

## RESPONSE FORM

### PREPARATION OF THE TENTH PROGRAMME OF LAW REFORM

We hope that by using this form it will be easier for you to respond to the questions set out in the consultation paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as set out in the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this consultation paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only one or two of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to [info@scotlawcom.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk). Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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# Questions

1. Do you have any suitable law reform projects to suggest?

## Comments on Question 1

Yes – reform of the law relating to mental health, capacity and adult support and protection.

2. Do you have any project to suggest that would be suitable for the Commission Bill process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

## Comments on Question 2

No

3. If suggesting a new project:-

- (a) Please provide us with information about the issues with the law that you have identified:

### 1. Introduction

At the time of their enactment Scotland's mental health and capacity legislation was regarded as world leading in terms of their principled and human rights based approach to the care, treatment and protection of persons with mental disorder. However, international human rights standards in this area have evolved significantly over the past decade with the focus moving away from compulsion and restriction and towards greater respect for autonomy and the provision of support for the exercise of legal capacity.

This proposal is premised on the need for the law in Scotland to fully adopt a non-discriminatory approach to people with mental health issues and to move to a paradigm of support. A significant impetus for this is the UN Convention on the Rights of Persons with Disabilities (UNCPRD), to which the UK is a signatory<sup>1</sup>, and which requires that we think differently about disability and reshape our laws to recognise the full personhood of people with disabilities.

We consider that this is an area which requires significant and radical reform. If Scotland is to continue to be at the forefront of protecting the rights of people with mental disorder it is imperative that our laws keep pace with human rights standards.

The following sections will provide an overview of the recent and ongoing developments in

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<sup>1</sup> Thus creating obligations under international law with which the UK must comply. It is also noted that proposed devolved Scottish legislation and the actions of Scottish Ministers may be prevented where it is contrary to such international obligations (ss 35(1)(a) and 58(1) Scotland Act 1998).

international human rights law, the issues this presents for the thresholds and support provisions employed by Scottish legislation and suggestions for law reform questions.

## 2. International Human Rights Law

International human rights law in relation to disability has developed considerably in the past decade. Whilst this has been reflected to some extent in the jurisprudence of the European Court of Human Rights on Articles 5 and 8 of the European Convention on Human Rights<sup>2</sup> which has reinforced the need to respect the autonomy of persons with mental disorder, it is the UNCRPD which has been the main driver in this. Indeed, the UNCRPD has been described as invoking a ‘paradigm shift’ in how we approach disability in general and mental disability in particular. It requires that we adopt the social model of disability which locates experiences of disability in the attitudes and barriers created by society and challenges us to dismantle these barriers through respect for autonomy and dignity, full participation of persons with disabilities and non-discrimination. Fundamental to this is Article 12 UNCRPD, the right to equal recognition before the law, which has been at the forefront of discussions on the UNCRPD and mental health and capacity laws.

The UN Committee on the Rights of Persons with Disabilities which oversees the UNCRPD has adopted a radical interpretation of Article 12 UNCRPD in its General Comment No. 1 which states that the justification for any form of non-consensual intervention based, even in part, on a diagnostic label such as ‘mental disorder’ and the use of capacity assessments is inherently discriminatory. For this reason, the Committee considers that all compulsory treatment and substitute decision-making should be abolished and replaced by a new framework of supported decision-making. According to the General Comment, supported decision-making mechanisms must respect the rights, will and preferences of persons with disabilities and must never amount to substitute decision-making or operate within a substitute decision-making regime.<sup>3</sup>

This call for the abolition of mental health and guardianship laws has caused worldwide debate. Governments in the UK and elsewhere are currently grappling with how to amend their laws and there has been much discussion and activity in the academic community on the interpretation of the UNCRPD and Article 12 and the extent to which it should and will impact on national legislation.

The UNCRPD therefore challenges us to consider our mental health and capacity laws in light of the new paradigm. Central to this is making support for the exercise of legal capacity/supported decision-making a fundamental aspect of our legal framework. Law commissions around the world, including in Canada and Australia, have placed this principle at the heart of their law reform endeavours.<sup>4</sup> They have produced substantial reports which

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<sup>2</sup> *Shtukurov v Russia* (App no 44009/05) (2012) 54 EHRR 27, paras 87-89; *Sykora v Czech Republic* (App no 23419/07) (2012) ECHR 1960, paras 101-103; *X v Finland* (App no 34806/040) (2012) ECHR 1371, para 220.

<sup>3</sup> 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) para. 16 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>> accessed 30 June 2017

<sup>4</sup> Australian Law Reform Commission, ‘Equality, Capacity and Disability in Commonwealth Laws - Final Report’, ALRC Report 124 (August 2014) <[https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc\\_124\\_whole\\_pdf\\_file.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf)> accessed 30 June 2017 and Law Commission of Ontario, ‘Legal Capacity, Decision-Making and Guardianship – Final Report’ (March 2017) <<http://www.lco-cdo.org/wp-content/uploads/2017/03/Project-Background-Capacity-EN.pdf>> accessed 30 June 2017

are contributing to global understandings of how to make the rights contained in the UNCRPD a reality and provide encouragement for a similar venture in Scotland.

Some limited research has been done in relation to the UNCRPD and mental capacity laws in the UK. The 2016 Essex Autonomy Project 'Three Jurisdictions Report' recommended that 'respect for the full range of the rights, will and preferences of everyone must lie at the heart of every legal regime' and that this be secured by the introduction of a rebuttable presumption that effect should be given to the person's will and preferences.<sup>5</sup> In addition, the recent law reform report of the Centre for Mental Health and Capacity Law and the Mental Welfare Commission has offered two potential options for law reform in Scotland – graded guardianship and unified legislation. The report also recommends that there 'should be a long-term programme of law reform, covering all forms of non-consensual decision making affecting people with mental disorders' which should be non-discriminatory.<sup>6</sup>

Significantly, the Scottish Government has already committed to realising the UNCRPD in its 'A Fairer Scotland for Disabled People: Our Delivery Plan to 2021 for the United Nations Convention on the Rights of Persons with Disabilities 2016'.<sup>7</sup> This includes a commitment to review legislation and consider circumstances in which supported decision-making can be promoted. The aforementioned research in this area, in addition to commitments made by government, signifies a willingness to engage with the UNCRPD and a Scottish Law Commission project would be a meaningful and significant step in this process.

### 3. The Current Legal Framework

The three main pieces of legislation related to the care, treatment and protection of people with mental disorder in Scotland - the Adults with Incapacity (Scotland) Act 2000, the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007 - all contain guiding principles which were intended to reduce intervention in the lives of people with mental disorder and to promote their autonomy. Principles include: using the least restrictive option, taking account of the views of the adult and only carrying out an intervention if it would benefit the adult. However, it has been reported that in practice the principles of the legislation are not being implemented and that there is a lack of awareness of the principles amongst health care staff.<sup>8</sup> In addition, there has been a 'significant and longstanding trend of increased use of both mental health and incapacity legislation in Scotland'.<sup>9</sup> This has resulted in a 99% increase in the use of

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<sup>5</sup> Wayne Martin and others, 'Essex Autonomy Project - Three Jurisdictions Report – Towards Compliance with UNCRPD Art.12 in Capacity/Incapacity Legislation across the UK' (6 June 2016) <<https://autonomy.essex.ac.uk/wp-content/uploads/2017/01/EAP-3J-Final-Report-2016.pdf>> accessed 30 June 2017

<sup>6</sup> Centre for Mental Health and Capacity Law and Mental Welfare Commission, 'Scotland's Mental Health and Capacity Law: the Case for Reform' (May 2017) p.6 <[http://www.mwcscot.org.uk/media/371023/scotland\\_s\\_mental\\_health\\_and\\_capacity\\_law.pdf](http://www.mwcscot.org.uk/media/371023/scotland_s_mental_health_and_capacity_law.pdf)> accessed 30 June 2017.

<sup>7</sup> Scottish Government, 'A Fairer Scotland for Disabled People: Our Delivery Plan to 2021 for the United Nations Convention on the Rights of Persons with Disabilities 2016' (December 2016) <<http://www.gov.scot/Resource/0051/00510948.pdf>> accessed 30 June 2017.

<sup>8</sup> Scottish Human Rights Commission, *Getting it Right? Human Rights in Scotland*, (October 2012), page 69 and 102-103, available at <<http://www.scottishhumanrights.com/application/resources/documents/SNAP/GettingitRightAnOverviewofHumanRightsinScotland2012.pdf>> accessed 30 June 2017

<sup>9</sup> Centre for Mental Health and Capacity Law and Mental Welfare Commission, 'Scotland's Mental Health and Capacity Law: the Case for Reform' (May 2017) p.12 <[http://www.mwcscot.org.uk/media/371023/scotland\\_s\\_mental\\_health\\_and\\_capacity\\_law.pdf](http://www.mwcscot.org.uk/media/371023/scotland_s_mental_health_and_capacity_law.pdf)> accessed 30 June 2017.

guardianship from 2009/10 to 2015/16<sup>10</sup> and a roughly 4% increase per year in the number of people being detained under the 2003 Act since 2011/12.<sup>11</sup>

Considered in light of the aforementioned developments in human rights law requiring less restriction, we suggest that it is imperative to reconsider the fundamental underpinnings of our laws, that is, the thresholds employed for intervening in peoples' lives and the rights they have to access support, in order to secure a more UNCRPD compliant regime.

*a. Mental Disorder and Capacity Thresholds*

The thresholds for intervening in the lives of people with mental disorder have become increasingly problematic. Our existing mental health, capacity and adult support and protection legislation apply diagnostic thresholds linked wholly or partly to mental disorder and capacity assessments, an approach which is clearly at odds with the interpretation of Article 12 advanced in General Comment No.1 (as noted in section 2) and more generally with the principles of non-discrimination and equality which form the foundation of the UNCRPD.

The 2000, 2003 and 2007 Acts can therefore be described as discriminatory in that they apply to individuals with a mental disorder. While this diagnostic threshold has traditionally been accepted as permissible, there is a growing consensus that such an approach unfairly singles out a group of people for differential treatment without sufficient or convincing justification. The requirement for an individual to have a mental disorder before they fall within the ambit of the legislation places a disproportionate focus on their status and diagnosis.

In addition to the diagnostic threshold, different tests of 'capacity' and 'significantly impaired decision-making ability' (SIDMA) are employed, respectively, by the 2000 and 2003 Acts to determine who falls within the scope of the legislation, and concerns have been raised about the way in which professionals currently make these assessments. There have been particular concerns around the lack of clear guidance for practitioners on how to assess SIDMA. A recent report by the Centre for Mental Health and Capacity Law and the Mental Welfare Commission noted that service users felt that a diagnosis of mental disorder can lead to professionals making assumptions that the individual lacks capacity.<sup>12</sup> This has profound implications for rights to autonomy and legal capacity and points to an inherent problem with capacity assessments.

The concept of capacity and the issue of capacity assessments are being increasingly questioned and debated on a philosophical and practical basis. There is doubt that such concepts are still fit for purpose. The following summarises the main arguments for and against their use.<sup>13</sup>

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<sup>10</sup> Mental Welfare Commission, 'Adults with Incapacity Act Monitoring Report 2015/16' (September 2016) <[http://www.mwscot.org.uk/media/342863/2016\\_awi\\_report\\_v3\\_07.09.2016\\_final\\_jw\\_27.09.16.pdf](http://www.mwscot.org.uk/media/342863/2016_awi_report_v3_07.09.2016_final_jw_27.09.16.pdf)> accessed 30 June 2017.

<sup>11</sup> Mental Welfare Commission, 'Mental Health Act Monitoring 2015-16' (September 2016) <[http://www.mwscot.org.uk/media/342871/mental\\_health\\_act\\_monitoring\\_2015-16.pdf](http://www.mwscot.org.uk/media/342871/mental_health_act_monitoring_2015-16.pdf)> accessed 30 June 2017.

<sup>12</sup> Centre for Mental Health and Capacity Law and Mental Welfare Commission Report (n 6) p.34

<sup>13</sup> Arguments contained in Centre for Mental Health and Capacity Law and Mental Welfare Commission Report (n 6) p. 30-32

Arguments in favour of a capacity threshold:

1. Article 5 ECHR compliance – Article 5(1)(e) and (4) of the ECHR link safeguards relating to deprivation of liberty to mental incapacity. The Scottish Government is currently considering how to address this in relation to adults with incapacity and the Scottish Law Commission has of course previously reported on this issue.<sup>14</sup>
2. Avoidance of two-tiered care and treatment decisions – the use of capacity thresholds prevents situations where a person may be deprived of their liberty on the basis of concerns around harm and risk but it is not possible to treat them if they retain or regain capacity and refuse treatment. Such an approach may leave very ill individuals without treatment.
3. Creating parity of esteem in physical and mental health care and treatment – adopting the same capacity threshold for all types of interventions creates parity of esteem, and thus avoids discrimination, in the care and treatment of persons with physical and mental health conditions. This Bamford Report in Northern Ireland strongly argued this and as a result the subsequent Mental Capacity (Northern Ireland) Act 2016 adopts a pure capacity threshold with no reference to mental disorder.

Arguments against a capacity threshold:

1. Addressing risk and harm issues – It is possible that relying only on a capacity threshold may exclude persons with capacity who present a risk to others whilst at the same time, include those lacking capacity but who present no risk and would not gain any benefit from the intervention. It has been suggested that the concepts of ‘mental disorder’ and ‘harm’ provide a more constant, and thus reliable, basis for involuntary intervention than incapacity which enables forward planning and the sustainment of important support, care and treatment which is necessary for full recovery. It is also inevitable that governments will take into account public policy concerns around risk and harm and will have to consider the extent to which a capacity threshold can address these.
2. Denying appropriate care and treatment – It is also possible that capacity thresholds have the effect of excluding people from receiving support and treatment where they retain capacity, for example, people with mood or eating disorders or obsessive compulsive disorder. A capacity threshold may also discourage early and important intervention.
3. Applying capacity thresholds in non-health settings – Concerns have also been raised as to whether it is appropriate to use the capacity threshold in situations beyond health settings.

The UNCRPD provides us with an opportunity to fundamentally reconsider the way in which mental health and capacity laws operate. It allows us to consider whether Scotland could adopt a different threshold that would enable interventions and non-consensual care on a non-discriminatory basis. The diagnostic threshold could be replaced by a more neutral threshold based on, for example, a lack of decision-making ability or on vulnerability, although the extent to which this achieve a non-discriminatory approach in reality would

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<sup>14</sup> Scottish Law Commission, *Report on Adults with Incapacity* (Scot Law Com No 240)

need to be explored. Adopting a more neutral threshold may have the effect of unnecessarily and discriminatorily expanding the reach of the law. However, if such laws are premised on the support paradigm, rather than compulsion, this may prevent unnecessary interventions in the lives of people with mental disorder and, simultaneously, open up support for people who need it but are currently unable to access it because they do not meet the diagnostic threshold.

*b. Support under Scottish Legislation*

The 2000, 2003 and 2007 Acts all provide for some forms of support to assist individuals in making known their wishes and feelings. Under the 2000 Act people can make a power of attorney to plan for future incapacity.<sup>15</sup> The 2003 Act makes provision for psychiatric advance statements where people can state their treatment preferences which must be taken account of by medical professionals and the Mental Health Tribunal.<sup>16</sup> Both the 2000 and 2003 Acts also recognise and provide for, to differing degrees, access to independent advocacy. Assistance with communication is also reinforced in all of the Acts.<sup>17</sup> The 2003 and 2007 Acts further include a requirement to allow the person to participate as fully as possible in care and treatment decisions and to provide information and support to enable them to do so.<sup>18</sup> While these are all forms of ‘support’ the extent to which they actually enable people to exercise their legal capacity and avoid non-consensual intervention is currently unclear. They also operate within a system of substitute decision-making which is fundamentally at odds with General Comment No. 1.

The aforementioned Three Jurisdictions Report recommended that the ‘scope of statutory requirements regarding the provision of support should be expanded to encompass support for the exercise of legal capacity’<sup>19</sup> and that ‘statutory provisions regarding support in the exercise of legal capacity must be attributable.’<sup>20</sup> This was also largely reflected in the recommendations of the Centre for Mental Health and Capacity Law and the Mental Welfare Commission report. Indeed, it is imperative that a new legal framework is based on support, which in turn could result in less need for the use of compulsory measures. This will necessarily link in with what kind of threshold a new regime would employ by balancing the need for the framework to be sufficiently flexible to cover all individuals who may require access to support.

**4. Reform Suggestions**

We propose that a Scottish Law Commission law reform project should examine how existing Scottish incapacity, mental health and adult support and protection legislation approach eligibility and support and whether these can be reformed to work consistently together to ensure a non-discriminatory legal framework which is built around the provision of support.

We suggest that this would require consideration of: (1) the capacity thresholds and identified support provisions under such legislation; (2) the desirability of capacity and diagnostic thresholds as the basis for interventions and non-consensual care; (3) how the

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<sup>15</sup> 2000 Act, Part 2

<sup>16</sup> 2003 Act, ss 275-276

<sup>17</sup> 2003 Act, s 259; 2000 Act, s 3(5A)

<sup>18</sup> 2003 Act, ss 1(3) and 1(4); 2007 Act, s 2(d)

<sup>19</sup> Essex Autonomy Project (n 5) recommendation 5, p.2

<sup>20</sup> Essex Autonomy Project (n 5) recommendation 6, p.2

capacity thresholds and support mechanisms identified in Scottish legislation actually operate; and (4) whether there is a workable alternative to the capacity and diagnostic thresholds – for example providing access to services and support by reference to need.

(b) Please provide us with information about the impact this is having in practice:

See previous comments.

(c) Please provide us with information about the potential benefits of law reform:

See previous comments.

**General Comments**

See previous comments.

Thank you for taking the time to respond to this consultation paper. Your suggestions and comments are appreciated and will be taken into consideration when preparing our Tenth Programme of Law Reform.