

Mental Health Rights Scotland

Response to the findings and recommendations of the Independent Review of the Mental Health Act (IRMHA)

Mental Health Rights Scotland is an association of service users and carers who have lived experience under mental health, incapacity and protection legislation and campaign for full recognition of human rights within this jurisdiction.

Members who have children with Autism have contributed to this response. We have no members with Learning Disability but we agree substantially with the views of People First (PF) and commend the clarity of their thinking.

We congratulate the Review Team on its ground-breaking efforts to be accessible to people with Learning Disability and Autism. However, we think that the full Stage 3 report is unnecessarily long, detailed, repetitive and disjointed, to the extent of being confusing even for a person without a mental impairment.

Like PF we are dissatisfied with many of the Recommendations because, contrary to Article 12 of the UNCRPD, they do not empower people with Learning Difficulty or Autism to be equal citizens under the law. Instead they continue to empower professionals to make decisions for them in a way which would be unlawful for any other citizen.

The Review's suggestions about re-defining autism and learning disability as 'disabilities' are confusing and fraught with difficulty. Particularly because you have not offered any definition of 'mental disorder'. All mental disorders fit the UNCRPD definition (inability to participate equally in society). The proposal to limit rights on the basis of 'autistic of learning disability' appears to contradict the assertion that rights must not be restricted on the basis of disability.

We respectfully disagree with PF that 'disability' should be restricted to life-long, untreatable mental impairments. Using time limits and treatability as criteria is arbitrary and unsatisfactory. The MHA does not distinguish between nursing care and medical treatment - all 'disorders' can be ameliorated with appropriate care.

In our view it is irrelevant how mental disorder is defined, and what 'disorders' are included. The crux is that the Mental Health Act does not serve people with Autism or Learning Disability well, particularly because diagnosis and treatment are dominated by the medical model and psychiatry. In many cases the Act causes harm and injustice. The same can be said for other disorders such as dementia. All interference with personal choice and autonomy must be on the same basis for all citizens, regardless of any disability, impairment or diagnosis, whether mental or physical or neither. We believe that is the intention of Article 12.

Many of the safeguards of the Act are currently applied as a formality, a 'box ticking' exercise. We do not believe that requiring professionals or tribunals to make human rights assessments and to have 'special regard' to them will make any difference to outcomes. They are already required to 'take account of' human rights Principles and either ignore them or make them subject to their own assessment of "best interests". Advance Statements are often over-ruled if the psychiatrist disagrees. Why should a Statement of Human Rights fare any better?

All decisions require a subjective balancing or prioritisation of rights and interests. Different people come to different conclusions. All other citizens do this for themselves. Medical professionals and tribunals are likely to continue to prioritise the right of access to treatment above other rights. It is naive to assume otherwise without evidence. If they are required to use the patient's priorities, how is this any different from the patient making his/her own decision?

We do not believe that expanding the powers of Tribunals will deliver fairer outcomes. This recommendation is inconsistent with the Review's finding that tribunals frequently side with the psychiatrist despite being required to apply the human rights Principles of the Act. The problem is not that tribunals currently lack sufficient powers to uphold human rights. It is that they lack the will to do so, and are not able to recognise their own failings and biases.

We note that the Chair is a Member of the Tribunal so he is not independent on these issues.

The Mental Welfare Commission already professes to "protect and promote the human rights of people with mental illness, learning disability, dementia and related conditions". Giving the Commission a statutory power to do what it already claims to be doing is not going to make any difference. The Commission needs to start using the powers that it has to challenge treatment in specific cases, rather than simply making general observations.

We agree with the idea of a Decision Supporter, someone whom the patient knows and trusts. We think that greater recognition should be given to family carers as 'experts by experience' on an equal standing with professionals.

We agree that much more needs to be done to support people to live independently, and that investment needs to shift from institutional crisis services to community support services to avoid crises.

We share PF's disappointment with the suggestion that "Scotland is not yet ready to end all detention on the basis of disability, or all compulsory treatment, in a safe way." Who is not ready, and why? A change in the law is necessary to make such progress happen, as was argued for the Children (Equal Protection from Assault) Act 2019.

In summary, although this Review has made some useful suggestions, it has failed to embrace the spirit of the UNCRPD.