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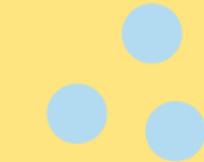
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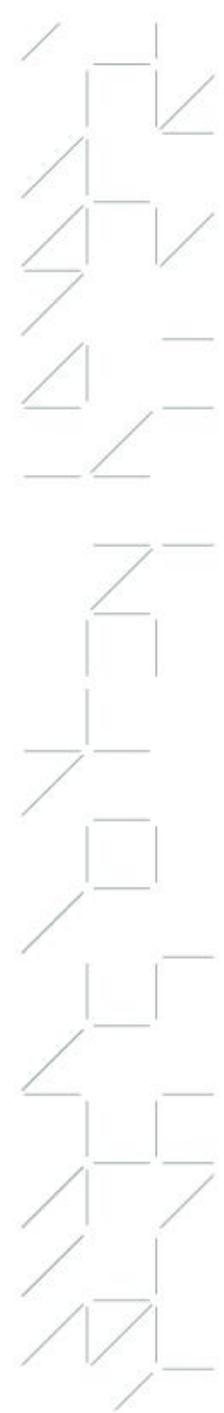


Repurposing mental health and capacity law

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Outline

Scottish Mental Health Law Review (Scott Review) and repurposing the law: why and recommendations concerning capacity and decision-making

What is required to achieve this

What can be done to move towards achieving this absent of new legislation



Scott Review – why was it required

Existing Adults with Incapacity and Mental Health legislation:

- Not meeting needs

- Out of step with developing human rights

- Need to address Convention on the Rights of Persons with Disabilities (CRPD) requirements, especially around respect for exercise of legal capacity, need to look at the whole range of rights and non-discrimination



Scott Review – considerations

How to address CRPD General Comment No 1 (2014) – abolition of laws authorising psychiatric coercion/guardianship (proxy decision-making) and replacement with supported decision-making

Diagnosis and mental (decision-making) capacity assessments are a discriminatory means by which to limit the exercise of legal capacity

UN Special Rapporteur on the Right to Health (2020), World Psychiatric Association (2022), WHO (2023) and Council of European (2019) – clear pathway to reducing/eliminating coercion and availability of alternatives

Existing law in Scotland non-compliant



Scott Review – findings

A majority of stakeholders (including lived experience) wanted better all-round support, respect and say but not necessarily total abolition of non-consensual interventions

‘Capacity’ assessments are currently not operating well to provide support and protection

Effective support transcends capacity/incapacity assessments and non-consensual interventions

A person’s decision-making may be compromised by factors other than illness and cognitive impairment



Scott Review – findings

A need to focus first on achieving effective support and human-rights based outcomes for persons with mental disabilities

Realisation that a more holistic approach to rights is required to fully support the needs of persons with mental disabilities

What is the purpose of mental health and mental capacity law?



Scott Review – relevant recommendations to bring about change

Repurposing the law:

- Meeting needs to live life on own terms

- Underpinning principles - respect for dignity and autonomy, equality and non-discrimination and inclusion

- Less fixation on justifying non-consensual measures, more about support

Strengthening the person's voice

- Reducing coercion – ‘a well-stocked basket’ of alternatives



Scott Review – relevant recommendations to bring about change

Achieving this through:

Human Rights Enablement/Supported Decision Making
/Autonomous Decision Making framework

Enforceable social, economic and cultural rights



What has happened?

Scottish Government Programme of Mental Health and Capacity Law Reform (announced June 2023)

Human Rights Bill – in absence of which CRPD, ICESCR, remain persuasive/influential but rights not legally binding

Glacial legislative reform progress

Adults with Incapacity Act reform

UNCRC incorporation – possibility to enhance economic, social and cultural rights realisation?



Repurposing without new legislation

Scott Review final report – much can still be done absent of legislative change

- Culture change/supporting existing intention

- Resourcing - more about creative use?

- Human rights standards

 - A baseline – can be built on

 - ECHR rights – developing and CRPD influence

 - UNCRC

 - CRPD – not as ‘scary’ as might appear – non-discrimination and support as key messages



Repurposing without new legislation

Achieve better implementation of existing legislative principles

Full focus away from non-consensual measures

Greater focus on situations before and following non-consensual interventions, and wider needs during non-consensual interventions

How

Supported Decision Making

Considering:

Wider needs

Alternatives to non-consensual measures

Non-discrimination

Impact

Reinforcing legislative principles:

Regard for wishes and feelings

Least restrictive means/avoidance of non-consensual measures

Better presumption of capacity and use of capacity assessments

Better support



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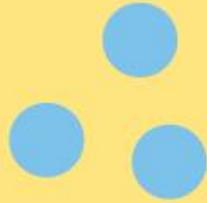


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