Law Society of Scotland

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Consultation Response

Independent Review of Learning Disability and Autism

31 October 2019

Introduction

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We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Independent Review of Learning Disability and Autism consultation. The sub-committee has the following comments to put forward for consideration.

General comments

We welcome the work of the Independent Review, and in broad terms the proposals in it. We are grateful for the extent to which we have been invited to provide input and comment during the process of the Review, including engagement with our committees and staff, and are pleased to note the extent to which account of this input has been taken. Given that one half of the core research team on the Essex Autonomy Three Jurisdictions Project are current members of our Mental Health and Disability sub-committee, we are also pleased to note the extent to which account has been taken of the Three Jurisdictions Report.

We are pleased to note the acknowledgement on page 148 of the significance of the Adults with Incapacity (Scotland) Act 2000 ("2000 Act") and the Adult Support and Protection (Scotland) Act 2007 ("2007 Act"); and of the Scott review. We note that the remit of the review was limited to the Mental Health (Care and Treatment) (Scotland) Act 2003 ("2003 Act"). That can now be remedied by carrying the work of the review through into the work of the Scott review, with its wider remit. Indeed, it is essential that this be done.

Particularly in relation to people with learning disabilities, there is at present lack of clarity on the inter-relationship between powers under the Acts. For example, cases have arisen where psychiatrists have made a decision about place of residence but a different decision has been made by family members with much greater knowledge of the individual, holding powers to determine residence under the 2000 Act (the same could even happen where an attorney, appointed by the person in question, holds such powers).

In particular, it should be recognised that the 2000 Act and the long history of development leading up to it were more than anything else a response to the needs of people with learning disabilities, following recognition long ago of the inappropriateness of trying to treat learning disabilities (formerly termed "mental

handicap") as a mental disorder. Thus, at page 109 of "Scots Law and the Mentally Handicapped" (1984) it states: "The law of the mentally handicapped suffers from the bracketing of mental handicap and mental illness. They are put together as 'mental disorder'."

We note the difference in terminology between "people with learning disability" and "autistic people", "autistic citizens" and "autistic offenders". We acknowledge that some people with autism opt for the description "autistic people", but such terminology has the disadvantage of implying that people are defined by their autism, and that is emphasised with the juxtaposition with "people with learning disability". It is understood that Equality and Human Rights Commission consistently refers to "people with learning disability", "people with autism" and so forth, as being the preferred human rights-compliant terminology. We would suggest that the final report should employ that consistent terminology or, if departing from it, should contain a full and clear explanation of the differentiated terminology in fact adopted. Except in that situation, we would suggest that the difference in language is discriminatory. "It should perhaps also be acknowledged in the final report that to an extent what is proposed are changes in terminology. They are important because they are likely to affect perceptions and behaviours. Thus, the proposed references to "impairment" and "disability" reflect, in different language, the long-standing structure proposed by World Health Organisation in the International Classification of Impairments, Disabilities and Handicaps (World Health Organisation, Geneva, 1980). What is proposed is to amend "disability" to "impairment", and to amend "handicap" to "disability". This is important, but should be explained as a change of terminology in relation to a structure established in 1980. That may assist acceptability.

The history of reintroduction of tutors to adults, and development of that concept, from 1986 right through to implementation of Part 6 of the 2000 Act in 2002 was driven almost entirely by the needs of people with learning disabilities; and that experience – above all – shaped the 2000 Act itself.

Aligning with modern international terminology is also important for a quite different reason. Increasingly, people with impairments cross borders, or have families or assets in different jurisdictions. The impediments that still arise in these situations are currently cause for major international involvement and concern. They arise within the United Kingdom, not helped by the fact that although Scotland was the first jurisdiction in the world in relation to which Hague Convention 35 on the International Protection of Adults was ratified, it has still not yet been ratified in respect of England & Wales. It will help in dealing with cross-border situations if Scotland's terminology coincides with modern international human rights norms, helping to avoid problematic misunderstandings.

We welcome the greater emphasis placed upon psychologists. That should apply more generally. For example, during the development of use of tutors-dative to support people with learning disabilities, reports by psychologists were given equal status with reports by psychiatrists by the Court of Session, and it has always been our viewthat this should have been carried forward into procedures under the 2000 Act.

The document does not address resource implications. They are substantial. In particular, the reforms proposed, even though it may be some time before they come into force, will be inoperable unless the present severe shortage of mental health officers is addressed with immediate effect. We urge that the review's report recommend that with immediate effect Scottish Government ensures that the shortage be addressed;

that adequate measures to recruit, train and retain MHOs be instituted; and that these be adequately resourced.

"Disability", "support for exercise of legal capacity" and "capacity"

The CRPD definition of "disability" is misquoted on pages 15 and 124. Under that definition, people with disabilities "include" those whose disabilities are as a result of barriers. It is discriminatory to exclude those whose disabilities are so severe that they apply regardless of removal of all barriers.

CRPD does not once refer to "supported decision-making". The requirement is the much broader concept of support for the exercise of legal capacity, equating to "acting or deciding" in the 2000 Act, and the broad concept of any "juridical act". In limiting the language to decision-making, the document appears to reflect the law of England & Wales, which is restricted to decision-making, rather than the much broader concept of "exercise of legal capacity" in CRPD and in the definition of "incapable" in the 2000 Act.

In terms of language, the document does not acknowledge the dual meaning of "legal capacity", reflected in CRPD in the two separate terms "legal capacity" and "exercise of legal capacity". The final report of the review should make clear that it uses "capacity" only in the first sense, and not in the second sense, particularly because the 2000 Act uses the second sense, defining "incapable" then stating that "incapacity" shall be construed accordingly. This concentrates on factual capabilities, as distinct from any implied limitation upon rights and status, and the entitlement to exercise and safeguard them.

"Rights, will and preferences"

References to this concept fail to make the important distinction between "will" and "preferences", as developed subsequently to the Three Jurisdictions Report. Preferences are all the elements that may inform an expression of will at any particular point in time. There may well be conflicting preferences which require to be balanced in order to achieve an expression of will. The "will" which a person may derive from that person's "preferences", in relation to any particular matter, may and often does change rapidly, even from day to day. See the examples provided by people with learning disabilities quoted in "Respecting 'will': Viscount Stair and online shopping", Ward and Curk (with contributions by People First (Scotland)), 2018 SLT (News) 123. It is notable that the points made in that article have already gained a degree of international currency (the article itself appeared in German translation in the April 2019 issue of the main German journal BtPrax). It may be problematical to encourage people to include "will" in a document recording "preferences", as that could lock people into an expression of will that was only transient at time of preparation of the document.

Training and broader application

It is appears that reference is not made to the training obligations of Article 13.2 of CRPD. These are highly relevant.

Also, the document is perhaps too limited in that it does not acknowledge the importance of more broadly-based obligations and education in relation to all services. An example from our committee convener's experience was a proposal to change at short notice long-standing transport arrangements for a person with autism to go each day to the centre that he attended: fortunately this was stopped, but otherwise the effects of this unplanned change in routines would without doubt have been disastrous.

Procedural fairness

At present there is a deficit in procedural fairness (ECHR Article 6) where someone such as a curator *ad litem* has been appointed who comes to conclusions which differ from the views of the person in question. In that situation, there should be an automatic and absolute requirement for the person's own views to be legally represented.

Procedures generally are still not sufficiently inclusive. There is too much "talking over the head" of the person in question. A useful technique reported to our committee recently was the issue to persons in any such procedures of a large red card with the word "STOP" on it, which they could raise up whenever they could not fully follow or understand what was being said or done in proceedings. The introduction of that technique might contribute more in the long term to Article 13.2 training than anything else.

Disabled persons' organisations

It is very important to make a clear distinction between organisations for people with particular disabilities, and organisations of such people. There can be significant differences in the views that one hears from each.

Reciprocity and proportionality

These concepts are indeed under-represented in existing law, and it has for long been our view that they should be strengthened.

Women

We are aware of complaints that serious discrimination and injustice has sometimes resulted from failure to recognise that drugs may have very different, and sometimes exaggerated, effect during pregnancy. The same may also happen during menopause.

Discriminatory limitations

We would conclude with an underlying concern that to pick out people with learning disabilities and people with autism for particular special treatment risks discrimination against others who do not come within those categories but would benefit equally. There should be a presumption against linking any proposed provisions solely to people with autism and people with learning disabilities, unless it is clearly understood that no-one else with any form of impairment or disability could ever benefit from similar provisions.

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