

The Independent Review of Learning Disability and Autism in the Mental Health Act

East Ayrshire HSCP Response

East Ayrshire HSCP are grateful for the opportunity to comment on Stage 3 of the independent Review of Learning Disability and Autism in the Mental Health Act.

EAHSCP offers a response to the following areas within the consultation document and is happy for the review to publish these comments.

WHAT SCOTLAND NEEDS TO DO

We think that Scotland's mental health law needs to change for autistic people and people with learning disability.

We think that the law needs to change to comply with the United Nations Convention on the Rights of Persons with Disabilities.

We also think that it needs to change to comply with the European Convention on Human Rights in full.

EAHSCP welcomes the commitment of the independent review to embed human rights into mental health legislation in Scotland, with a clear emphasis on ensuring compliance with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the European Convention on Human Rights (ECHR).

More generally, EAHSCP questions why such an approach should be restricted to persons only with a diagnosis of autism or learning disability, recognising that all individuals for whom compulsory measures to support care and treatment is being considered would benefit from such an approach.

HOW WE UNDERSTAND AUTISM, LEARNING DISABILITY AND MENTAL HEALTH

We suggest that Scotland needs to move to understanding autism and learning disability as disabilities, not as mental disorders.

We think that Scotland's mental health services for autistic people and people with learning disability need to move to a human rights culture.

In Scots law, everyone is presumed to have legal capacity. We suggest that it should not be possible to challenge the legal capacity of autistic people or people with learning disability.

EAHSCP recognises that learning disability and autism included within the definition of mental disorder is contentious and accepts that a definition of impairment and disability is more appropriate. However, EAHSCP acknowledges that there may be circumstances where the criteria for compulsory measures could and should be applied to people with learning disability and autism where there may also be the need to provide care and treatment for a mental illness, recognising that compulsory measures are rarely applied where mental disorder is exclusively defined as autism or learning disability. Similarly, where people with autism or a learning disability are also experiencing a mental health problem which affects their capacity to make certain decisions about care and treatment for the same, it may be necessary to intervene using compulsory measures.

SUPPORT FOR DECISION MAKING

We suggest that Scotland should make change to comply in full with a key right in the Convention on the Rights of Persons with Disabilities, the right to equal recognition before the law.

To make it possible for autistic people and people with learning disability to have and use their legal capacity, Scotland would have to give strong support for decision making. We make a range of suggestions on how this support should be set up.

We also discuss how we think decisions should be made on psychological interventions, psychotropic medication, and at times of crisis.

EAHSCP accepts that people with learning disability and autism should be afforded equal recognition before the law and have access to the same rights as others in line with UNCRPD.

EAHSCP fully accepts that supported decision making should be made available to ensure that all individuals are able to realise their right to make decisions, however EAHSCP also recognises the wide ranging implications of assuming legal capacity for all, regardless of disability. Current legislation acknowledges that an individual's capacity should be judged as decision specific, advocating a strengths based approach whilst recognising certain limitations associated with an individual's cognitive disability. A fundamental change of existing legislation and practice, particularly in relation to Adults With Incapacity legislation will therefore be required in order to support full compliance with UNCRPD in this regard.

EAHSCP acknowledges the value in supported decision making as a means of better understanding and articulating an individual's rights, will and preferences, however there are some concerns in relation to the role of non-instructed advocacy and the making of a 'best interpretation' of the rights, will and preferences and how this in practice would be achieved in reality. The adoption of this recommendation would require significant training for existing advocacy services, as well as an increase in the number of advocates available to take on this enhanced role. Additionally, it is suggested that the role of non-instructed advocacy would include providing agreement to authorise medical treatment on a compulsory basis. EAHSCP would seek additional detail on this. Such a recommendation has the potential to significantly change the independent nature of the advocacy role as well as introducing questions as to why the advocate is regarded as the person best placed to make such a determination in preference to family members and other relevant parties.

Advocacy in its purest sense should always be independent of statutory services in order to avoid professional conflicts of interest. Additionally, an 'opt-out' arrangement where access to advocacy is automatic unless otherwise stated would have significant resourcing implications which would need to be addressed. In EAHSP, for example, current levels of demand on our advocacy services mean that priority is given to statutory duties in the first instance. Notwithstanding, EAHSCP welcomes any recommendation that has the potential to increase access to advocacy for the population of people with autism or learning disability

More generally, EAHSCP fully supports the intention that a duty is placed on all professionals to demonstrate that all possible steps have been taken to support decision making for all.

SUPPORT, CARE AND TREATMENT

We suggest that autistic people and people with learning disability should be given rights in law to have access to the support, care and treatment that they need.

We also makes suggestions on how support, care and treatment could be provided for women, children and offenders, in ways that respect human rights.

We discuss some duties that would need to be placed on public authorities to make these rights real.

EAHSCP welcomes the commitment to develop high quality services for people with learning disability and autism, in terms of establishing an appropriately qualified and experienced workforce and to providing appropriate environments for care and support. EAHSCP is of the view that this ambition should be extended to all individuals requiring care and support by reason of a recognised mental disorder. In addition, rather than working to an assumption that that people with learning disability and autism should be excluded from hospital admission on a compulsory basis, there should instead be an assumption that care and treatment will be provided in the most appropriate environment to provide necessary benefit, with the minimum restriction on rights and freedoms. This would safeguard against any potential discrimination associated with excluding persons with a diagnosis of learning disability or autism from admission to hospital.

HOW PROFESSIONALS MAKE DECISIONS

We suggest that Scotland should make changes to move closer to compliance with the right to liberty and security. This is another key right in the Convention on the Rights of Persons with Disabilities.

We suggest that Scotland is not yet ready to end all detention on the basis of disability, or all compulsory treatment, in a safe way.

We suggest that human rights assessments should be the basis for all professional decision making for autistic people and people with learning disability.

We suggest new roles for a broad range of professionals.

EAHSCP agrees with the premise that any professional decision that limits a person's rights must be proportionate and necessary at all times and that there should be a clear and open route to challenging such decisions via judicial authority (Court/ Tribunal).

EAHSCP questions the added benefit of introducing a distinct proportionality test in the form of a human rights assessment to support the threshold criteria test. The existing criteria of least restrictive option coupled with necessity test could be applied more rigorously by incorporating explicit reference to relevant human rights based legislation as part of a human rights assessment within the current criteria to be evidenced for compulsory treatment, ensuring that human rights forms the basis for all decision making. Where a separate human rights assessment is advocated EAHSCP is of the view that this assessment should not exclusively be the responsibility of the MHO. Social work as a profession has human rights embedded in its values and codes of practice and social workers are therefore competent to carry out the proposed human rights assessment as outlined within the proposal document.

EAHSCP recognises that the introduction of additional tasks for MHOs has the potential to place additional pressure on the social work workforce. If this is pursued, it is imperative that additional tasks for the workforce are properly and fairly costed through a comprehensive financial impact assessment and that additional financial resources are made available for Local Authorities

Additional clarity is required in relation to the application of human rights assessments in the event that a professional is required to make a decision in an emergency where there is an immediate or grave risk to life or a person's safety.

EAHSCP have a question in relation to the recommendation that the Mental Health Officer would need to be employed in a way that made them independent of the Health and Social Care Partnership and Social Work Departments in an effort to avoid conflict of interest (although understand where potential conflicts of interest may currently arise). Currently all MHOs are workers who must be employed by a local authority and appointed specifically as MHOs. As employees of local authorities, MHOs are independent of the NHS and currently have a role requiring them to make specific assessments independently from the other services provided to individuals. The autonomous nature of the MHO role is explicit and currently well understood. EAHSCP would question *how* MHOs could be employed outside of statutory social work services as many areas manage the MHO role as a dual function role within other social work posts (i.e. social workers deploy their time between multiple roles).

HOW DECISIONS ARE MONITORED

We think that Scotland needs mental health law and services based on human rights. We think that autistic people and people with learning disability should be routinely involved in developing, implementing and monitoring the law and services.

We suggest that the Mental Welfare Commission for Scotland and the Mental Health Tribunal for Scotland should be more authority to protect the rights of autistic people and people with learning disability.

We make a range of suggestions on how human rights should be monitored.

EAHSCP welcomes the assertion that there are no plans to adopt the model of Approved Mental Health Practitioner that extends the equivalent role of the MHO to include nurses, occupational therapists and clinical psychologists as in England and Wales. EAHSCP agrees that social workers are professionally qualified to fulfil the role of Mental Health Officer. EAHSCP asserts that Social Work values are consistent with the values required of undertaking the MHO role. MHOs also operate within the SSSC codes of practice where social workers are required to treat each person as an individual; respect and where appropriate promote the views and wishes of people who use services and their carers; support the rights of people who use services to control their lives and make informed choices about the services they use; respect and maintain the dignity and privacy of people who use services and work in a way that promotes diversity and respects different cultures and values.

WHAT THIS MEANS FOR THE LAW

We suggest that autism and learning disability should no longer be defined as 'mental disorders' in Scotland's Mental Health Act.

We suggest that Scotland develops a new law to give 'positive rights' for support, care and treatment to autistic people and people with learning disability.

We give a summary of the changes that we are suggesting for criminal law.

We suggest how Scotland might prepare to end detention on the basis of disability, and to end compulsory treatment, at some time in the future.

EAHSCP agrees that a definition of impairment and disability is more appropriate than defining learning disability and autism as a mental disorder.

The suggestion that all autistic people and people with learning disability who need mental health services should be supported under a new law is more problematic, where learning disability or autism could have the potential of excluding individuals from receiving necessary clinical care and treatment using the existing legislation . To exempt persons with learning disability or autism, regardless of the presence of mental illness or personality disorder from existing safeguarding legislative frameworks has in itself the potential to be considered discriminatory.

Elaine Davison (MH Co-ordinator)

East Ayrshire Health & Social Care Partnership

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