland. Revisions should be directed towards further compliance with international human rights obligations while ensuring the legislation remains practical and incorporates a needs-based approach. It is on this basis that we engage with the proposals the Review has set out.

We are grateful to the Review for its efforts to date to support us and other organisations and professions to consider the practical implications of changes to mental health law, including through clinical scenarios. In developing the proposals in this report into fully realised legislation and subsequent guidance, we would urge the Review to continue to utilise these alongside discussions with all those involved in providing or accessing care under the provisions of mental health legislation, to ensure that change is both progressive and attainable.

We welcome the changed perspective that the Review proposes towards a positive fulfilment of rights. People with defined mental health conditions should be able to enjoy the full range of rights applicable to all citizens, and we support this mission.

Our overarching comments are as follows:

- **Scope** – The proposals extend far beyond the core purpose of mental health legislation, and its initially intended beneficiaries, those with a defined mental health condition. We endorse the position of the Review that some provisions will need to be in laws which apply to everyone. We would advocate for a focused set of instruments in the context of the provision of mental health care, that would allow the promotion of rights for those who are amongst the most disadvantaged in society.
- **Inclusion** – Any new legislation must work for all people of all ages, including children and young people and people with learning disabilities. We recognise this may be difficult for the forensic population, but these should apply to this population to the greatest possible extent.

- **Workforce implications** – We urge that specific evaluations of the workforce and resource implications of proposals from the Review are undertaken ahead of any legislative process, across all relevant settings. Identification and resourcing for additional requirements is essential to ensure we have a workforce able to meet the needs of people with defined mental health conditions and to minimise where possible the need for compulsory and/or restrictive practices.
- **Clinical diagnosis** – While recognising the need to reduce stigma and reduce it around defined mental health conditions, removing the criterion within legislation of a mental health diagnosis or condition is not the way forward. The use of diagnostic criteria allows a link to be made between a condition, its effects, potential interventions, and the use of legal frameworks to provide said interventions. It allows an approach based on objective evidence which can then be effectively challenged, thereby improving the protection of rights.
- **Applicability across patient groups** – We remain concerned that certain proposals, such as human rights enablement, are written with particular patient groups in mind, reducing their applicability across those with a defined mental health condition.
- **Non-consensual treatment** – We agree with the Review's conclusion that there should be an aim to minimise the use of compulsory or non-consensual, treatment but that it cannot currently be eliminated. We consider that the term "coercion" is perceived as stigmatising towards those providing care, and carries connotations of nefarious motivations rather than the use of compulsory measures to deliver essential, potentially lifesaving care and treatment, balancing conflicting rights and impaired decision-making capacity.
- **Conflicting rights** – Rights inevitably can come into conflict. It is essential that any legislative framework can encompass such factors, and invoke principles to assist in determining how to reach a balance in often complex and challenging situations. We wish to ensure the right to life and to health encompasses a right to treatments which are effective in maintaining/restoring health. This right must be maintained alongside rights to autonomy, dignity, social, cultural, and economic rights, and liberty and security.
- **Decision making frameworks** – We support proposals to optimise people's ability to make their own decisions or to have as much input and influence into the process as possible. Supported decision making, improved links with carers and autonomous decision-making processes are all very welcome. We await additional detail to enable further thinking, consultation, and development on how they would be applied in practice.

- **Practical reality** – There will always be a balance to be reached in developing proposals which seek to bring about fundamental change while recognising the practical implications of such change. We urge continued work and engagement to ensure that there are not unintended consequences. In particular, we wish to ensure that resources reach those most in need, that systems are accessible, and that fundamental rights such as the right to life and the right to health can be promoted and protected.
- **Responsibilities and resource** – For the Review’s ambitions to be realised, it is necessary for there to be a clear demarcation of who is responsible for the delivery of the wider set of social, economic and cultural rights, the resourcing for this, and where accountability is held. Minimum obligations are one mechanism of achieving this. Clarity will be required to ensure accountability for these rests with the organisation or body which is able to deliver the provisions required.
- **Delivery of the principles of HRE framework** – To ensure these principles are utilised at the point of need, we would urge the Review to advocate for the principles of the HRE framework to be delivered through currently utilised assessments and practice, mainstreaming them now to the benefit of our patients.
- **Delayed discharges** – Delayed discharges from hospital, particularly for people with a learning disability and dementia, are a clear example of a failure to uphold patient’s rights. Addressing delayed discharges should be a key test of the success of the legislative changes being proposed.
- **Autonomous Decision-Making Test in place of SIDMA** – We agree with the Review that SIDMA is no longer fit for purpose and support, in principle, their proposals for an autonomous decision-making test.
- **Children and young people** – There are significant concerns around the proposals for children and young people lose the protections and safeguards of mental health legislation. We do not believe separate children’s legislation would deliver the protections and safeguards available under current legislation.
- **Deprivation of Liberty** – As part of a ‘progressive alignment’ of mental health legislation, some lawful authorisation for deprivation of liberty must be subsumed within the revamped guardianship processes, with the same timescales as provided for under the Mental Health Act.
- **Exclusions** – It is important to maintain protections for certain groups who are currently excluded under mental health legislation. This includes people with a drug and/or alcohol addiction.

- **Not ready for fusion** – We would urge the Review to pay cognisance to the tests for implementing fused mental health and capacity legislation proposed in the Wessely Review. From our perspective, we do not believe these tests can be met in this process that achieves a universal approach inclusive of children and young people and people with learning disabilities.
- **Progressive alignment** – We recommend the progressive alignment of mental health and capacity legislation that minimises the variation in safeguards and protections people can access depending on which piece of legislation applies to their particular circumstances. The population who come under mental health legislation should be consistent across the three acts.
- **Changes which can happen ahead of a legislative process** – This is an ambitious set of proposals which would make Scotland a world leader in the provision of human rights in mental health. In meeting this ambition through a comprehensive set of changes to legislation, we cannot delay changes which could be enacted in the immediate and near future. We call on the Scottish Government to enact the following ahead of any legislative process:
  - Entrapped patients awaiting a complex package of support in the community can appeal to a tribunal, which would create a statutory duty for such support packages to be provided.
  - Excessive security appeals to be applicable to people in low security settings
  - To move towards decisions on mental health law currently taken in the sheriff court to be taken up by the Tribunal.
  - Shifting the Commission from reporting to ministers to reporting to parliament.
  - Reflecting the aspirations of the 2015 Act, ensure digital, up-to-date access to advance statements be made available to both patients and staff charged with their care.
- **Further consultation** – We recognise that there are outstanding areas of consultation including around community CTOs. We would welcome ongoing involvement with the process of consultation and development to ensure genuine improvements in rights and care for people whose lives are impacted by mental health legislation are delivered.