



Consultation Response

SMHLR Additional Proposals Consultation

The Scottish Commission for
People with Learning Disabilities
July 2022



Independent Advocacy

What are your views on the proposal that the Scottish Government should consolidate and align all the different pieces of legislation and policy to ensure consistency regarding the definition of independent advocacy, the right to access it and how it is commissioned and funded?

People with learning disabilities have a right to access independent advocacy under the Mental Health (Care and Treatment) (Scotland) Act 2003. However, in the context of static or reducing budgets and increasing demand, advocacy services in Scotland have faced significant pressures with organisations increasingly have to restrict and / or prioritise requests for referral and also to reduce or stop awareness raising work¹. The Scottish Independent Advocacy Alliance (SIAA) have identified people with learning disabilities as a group for whom there are gaps in provision and who may be unaware of their right to access advocacy².

As the consultation document notes, the 2003 Act has been followed by several pieces of additional legislation that give people a right to access independent advocacy including the Adults Support and Protection (Scotland) Act 2007, the Patient Rights (Scotland) Act 2011 and the Social Care (Self-Directed Support) (Scotland) Act 2013 and the Social Security (Scotland) Act 2018³. This has added to the complexity of the landscape for advocacy provision in Scotland and for people with learning disabilities and there is considerable variation in the nature and availability of the advocacy support provided locally.

For these reasons, SCLD believes there is a need to establish a more streamlined system of independent advocacy in which there is greater clarity and awareness of

¹ A Map of Advocacy across Scotland, SIAA (2017)

² [A-Stronger-Voice-SCLD-Advocacy-Report-July-2018.pdf](#)

³ [SMHLR Additional Proposals June 2022](#)

around the right to access independent advocacy and increased consistency in the nature and availability of that provision. We are supportive of the call by SIAA and the Human Right Consortium Scotland (HRCS) for independent advocacy to be embedded as a core part of the new statutory framework⁴ in which:

- There is a right to independent advocacy in Scotland in law
- There are duties on relevant duty-bearers to provide the service and to provide information about the service to rights-holders
- Independent advocacy is a core part of non-court and court routes to remedy
- Independent advocacy adequately and sustainably is resourced.
- There is a public awareness raising about independent advocacy
- There is a requirement on Scottish Ministers to include reporting in availability of independent advocacy

Do you think there should be an opt out system for independent advocacy?

Independent advocacy, both individual and collective has a critical role to play in working alongside people with learning disabilities and supporting them to be empowered to take part in decision-making about their lives, and about policy and law making, on an equal basis. It can play an important role in supporting people with learning disabilities to choose where they live and who they live with and supporting people to be involved in decision about their care, treatment and support.

In the context of human rights, Article 12 of the UNCRPD is clear that people with a disability have the right to support that enables them to exercise the same legal and civil rights as other people and for this right to be protected from abuse. This includes a range of formal and informal support arrangements including

⁴ [Putting independent advocacy at the heart of the new human rights statutory framework in Scotland \(HRCS & SIAA\)](#)

independent advocacy and self-advocacy. Independent advocates across Scotland work in a range of situations to support people to understand and realise their economic, social and cultural rights. Independent advocacy can empower rights-holders, enable the right to participation, routes to remedy and a better understanding of rights.

SCLD believes, independent advocacy must be a key component of the Supported Decision Making framework for people with learning disabilities and in line with the Rome review that individuals should be automatically entitled to support from an independent advocate unless they actively choose to opt out of this. We see a potential role for the learning disability, autism and neurodiversity bill to ensure equity of provision and access to this for people with learning disabilities within the context for the new human rights framework.

Do you think there should be a national fund for the provision of independent advocacy in Scotland?

Independent advocacy is already significantly underfunded in Scotland, despite existing statutory requirements.⁵ It is clear, therefore, that making independent advocacy a key feature within an extended support for decision-making for people with learning disabilities will require a significant commitment to additional long-term investment including funding for high quality training on a range of support and communication skills for independent advocates.

SCLD believes it is critical that any funding proposal for the future delivery of advocacy provision is sustained over the long term and we are unsure that this is achievable without continued and strengthened duties on local authorities and health boards to fund this provision. We have concerns that a national fund may be

⁵ [SCLD \(2018\) A Stronger Voice? A scoping study of independent advocacy for people with learning disabilities](#)

more vulnerable to cuts overtime as priorities change. Information on the evidence base behind the proposal would be welcome alongside greater detail around how a national fund would operate in practice and how it is envisaged it will remove unequal levels of access.

The role of independent advocacy in supported decision making

We agree that independent advocacy should be part of the wider Supported Decision Making (SDM) landscape with SDM delivered through a suite of options including:

- Specialist SDM practitioners
- Independent advocacy organisations
- Peer support
- Unpaid carers/family/friends
- Professionals

Within this independent advocacy occupies a unique position in that it is free from conflict of interest which can be a very important distinction for people with learning disabilities. We would support the proposal for the Scottish Government to commission training on Human Rights and SDM to all independent advocacy organisations as well as training and awareness raising for the wider public.

What are your views on our proposals for scrutiny of independent advocacy organisations?

In the context of a new human rights framework for Scotland, SCLD sees an increasing the role of independent advocacy for people with learning disabilities and a strengthening of the role of collective advocacy with a view to raising court actions.

Despite amendments to the The Mental Health (Scotland) Act in 2015 which provided additional duties to the Mental Welfare Commission to monitor health

boards and local authorities legal responsibilities in relation to the planning and provision and independent advocacy services there has been a continued lack of robust scrutiny locally.

We believe the new Human Rights Bill for Scotland provides opportunities to develop a multi-institutional scrutiny landscape within Scotland and a Learning Disability, Autism and Neurodiversity Commission(er) could have a scrutiny role around equitable access to advocacy within the context of supported decision making for people with learning disabilities.

Advance Statements

What do you think of the general approach to a 'statement of will and preference' (SWAP)?

We agree that advance statements should be replaced by a 'Statement of Will and Preference' (SWAP) and this should not be a rebranding but a new model to address the inadequacies of the current system. We agree that a SWAP should be available to everyone who wishes to make provision for their futures involving mental health or incapacity legislation.

In line with recommendation from the Rome Review, we believe with respect to people with learning disabilities that professionals should act to put each person's will and preferences into effect. In circumstances where a person's will and preference is not followed, this justification should be made in terms of the person's human rights, and professionals should be required to demonstrate that their decision was a necessary and proportionate means of protecting the full range of someone's rights and freedoms.

What are your views on the application of the 'statement of will and preference' (SWAP) to treatment under Mental Health Law, other medical treatment and other welfare issues?

We agree that priority or 'special regard' should be given to a person's will and preferences either as directly expressed or via an advance statement of rights, will and preferences and that this should include:

- Making all efforts to best understand the person's will and preferences
- Giving effect to these
- Only limiting the person's rights if this will demonstrably lead to more respect, protection, and fulfilment of the person's rights overall, and
- Only limiting rights to the extent required to achieve these protections.

In our view, a Human Rights Enablement (HRE) should be required before any treatment or intervention that overrides the will and preference of any individual is permissible. The legitimacy for this should be justified on an assessment of an individual's competing rights and their expressed will and preference through the HRE process. Any statement of rights, will and preference should have to be directly and wholly addressed in any professional decision making that might limit the person's human rights.

There should be a right to challenge any professional decision that does not respect a person's will and preferences, and which may not be proportionate for their human rights. This should also be accompanied by a right in law to notify the appropriate scrutiny bodies when any statement of rights, will and preferences is not complied with, in addition to duties on professionals to report this.

What are your thoughts on the process for making a SWAP and the requirements for its validity?

We believe it is critical that SWAP have greater force and legitimacy in decision making than advance statement currently do.

People with learning disabilities are likely to require support to produce a SWAP and it is essential that independent support and advocacy is available which is free from a conflict of interest. There may also be a role unpaid carers, professionals, family

and trusted people to input into the process, if the individual gives permission for this. Additionally, it is critical that the SWAP is viewed as a living document which is updated on a regular basis. We agree it must be possible to produce a SWAP in a variety of formats, including video, or audio recording and visual statements.

We have strong reservations about the proposals that for a SWAP to have legal status, it should be signed or authenticated by someone appropriately qualified to certify that the person was able to make an autonomous decision in respect of the SWAP. It is critical that supported decision making structures are in place and that the system does not disadvantage or discriminate against people with learning disabilities with respect to the legitimacy of their will and preferences.

Forensic Services

Do you agree that we should introduce intermediaries to support people who need them in criminal proceedings?

Individuals with learning disabilities commonly experience communication difficulties and other barriers that impact their ability to understand and communicate effectively in the criminal justice system⁶. Research by the Equality and Human Rights Commission (EHRC) in 2017⁷ highlighted there is no consistent method in the criminal justice system for assessing requirements for additional support. The Scottish Human Rights Commission (SHRC)⁸ found that police officers tend to rely on their own experience to make a subjective assessment about whether someone has a learning disability and requires additional support.

Therefore, we support the proposal for ‘intermediaries’ to support people who need them in criminal proceeding. We believe these should be made available for all people

⁶ SOLD (2016) Improving Support for people with learning disabilities from assert to court

⁷ EHRC (2017) Experiences of people with a learning disability in the Scottish criminal justice system

⁸ SHRC (2017) Disability Rights in Scotland

with learning disabilities who come into the criminal justice system both as suspects and defendants. The Supporting Offenders with Learning Disabilities (SOLD) Network's user group⁹ has emphasised that this kind of support requires time to prepare and an in-depth understanding of communication needs as well mutual trust. We see an role for an intermediary in meeting with an individual to assess any communications barriers and requirements for additional support and then providing a report to the police and court. The role of the intermediary would also be to help a person understand information and support them with their communication as well advise and inform the court if the person is having difficulty understanding the questions.

Do you think there are specific legal changes that could support more appropriate diversion of offenders into the mental health system?

At present, it is possible for an offender with learning disability to be detained or restricted in forensic wards, units or hospitals for longer than another person would spend in prison for a similar offence.

It is vital, however, to ensure that people with learning disabilities have a safe experience while serving custodial sentences. This requires environments where people are protected from violence and abuse and have access to the appropriate support, care, treatment. However, we also believe that any offender including someone with learning disabilities should be sentenced in a way that will help with their rehabilitation and encourage them not to reoffend.

Therefore, in our view, systemic reform is required which places much greater emphasis on social supports, education programmes and psychological interventions alongside much greater use of community based sentences where appropriate.

⁹ SOLD (2017) Improving support for the accused person with a learning disability in Police Custody



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