

Institution: Edinburgh Napier University		
Unit of Assessment: UoA18 - Law		
Title of case study: Implementing international human rights standards for persons with mental disabilities		
Period when the underpinning research was undertaken: 2009 to 2020		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s): Jill Stavert	Role(s) (e.g. job title): Professor	Period(s) employed by submitting HEI: 2004-Present
Period when the claimed impact occurred: 2009 to 2020		
Is this case study continued from a case study submitted in 2014? N		
<p>1. Summary of the impact (indicative maximum 100 words)</p> <p>Research by Stavert at Edinburgh Napier University has evaluated the effectiveness of implementation of international mental health human rights legislation. It has significantly influenced mental health and capacity law interpretation and implementation, in addition to law and policy review and reform frameworks in Scotland, the UK and internationally.</p> <p>The research has influenced Scottish Government law reviews, effectively supporting changes to legislation to give effect to human rights. Research by Stavert has strongly influenced the Scottish Government's decision to review its current mental health and capacity legislation.</p> <p>It has led to the creation of Mental Welfare Commission led guidance for practitioners, which can support both public and mental health employees in understanding relevant law and rights. It has led to new training considerations for Mental Health Tribunal panel members, to improve practice with regard supporting the exercise of legal capacity, and finally has been cited by the Australian supreme court. Her research resulting in the 'The Case for Reform' report strongly influenced the Scottish Government's decision to review current Scottish mental health and capacity legislation.</p>		
<p>2. Underpinning research (indicative maximum 500 words)</p> <p>Traditional human rights models have permitted the limitation of the rights of persons with mental disabilities (meaning psychosocial, cognitive and intellectual disabilities). These models have led to non-consensual interventions occurring more frequently in the lives of persons with mental disabilities compared to those without, in decisions regarding treatment, care, property and personal finance. However, the UN Convention on the Rights of Persons with Disabilities (CRPD) is clear that this is discrimination. It states that this approach cannot continue if persons with mental disabilities are to be genuinely treated as equal members of society in all respects, and openly challenges states to address this. CRPD advocates active support of the exercise of legal capacity of persons with mental disabilities as integral to avoiding this discrimination. It encourages states to look beyond rights interpretation in terms of merely limiting arbitrary interventions, to pursuing rights enjoyment more widely, including the right of every individual to the highest attainable standard of physical and mental health. This approach significantly broadens the agency and capabilities of persons with mental disabilities.</p> <p>Since the UK ratified the CRPD in 2009, Professor Jill Stavert (Lead of the Centre for Mental Health and Capacity Law at Edinburgh Napier University), has led research on:</p> <p>(a) How the CRPD can enhance the non-discriminatory realisation of rights. This is in relation to rights identified in treaties such as the European Convention on Human</p>		

Rights, and International Covenant on Economic, Social and Cultural Rights.

(b) What is required to give effect to the CRPD in law, policy and practice (including during emergencies such as the coronavirus pandemic.

(c) The implications for national law, policy and practice reform in the UK and Scotland. Research has focused on practical implications regarding autonomy in decision-making around treatment and other interventions, and the right to mental health.

In 2015 Stavert was invited to contribute to a special issue international law journal at the invitation of Dr Shin Ning Then (Queensland University of Technology) [O1]. This analysed CRPD requirements for supported decision-making and their potential implementation in Scottish. Stavert's research and writing on the CRPD led to her being invited, in 2015, to become a co-investigator in the multi-centre/multidisciplinary 'Three Jurisdictions' project led by Professor Wayne Martin (University of Essex). During the project (2016) Stavert, along with other project team members, presented their research on the effectiveness of UK capacity legislation to the UN Committee in Geneva (side event title 'Operationalising Article 12.4 Safeguards: Lessons from the Three Jurisdictions of the UK'). The project culminated in a report [O4] which noted the broad compliance of UK jurisdictions, but also made recommendations against where they were falling short.

In 2016 Stavert was invited to jointly lead a law reform scoping exercise with the Mental Welfare Commission for Scotland which analysed the effectiveness of Scotland's mental health and capacity law, in relation to developing international standards. This resulted in a report titled 'The Case for Reform', which included a number of recommendations for improvements to Scottish legislation [O5].

Stavert's work also led to publications with the Scottish Human Rights Commission Research Advisory Group in 2017 [O2], and work which led to an invitation to publish as a co-investigator with Professor Penelope Weller (RMIT University, Melbourne) in 2018 [O3]. Stavert has also undertaken research into the effects of emergency situations, in this case COVID-19, on Scottish Mental Health Capacity Law [O6].

The findings revealed that the European Convention on Human Rights (ECHR)-influenced UK legislative principles, promoted respect for an individual's wishes and feelings, and led to less restrictive interventions. The legislation also provides for forms of support for decision-making, in the form of advance statements and independent advocacy (mental health legislation), and powers of attorney (capacity legislation) [O1][O3][O4]. In addition, the findings have also ascertained that the current legislative framework does largely play an effective role in ensuring civil rights. It has limited unwarranted and unlawful detention and involuntary interventions regarding persons with mental disability [O1-O5]. However, these are found to still fall short of CRPD requirements [O1-O6]. Legislation is less effective in ensuring that the rights reinforcing the wider needs of persons with mental disabilities are met. There is still a limit to their allowance for autonomy and participation in society on an equal and non-discriminatory basis with others [O2][O5][O6]. Such rights include the right to the highest attainable standard of physical and mental health and other economic, social and cultural rights [O5][O6].

3. References to the research (indicative maximum of six references)

[O1] Stavert, J. (2015). The exercise of legal capacity, supported decision-making and Scotland's mental health and incapacity legislation: working with CRPD challenges. *Laws*, 4(2), 296-313. <https://doi.org/10.3390/laws4020296> (Submitted to REF2) Peer reviewed journal

[O2] Stavert, J., & McGregor, R. (2018). Domestic legislation and international human rights standards: the case of mental health and incapacity. *International Journal of Human Rights*,

22(1), 70-89. <https://doi.org/10.1080/13642987.2017.1390307> (Submitted to REF2) Peer reviewed journal

[O3] Stavert, J. (2018). Paradigm Shift or Paradigm Paralysis? National Mental Health and Capacity Law and Implementing the CRPD in Scotland. *Laws*, 7(3), 26.

<https://doi.org/10.3390/laws7030026> (Submitted to REF2) Peer reviewed journal

[O4] Martin, W., Michalowski, S., Stavert, J., Ward, A., Ruck Keene, A., Caughey, C., ...McGregor, R. (2016). The Essex Autonomy Project Three Jurisdictions Report: towards compliance with CRPD Art. 12 in capacity/incapacity legislation across the UK. United Kingdom: University of Essex – AHRC (Submitted to REF2)

[O5] Stavert, J., & McKay, C. (2017). Scotland's Mental Health and Capacity Law: The Case for Reform. Edinburgh: Mental Welfare Commission for Scotland (Submitted to REF2)

[O6] Stavert, J., & McKay, C. (2020). Scottish mental health and capacity law: The normal, pandemic and 'new normal'. *International Journal of Law and Psychiatry*, 71 (July-August).

<https://doi.org/10.1016/j.ijlp.2020.101593> Peer reviewed journal

4. Details of the impact (indicative maximum 750 words)

Stavert's research has thrown light on how international standards of mental health and capacity law can be appropriately understood, and effectively implemented in practice. These findings have led to impacts at a variety of levels, to a number of beneficiaries.

As well as influencing and informing legal policy in the UK, the research has created guidance for publics, and mental health employees, has trained mental health tribunal members, and has been cited internationally in legal proceedings regarding mental health and capacity.

1. INFLUENCE ON UK LAW REVIEW AND REFORM

The 'Three Jurisdictions' project report **[O4]** has been instrumental in informing ongoing UK Government review of mental capacity and mental health law. It is cited in the Scottish Government reform of the Adults with Incapacity (Scotland) Act **[C1]**, and its observations about the presumption of capacity being reinforced in the Act via principles and capacity assessments, have been taken on board by the Scottish Government **[C2]**. Recommendations regarding support for the exercise of legal capacity, and how this might be most effectively achieved have also been considered. As have highlighted challenges regarding giving effect to the genuine will of the adult, even where deemed to lack capacity, and how to address high risk situations.

The project report **[O4]** will also be specifically mentioned in the Scottish Government document '*Rights for Persons with Cognitive Disabilities – Making Decisions - My Rights: Creating a National Overarching Supported Decision-making Framework for Scotland*' (August 2018). This document has not been published but it is one of the documents informing the current Scott Review (below) Capacity and Support for Decision-Making workstream.

In 2018 Stavert was invited to be an expert advisor on international human rights to the Scottish Government established Independent Review of Learning Disability and Autism in the Mental Health Act **[C3]**. Later in 2019 she was appointed as a legal expert to the Review **[C4]**, and her 2015 *Laws* journal article **[O1]** was cited in the Review's Stage 1 report **[C5]**. The review took particular account of identified concerns for respect towards individuals, and the requirements for support for the exercise of legal capacity. It also acknowledged suggestions made regarding non-discriminatory rights enjoyment, and general CRPD rights compliance, in determining

whether persons with learning disability and autism should be included within the definition of 'mental disorder' under the Mental Health (Care and Treatment) (Scotland) Act 2003.

Finally, in 2019 the Mental Welfare Commission for Scotland stated that The Case for Reform [O5] had influenced the need for reform of the Mental Health (Care and Treatment) (Scotland) Act 2003 [C6]. The Case for Reform made clear recommendations that current mental health and capacity legislation in Scotland was not fully meeting the needs of persons with mental disabilities. It also noted that legislation was no longer fully compliant with international human rights standards in light of recent developments in ECHR jurisprudence, and the UK becoming a state party to the CRPD. This was followed by Stavert being invited, in August 2019, by the Chair (John Scott QC) to join the Scottish Mental Health Law Review (the Scott Review) Executive Team as a Professional Advisor [C7]. The review terms of reference cited 'The Case for Reform' [C8]. Since 2020 she has also chaired the Capacity and Support for Decision-Making workstream in the Scott Review.

2. GUIDANCE FOR HEALTH, SOCIAL, AND LEGAL PRACTICE

In 2015, the Mental Welfare Commission for Scotland, commissioned Stavert to assist them to develop and write guidance on supported decision-making. The aim was to encourage the approximately 360,000 persons who work in health and social care throughout Scotland, to align with Article 12 CRPD, via an increase in supported decision-making. This was published in 2016 [C9]. The guidance is primarily for health and social care staff but it also serves as a guide to persons with mental disabilities, their families, and those who support or work with them (e.g. financial and welfare attorneys and guardians). It provides details of the legal and human rights importance of supported decision-making, to ensure that those who experience decision-making challenges are still able to exercise their legal capacity (even where they are assessed as lacking mental capacity), and have their voice heard. Although, the current legal framework in Scotland does not fully comply with Article 12 CRPD, the uniqueness of this guidance, which was the first of its kind, in that it endeavours to work with the existing legal framework, and provides examples of how and by what means this can be effected.

3. TRAINING FOR MENTAL HEALTH TRIBUNALS

The Mental Health Tribunal for Scotland commissioned Stavert to deliver training on supported decision-making and its relevance to Tribunal panel members. In particular the training focused on giving effect to CRPD supported decision-making requirements in context of the Mental Health (Care and Treatment)(Scotland) Act 2003 tribunal proceedings. Stavert delivered to approximately 350 legal, medical and general members across Scotland at each of the panel members training events during 2017 [C10][C11]. The training was provided to increase awareness amongst tribunal panel members of the role of supported decision-making in relation to tribunal proceedings. Training aimed to ensure that the patient's voice is heard in proceedings, and emphasised the need for panel members to be fully aware of the increased requirement in ECHR jurisprudence and CRPD for vigilance in this respect. Whilst the panel members were well versed in ECHR requirements they were not so aware of those of Article 12 CRPD.

4. INFORMING INTERNATIONAL LEGAL RULINGS

In November 2018 'Domestic legislation and international human rights standards: the case of mental health and incapacity' [O2] was cited with approval [C1] and quoted from in the recent Victoria Supreme Court, Australia, ruling PBU & NJE v Mental Health Tribunal VSC 564 [C12]. The court referred to the research in the context of the need to take into account the fact that patient consent to treatment, in this case Electro Convulsive Therapy, was also an important element of their right to the highest attainable standard of mental health. This is important recognition because, in comparison to the right to physical health, it has been traditionally more difficult to identify precisely what the various elements that comprise the right to mental health. The research [O2] provided these elements for this case.

5. Sources to corroborate the impact (indicative maximum of 10 references)

[C1] Scottish Government *Adults with Incapacity (Scotland) Act 2000: Proposals for Reform*, 2018, <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2018/01/adults-incapacity-scotland-act-2000-proposals-reform/documents/00530800-pdf/00530800-pdf/govscot%3Adocument>

[C2] Email: Scottish Government to Jill Stavert 4 March 2021.

[C3] Email: Secretary to the Review to Jill Stavert 26 July 2018.

[C4] Independent Review of Learning Disability and Autism in the Mental Health Act *Final Report*, December 2019

<https://webarchive.nrscotland.gov.uk/20200313213229/https://www.irmha.scot/wp-content/uploads/2020/01/IRMHA-Final-report-18-12-19-2.pdf>

[C5] Independent Review of Learning Disability and Autism in the Mental Health Act *Stage 1 Report*, May 2019

<https://webarchive.nrscotland.gov.uk/20200313222518/https://www.irmha.scot/wp-content/uploads/2019/05/independent-review-stage-1-report.pdf>

[C6] Mental Welfare Commission for Scotland *The Mental Welfare Commission today welcomed the government's announcement of a review of Scotland's Mental Health Act*, 19 March 2019

<https://www.mwcscot.org.uk/news/mental-welfare-commission-welcomes-review-mental-health-act>

[C7] Scottish Mental Health Law Review Executive Team

<https://www.mentalhealthlawreview.scot/about>

[C8] Scottish Mental Health Law Review Terms of Reference

<https://cms.mentalhealthlawreview.scot/wp-content/uploads/2020/01/Terms-of-Reference-1.pdf>

[C9] Mental Welfare Commission for Scotland *Supported Decision-making Guide*, 2016

https://www.mwcscot.org.uk/sites/default/files/2019-06/mwc_sdm_draft_gp_guide_10_post_board_jw_final.pdf

[C10] Email: Mental Health Tribunal for Scotland to Jill Stavert 23 January 2017

[C11] Email: Mental Health Tribunal for Scotland to Jill Stavert 15 February 2017

[C12] Judgment in Victoria Supreme Court ruling PBU & NJE v Mental Health Tribunal [2018] VSC 564.