



The independent review of  
**Learning Disability  
and Autism**  
in the Mental Health Act

**Final consultation - Stage 3 of the review**

**Response by Social Work Scotland**

Social Work Scotland  
Mansfield Traquair Centre  
15 Mansfield Place, Edinburgh  
EH3 6BB

Contact: Dr Jane Kellock, Head of Strategy

Social Work Scotland is the professional body for social work leaders, working closely with our partners to shape policy and practice within social services. We welcome the intention to review and reform mental health legislation in Scotland, and we are grateful for this opportunity to comment on stage 3 of the independent review of Learning Disability and Autism in the Mental Health Act.

We offer a response to the following areas within the consultation document, and we are happy for the review to publish our response.

**1. 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.*

Social Work Scotland fully supports the approach taken by the review to embed human rights into mental health legislation in Scotland, and we consider the emphasis on the human rights principles of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the European Convention on Human Rights (ECHR) vital and welcome.

We appreciate that the changes put forward by the independent review are progressive and ambitious, and we would support the review's aspirations at this stage. We would wish to emphasise that the practical implications are significant, particularly given the existing economic, workforce and organisational challenges facing Health and Social Care Partnerships, and we put forward our views on this in later sections of the response. Implementation of such transformational change needs to be practical, workable and sensible, and should enable people, their carers, family, and professionals to build positive relationships and enhance lives.

We understand that the independent review of Learning Disability and Autism in the Mental Health Act will feed into the review of mental health legislation, chaired by John Scott QC. We look forward to considering the findings and recommendations that emerge from this wider review, particularly in relation to the lived experience of legal compulsion.

## **2. 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.*

Social Work Scotland is of the view that people with learning disability and autism are not well served by the existing legal definition of disorder, and wholeheartedly agrees that autism and learning disabilities should be defined as impairments and disabilities and not as mental disorders. Disability is a better signifier for understanding experiences and life aspirations, and identifying the best social, economic and cultural supports for people with lifelong impairments.

This change in definition will require a significant and profound shift in professional and legal understanding towards the social model of disability. The principle that disability results from the interplay of the person's impairment with disabling social and environmental factors, rather than residing wholly with the person, should thread through the wider review of mental health legislation and beyond. The notion of reciprocity embedded in the current Act will become all the more significant.

Despite the definition of 'treatment' under the current Act including non-medical intervention such as accommodation and personal support, we consider the current Act reinforces the medical model, whereas the national learning disability strategy, Keys to Life complies fundamentally with a rights based approach.

A core component of social work practice is understanding and enabling reasonable risk in order to support people to live full, interesting and self-determined lives. We understand the issues inherent in balancing risks and rights. We recognise that in

order to support reasonable risk, professionals have to intervene early in the problem trajectory before a crisis escalates. This requires accessible and well-structured resources, a suitably trained workforce, and timely local service responses.

### **3. 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.*

Social Work Scotland fully supports the position that people with learning disability and with autism should enjoy the same rights as all. Supported decision making should be made available to realise their right to make decisions. There are wide ranging implications in taking this position, which include review of the Adults with Incapacity Act under the wider legislative review, the development of new models of practice across social work and health, and analysis of resource and workforce implications.

We agree with the statements made about the role of the unpaid carer. However there should be acknowledgment that there can be a need to navigate complex differences of view within families about the best option for the person with disability. We understand that the wider Scott review will address adults with incapacity legislation, and look forward to considering this in due course.

Social Work Scotland fully endorses the principles of advocacy, however offering advocacy on an opt-out basis would be significantly challenging. The current supply of independent advocacy barely covers basic statutory duties. There is a difficulty in recruiting volunteer advocates. In some areas, due to short supply, only instructed advocacy is undertaken by advocacy providers. It would require considerable additional strategic investment to rectify the shortfall, in the context of existing health and social care financial and workforce challenges.

We do not think that the Mental Health Tribunal is an appropriate route to deal with breaches of human rights. The MHT's focus and expertise is to support the current Act. If we intend to move away from disorder to human rights, then this requires a more appropriate and competent route to dealing with human rights issues. We suggest that there is consideration given to developing a separate system to address this.

Social Work Scotland supports the suggestion that a duty is placed on professionals to demonstrate that they have taken reasonable steps to support decision making.

We support the use of evidence-based, adapted psychological therapies, and agree that more work needs to be done to understand prescribing practices.

We agree with the principle that a person's human rights, will and preference should be supported even in times of crisis, although there are significant challenges to support this if risk has escalated.

Social Work Scotland supports the development of a model of 'safe places'. We would ideally want to intervene early to prevent crisis from occurring or escalating.

We understand less well what secure support centres would look like in practice. We understand it to be an alternative to hospital provision. Whilst we would agree that mainstream mental health inpatient provision is not suitable for people with learning disability or autism, alternative provision will be significantly resource intensive.

#### **4. 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.*

Social Work Scotland supports the legal access to support, care and treatment on the understanding that considerable attention is required as to how this will be implemented in practice.

Social Work Scotland supports the assertion that autism is not well understood across mental health and wider health and social care services, however we would question the need to set up a standalone national autism service.

We agree with the statements made by the review about the need to address discriminatory practice; and we support the application of the United Nations Convention on the Rights of the Child as an additional mechanism to secure rights for children and learning disability and with autism. The complexity of overlapping legislation can obscure some key developments and interrelated duties and graphic representation of legislation that must be considered can be helpful for practitioners. For example, The Scottish Transitions Forum provides an illustration at transitional ages and stages<sup>1</sup>.

We agree that the changes should apply equally to people who offend, and think that the justice system should allow advice and support to be provided at an earlier stage

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<sup>1</sup> <https://scottishtransitions.org.uk/flowchart/legislation-flowchart-2nd-edition-2/>

in the process to avoid unnecessary trauma to the individual or inappropriate court disposals.

### **5. Where support, care and treatment happens**

*We suggest that there should be a shift towards voluntary support and care that emphasises social support and care. We suggest a shift away from compulsory treatment in hospitals that emphasise medical treatment.*

*We suggest places where support, care and treatment should happen. This includes a new type of service which we call secure support centres.*

Social Work Scotland agrees with the statement that there should be a shift towards voluntary social support and care away from compulsion, and we welcome the suggestion of the safe places model. However, we think that there is a lack of reflection in the report of the significant operational challenges of supporting people with challenging behaviour in community settings, of the inherent complexity of support people through transitions, demographic changes and the pressures on resources. We would emphasise that the consequences of introducing the progressive approach outlined in the report with insufficient resources and untested or unworkable models of practice would be catastrophic. We would like to understand what is envisaged for rural and island geographies.

We are not attracted to the suggested secure support services model and it is not clear how the review envisages the use of such centres. There would appear to be a contradiction in section 5.3 regarding the end of compulsory treatment in hospital for people with learning disability and autism, yet supporting the detention in specialist secure support centres. The distinction between hospital and secure centre is unclear.

We think that determined focus and resourcing of the right community resources to meet individuals' needs would mitigate the need for secure care provision. Our experience of similar provision (e.g. health care houses) is that they become full almost immediately and that there is a lack of adequate and appropriate specialist resources available for long term support and care.

### **6. 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.*

Social Work Scotland recognises that the matter of supported or substitute decision making is complex and it is challenging to consider how we can respect and comply with human rights in a practical and straightforward way.

Whilst we think that the concept of Human Rights Assessment as a proportionality test is not sufficiently clarified in the report, we do not think that it requires a specialist social worker i.e. Mental Health Officer to undertake a Human Rights Assessment. Social work as a profession already has embedded the purpose of supporting human rights in its values and codes of practice<sup>2</sup>, and it would be within the competence of social workers to carry out the type of human rights based assessment outlined in section 6.1. It has been recognised that the role of the MHO is under pressure across Scotland with insufficient capacity to meet current duties and demands. The proposal does not have the support of Social Work Scotland's Mental Health Officer group as it is thought to be impractical for an already overstretched group of professionals.

As noted earlier, we consider there to be a mismatch in assigning a human rights role to the Mental Health Tribunal, and would suggest that challenges to human rights should be considered in a separate forum.

We agree that the disability experienced by many people is in large part due to societal inadequacies, and that ideally the right kind and level of support should be available to all who need it. However, we also believe that the provision of this level of support is impractical in the current economic situation. We would support a move towards reducing the use of compulsory treatment and deprivation of liberty while accepting that this may still be required to keep people safe.

The future criteria outlined on p83 needs to be further clarified and developed into a workable process. We are concerned about how the future criteria can be constructed as to be evidenced. It is not clear how the process would work in practice, for example how a human rights assessment could be carried out quickly so as to allow protective intervention for a person in crisis.

As noted previously, Human Rights Assessments could be undertaken by the social worker or other professional care managers if provided with additional training (section 6.3).

We would support the intention to provide additional education on autism and learning disabilities. This is already included in social work training to a certain extent. It would be difficult to ensure that all students received more intensive training within their basic qualification curriculum. Again, there would be a significant resource implication.

We do not agree with the statement that Mental Health Officers would need to be employed independently of social work departments. MHOs are independent professionals who currently must be employed by a local authority. We would

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<sup>2</sup> <https://www.sssc.uk.com/the-scottish-social-services-council/sssc-codes-of-practice/>

question how they could be employed other than within a statutory social work service.

We agree that social work should have a more central remit in the support, care and treatment of people with autism and learning disability, and we support the use of Chief Social Work Officers, rather than Chief Officers, in the role of Responsible Officer.

## **7. 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.*

Social Work Scotland is supportive of the intention to strengthen monitoring and regulatory scrutiny in order to ensure compliance with human rights.

However, as previously noted, Social Work Scotland is unconvinced about the increase in role and remit for existing mental health bodies given the intention to remove learning disability and autism from the mental health act. We think that the roles of other monitoring bodies (Care Inspectorate, SSSC, local authority complaints systems) need also to be determined.

## **8. Offenders**

*We suggest changes to make the criminal justice system fairer for autistic people and people with learning disability.*

*We suggest that Scotland uses 'intermediaries' to support suspects and defendants who have communication impairment.*

*We suggest a change to how disability is understood in criminal law. This change could make it possible for person to be held responsible for an offence, but also to have adapted consequences that take account of the person's disability.*

*We suggest that punishment, treatment and support to stop offending should be clearly separated out in law for autistic offenders and offenders with learning disability.*

*We suggest that punishment should not be longer for these offenders than for any other offenders.*

Social Work Scotland is broadly supportive of the principles set out in sections 8 and 9, with the aforementioned caveat regarding adequate resourcing. We would like to

see more explanation of how this sits within the wider forensic, court, and prison system.

We agree with the intention to make the justice system fairer for autistic people and people with learning disabilities.

We regard the suggested use of intermediaries as a positive step to be scoped and defined, while at the same time note some of the current challenges and recommendations as outlined in the research by SOLD/ARC Scotland (2015)<sup>3</sup>.

While this intention to change how disability is understood in criminal law appears laudable and congruent with an effective, balanced and fair system, we would need to be able to see how this would be achieved in order to comment, given the complexity of inter-related impairments in functioning and capacity, some of which may be difficult to delineate/diagnose with indisputable clarity.

Separating out punishment, treatment and support makes sense as an intention, however, we would need to see the detail of how such clarity of categorised action would be delineated. Although in many instances custodial punishment diminishes capacity to change, some punishment can influence positive behaviour change by means of deterrence/understanding of boundaries and consequences. Some alternatives disposals are therapeutic, and some people experience some therapies as punitive or restrictive. In short, there is not a binary option of punishment or treatment. There is likely to be a continuum in which some disposals are simply punitive and others are simply therapeutic but in many instances a balance of punitive and therapeutic intention and impact are played out. All compulsory options and disposals must be proportionate, safe for the public, effective (on balance of probability from evidence about approaches and assessment of the person) and not significantly harmful for the person in terms of long term further impairment of health and development.

The suggestion that punishment should not be proportionately longer, is extremely complex territory to which to respond. In general, we agree with the suggestion but have concerns about the confidence with which you will be able to categorise types where a combination of conditions, factors and impairments are present. There may be instances in which the combination of factors that includes impaired capacity due to learning disabilities or affected by autism increases the likelihood of repeated and seriously harmful behaviours. Might this not affect disposal in some situations, with due assessment and attention to capacity, needs, rights, the ability to treat etc?

### **9. Where support, care and treatment happens for offenders**

*We suggest that rehabilitation should usually happen in the community, for offences that would usually lead to community rehabilitation for anyone else.*

*We suggest that offenders should usually be given support, care or treatment in the community or in rehabilitation centres, not in hospitals.*

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<sup>3</sup> <https://arcscotland.org.uk/wp-content/uploads/criminal-justice-pathway.pdf>



*We suggest that prison should only be used for autistic offenders or offenders with learning disability when it is specially designed or adapted to meet the person's needs.*

We agree that rehabilitation should usually happen in the community when this is safely achievable

The location for support, care and treatment depends on the nature and consequences of the behaviour; the safety of the public; existence of appropriate resources relative to the needs and capacity to change of the individual; and the effect of the disposal in relative terms with each option.

In principle we agree that specially designed or adapted prison settings would be ideal. We would be more confident about this response when we understand the range of adaptations under consideration.

There is no mention of the role of the Appropriate Adult in the report. We note that the Appropriate Adults scheme will require to be redesigned to comply with a human rights approach, and the scheme tailored to fit with redesigned operational systems required for the new approach.

#### **10. 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.*

Social Work Scotland supports the position that learning disability and autism should no longer be defined as mental disorders.