Scottish Mental Health Law Review

RCN Scotland submission

RCN Scotland welcomes the opportunity to make a submission to this review. Given the amount of time which has passed since the passage of the Mental Health (Care and Treatment) (Scotland) Act 2003 (MHA), we agree that this legislation and other related Acts would benefit from a review and that this should take place with a human rights focus.

To inform this response, RCN Scotland has consulted with a number of members working in community and acute mental health service and we have drawn from data from our 2019 Members' Survey. Due to the pressure across the health service caused by the response to COVID-19, this engagement has not been as extensive as we originally planned. Nevertheless, we hope it provides a useful insight into the experience of mental health nurses in working with the legislation, and acts as a starting point for some of the changes to the law which might be considered by the review.

Importance of nurses' views and experience

As both a professional college and a trade union, the RCN has a keen interest in the two key aims of the review; namely to improve the rights and protections of persons with a 'mental disorder' and to remove barriers to those caring for them.

There are just under 6,500 qualified mental health nurses working in Scotland and a further 2,900 support staff within the mental health nursing workforce, meaning nursing is by far the largest single profession providing care for people with mental health issues.[1]

Mental health nurses play a central role in providing care for people with mental health disorders both in hospital and in the community. Nurses are often the healthcare professionals who provide the greatest amount of direct patient care. They work across multi-disciplinary teams to provide care and treatment and have some formal roles within the existing legislation.

We would expect the review to take into account the views and experience of nurses in order to ensure that any changes take into account their extensive and central role in providing care to people who may be subject to the Mental Health Act, the Adults with Incapacity Act or Adult Support and Protection legislation.

Workforce issues

Any change to the law must be cognisant of the current workforce challenges in the sector and the fact that there are insufficient mental health nurses to meet demand in mental health pathways. Mental health nursing has one of the highest vacancy rates out of any nursing job

[1] See ISD Scotland Workforce statistics.

category in Scotland, with more than 750 posts unfilled, or a vacancy rate of 7.5%.[2] This is a trend that has been getting worse over time.

This is primarily a safe staffing issue which we anticipate the implementation of the Health and Care (Staffing) Scotland Act 2019 will address, but it is important that the current workforce challenges that exist are understood by the Review before proposals are made. No changes in the law can improve patient outcomes if the workforce to implement these changes is not in place.

RCN Survey

Our members tell us that working in mental health services can be challenging. While it is important to recognise that mental health nursing is not one homogenous group and that the role varies considerably depending on the service, it is clear that a significant proportion of our members working in mental health experience a pressurised environment.

Our membership survey, published in November 2019, provides a useful snapshot of the views of mental health nurses[3]. We received around 150 responses from members who identified their area of practice as mental health, so these responses are indicative of the sector, though should not be considered a comprehensive survey.

Some key findings from the survey include:

- 44% of those working in mental health said they worked in excess of their contracted hours one a week or more. (This is broadly in line with rest of the profession, but is clearly too high.)
- One response we highlighted in our survey was from a Band 6 community psychiatric nurse who told us: "*There is no human way to fit current nursing workload into a 37.5 hour week so working unpaid hours to get all work done is the only option and managers continue to allow it."* This is a very common issue in the sector.
- 68% of respondents felt they were under too much pressure at work, which is significantly higher than the average of 60% for the whole sample.
- 69% said they were too busy to provide the level of care they would like to, again higher than the average of just under 60%.
- 49% said they had experienced physical abuse and 83% had experienced verbal abuse, significantly higher than the whole sample. While we do not want to stigmatise people with mental health difficulties, this does confirm that mental health nurses can face a difficult working environment which could have a harmful effect on the health and wellbeing of staff.

What this means for the reformed Mental Health Act

The survey results show how important it is that the is appropriate capacity and resource to implement any proposals. Giving nurses a greater involvement in Mental Health Tribunals, for example, must be properly resourced.

Furthermore, any changes in the law must be properly communicated to the workforce and adequate time for training has to be set aside. There must be investment in training and development for practitioners, including Registered Nurses and health care support workers, on the implications of any legislative change and how they will carry out their roles. For

[2] See ISD Scotland Workforce statistics.
[3] See RCN Scotland 2019 employment survey.

Registered Nurses, this should involve planned and coordinated training and development, commencing at pre-registration education level.

Feedback we have received from members in drawing up this response indicates that while there is a good understanding of the mental health legislation amongst the nursing workforce, there remains some inconsistency about which piece of legislation is used in a given scenario. Further legislative changes and associated implementation guidance should seek to make processes and requirements as clear as possible and must be properly communicated to and easily understood by those who will be applying it in practice.

Any change in the law must be mindful of the pressure staff are already under and consider whether changes will help or hinder the provision of high-quality, person centred care.

The impact of COVID-19

Before the COVID-19 pandemic, waiting times for psychological therapies were already higher than the Scottish Government's target. For the quarter ending December 2019, 79% of patients started treatment within 18 weeks of referral. While the average waiting time for treatment was 5 weeks, this still means some 3,600 patients seen in the last quarter were waiting more than 18 weeks. [4] Pressures on CAMHS services also means fewer young people are receiving treatment within the target time and a significant proportion were being rejected from the service. A lack of mental health provision for young people will mean too many slip through the net and go on to adult life with ongoing mental health issues.

As resources have been diverted to providing care for patients with COVID-19, clinical guidance to health boards has been to largely suspend all but the most essential mental health referrals and reviews during the pandemic[5]. While this was justifiable in terms of infection control and ensuring resources were in place to care for COVID patients, the impact of suspending so many services for several months will have meant some people who would have received help have not been getting it.

In addition, 'lock-down' has meant people's normal support networks of friends and family have been affected and worries about finance, work and childcare has meant more people are struggling with their mental health.

In short, the approach to the pandemic is likely to put pressure on services which were already struggling to meet demand and again this must be considered by the review.

Human rights approach

A human rights based approach to this review has been welcomed by our members. Applying this approach to mental health service allows health professionals to formulate their decision making based on certain values, principles and the law, whilst ensuring that the person and their particular wishes and needs are at the centre of that decision making process.

The Mental Health Act and other legislation need to provide a framework to enable transparency, fairness and proper process to manage situations where rights come into conflict with each other. This, of course, may include reducing someone's rights in respect of choice and control over aspects of their lives in order to maintain other more fundamental rights. Staff working in mental health services need to be clear about how decisions over conflicting rights are to be made.

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[4] See: https://beta.isdscotland.org/find-publications-and-data/conditions-and-diseases/mental-health/psychological-therapies-waiting-times/

[5] See Scottish Government nursing & community health staff clinical guidance, table 8

In achieving this balance, the rights of staff need also to be upheld. We need to ensure staff feel safe and the society they serve values their safety. This review could reflect on the judicial response to those who assault staff and lay out in a clearer way when further action is justifiable.

Principles for transformational change

In 2016, RCN Scotland published a paper on the transformation of adult mental health care in Scotland[6] which focused on the how previous reforms could inform the integration of health and social care. In completing this work, we heard from members that the biggest impact on their career was the 2003 Act and that the changes the Act brought in were generally welcome. In particular it was noted that the focus on users' rights and involvement as well as the principle of reciprocity within the Act were welcome changes.

This work identified a number of key enablers of transformational change for delivering integrated services, the most relevant of which are outlined below. Though these were developed with integration of mental health services in mind, we hope that they are helpful in the context of this review:

1. Change should be well led, managed and funded – reforms work best when leaders work collaboratively with staff who are providing the services on the ground and change is accompanied with additional resources during the transition period.
2. Health and wellbeing are defined by the individual – each service user is unique and services should be rights-based, person centred and recovery focused.
3. People using services are involved both in decision-making about their care and at a strategic level
4. Real relationships are developed as the foundation of effective teamwork - To develop strong multidisciplinary teams, leaders need to address tensions between staff and keep the person receiving care at the centre of all care planning and provision.
5. An environment is created which enables people to take risks proactively - staff should feel able to take positive risks with the right clinical supervision and opportunity to reflect on practice.
6. Services have the right staff, with the right support and training, to meet identified needs – sufficient workforce, with the right skills mix and team support are crucial to maintaining and transforming services.

Where reform is needed

We have identified three broad areas where we would welcome reform. They are: Legislative Clarification, Enhancing the Role of Nursing and Modernisation.

1. Legislative Clarification

RCN members from a range of mental health settings tell us that while they generally feel comfortable with the legal framework and the powers and responsibilities the legislation lays out. The relationship between nurses and other disciplines, in particular MHOs has been repeatedly mentioned as pivotal in terms of navigating the legal framework.

Overlap, or a perceived overlap between the Mental Health Act and the Adults with Incapacity Act means that some medical professionals appear to have a preference for using

[6] See RCN Scotland briefing on mental health care transformation, 2016.

one Act over the other and this can cause confusion. While there are mixed views as to whether it would be helpful to try to consolidate the three pieces of legislation into one, there does appear that clearer guidance on the linkage between the different pieces of legislation and their application is needed.

The nurses' power to detain (provided for by section 299 of the MHA as amended) is perhaps an example of how the legislation could be clarified. The Mental Welfare Commission has indicated that there are issues around reporting on the use of this power[7] and completion of NUR1 forms.[8] What is clear is that the power is comparatively rarely used (in 2018, the latest figures available, 178 instances were reported) which may in itself indicate a lack of confidence in its use, particularly given it is necessary any time a nurse prevents someone from leaving a care setting. The anecdotal evidence we have received is that there is a feeling that the guidance of the power of nurses to detain a patient is not as clear as it could be.

Other areas of the law identified by our members as unclear include the definition of medical treatment and whether this includes examination and investigations and guidance on what to do when people who lack capacity resist healthcare interventions and medical treatment.

The low uptake of advance statements is an issue which has been identified in previous reviews of mental health services in Scotland.[9] While a lack of awareness amongst the general population and potentially staff may well continue to be an issue, some of our members tell us there is also a feeling (amongst staff and patients) that advance statements are of little value due to a perception that they are not always taken into account. This is an area where the legislation could be more rights based and the importance and implications of making an advance statements strengthened.

2. Enhanced role of nurses

There is a common view that in a range of ways, nurses could be given a greater role in mental health services in the legislation. The most appropriate clinician should be given legal responsibility for a patient. In many cases, it is most beneficial to the patient that the person most involved in the assessment, planning, delivery and review of care is given this role. Registered Nurses will often be best placed to this, particularly in a community setting and out of hours, when the availability of other staff can cause delays.

In particular consideration could be given to giving Advanced Nurse Practitioners (ANPs) a greater role. ANPs are nurses who have been educated to a Masters Level in clinical practice, have worked at an advanced level of clinical practice and who have non-medical prescribing rights. They have the freedom and authority to act, making autonomous decisions in the assessment, diagnosis and treatment of patients[10]. ANPs are highly skilled, registered professionals who often have greater patient contact than medical professionals.

With the right training and with governance structures in place ANPs, or Registered Nurses could be given a greater role by the legislation, for example:

- Enabling nurses to determine capacity for the purpose of guardianship or intervention orders.

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[7] https://www.mwcscot.org.uk/sites/default/files/2019-07/nurses_power_to_detain_section299__July2019.pdf

[8] See p.37 https://www.mwcscot.org.uk/sites/default/files/2019-10/MHA-MonitoringReport-2019_0.pdf

[9] See Mental Health Foundation. 2016. A review of mental health services in Scotland: Perspectives and experiences of service users, carers and professionals

[10] https://www.rcn.org.uk/-/media/royal-college-of-nursing/documents/professional-development/credentialing/credentialing-handbook.pdf?la=en&hash=5DCC2513C9A347F3AB044DCCE0BC27D6

- Introducing a presumption that nurses should provide evidence in Mental Health Tribunal proceedings.
- In light of the fact that unscheduled psychiatric assessments are already conducted by experienced nursing staff, enabling Registered Nurses to conduct assessments under section 287 of the MHA.
- Amending the RMO role to involve ANPs or Registered Nurses in decisions around care plans following a CTO, the extension of CTOs or the suspension of Emergency Detention Orders etc.

There are already examples of Registered Nurses having this role in the legislation. Section 47 of the AWI Act allows Registered Nurses to authorise medical treatment for adults with incapacity and to "do what is reasonable in the circumstances…to safeguard or promote the physical or mental health of the adult". Elsewhere in the UK, legislation enables nurses to have a greater role, most notably in England where there has been a move to the idea of a Responsible Clinical Officer, which includes Registered Nurses, replacing the role of the RMO.

Modernisation

The MHA was seen as a step change in how Scotland approached mental health and at the time was a welcome and modernising step forward. Since then, however the approach to the treatment of mental health, as well as society's views on mental health have changed significantly.

Some of the language used in the legislation is outdated and doesn't incorporate the principles of recovery focused care. The use of the term "mental disorder" is the most obvious example. Any review of the law would benefit from a greater acknowledgement of the importance of reducing the stigma around mental health and the ongoing promotion of the Milan Principles.

There is limited recognition in the law of the importance of promoting social, economic and cultural rights and this could be built upon in the review.

Similarly, since the passage of the 2003 Act, legal decisions across the UK, and the opinion of the United Nation Committee on the UN Convention on the Rights of Disabled People, have described the importance of ensuring that individuals are able to make their own decisions as far as possible, preferring supported to substitute decision-making. An individual might have the capacity to make decisions on elements of their care or other aspects of their life but not others. Capacity may also fluctuate. Supported decision-making requires professionals to regularly assess whether a patient has capacity and without clear rules and guidance this can lead to risk aversion or accusations of professional influence. Nursing staff would require protection against this, as well as clarity, both in the law and in the guidance, if their role is to be changed to include analysis of capacity in a supported decision-making model.

The way in which care is being delivered has also changed significantly in Scotland since 2003. The third sector now has a greater role now in providing support, care and treatment in the community and there is rightly a focus on this model of care and on reducing the length of hospital stays.

Further information

We hope that these comments are helpful. Our priorities are clear: nursing professions are key to the successful implementation of the current Mental Health Act, Adults with Incapacity Act and Adult Support and Protection legislation. The Act must recognise and include the contribution that nursing professions at all levels can make to improving outcomes for people subject to the Acts, but implementation must ensure clarity of roles and processes, adequate training and safe staffing levels or those outcomes will not be achieved.

RCN Scotland would be happy to discuss these comments further with the review team, and to support the review as it progresses. Please contact Ross Sanderson, Policy Officer, ross.sanderson@rcn.org.uk, 0131 662 6197