Adults with Incapacity Amendment Act Consultation

SCLD Submission – October 2024

Background

The Scottish Commission for People with Learning Disabilities (SCLD) is an independent charitable organisation and human rights defender, working to uphold, protect and raise awareness of the human rights of people with learning disabilities.

Our vision is of a fairer Scotland where people with learning disabilities live full, safe, loving and equal lives. We influence the development of policy, practice and legislation with a focus on human rights, leadership and evidence. We are respectful, inclusive, collaborative and pioneering.

Introduction

This response has been informed by the involvement and engagement of people with learning disabilities through our lived experience forums; our engagement and responses to previous consultations and reviews; as well as by two seminars SCLD held in August and September with people with learning disabilities, their families and carers and other stakeholders.

The focus of the seminars was on supported decision-making (SDM) and the specific proposals in the consultation related to this and guardianship. A recurring theme from these events was the need for significant systemic change. Some stakeholders argued that minor amendments to the law will not adequately address deeper cultural practices and highlighted the need for more radical measures.

SCLD has consistently called for reform and realignment of the mental health and capacity legislative framework to better respect, protect and fulfil the human rights and well-being of people with learning disabilities.[1][2][3][4] We have significant concerns about the extent to which this legislation permits non-consensual interventions in the lives of people with learning disabilities and the steady increase in guardianship orders under the AWI Act[5].

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[1] https://www.scld.org.uk/wp-content/uploads/2019/04/Designed-AWI.pdf
[2] SCLD-submission-to-Stage-1-of-SMHLR-May-2020_designed.pdf
[3] Designed_IRMHA-Consultation-Response_Nov-2019.pdf (scld.org.uk)
[4] SMHLR-Consultation-response-May-2020-Designed-Full-version-2.pdf (scld.org.uk)
[5] Adults With Incapacity Act monitoring report 2022-23

Since the Adults with Incapacity (Scotland) Act 2000 (AWI Act) was passed, there have been significant developments in human rights law, not least the UN Convention on the Rights of Persons with Disabilities – the CRPD[6], which was ratified by the UK Government in 2007.

The CRPD requires states to provide the support people with disabilities require to exercise their legal autonomy and ensure respect for their rights, will and preferences'.[7] SCLD has concerns that the AWI Act is not fully aligned with the CRPD and permits practices which risk depriving people with learning disabilities of their autonomy and their ability to exercise choice and control.

In our view, we need to reframe the current legal framework from one that is mainly restrictive in nature towards an enabling piece of legislation which reflects and enshrines the principles and practices of SDM to ensure people with learning disabilities' rights, will and preferences are respected on the same basis as others.

This must be underpinned by robust SDM structures and widespread changes to culture and practice. We believe it also necessitates a national supported decision making framework and the necessary resources to support these changes, which are paramount to realising the paradigm shift that incorporation of the CRPD requires.

SCLD is clear that people with learning disabilities cannot continue to experience systemic human rights denials. The need for change is urgent and this change will require not only the promotion of rights but also the active removal of barriers, including legislative barriers, which prevent people with learning disabilities enjoying full, active and equal lives[8].

We welcome the opportunity to respond to the Adults with Incapacity Amendment (AWI) Act Consultation and are committed to working with people with learning disabilities, wider stakeholders and the Scottish Government to effect transformational change for people with learning disabilities, whose rights are most at risk.

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[6] Convention on the Rights of Persons with Disabilities (2006)
[7] Stavert, J (2018) Paradigm shift or Paradigm Paralysis? Mental Health and Capacity Law and Implementing the CRPD in Scotland
[8] Convention on the Rights of Persons with Disabilities (2006)

Part 1 – Principles of the legislation

1. Do you agree that the principles of the AWI Act should be updated to require all practicable steps to be taken to ascertain the will and preferences of the adult before any action is taken under the AWI Act?

SCLD welcomes the proposed amendment to the principles. In our view, this will ensure closer alignment with Article 12 of the CRPD and has potential to increase the autonomy of people with learning disabilities who may be or are subject to the AWI Act. However, we have concerns about what impact changing the principles will have in practice.

In our engagement events, stakeholders highlighted that the current principles in the AWI Act, such as least restrictive interventions and taking account of wishes and feelings are actually fairly robust, but are not consistently followed. There was concern that introducing new principles focused on will and preference and support to make decisions will not lead to meaningful change without robust enforcement, accountability mechanisms, and a SDM framework.

To ensure maximum impact, we urge the Scottish Government to accompany this principle with strong rights and attributable duties to access and provide SDM to ensure that a person's will and preferences can be both discerned and given effect.

Furthermore, we believe the Scottish Government must provide appropriate and effective accountability mechanisms and safeguards to prevent abuse in this regard[9]. These safeguards must ensure respect for the rights, will and preferences of the person and be free of conflict of interest and undue influence.[10]

2. Do you agree that in the AWI Act we should talk about finding out what that adult's will and preference are instead of their wishes and feelings?

The CRPD Committee's General Comment No.1 is clear on the need to respect the person's autonomy, will and preference[11]. However, at present, the AWI Act does not place any primacy on the will and preference of someone with learning

[9] Convention on the Rights of Persons with Disabilities (2006)
[10] Supported Decision-Making and Paradigm Shifts (2021)
[11] General Comment No.1 (2014)

disabilities. It only requires their 'wishes and feelings' to be 'taken account of' as part of a number of principles.

We believe the concept of 'will and preference' is a more robust and holistic concept than 'wishes and feelings' as it encompasses someone with learning disabilities' long term goals as well as their more immediate concerns. We believe it also better reflects decision-making as an ongoing, flexible, and individualised process rather than a one-off event.

Therefore, in line with the proposed amendment in Question 1, we believe it is essential that the AWI Act not only uses the language of will and preference but crucially respects this to provide greater protection for the rights of people with learning disabilities.

3. Do you agree that any intervention under the AWI Act should be in accordance with adult's rights, will and preferences unless not to do so would be impossible in reality?

We agree with the type of example given in the consultation document. In this situation, we believe someone with learning disabilities must receive the appropriate support to decide on an alternative option. It is imperative that individuals have the necessary support to enable their voice to be heard and respected in these situations.

However, it is also important to be clear about circumstances and criteria in which people with learning disabilities' will and preference could be contravened under the AWI Act.

The consultation document states that someone's will and preferences would be rebuttable only 'if it is shown to be a proportional and necessary means of effectively protecting the full range of the person's rights, freedoms and interests'. We welcome this in principle, however, there is no clarity or transparency about what the process and criteria for assessing or 'showing' this would look like.

At our engagement event, many stakeholders raised concerns that, at present, the system gives preference to professionals over family carers and individuals. There will be significant concern, particularly amongst families of people with Profound and

Multiple Learning Disabilities (PMLD), if these changes add to this unequal power dynamic.

4. Do you agree that the principles should be amended to provide that all support to enable a person to make their own decisions should be given, and shown to have been unsuccessful, before interventions can be made under the AWI Act?

SCLD welcomes this proposed amendment to the principles. However, we have concerns about the lack of clarity regarding the process and criteria for establishing that someone has been unsuccessful in making their own decisions as well as the absence of any reference to the provision of SDM. We believe the AWI Act needs to go further to maximise autonomy for people with learning disabilities and achieve Article 12 compliance.

Decision-making capacity is not an all-or-nothing issue and, in our view, the AWI Act needs to more clearly delineate the role of SDM when an intervention has been made. Someone with learning disabilities may lack capacity to make certain decisions for themselves, but have capacity to make other decisions and this may change over time. Therefore, capacity for agency and autonomy is on a spectrum and, in our view, the legislation needs to reflect this.

We also repeat our concerns that amending the principles of the AWI Act is unlikely to lead to significant change without robust SDM structures and a well-resourced SDM framework. People First (Scotland) have produced a Framework for Supported Decision-Making[12] and this has potential to inform the development of a national framework for SDM.

At our engagement events, stakeholders emphasised that a national SDM framework needs to be flexible, accommodating individual needs and circumstances to ensure that decision-making is person-centred and rights-based. They also highlighted that enforceable legal rights, clear processes and guidelines, and crucially accountability are needed to ensure SDM is applied in practice and that supported decisions are recognised and respected.

[12] People First (2017) Framework for Supported Decision Making

Furthermore, it is critical that any SDM framework accounts for the capability of supporters to ensure they have the necessary skills, information, resources and time to support people with learning disabilities to make decisions. Stakeholders highlighted that comprehensive and nuanced training for professionals, including social workers and solicitors, is crucial to shifting the culture and fostering a better understanding of people with learning disabilities, as well as the principles and implementation of SDM.

Therefore, establishing a national SDM framework clearly requires significant change not only to law but to policy, culture and practice in Scotland. It will require capacity building and a change of mindset across a wide range of professionals and non-professionals. This includes amongst trusted persons (professionals, friends or families), peer support, independent advocacy, as well as community and neighbourhood support.[13]

Supporters need to know the person well and understand their circumstances, needs and modes of communication. There should be an emphasis on equality, respect, trust and a positive attitude to risk. People with profound and multiple learning disabilities may face particular barriers to communicating and expressing their will and preference. It is vital that SDM encompasses a range of augmentative communication tools including, but not limited to, Talking Mats and Eye Gaze.

We urge the Scottish Government to recognise that achieving this necessitates leadership at every level as well as adequate investment and resources to support the implementation and delivery. Without this, the laudable intent of these proposals will not effect change and individuals will continue to face significant barriers to making decisions and exercising their legal autonomy.

5. Do you agree that these principles should have precedence over the rest of the principles in the AWI Act?

At present, the requirement in the AWI Act to take someone with learning disabilities' wishes and feelings into account has no primacy and must therefore compete with other principles. Furthermore, in practice, courts are mainly focussed on benefit to the adult and there is little or no opportunity for someone with learning disabilities to

[13] Supported Decision-Making and Paradigm Shifts (2021)

express their ‘wishes and feelings’. Therefore, the current legislation provides no guarantee that someone’s will and preferences will lead decisions concerning them.[14]

This is in contrast with human rights standards. The CRPD Committee’s General Comment No.1 (2014) is very clear that the law must respect the person’s autonomy, will and preference[15]. Furthermore, the starting point of the European Court of Human Rights (ECtHr) in *A-MV v Finland*, based on the current international standards, was that the will and preferences of a person with disabilities should take precedence over other considerations when it came to decisions affecting that person[16].

Therefore, in accordance with human rights standards and to promote and advance the autonomy of people with learning disabilities who are or may be subject to the AWI Act, we agree that this principle should take precedence over the current principles. However, in our view, this will only make a practical difference if appropriate scrutiny is established and enforced.

6. Do you have any suggestions for additional steps that could be put in place to ensure the principles of the AWI Act are followed in relation to any intervention under the Act?

There is broad consensus that, at present, the current AWI principles are not consistently applied in practice, and this was echoed by participants at our stakeholder events.

They expressed concern about a widespread lack of knowledge and understanding about the principles of the AWI Act and a tendency for public bodies not to properly implement existing legislation or guidelines.

We believe the duties attached to the principles in the AWI Act, and the scrutiny of the performance of those duties, need to be more robust. Furthermore, it is not clear how adherence to any new principles would be evidenced and tested. In our view, it is critical that the new principles are underpinned by an attributable and enforceable

[14] The CRPD and mental health law reform in Scotland (2024)
[15] General Comment No.1 (2014)
[16] A clash of rights (models)? The ECtHR and the CRPD (2017)

duty to provide evidence of their performance alongside clear guidance about who bears responsibility for providing the support.

At our engagement events, many stakeholders suggested that a regulatory body, such as the Mental Welfare Commission or an ombudsman, could help ensure adherence to the principles of the AWI Act. This could be an important mechanism for monitoring compliance, addressing breaches, and providing oversight.

Furthermore, there is a need for a cultural shift within social care and public bodies to prioritise the voices and rights of people with learning disabilities. Respect for will and preference and the delivery of SDM needs to move from theory to practice, with an emphasis on collaboration, respect for lived experiences, and the inclusion of diverse support needs.

Part 3

Powers of Attorney (POA)

SCLD believes POA can offer a less restrictive option to guardianship for people with learning disabilities. Granting a POA can empower people with learning disabilities to retain control over aspects of their lives and legal capacity, which may otherwise be denied them under the current legal framework.

We support the proposal that a clinical psychologist should be able to certify a granter's capacity in a POA, as these professionals work regularly with people with learning disabilities. Furthermore, we agree there is a need to increase promotion around taking out a POA and to generally increase awareness and understanding of POAs among people with learning disabilities and their families. We also support the proposals for mandatory training for attorneys. We believe this should include a strong focus not only on enacting the principles of the AWI Act but also on SDM including supporting people with learning disabilities.

However, as we have stated previously[17], we have concerns around the lack of safeguards that POA provides to ensure people with learning disabilities are not subject to restrictions on their liberty. We believe there is a requirement for additional safeguards including access to a judicial procedure.

[17] SCLD response to Scottish Mental Health Law Review (2022)

In addition, while the proposed changes to the investigatory framework and powers of the public guardian are welcome, we believe safeguards and access to judicial oversight can be strengthened still. We would like to see regular review and supervision as an automatic requirement of welfare POA, in the same way as for guardianship orders.

Part 5

Authority to medically treat adults with incapacity

36. Do you agree that the existing section 47 certificate should be adapted to allow the removal of an adult to hospital for the treatment of a physical illness or diagnostic test where they appear to be unable to consent to admission?

We agree there needs to be clear and specific procedures for these situations. However, in our view, it is also important to be cognisant that these proposals have potential to widen the scope for restricting a person with learning disabilities' legal capacity and permitting non-consensual interventions. Therefore, these measures need to be accompanied by appropriate safeguards.

We think it is particularly important that the authorisation process for the s.47 certificate should record:

- What attempts were made to ascertain the will and preference of the person with learning disabilities – and to what extent were these followed?
- What support was provided to enable the person to make their own decisions before the intervention was deemed necessary?
- Were any family members, POAs or guardians consulted?

37. Do you consider anyone other than GPs, community nurses and paramedics being able to authorise a person to be conveyed to hospital? If so, who?

We agree with this list – and would like to highlight the inclusion of Learning Disability nurses.

38. Do you agree that if the adult contests their stay after arriving in hospital that they should be assisted to appeal this?

We are concerned that this situation, where a person with learning disabilities will most likely be prevented from leaving hospital, will give rise to a de facto deprivation of liberty potentially engaging Article 5 of the ECHR. In these circumstances, we believe there must be appropriate safeguards. The right to assistance to appeal for the person with learning disabilities and/or their family/proxy/guardian is essential in this regard. To ensure that the right of appeal is effective the person must be practically and actively assisted in the appeal process. Further safeguards are discussed below.

40-42. Do you agree that the lead practitioner for authorising the section 47 certificate can also then authorise measures to prevent the adult from leaving hospital?

We are not in agreement with the proposal that the lead clinician responsible for authorising medical treatment should also be responsible for authorising measures that prevent someone with learning disabilities leaving hospital.

The SMHLR emphasised "there needs to be safeguards against people being made to stay in hospital, potentially against their will, without access to proper review". Furthermore, the ECtHR has made it clear that authorisation to administer non-consensual treatment does not automatically follow from authorisation to detain, instead it requires separate substantive and procedural safeguards[18]. We believe that the reverse also applies and requires appropriate safeguards alongside clear and specific procedures.

Therefore, in our view, there is a need for separate processes and safeguards to address the question of detention and the question of medical treatment for people with learning disabilities. We think this should involve a second medical practitioner who has not certified the S.47 certificate treatment that then authorises the measures to prevent someone with learning disabilities from leaving hospital.

In all cases, it is essential that someone with learning disabilities' family and/or guardian/attorney are consulted, in line with principle 4 of the AWI Act - and we welcome the proposal that a family member, guardian/attorney can appeal the treatment and detention at any time.

[18] ECHR Detention and Mental Health (2022)

44. Do you support a review process after 28 days to ensure that the patients still need to be made subject to the restriction measures under the new provisions?

We support a review interval of 28 days. However, in our view, both the lead clinician authorising medical treatment and the clinician authorising detention need to be involved in the review process. We believe it is particularly important in this process that clinicians pay close attention to the principles of the AWI Act including:

- Taking account of the past and present wishes and feelings of someone with learning disabilities
- Action that will benefit the them
- Action that is the least restrictive option

In our view, it is imperative that these processes and procedures ensure that someone with a learning disability is not kept in hospital without medical reason. This is in compliance with the Article 5 ECHR requirement and is central in mitigating the risk of people with learning disabilities becoming subject to delayed discharge under the AWI Act.

Part 6

Guardianship

SCLD's overall reflections on the consultation proposals on guardianship are that they are limited in ambition. While the current proposals only concern amendments to the AWI Act, we believe that a more comprehensive reframing of the current legal framework is required.

We understand that radical reform is complicated and requires not only legislative measures but also change to culture and practice. However, we believe, it is imperative to move away from a deficit-based approach still largely focussed on demonstrating a someone with learning disabilities' 'lack of capacity' to justify substitute decision-making, towards one focussed on providing the support people with learning disabilities require to make decisions and exercise legal autonomy.

With regard to guardianship specifically, we are concerned about the steady increase in guardianship orders in Scotland, despite the well documented pressure

on the system, and the restriction on choice, autonomy and privacy this may entail. There are now 17,849 people who have a guardian compared with just 8,717 in 2014[19] - and people with a learning disabilities comprise 46% of these.

A number of concerns about current practice have been documented including:

- The legal principles not being well understood by legal, health and social care practitioners.
- People with learning disabilities being denied due process rights in guardianship proceedings such as attendance at the hearing and sufficient access to independent advocacy.
- Concerns about the reliability of capacity assessments and poor practice which may undermine the actual or potential capacity of individuals and their right to be involved in decisions about their own support, care and treatment.[20]

Further to this, a number of concerns in relation to guardianship and the current system were raised at our engagement events including:

- Guardianship can function as a means of control and limit people's right to make decisions.
- Guardianship orders can be used as a default option with some people with learning disabilities ending up on guardianship unnecessarily - this was particularly felt to be the case during transitions from childhood to adulthood and was often at the suggestion of legal professionals.
- Families can often feel pressured into guardianship to maintain access to services and benefits.
- Local authorities regularly require guardianship for Self-Directed Support (SDS) packages.
- Guardianship orders can be used as a barrier to people with learning disabilities accessing some services such as bank accounts and even sometimes medical treatment.

While guardianship was recognised as potentially beneficial if the guardian knows and empowers the supported person, many highlighted the need for a new legal

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[19] Adults with Incapacity Act monitoring report 2023-24

[20] Mental Welfare Commission & Centre for Mental Health and Capacity Law, 'Scotland's Mental Health and Capacity Law: the Case for Reform (2017)

framework which offers less restrictive alternatives outside of guardianship. There was a strong wish for more accessible, flexible, and informal options. Advocacy, support networks, mediation and remedy panels were all suggested as alternatives to formal legal processes. The system in Ireland, which includes a SDM framework and central regulation with an ombudsman appointing supporters and dealing with complaints, was highlighted as a potential model for Scotland.

However, some participants, particularly families and carers of people with PMLD, raised concerns about what the alternative to the guardianship system might be. They worried that it could give greater preference to professionals over family carers and individuals. They emphasised that they are the experts in their loved ones' lives and that the principles of SDM are at the centre of this. However, there were still frustrations at the guardianship process itself. One family carer and guardian described it as protracted, negative and antiquated process and felt it needed to be replaced by something more modern and fit for purpose.

Question 49. Do you think the requirement for medical reports for guardianship order should change to a single report?

SCLD understands the desire to speed up the guardianship process and make it less bureaucratic. However, at the same time, we believe there is a need to exert caution around any reduction to the checks and balances in the application process. In our view, a careful balance must be struck to ensure there is an appropriate level of scrutiny for any measure which has the potential to increase non-consensual interventions for people with learning disabilities and remove their autonomy.

50. Do you agree with our suggestion that clinical psychologists should be added to the category of professional who can provide these reports (where the incapacity arises by reason of mental disorder)?

We believe that psychologists may be appropriately placed to carry out capacity assessments.

However, there are widespread concerns about how 'capacity' is currently assessed by clinicians and practitioners. Capacity assessments can often be made by professionals on the basis of how the individual presents on a given day and with

little or no knowledge or involvement of the individual and their background or their carers, family, partners, friends and professionals[21].

A report published by the Mental Welfare Commission noted that 'whilst a variety of people are consulted through Mental Health Tribunal processes including psychiatrists, psychologists, carers and specialist lawyers, a normative standard on capacity assessment is lacking in Scotland'[22].

People First have also stated that "there is no agreed, reliable and accepted method of assessing capacity in Scotland and, while conducted mostly by highly educated and trained professionals, it remains as an entirely subjective and unscientific process based mainly on prejudicial assumptions about intellectual impairment"[23].

Furthermore, the concept of capacity assessments is also highly contested from a CRPD perspective[24], and the assumption that it is possible to determine a point beyond which a person can be deemed incapable of making certain decisions is similarly disputed.

As capacity assessments open the route to significant restriction or removal of legal autonomy for people with learning disabilities, we believe that caution must be exercised in widening this power and increasing the potential for its misuse.

60. Does the current approach to length of guardianship order provide sufficient safeguards for the adult?

We are aware that many parents are being encouraged to start applying for guardianship orders before their children have reached the age of 16. While this may be the point at which the legal transition from childhood to adulthood occurs, young people will clearly continue to develop and mature much beyond this, and their capacity will often change accordingly. Therefore, we believe that in most cases, it is particularly inappropriate to grant a guardianship order of more than three years to a young person with learning disabilities.

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[21] Mental Welfare Commission & Centre for Mental Health and Capacity Law, 'Scotland's Mental Health and Capacity Law: the Case for Reform (2017)
[22] Mental Welfare Commission & Centre for Mental Health and Capacity Law, 'Scotland's Mental Health and Capacity Law: the Case for Reform (2017)
[23] People First (2020) Response to SMHLR Capacity Assessing Survey
[24] General Comment No.1 (2014)

More widely, People First have pointed out that *'While it is true that Guardianship orders are required to specify the Guardianship and substitute decision-making powers granted by the courts, it is all too common that long lists of powers are included in the applications and the orders, often based on legal advice that more is better.'*[25]

We share People First's concerns regarding the wide ranging powers included by the courts - as guardianship, of any length, necessarily entails serious restrictions on someone with learning disabilities choice, autonomy and privacy.

For these reasons, SCLD believes that until the current legal framework in Scotland is fundamentally reformed, the length of a guardianship for people with learning disabilities should be for a maximum of three years. However, we accept that in a small number of circumstances, for those with the most complex needs and for whom the process may be particularly distressing, it may appropriate to grant a longer order.

In all cases, it is imperative that this is accompanied by automatic and periodic judicial review which meets ECHR requirements and assesses the appropriateness of the order. In this process the revised principles of the AWI Act should be followed at all times including ascertaining the will and preference of the person with learning disabilities and providing them with support to give their views

62. Is there a need to remove discretion from the sheriff to grant indefinite guardianship?

We recognise that the use of indefinite guardianship orders has declined significantly in recent years. However, of all extant guardianship orders, 27% are indefinite orders and people with a learning disability make up 51% of this group[26]. We do not believe indefinite orders are in accordance with rights under Article 5 of the ECHR, the CRPD nor are they consistent with the principles of the AWI Act. Therefore, we support the proposal to remove discretion to grant indefinite orders.

[25] People First (2020) Response to SMHLR Capacity Assessing Survey
[26] Adults with Incapacity Act monitoring report 2023-24

Part 7

Approach to Deprivation of Liberty (DOL)

66. Do you agree with the overall approach we are proposing to address DOL?

The Cheshire West ruling by the UK Supreme Court in 2014[27] and the findings of the Scottish Law Commission's report on Adults with Incapacity[28] highlighted the need for further legal and procedural safeguards to protect those considered unable to consent to a DOL. At present, under existing law many adults with learning disabilities in Scotland who are deemed to lack capacity and who live in care homes, out-of-area placements or in hospitals, could be regarded as DOL in violation of their rights under Article 5 of the ECHR[29].

At a minimum, SCLD believes there must be robust scrutiny of DOL for people with learning disabilities deemed to lack capacity under the AWI Act including clear legal processes and ECHR compliant safeguards. Therefore, we agree with the proposals that where someone is in a setting which may form a DOL this needs to be time limited, subject to regular reviews and with a right of appeal.

However, we believe there is a much more fundamental issue involved here - the ongoing inclusion of learning disability within the definition of 'mental disorder'. It is this which provides a legal basis for DOL for people with learning disabilities and, in our view, leads to practices which support the continued institutionalisation of people with learning disabilities contrary to the CRPD.

The United Nations Committee on the CRPD's guidelines on deinstitutionalisation state that:

" Institutionalisation is a discriminatory practice against persons with disabilities, contrary to Article 5 of the Convention. It involves de facto denial of the legal capacity of persons with disabilities, in breach of Article 12. It constitutes detention and deprivation of liberty based on impairment, contrary to Article 14. States parties should recognise institutionalisation as a form of violence against persons with disabilities. It exposes persons with disabilities to forced medical intervention with

[27] Deprivation of Liberty Advice Notes, Mental Welfare Commission (2015)
[28] Report on Adults with Incapacity, Scottish Law Commission (2014)
[29] European Convention of Human Rights

psychotropic medications, such as sedatives, mood stabilisers, electro-convulsive treatment, and conversion therapy, infringing articles 15, 16 and 17. ”[30]

It is our clear view that all people with learning disabilities living in a hospital setting without clinical need or being placed in out-of-area placements or care homes without choice are subject, at the very least, to an excessive restriction on liberty. This denies them the right to a home life and independent living in the community and makes them more vulnerable to human rights abuses associated with institutionalisation.

Therefore, as well as the proposed additional legal process and safeguards to ensure Article 5, ECHR compliance, SCLD believes it is imperative that the Scottish Government undertakes more significant reform to ensure greater compliance with the CRPD and eliminate potentially discriminatory practices experienced by people with learning disabilities. To achieve this, we believe it is imperative for the Scottish Government to act on the recommendation from IRMHA that learning disability be removed from the legal definition of ‘mental disorder’[31].

For further information please contact:

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[30] CRPD Committee (2022)
[31] The independent review of Learning Disability and Autism in the Mental Health Act (2019)