

1. What Scotland needs to do

This section gives you some important background information about the review and about human rights challenges for Scotland.

It also gives you a summary of all the ideas across all sections of this report.

There are no questions in this section.

If you are reading the full consultation document, there is a separate survey that you can fill in.

This is available at the end of this document.

It is also available separately.

If you are taking part online, there are questions in each online survey. There are also questions in the downloadable sections within each survey.

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1.1 About this review

A review of the law is when people look at the law and see if it needs to change.

This review is about a law called the Mental Health (Care and Treatment) (Scotland) Act 2003. We will call this the Mental Health Act.

This review is looking at whether this law needs to change for people with learning disability and / or autistic people. We are finding out how well the law supports people's human rights.

This review is independent. This means that no group of people can decide how the review will happen or what it will say, except the independent people who run the review. The review will finish in December 2019.

On our website there is more information about the review. There are videos and easy read information [link](#).

The review's remit

Scottish Government set the remit for this review. The remit is the list of things that we need to talk about and report on. Scottish Government said:

“The review will need to gather evidence from a wide range of sources and engage widely with those who have an interest, whether that interest is personal or professional and reflect this evidence in its final analysis and recommendations.

The objectives of the evidence-gathering and analysis will focus on:

The operation of the 2003 Act – are people with autism and learning disability well served?

Increasing the role of psychologists in relation to the 2003 Act [we are looking at *the role of psychology* in the 2003 Act]

The definition of mental disorder under the 2003 Act in relation to learning disabilities and autism

The criminal justice system and the interaction with the Act

The use of psychotropic medication (current prescribing practices)”

Our approach

It is very important that we include people with lived experience in this review. We have to do this to really understand things. Also, the United Nations tells us that we have to do this. In all aspects of this review, we are trying to give the same importance to what people with lived experience tell us and what professionals tell us. To make this possible, we are trying to make every part of the review accessible to all people.

This review has 3 stages. Before stage 1 began, we chose advisors for the review. We have the same number of advisors with lived experience as professional advisors. The advisors help us to make sure that the review is accessible to people and that the review can get the evidence that it needs. The advisors do not decide what the review should do. Only the review team makes decisions.

The stages of this review

Stage 1: September 2018 - February 2019

We heard about people's experiences
We collected stories about people's experience
of the Mental Health Act



Stage 2: March 2019 - July 2019

We thought about what needs to change and what
needs to stay the same in the Mental Health Act.
We did this with people with lived experience and professionals



Stage 3: August 2019 - October 2019

We are telling everyone about the suggestions
that came out of stage 2.
We are asking everyone what they think about what should stay
the same and what should change in mental health law.



Reporting: November and December 2019

The review's executive group will agree and write
the report and recommendations.
The Chair will make these recommendations
to the Scottish Government

Stage 1

In stage 1 we asked about people's experiences of the Mental Health Act and how the Act affects people's human rights. We needed to find this out from people who had experience of the Mental Health Act. This included people with learning disability, autistic people, carers, and professionals. We called this "new evidence".

We also needed to find how the Mental Health Act affects people's human rights from what people had already written. We called these sources of information "reports". These include articles in journals, news reports and other written reports. The reports were about mental health and rights in general, not just the Act.

Stage 1 told us that even when good care is provided, the Mental Health Act sometimes fails to protect people's rights. We also heard that the Act sometimes makes it legal for public services to do things that have negative effects overall on people's human rights. You can read more in our stage 1 report [link](#).

Stage 2

In stage 2, we asked organisations how the law could promote and protect human rights better in future. We met with organisation of autistic people and people with learning disability, and with carers organisations. We met with professional, third sector and public sector organisations. We met with human rights, judicial and monitoring organisations.

We also needed to understand what people have tried to do in the law and in practice, in this country and in other countries. We met or spoke with experts in the law and in services for autistic people and people with learning disability. These experts were in all of the countries in the United Kingdom and Ireland. We also spoke to experts in Australia, Canada, New Zealand and Switzerland.

After hearing all of that, we developed some ideas on what the law might do in future. We tested different ideas with groups of people with lived experience and professionals. After that, we made some changes to the ideas.

At the end of stage 2, we looked at all of the suggestions that organisations had made to us. This told us that we needed to have some more ideas for changes to the law. We then took all of these ideas and asked some legal experts to check that the ideas would work in law.

Stage 3

In stage 3, we are asking for your views on suggestions for the law in future. We need to know what you think of the suggestions in this document. At the end of stage 3, we will consider what you tell us about these suggestions.

Final report and recommendations

We will send a final report on this review to the Scottish Government in December 2019. That report will tell the Scottish Government what we did in this review and what we found. It will report on what people told us in stage 3. What people tell us will have an effect on what we write in the final report.

The final report will give recommendations to Scottish Government on how mental health law should be in future, for autistic people and people with learning disability.

1.2 The challenge for Scotland

Are people well served by the law?

An important part of this review's remit is to consider:

'The operation of the 2003 Act – are people with autism and learning disability well served?'

At the end of stage 1, we found that autistic people and people with learning disability are not well served by the Mental Health (Care and Treatment) (Scotland) Act 2003. We do not think that this law is good enough at promoting and protecting the human rights of autistic people and people with learning disability.

Complying with the Convention on the Rights of Persons with Disabilities

We understand that when it was written, Scotland's Mental Health Act was one of the best mental health laws in the world for human rights. After that, the United Nations decided that governments were not doing enough for the human rights of people with disabilities. The United Nations created the Convention on the Rights of Persons with Disabilities [link](#) [link](#).

It is very important that Scotland complies in full with this Convention. The Scottish Parliament agreed in 2016 that 'the Scottish Government should be firmly committed to implementing the UN Convention on the Rights of Persons with Disabilities in full so that disabled people in Scotland can realise all of their human rights' [link](#) (paragraph 4).

All nations are challenged to comply with this Convention. We think that it will take a lot of time and effort to do this. However, as part of the United Kingdom, Scotland has already committed to comply with it. We understand that the question is not whether to comply with the Convention on the Rights of Persons with Disabilities, but how to comply with it.

European Convention on Human Rights

The Scotland Act 1998 requires all Scots laws to comply with the European Convention on Human Rights [link](#). Also, the Human Rights Act 1998 requires all public authorities to act in ways that comply with the European Convention. This is also very important. As you will see in this document, we think that Scotland's Mental Health Act may not fully comply with the European Convention on Human Rights. Since 2003, judgments of the European Court of Human Rights have developed our understanding of how the European Convention should be reflected in law. Some judgments have created challenges for many European nations.

We think that the positive approach of the Convention on the Rights of Persons with Disabilities can be used to enhance the rights in the European Convention on Human Rights. That convention does not deal with all of the rights that relate to mental health. For example, there is no right to health in the European Convention. The rights in the European Convention only give minimum standards.

Equality and non-discrimination in how people experience their rights

The Convention on the Rights of Persons with Disabilities makes it clear that the rights of all people should be enjoyed on the same basis for everyone. Also, the rights of people with disabilities can be limited. However, a characteristic such as disability can never be used to justify a limit on human rights. Even detention and compulsory treatment could be justified. But autistic people and people with learning disability must not be detained or given compulsory care or treatment because of their disability.

Supported decision-making

In the Convention on the Rights of Persons with Disabilities, support for making decisions is very important. This includes support to give effect to those decisions in reality.

Supported decision-making is not just a way of supporting someone to make decisions in a shared way with other people. Each person with disability is entitled to make their own decision. Supported decision making has to make sure that a person's rights, will and preferences are respected on the same basis as other people's rights, will and preferences.

Proportionate decisions

When people's human rights are limited, this must be done in a way that is proportionate. As for everything in the Convention on the Rights of Persons with Disabilities, limits to rights must be used equally for all people. Limits must not discriminate against people with disabilities in any way. For example, it is not proportionate to limit the rights of a person with disability on the basis that this might help the 'greater good' of other people in general.

Led by people with disabilities

Scotland has to fully involve autistic people and people with learning disability in the whole process of making Scots law comply with human rights standards. We have tried to do that in this review. The Convention on the Rights of Persons with Disabilities also requires Scotland to fully involve autistic people and people with learning disability in developing, implementing and monitoring the laws and policies that support Scotland's commitment to this Convention.

The 'paradigm shift' in how we understand disability

We think that a lot of change will be needed for Scotland to comply with all of its human rights duties. We think this will need to include changes in culture, practice and use of resources. New resources may be needed.

An important reason for this change is the 'paradigm shift' that the Convention on the Rights of Persons with Disabilities requires around the world [link](#). The United Nations requires us to understand disability differently, and to improve how we relate to and support people with disabilities. Dignity and equality are very important in this, across

all areas of life at all times. We need to understand disability as something that happens when people with impairments meet barriers in attitudes and in their environment. We need to see all people as equal citizens who hold rights, not as people who might receive charity to meet some of their needs. We also need to recognise all people as citizens who have equal standing before the law, and support all people to make full use of their legal capacity. We discuss this more in section 2.

Scotland's opportunity

We suggest that Scotland has an opportunity to face these challenges, and to become a leader in implementing human rights in mental health law and in practical reality. This consultation document gives you our suggestions on how Scotland can do this for autistic people and people with learning disability, based on what we have heard from the people of Scotland and from around the world.

What we are asking of you

In this consultation, we are asking for your suggestions on our vision for this change. It is a big vision, and it would not be easy to implement. Our final report will deal with how we can work towards this vision.

1.3 The changes that we think need to happen

Here is a summary of the changes that we think need to happen in mental health law, for autistic people and for people with learning disability.

Section 2. How we understand autism, learning disability and mental health

We suggest that Scotland needs to move to understanding autism and learning disability as disabilities, not as mental disorders.

We think that Scotland's mental health services for autistic people and people with learning disability need to move to a human rights culture.

In Scots law, everyone is presumed to have legal capacity. We suggest that it should not be possible to challenge the legal capacity of autistic people or people with learning disability.

Section 3. Support for decision making

We suggest that Scotland should make change to comply in full with a key right in the Convention on the Rights of Persons with Disabilities, the right to equal recognition before the law.

To make it possible for autistic people and people with learning disability to have and use their legal capacity, Scotland would have to give strong support for decision making. We make a range of suggestions on how this support should be set up.

We also discuss how we think decisions should be made on psychological interventions, psychotropic medication, and at times of crisis.

Section 4. Support, care and treatment

We suggest that autistic people and people with learning disability should be given rights in law to have access to the support, care and treatment that they need.

We also makes suggestions on how support, care and treatment could be provided for women, children and offenders, in ways that respect human rights.

We discuss some duties that would need to be placed on public authorities to make these rights real.

Section 5. Where support, care and treatment happens

We suggest that there should be a shift towards voluntary support and care that emphasises social support and care. We suggest a shift away from compulsory treatment in hospitals that emphasise medical treatment.

We suggest places where support, care and treatment should happen. This includes a new type of service which we call secure support centres.

Section 6. How professionals make decisions

We suggest that Scotland should make changes to move closer to compliance with the right to liberty and security. This is another key right in the Convention on the Rights of Persons with Disabilities.

We suggest that Scotland is not yet ready to end all detention on the basis of disability, or all compulsory treatment, in a safe way.

We suggest that human rights assessments should be the basis for all professional decision making for autistic people and people with learning disability.

We suggest new roles for a broad range of professionals.

Section 7. How decisions are monitored

We think that Scotland needs mental health law and services based on human rights. We think that autistic people and people with learning disability should be routinely involved in developing, implementing and monitoring the law and services.

We suggest that the Mental Welfare Commission for Scotland and the Mental Health Tribunal for Scotland should be more authority to protect the rights of autistic people and people with learning disability.

We make a range of suggestions on how human rights should be monitored.

Section 8. Offenders

We suggest changes to make the criminal justice system fairer for autistic people and people with learning disability.

We suggest that Scotland uses 'intermediaries' to support suspects and defendants who have communication impairment.

We suggest a change to how disability is understood in criminal law. This change could make it possible for person to be held responsible for an offence, but also to have adapted consequences that take account of the person's disability.

We suggest that punishment, treatment and support to stop offending should be clearly separated out in law for autistic offenders and offenders with learning disability.

We suggest that punishment should not be longer for these offenders than for any other offenders.

Section 9. Where support, care and treatment happens for offenders

We suggest that rehabilitation should usually happen in the community, for offences that would usually lead to community rehabilitation for anyone else.

We suggest that offenders should usually be given support, care or treatment in the community or in rehabilitation centres, not in hospitals.

We suggest that prison should only be used for autistic offenders or offenders with learning disability when it is specially designed or adapted to meet the person's needs.

Section 10. What this means for the law

We suggest that autism and learning disability should no longer be defined as 'mental disorders' in Scotland's Mental Health Act.

We suggest that Scotland develops a new law to give 'positive rights' for support, care and treatment to autistic people and people with learning disability.

We give a summary of the changes that we are suggesting for criminal law.

We suggest how Scotland might prepare to end detention on the basis of disability, and to end compulsory treatment, at some time in the future.