



Consultation Response

Scottish Mental Health Law Review Consultation Summary of Key Points and Recommendations

The Scottish Commission for
People with Learning Disabilities
June 2022



Summary

SCLD believes that current laws in Scotland that impact the lives of people with learning disabilities, including mental health and capacity law, require radical change in order to promote people's well-being and to respect, protect and fulfil their human rights.

Where someone with a learning disability experiences mental ill-health that requires care, support or treatment over and above their lifelong disability, SCLD believes they should continue to enjoy the care, support and protection from reformed human rights based mental health law in the same way as any other person.

However, given the continued marginalisation and disadvantage experienced by people with learning disability across a range of health, social, economic and cultural domains, we see a clear rationale, indeed imperative, for learning disability to be defined in separate legislation which supports access to positive rights and gives duties to statutory bodies to provide equity in law.

The Independent Review of Learning Disability and Autism in the Mental Health Act (Rome Review)¹, concluded that people with learning disabilities are poorly served by current legislation and that the Mental Health (Care and Treatment) (Scotland) Act 2003 had led to specific negative effects on the human rights of autistic people and people with learning disabilities.

The report made extensive recommendations, including:

- Learning disability and autism be removed from the definition of '*mental disorder*' in Scotland's Mental Health Act.

¹ [The Independent Review of Learning Disability and Autism in the Mental Health Act \(2019\): Final Report](#)

- Learning disability and autism should be defined in a new law which supports access to positive rights and gives duties to public services.
- Decisions for detention and compulsory treatment should not be made on the basis of learning disability or autism
- A new commission be established to promote and protect the human rights of autistic people and people with learning disabilities across all settings.

We are disappointed, therefore, that the Scottish Mental Health Law Review (SMHLR) Stage 3 proposals failed to meaningfully address some key recommendations of the Review and did not take a definitive position on the removal of learning disability from the definition of *'mental disorder'*.

SCLD believes that the inclusion of learning disability in the term *'mental disorder'*, as defined in the Mental Health (Scotland) Act 2003, serves to perpetuate the marginalisation of people with learning disabilities, leads to practices which are inherently discriminatory towards them and risks legitimatising the restriction of rights including detention and non-consensual treatment on the basis of disability.²

Furthermore, we do not believe that the automatic inclusion of people with learning disability within the term mental disorder and the associated legislative framework, is compliant with human rights either in the ECHR, UNCRPD, ICESCR or UNCRC. It is our view that defining and viewing learning disability in this way obscures societal structures and practices that deny people with learning disabilities access to active participation in society and the full enjoyment of their rights.

Since the publication of the Rome Review, there have been several further developments to strengthen the architecture for human rights in Scotland and

² [SCLD submission to IRMHA Stage 3 \(2019\)](#)

reform existing legislative and accountability frameworks which impact the lives and protect the rights of people with learning disabilities:

- Legislation for a National Care Service following the review of adult social care³
- A Human Rights Bill⁴ to incorporate four human rights treaties, including the UNCRPD and ICESCR, into Scots Law following the recommendations of the National Taskforce for Human Rights Leadership Taskforce⁵
- Giving domestic effect to the UNCRC through the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill
- A Learning Disability, Autism and Neurodiversity Bill and Commissioner detailed in the Programme for Government 2021-22⁶

Given this ongoing work to incorporate existing human rights treaties into Scots' law, SCLD believes it is critical the SMHLR's final report properly addresses the recommendations outlined in the Rome Review⁷. In doing this, we believe the SMHLR should endorse the removal of learning disability from the definition of '*mental disorder*' and its definition within new legislation which support access to positive rights, gives duties to statutory bodies and provides equity in law.

Finally, it is our view that reformed mental health and capacity legislation must take account of the potential for a new multi-institutional approach to accountability and justice being proposed as part of the new Human Rights Bill for Scotland and the

³ [Review of Adult Social Care In Scotland](#)

⁴ [Human Rights Bill](#)

⁵ [National Taskforce for Human Rights Leadership](#)

⁶ [Programme for Government 2021-22](#)

⁷ [The Independent Review of Learning Disability and Autism in the Mental Health Act \(2019\): Final Report](#)

potential role a Learning Disability, Autism and Neurodiversity Commission(er) can play in this.

Key Points and Recommendations

Legislative Reform

- A strengthened legislative and accountability framework beyond solely mental health and capacity law should protect and respect the social, economic and cultural rights of people with learning disabilities.
- The Human Rights Bill and Learning Disability, Autism and Neurodiversity Bill are an opportunity to enshrine positive rights, give duties to statutory bodies and define learning disability in a separate legislation which supports access to positive rights and provides equity in law.
- Revised law should remove people with learning disabilities from the term *'mental disorder'* in line with the Rome Recommendations. Where someone with a learning disability or an autistic person has a mental illness over and above their lifelong disability, then they should enjoy the care, support and protection from revised human rights based mental health law.

Supported Decision Making

- People with learning disabilities require strong rights to access SDM alongside attributable duties on public bodies to provide SDM and appropriate safeguards to ensure that rights, will and preferences are respected.
- This necessitates a national SDM framework which is robust, well-resourced and supported by a national strategy with independent oversight to ensure rights are upheld and duties delivered.
- There is a need for a well-resourced Centre of Excellence to provide leadership in capacity building, developing a 3-tiered national SDM training programme and setting national standards for accessible communication.

The Role and Rights of Unpaid Carers

- Respect for Carers should be a stated principle, recognising that carers are not a homogenous group and that unpaid carers must be included in discharge planning.
- Mandatory Carer Awareness training should be co-produced with relevant groups – including PAMIS with adequate resource available for this.

Human Rights enablement – a new approach to assessment

- The list of circumstances in the proposals that trigger an HRE are wide-ranging and the thresholds for applying a HRE are vague. We would like to see a revised and tightened HRE which is better defined, more rigorous and accompanied by clearer roles and responsibilities.
- With these revisions made, the HRE has potential to play a critical role in assessing the requirement for an intervention on the basis of an individual's competing rights and their expressed will and preference.

Autonomous decision making test

- The attempt to shift the focus of the criteria from a diagnosis of *'mental disorder'* is welcome but the ADM remains a capacity test in another guise. We are concerned around the inclusion of *'controlling influences'* which may be judged to present a barrier to an individual's autonomous decision making.
- The ultimate arbitration should not be whether someone is able to make an autonomous decision but rather whether contravening an individual's will and preferences is a necessary and proportionate means of protecting the full range of someone's rights and freedoms.
- The basis for such an intervention should be justified on an assessment of an individual's competing rights and their expressed will and preference through the HRE process.
- There should be a right to challenge any professional and notify the appropriate scrutiny bodies when a decision does not respect a person's will

and preferences, and may not be proportionate for protecting their human rights.

Reduction of coercion

- All forms of coercion can be inherently distressing and traumatising and there is a requirement for greater safeguards in law.
- We broadly support the proposal's approach to reducing coercion in services and believe there is significant learning to be gained from the work, expertise and learning of Restraint Reduction Scotland (RRS).

Accountability

- While supporting the core remit of the Mental Welfare Commission with respect to mental health and capacity law there is a need to explore structures for further scrutiny powers pertaining to rights such as IS CER and the UNCRPD as part of the new Human Rights Bill for Scotland and other planned legislative developments.

Children and Young People

- The 2003 principle for children should be replaced by a commitment respecting all the rights of the child in any interventions.
- Utilise the UNCRC Children's Scheme as a reporting tool for monitoring respecting the rights of a child in any intervention and statutory duties for Scottish Minister and Health Care Agencies.
- Explore the potential supported decision making approach to working with children and young people accessing mental health support and treatment drawing from existing expertise in the Scottish Children's Sector and evidence-based models of participation.
- Explore alternate legislation to ensure disabled children including children and young people with learning disabilities rights to coordinated support plans and their implementation with a view to supporting the realisation of Article 23 of the UNCRC.

- Conduct focused stakeholder engagement with the children's sector on the issue of integrating child law and mental health law.

Adults with Incapacity proposals

- There is a need for reformed capacity legislation which is supportive rather than restrictive encompassing a new decision-making framework and accompanied by revised terminology.
- Reformed legislation should be underpinned by a robust set of revised principles within the Act which are rights based and have duties and scrutiny attached to them. The new framework must be adequately resourced at a national and local level.
- Extreme care must be taken to ensure the proposed reforms do not in any way dilute existing safeguards and inadvertently permit greater interference with human rights. The role of supervision is an essential safeguard which must be well resourced and designed to avoid conflict of interest.
- People with learning disabilities require support, including funded independent advocacy and communication, to be aware of their rights and a view to maximising their participation and autonomy and reducing the need for formal measures.
- Separate safeguards are required to address the question of detention and the question of treatment, with clear and specific procedures for each.
- Revised guidance on decision support and reviewed training for those who grant section 47 certificates must address the issue of covert use of antipsychotic medication.
- Caution is required around extension of the range of professionals who can issue a section 47 certificate that could risk widening the scope of non-consensual interventions.

Deprivation of Liberty

- There is a need for a requirement for obligations on those proposing the care arrangements to demonstrate the steps they have taken to maximise autonomy accompanied by appropriate oversight for this process.
- The granting of power to the decision-making representative must be subject to a judicial process. Additional safeguards are required for POA including access to a judicial procedure capable of determining the lawfulness of an individual's detention.
- Where an individual has not been able to make an autonomous decision with support, it should not be possible for an individual to consent to their own deprivation of liberty.

Mental Disorder

- The inclusion of learning disability in the term '*mental disorder*' as defined by mental health law serves to perpetuate the marginalisation of people with learning disabilities and risks legitimatising the restriction of rights on the basis of disability.
- Labelling all people with learning disabilities in this way is not compliant with a human rights approach or the core principles proposed by the SMHLR.
- SCLD fully supports the Rome Review's proposed solution that learning disability and autism should be removed from the definition of '*mental disorder*' and that they should be defined in a separate law designed to provide support and equity in law.
- Transformative change is required to criteria not only for health law but also capacity law which also relies on the concept of '*mental disorder*'.
- The gateway for compulsion under mental health and capacity law should be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.

Fusion or aligned legislation

- SCLD cautiously supports a move towards aligned legislation and we see advantages in establishing, as far as possible, a common set of principles, safeguards and routes to remedy across the separate acts.
- It is important to maintain an appropriate separation in the provisions within law for individuals who may fall within the remit of adult protection, adults with incapacity or mental health legislation.
- We believe that the title of the AWI legislation should be changed to focus on support rather than incapacity e.g. Supported/Assisted Decision-Making (Capacity) Act
- It is of critical importance that the existing Acts are suitably aligned and coherent with planned future legislative developments and the potential for a new multi-institutional approach to accountability and justice.



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