

Consultation Response

Learning Disabilities, Autism and Neurodivergence Bill

April 2024

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Mental Health and Disability and Equalities Law Sub-Committees welcome the opportunity to consider and respond to the Scottish Government consultation: *Learning Disabilities, Autism and Neurodivergence Bill*.¹ We have the following comments to put forward for consideration.

Consultation Questions

Part 1: Reach and definitions: who should the Learning Disabilities, Autism and Neurodivergence (LDAN) Bill include?

Which of these proposals do you agree with (if any), please tell us why?

Of the three options, we prefer Proposal 2, with caveats.

In general, we agree that the focus should be on need rather than diagnosis and we should move away from a medical model of disability. In this regard, we recognise that the LDAN Bill proposal has a different focus from that of the Equality Act 2010. The origins of that act in preventing discrimination mean a definition based on the effect of someone's impairment is generally appropriate. The legislation envisioned though this consultation seeks to provide a more rounded, proactive, approach to ensuring people who have a learning disability or are neurodivergent have the best life possible rather than reactive anti-discrimination legislation. But, as we discuss in our response on 'anything else that we should consider', we are not sure what specific needs the Bill is addressing. Unless that is clear, it is hard to know who the bill is 'for' and when the scope becomes 'too wide'.

We strongly agree that autistic people and other neurodivergent groups have been significantly harmed by services, including mental health services, which do not

¹ [Learning Disabilities, Autism and Neurodivergence Bill: consultation - gov.scot \(www.gov.scot\)](https://www.gov.scot/consultations/Learning_Disabilities,_Autism_and_Neurodivergence_Bill_consultation)



accommodate their particular needs. It is absolutely right that more should be done to address this and that it be a policy priority. However, passing a law which will apply to some groups and not others with similar needs is difficult to justify from an equality standpoint unless there is some clear rationale for who is included or excluded.

This is made more complex by the open-ended nature of the term 'neurodivergent'. We discuss this in more detail in our response on 'anything else we should consider'.

As a general comment, consideration should be given to avoiding un-necessary overlap with other legislation. If people who have a learning disability or are neurodivergent are not able to access support they are entitled to due to lack of understanding or knowledge of existing legislation by public bodies, then this should be tackled though addressing a failure to apply or interpret legislation rather than developing new legislation.

Which of these proposals do you not agree with (if any), please tell us why?

We do not agree with Proposal 1, for the reasons outlined in the consultation. We discuss below a possible variant which might be more workable, at least in respect of some aspects of the Bill.

We do not agree with Proposal 3, although it is less problematic than proposal 1. Naming specific conditions is essentially a medical model approach which grants rights or status according to a diagnosis, rather than a person's needs and circumstances. If this proposal was adopted, we agree that it would be necessary to permitting amendment via regulation to allow the constantly evolving terminology around disability to be recognised.

We do not support separately mentioning Down Syndrome within the definition (or any other specific form of learning disability). Down Syndrome is one genetic condition among many others, and people with Down Syndrome have diverse needs.

Is there anything else that we should consider in relation to this topic?

The Society's general position remains as set out in its response to the Scottish Mental Health Law Review (<https://www.lawscot.org.uk/media/hqzcla51/22-05-27-mhd-crim-smhlr-consultation.pdf>), as follows:

"We emphasise the need for reforms to be designed to meet all needs for support for the exercise of legal capacity and effective enjoyment of all rights "on the same basis as others" in terms of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), including to act, transact, make decisions, and generally safeguard, exercise and have the full benefit of their rights and interests. We call for the abolition of "mental disorder" or similar gateway terminology based on diagnostic criteria, in order to achieve compliance with UNCRPD and a human rights approach."



However, we appreciate that the policy intention here is to do something particular for learning disability, autism and neurodivergence.

In our response to the Scottish Human Rights Bill consultation (<https://www.lawscot.org.uk/media/ojppaix/23-10-05-a-human-rights-bill-for-scotland.pdf>) we highlighted that “It must be clear why the proposed Bill is necessary, and the gaps which existing in current law that the proposed Bill would fill. It must be clear how the law will allow judges and the legal system generally to implement coherent decisions in practical cases, consistent with the rule of law requirement for reasonable certainty in any rule with a sanction- civil or criminal.” We consider that these comments apply equally to the proposed LDAN Bill. The key questions that need answered before defining who the Bill covers are (a) what the Bill is intended to do, and (b) why any particular group of people should be covered by a different legal framework to others who may have similar needs.

If the Bill generally focuses on broad duties (e.g. to draft strategies), it will be easier to use a broad and open-ended definition. A variant of Proposal 1 might work if, rather than saying the Bill is for people who are neurodiverse, the Bill creates duties to ensure that neurodiversity is taken into account in policies, strategies and so on. That could support a non-discriminatory and universalist approach.

However, the more that the Bill creates rights for particular individuals which may be subject to judicial oversight, the more specificity will be required.

A particular challenge is that neurodivergent is a relatively new term without, as far as we know, much legal interpretation of its meaning. It can also mean different things in different professional and service contexts.

If it simply means ‘people whose brains function differently from the norm’, it would also include people with mental illnesses, personality disorders and dementia. There is debate in academic literature about whether conditions such as schizophrenia, dementia and bipolar disorder can be incorporated within the framework of neurodiversity.

It appears that the intention may be to include developmental but not acquired conditions, but the boundaries between these are not clear, and nor is there an obvious justification for drawing the line there.

For example, the consultation implies that people with acquired brain injuries are not meant to be included, whereas people with conditions such as foetal alcohol spectrum disorder (FASD) are included. We would welcome clarification on the policy justification for such a distinction. We would also welcome clarity on the position regarding people with a neonatal or early childhood brain injury or disease (who would normally be included in the definition of learning disability).

If the intention is to adopt a narrower model of ‘autism, ADHD and similar conditions’, we are not sure that learning disability should be swept up in the general category of ‘neurodivergent’. Many people with learning disabilities are



also autistic, but many are not, and we are not clear to what extent they would identify with the neurodivergent label. Learning disability is also a well-established term in legislation. It may be better to add this as a separate category alongside neurodivergence, recognising of course that there is significant overlap.

Some level of definition will be required on the face of the Bill to ensure that legislation is workable in practice.

Part 2: Overarching Themes

Section 1: Statutory Strategies for Neurodivergence and Learning Disabilities

Which of these proposals do you agree with (if any), please tell us why?

We have some support for Proposal 3. We are supportive of the idea that Scottish Government should lead and co-ordinate strategic change across the system. Particular examples where this would apply would be a national strategic drive to reduce coercion in care and support settings as recommended in the Scottish Mental Health Law Review (SMHLR), Chapter 9: Reduction of coercion and the commitment to address the scandal of autistic people in NHS care or in out of area placements.

Further, prompting public bodies as to what they should be addressing by providing detailed guidance would likely be welcomed by those bodies. This ensures that actions required are not omitted due to a lack of knowledge and expertise within public bodies.

We strongly support Proposal 5. The UN Convention on the Rights of People with Disabilities (CRPD) requires close consultation and active involvement of persons with disabilities, through their representative organisations, in the development and implementation of legislation and policies to implement the Convention, and in other decision-making processes (Article 4(3)), and in statistics and data collection and implementation and monitoring of law, policies and related strategies and processes involving persons with disabilities (Articles 31 and 33(3)).

We agree with the general intent of Proposal 6 that strategies should be subject to review by accountability mechanisms. It is important that these mechanisms are sufficiently robust to ensure that review leads to action and improvement.

Which of these proposals do you not agree with (if any), please tell us why?

We do not fundamentally object to any of the proposals, but we have questions about the likely impact of Proposals 1, 2 and 4.

Proposal 1

Whilst we have previously supported proposals for national statutory strategies in some situations (see for example: <https://www.lawscot.org.uk/research-and->



policy/influencing-the-law-and-policy/our-input-to-parliamentary-bills/bills-202223/disabled-children-and-young-people-transitions-to-adulthood-scotland-bill/) in this case it is not clear what the effect of a statutory strategy would be. The Government can already produce a strategy on neurodivergence, if it wishes, and has a number of levers to encourage public bodies to follow it (including powers of direction and statutory guidance in health, social work and other legislation).

Scottish Government has in recent years produced extensive strategies on autism and learning disability. While undoubtedly helpful in focusing energies, in our view they have sometimes acted as a drag on innovation, particularly in their later years, and as more of a bureaucratic process than a driver of change.

Proposal 2

Legislation is more justifiable if it creates new duties on other public bodies. However, being too specific about the form and focus of strategies for individual issues can lead to overlap and duplication, and constrain different ways of addressing multi-factorial social problems. As we point out in relation to proposal 1, the Government can already drive change, through its direct oversight of the NHS (and much of the justice system), and its powers of direction and guidance in relation to social work duties.

Proposal 4

We agree that strategies need to be reviewed, but it seems over-prescriptive to set out a duration for strategies in primary legislation.

Is there anything else that we should consider in relation to strategies?

It will be important that any strategies are fully embedded in the wider approach to Government strategies, including the National Performance Framework and National Outcomes. They also need to fit with strategies which overlap, for example the new Disability Equality Strategy which we understand is under development (see www.gov.scot/policies/disabled-people/uncrpd/). Importantly, they should be strategic, not just a list of actions which the Government is already undertaking.

It should be noted that the CRPD emphasises the ‘importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development’ (preamble, para g).

Section 2: Mandatory Training in the Public Sector

Do you agree with this proposal, please tell us why?

We agree with the proposal for mandatory training.

We support greater awareness of learning disability, autism and neurodivergence in public services and more and better training. A statutory requirement may be



helpful although how the training is developed and delivered is, in our view, more important than 'putting it in law'.

We understand the reference to 'the approach in England' is to s181 of the Health and Social Care Act 2022.

(<https://www.legislation.gov.uk/ukpga/2022/31/section/181/enacted>). This requires a Code of Practice and regulations to require service providers to ensure that each person working for the purpose of the regulated activities carried on by them receives training on learning disability and autism which is appropriate to the person's role.

It would be helpful to assess how effective the English approach has been before developing a Scottish approach. We note that the NDTi evaluation of the pilot English training (available at <https://www.hee.nhs.uk/our-work/learning-disability/current-projects/oliver-mcgowan-mandatory-training-learning-disability-autism/background>) concluded:

"Developing a standardised training package that is effective for large groups of staff across different settings will inevitably pose a challenge ... the main challenge now will be how to ensure consistent, high-quality delivery of the training and to ensure it leads to an improvement in the delivery of care and support to people with a learning disability and autistic people.

There is a need for longer-term work to explore the impact of this training on health and social care provision for people with a learning disability and autistic people."

It will be vital that training is developed and delivered with the full involvement of lived experience and Disabled People's Organisations, and that it reflects a rights-based/social model of disability.

The provisions should reflect the obligations in the CRPD to 'promote the training of professionals and staff working with persons with disabilities in the rights recognized in the Convention so as to better provide the assistance and services guaranteed by those rights' (Article 4(1)(i)) and 'promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities (Article 8(2)(d)). See also General Comment 7 on the participation of persons with disabilities, particularly paragraph 76.

We support widening the scope from health and social care to include other public services, including justice, education, housing and social security. It should also include private sector employees delivering services such as residential and home care.

[Do you not agree with this proposal, please tell us why?](#)

We have no specific comments.



Is there anything else that we should consider in relation to mandatory training?

Training should include awareness-raising on the duties owed to service users in domestic legislation and the CRPD. It should be linked to wider human rights awareness training following passage of the Human Rights Bill.

The Scottish Mental Health Law Review contains several references to training which could inform the scope and content of any mandatory training regime, including training in relation to equality and anti-discriminatory practice (Chapter 1); supported decision making (Rec.4.4); carer awareness (Rec.7.1); legal issues such as deprivation of liberty (Rec.8.11); and avoiding coercive practice (chapter 9).

It will be important to ensure training is properly funded and is sustainable, particularly in areas such as social care with high turnover of relatively untrained staff.

We would support targeted training directed at the areas/sectors where significant issues have been identified.

Issuing a blanket requirement across the public sector to undertake training specific to learning disabilities and neurodiversity would almost certainly not have the desired effect. Ideally public sector staff should be trained on an intersectional basis in the needs of each of all the communities they'll engage with, rather than focussing on one. Training should be targeted based on evidence and subject to robust monitoring and evaluation.

Section 3: Inclusive Communications

Which of these proposals do you agree with (if any), please tell us why?

Proposal 1 – We support this in principle, but it will be important that the duty involves ensuring that people are aware of the right to request alternative means of communication, rather than having to know this themselves. So far as possible, communication options should be developed using principles of universal design (CRPD Article 2). There are potentially significant resource implications in having access to a specialist practitioner as an enforceable right across all public services, and there would presumably be some urgent situations where it is impracticable, so the extent to which this is mandated will need careful consideration.

Proposal 2 – See comments in following section.

Proposal 3 – We agree meeting communication needs could be an important aspect of strategies, although it is important that this does not become a ceiling limiting the support agencies decided to provide.

Proposal 4 – In principle we agree that standards should be enforceable, but it is not clear what is proposed. The Standard in section 250 of the Health and Social Care Act 2012 is only 'enforceable' in the weak sense that NHS bodies must have



regard to it. We would advocate for a wider approach to access to justice and accountability in the implementation of this and wider human rights legislation. In general people already have difficulty using complaints processes (see SMHLR Chapter 11). A problem with communication is likely to be linked to other problems experienced by people and there needs to be a straightforward route to remedy, not numerous discrete ways to raise individual issues.

Which of these proposals do you not agree with (if any), please tell us why?

Proposal 2, inasmuch as we do not view Proposal 1 and 2 separately. A merger of these proposals focusing on inclusive communication as a general approach, rather than Easy Read as one particular mode would be more appropriate. Using Universal Design principles, if all the necessary information can be imparted using an Easy Read approach, this should be the approach adopted for everyone. And where an Easy Read document cannot adequately explain a complex issue (for example, a statement of legal rights) it needs to be supplemented by other forms of support and assistance.

Is there anything else that we should consider in relation to accessible information?

The consultation implicitly acknowledges that there are already statutory duties in relation to inclusive communication under the Equality Act 2010 duty of reasonable adjustment. It would be important that any new duties in the Bill are not drafted in such a way as to limit what might be classed as a reasonable adjustment in any particular case.

This consultation question shifts from 'inclusive communication', (a two-way process involving support for the disabled person to express themselves) to 'accessible information' (a one way process to make it easier for the disabled person to receive and understand what someone else is telling them). The two-way process is what is needed. This should be part of a wider approach to support for decision making, as recommended by the SMHLR.

Section 4: Data

Which of these proposals do you agree with (if any), please tell us why?

We agree with a modified version of Proposal 1. We suggest that the model advocated by the Scottish Mental Health Law Review be followed – with responsibility for overseeing data collection across public services shared by Public Health Scotland (PHS) and the Mental Welfare Commission (MWC). See the SMHLR discussion at pages 514-519 and recommendations 11.7 and 11.8 – duties on PHS and MWC to determine what needs to be monitored and on other public bodies to work together to gather the data needed to assess human rights compliance.



PHS and MWCS already have expertise in data collection and statutory responsibilities which are relevant here, so this would seem more appropriate than giving the responsibility to a new Commissioner.

We support Proposal 2, if combined with our modified suggestion for Proposal 1, including appropriate provision for data sharing to address privacy concerns.

Which of these proposals do you not agree with (if any), please tell us why?

See above in relation to Proposal 1 – we are sceptical about a new Commissioner holding responsibility for this. It would further complicate the landscape.

Under our modified version of Proposal 1, data would be provided to PHS and the MWC, rather than the Scottish Government as in Proposal 3.

Is there anything else that we should consider in relation to data?

We agree that more and better joined-up data is needed. The potential data sources are across the public sector, and there may be a difficulty in a duty which only covers LDAN – that much of it isn't collected in a disaggregated way for anyone, so doing it for this group only may be impractical or disproportionately complex. It should be noted that public bodies already have duties in terms of data collection more generally, and that imposing a specific requirement in relation to one area without addressing failures on public bodies to collect data more generally would not be helpful. High level data on learning disabilities and neurodiversity is collected currently through the census, and requirement-specific data through many other channels, for social care, as an example.

Many of the problems of disaggregation arise because the data may be collected for a particular purpose and in a particular way and it's difficult or not possible legally to join that up with other data from other sources.

Data is also often linked to a particular agency or intervention, rather than the overall outcomes for people with learning disability and/or neurodivergence. We need not just quantitative data but qualitative data measuring the interaction and overall impact of the whole range of interventions.

The data collected needs to also represent experiences of the LDAN communities of their needs and rights being met and what and how it is collected and analysed must involve LDAN representative organisations (Art 31 CRPD).

Section 5: Independent Advocacy

Which of these proposals do you agree with (if any), please tell us why?

We agree that it is helpful to improve understanding of situations where advocacy may make a positive difference (Proposal 2), and we also agree that it is important to address advocacy holistically in the context of the National Care Service and the response to the SMHLR.



The right to independent advocacy is integral to ensuring that the rights of neurodivergent people are protected. Independent advocacy is an important form of supported decision-making for people who may have decision-making or communication challenges and which supports the exercise of legal capacity on an equal basis with others (Art 12 CRPD, General Comment 1). The exercise of legal capacity is fundamental to the full and equal enjoyment of all rights, including the right to independent living and component of this (Arts 12 and 19 CRPD, General Comments 1 and 5).

Ultimately, there should be an enforceable right in legislation to independent advocacy, with accompanying monitoring, and sufficient and sustainable/guaranteed resourcing, whether this is in a single piece of legislation applicable to all disabled people (our preferred option) or in legislation specifically providing for the needs of neurodiverse people.

Which of these proposals do you not agree with (if any), please tell us why?

We do not support the first part of Proposal 1, insofar as it appears to be a completely open-ended power to make regulations with no clarity about what the regulations might do. It is important that primary legislation should be clear about its aims and scope, not be a placeholder while policy is developed.

We have some concerns regarding the second part of Proposal 1. We believe that there should be consolidation of the various advocacy duties and rights which have emerged over time, to ensure that advocacy is available whenever it is needed and for whomever it is needed, rather than create another duty for a particular group – and one which is, furthermore, apparently only a sign-posting duty rather than to actually provide accessible advocacy.

There may be some confusion between two issues – the issues people may need an advocate for, and who has the duty to secure an advocate. The proposal to ‘ensure that people are given information about advocacy’ is of limited value unless it is accompanied by a parallel provision to ensure advocacy services exist. Clearly people may need advocates in many areas of their lives. It may not be sensible for different public bodies each to fund their own advocacy arrangements for their sector, unless it is a highly specialised form of advocacy (like police interviews). So it may be that the duty should, as with the 2003 Act, remain with NHS and local authorities, but the right to advocacy should be more widely applied.

Is there anything else that we should consider in relation to independent advocacy?

Independent representative advocacy as traditionally understood is not the only form of advocacy which is needed. For example, community advocacy involves organising and mobilising grassroots communities to address social, economic, or environmental issues affecting their rights. This is an important aspect of the obligations under CRPD to support Disabled Person’s Organisations (DPOs) and to



ensure that they are able to influence policy and legislation. We believe the consideration of advocacy should include the development of collective advocacy, drawing on SMHLR (see recommendations 11.23 and 11.24) and CRPD General Comment 7.

Consideration should also be given to the development of other forms of advocacy which have tended to be overshadowed by the focus on independent representative advocacy, for example citizen advocacy and peer advocacy.

More needs to be said about the connection with supported decision making (which includes advocacy). Indeed, the Bill could be an opportunity to provide for LDAND people the more expansive concept of supported decision-making, as required by CRPD and as per recommendations 4.1 to 4.4 of SMHLR.

Part 3: Specific Themes

Section 1: Health and Wellbeing

Which of these proposals do you agree with (if any), please tell us why?

Proposals 1-5, in our view and subject to our comments below, could assist relevant public authorities to comply with the Public Sector Equality Duty, particularly the duty to have due regard to the need to advance equality of opportunity for those with a disability. Proposal 3 (Inclusive Communications and Accessibility) ought also to assist relevant public authorities meet the anticipatory duty on them to make reasonable adjustments to alleviate disadvantage experienced by those with a disability.

Proposal 1- We agree the health gap between LDAN people and the general population is a huge issue which needs addressed at a strategic level.

We agree with Proposal 2 that mandatory training should be required in health and care settings, and that this should address neurodivergence, not just autism and learning disability, subject to ensuring that there is a focus is on addressing the needs of those with the poorest outcomes.

Robust training on disability awareness and the specific needs of people with learning disabilities, autism and have neurodivergent conditions for all staff regardless of seniority should be implemented. Training sessions could be led by those with lived experience, to ensure high quality and valuable training to ensure that all attendees fully understand.

The consultation paper notes that the duty to make reasonable adjustments should ensure that the needs of neurodivergent people and people with learning disabilities are included in all health services and preventative health screening programmes, and in the design and delivery of specific services and support. Training will need to be given to NHS managers about reasonable adjustments. It is not enough to state that these need to be reasonably adjusted. Staff need training on what reasonable adjustments are appropriate. It is important to



implement the adjustments properly and to anticipate the needs of service users and what barriers they might face when accessing health care.

Which of these proposals do you not agree with (if any), please tell us why?

We disagree with Proposals 4 and 5 in their current format.

The notion of 'patient passports' implies a medical rather than holistic focus. We agree that initiatives such as this can improve outcomes but they depend on reflective practice and quality assurance more than legislative requirements

We are dubious about putting annual health checks in primary legislation as they can be mandated by Government anyway and it is possible that other interventions may turn out in future to be more effective or better value.

Is there anything else that we should consider in relation to health and wellbeing?

We believe the Bill must implement a person-centred approach, ensuring that decision regarding healthcare are made in line with the principles of CRPD including supported decision-making and existing capacity legislation. We would also refer to our comments on advocacy, above.

In relation to the comment on complaints systems, we would draw attention to the discussion and recommendations of the SMHLR – pages 554-581 and recommendations 11.19 – 11.28, particularly recommendation 11.21 on designing a more inclusive complaints system.

In developing Proposal 3 (Inclusive Communications and Accessibility) consideration should be given to aligning any duty with any action taken by the Scottish Government to implement the proposal made in their recent Review of the Public Sector Equality Duty to place a duty on listed authorities to embed inclusive communication proportionately across their work.

Section 2: Mental Health and Capacity Law

Do you agree with this approach? Please tell us why?

We agree that the place of learning disability and autism in mental health and capacity law needs to be seen in the context of the response to the SMHLR. The legislation needs to be joined up and take account of consequences arising from any change in the definition of 'mental disorder', including for capacity law as well as mental health law.

We note the consultation talks about removing learning disability and autism from incapacity law as well as mental health law. This goes further than suggested by the Rome Review (which focused on mental health law only).

As we understand it, many who campaign for the removal of autism and learning disability from mental health law do so on the basis that they are not 'mentally disordered' or mentally ill, so should not be included in a law primarily directed at ensuring people receive medical treatment for their condition. They are not



seeking their removal from capacity law, which applies to many more people with learning disability and autism, covers a much wider range of issues than mental health law including general medical treatment financial, management and a whole range of personal decision making.

We appreciate there is a wider argument under CRPD that capacity law is also discriminatory, but people whose decision-making ability may be seriously impaired cannot be taken out of capacity law unless and until it is replaced by something else to allow them to take decisions with legal effect.

Even if the focus were on mental health law only, there are potentially very significant consequences to removing people who need supported decision making from the Act without clear arrangements to ensure their rights are protected in other ways. We do not believe this Bill is the appropriate vehicle for addressing these complex issues.

Section 3: Social Care

Which of these proposals do you agree with (if any), please tell us why?

See our responses in Part 2 Section 3. See also Part 3 Section 1 – in general our responses on social care mirror those for health care.

We suspect that much of the detail will depend on the final shape of the National Care Service. We have commented on the National care Service (Scotland) Bill currently being considered by Parliament: <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-input-to-parliamentary-bills/bills-202223/national-care-service-scotland-bill/>.

Which of these proposals do you not agree with (if any), please tell us why?

See our responses in Part 2 Section 3. See also Part 3 Section 1 – in general our responses on social care mirror those for health care.

Is there anything else that we should consider in relation to social care?

We have no further comments.

Section 4: Housing and Independent Living

Which of these proposals do you agree with (if any), please tell us why?

Proposal 1- We agree housing is important for advocacy but any specialist advocacy for housing needs to be part of a wider strategic approach – see advocacy discussion in Section 5.

Similarly, we broadly support Proposals 2-5 provided they are embedded in a wider approach across public services to strategies, training, data and inclusive communication.



Proposals 1 – 5, in our view, would assist relevant authorities comply with the public sector equality duty, particularly the duty to have due regard to the need to advance equality of opportunity for those with a disability. Proposal 5 (Inclusive Communications) ought also to assist relevant public authorities meet the anticipatory duty on them to make reasonable adjustments to alleviate disadvantage experienced by those with a disability.

Which of these proposals do you not agree with (if any), please tell us why?

We do not disagree with them as such, but the proposals tend to place the onus of change for housing and independent living on the disabled individual. Accessible, affordable, and supported housing is a responsibility of the state and is a human rights issue – see CRPD Article 19.

Is there anything else that we should consider in relation to housing and independent living?

There requires to be consideration of intersectionality and how it affects the specific needs of those requiring housing. For example, access to supported living for young adults with a learning disability is limited, and the requirements of young people differ from those of older people. There is a lot more choice for older adults such a sheltered housing and supported living flats. Living with other young people with carers on hand when needed should be made available to young adults. This would help with issues such as loneliness and social isolation if they are living with other young adults. This could reduce the overall number of young adults placed in inappropriate care settings such as a care home. Article 19 of the UN Convention on the Rights of Persons with Disabilities states that: 'Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement; and Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.'

The social model of disability should be considered when examining accessible housing policy. We consider the data collection suggestion outlined in Proposal 4, is an important step to identifying relevant needs and interests which can inform steps taken to comply with the Public Sector Equality Duty and the anticipatory reasonable adjustments duty, as well as potential positive action to advance equality of opportunity.

In developing Proposal 5 (Inclusive Communications) consideration should be given to aligning any duty with any action taken by the Scottish Government to implement the proposal made in their recent Review of the Public Sector Equality Duty to place a duty on listed authorities to embed inclusive communication proportionately across their work.



Section 5: Complex Care – Coming Home

Should there be a statutory duty upon the relevant public body or bodies (Integration Authority, Health Board, Local Authority) to hold a Dynamic Support Register? (Proposal 1)

Yes No

Please tell us more?

We have not answered Yes or No, for the following reasons.

We are concerned that this appears to be putting on a statutory footing processes which the Government and COSLA already committed to following the Coming Home Implementation Report more than two years ago. Before agreeing to the further delay involved in putting this on a statutory footing, we would want to see a clear analysis of why public bodies have apparently failed thus far to live up to their commitments and mandating such registers in legislation would improve transparency and visibility.

We believe there need to be clear enforceable duties and a route to justice for people currently placed in more restrictive settings than they need to be, based on SMHLR recommendation 11.17 – a right of appeal against unjustified restrictions. See further discussion below.

We consider that it is important, however, if Dynamic Support Registers are to be a tool in advancing equality of opportunity, that law and policy on Dynamic Support Registers is precise about how they are to be used by relevant bodies to ensure sufficient planning and early intervention is put in place.

Which of the options for the National Support Panel (Proposal 2) do you think has the most benefits?

- Option A
- Option B
- Option C

Please tell us more?

We consider there is benefit in putting the National Support Panel on a statutory footing and therefore favour options A and B over option C.

We see some benefits in Option B, although it is not a complete solution. As we discuss below, there need to be clear mechanisms for redress in individual cases. We are also unclear what sanctions would apply should the local organisations fail to implement the recommendations of the panel.



A legislative panel has the benefit of being able to compel compliance with investigations and recommendations from the Integration Authority, Health Board, Local Authority etc. We do not consider a legislative panel necessarily inhibits a culture of open and reflective practice: lessons could be learnt from the operation of inquiries and/ or investigations conducted by the EHRC in fulfilment of its statutory powers. We note, however, that if a human rights-based approach is to be taken to review (whether of individual cases or processes), more emphasis ought to be placed on the National Support Panel consulting with those with relevant lived experience. We would suggest that the National Support Panel could fulfil a role which encompasses both options 1 and 2 and that a dual approach which investigates both individual cases and wider processes has the potential to be the most effective in advancing the interests of those with complex care needs.

Are there any other options that you think we should consider?

We believe it is vital that there is individual redress and accountability for a failure to secure an individual's human right to independent living. This might include resourcing the Mental Welfare Commission to investigate any situations where this has not been done.

We would also advocate consideration of the role of the Mental Health Tribunal. SMHLR Recommendation 11.17 provides a model whereby the Tribunal could hear an appeal against being subject to unjustified restrictions. This could be extended to situations where a person is not detained under the Mental Health Act but is nonetheless subject to an Article 5 deprivation of liberty.

Section 6: Relationships

Which of these proposals do you agree with (if any), please tell us why?

We consider all of the proposals have the potential to support local authorities and Police Scotland meet their obligations under the public sector equality duty. Given the high incidence of gender-based violence against women and girls with learning disabilities, and the lack of any legislation which directly addresses this, we consider the proposals for advocacy, data collection, inclusive communication and strategies for specialist support in the reporting of crime are particularly important.

Which of these proposals do you not agree with (if any), please tell us why?

We have no specific comments.

Is there anything else that we should consider in relation to relationships?

With regard to Proposal 3 (inclusive communications) we recommend consideration is given to requiring inclusive communications in RSHP education.



Section 7: Access to Technology

Which of these proposals do you agree with (if any), please tell us why?

We consider training (Proposal 1), data gathering (Proposal 2) and support (Proposal 3) all have the potential to advance equality of opportunity for those with a disability, as required by the public sector equality duty. We consider that in gathering data on the number of people with learning disabilities and neurodivergent people accessing and using technology, attention should be given to whether there is evidence of intersectional disadvantage involving age and socio-economic status.

Which of these proposals do you not agree with (if any), please tell us why?

We have no specific comments.

Is there anything else that we should consider in relation to access to technology?

We consider it is important that those who are not able to access or use digital technology are not indirectly discriminated against through exclusion from job or learning opportunities or from opportunities to participate in policy making processes. Consideration ought to be given to requiring non-digital access arrangements to complement digital ones for relevant social goods.

Section 8: Employment

Do you agree with this approach? Please tell us why?

The proposal to highlight disability equality training to employers could work to significantly promote inclusion and minimise workplace issues such as bullying and a lack of awareness. It may be advisable for training to be refreshed annually to remain effective.

The proposal for specialist training on individual impairments would be beneficial for line managers and job coaches. However, employers should also be encouraged to seek guidance on the adjustments that may be subjectively suitable for an employee in their given role.

There is a potential further option to provide written guidance to employers about the range of adjustments that could be explored, including how flexible working can be better utilised to support employees with learning disabilities. However, there will inevitably be cost implications in considering this, and also the challenges of some employers incorporating any guidance as mandatory, and closing their mind to any other adjustments, as opposed to dealing with matters on a case-by-case basis.

Written guidance could be provided to help employers identify when their duty to implement reasonable adjustments arises, so as to prevent delay with support.



We also agree that the aim of the LDAN Bill to challenge recipients of public sector grants and contracts is a positive suggestion. This may drive greater awareness and acceptance of those with neurodivergent conditions. We note that some large private entities also now require tender responders to provide details around their EDI and ESG initiatives. It is hoped that the push from the LDAN Bill could see private sector bodies adopt something similar in a trickle-down effect, for example, professional services organisations tendering for panel spots.

Finally, in relation to the proposal to review the language within condition level data, whilst this will not disadvantage neurodiverse individuals, we suspect it may be of limited benefit, without understanding more precisely the ways in which the data are reported.

Section 9: Social Security

Which of these proposals do you agree with (if any), please tell us why?

We are broadly supportive of these legislative proposals but would recommend that Proposal 2 and 3 be strengthened to legislatively prescribe rather than explore or consider mandatory training and data reporting/collection machinery of the type and nature suggested under these two proposals. Moreover, any legislative prescriptions in this regard should at all times have the needs and requirements of neurodivergent people and people with learning disabilities as the key factor, including with regard to mechanisms introduced to ensure organisational compliance with these obligations as well as mechanisms for redress where duties are not met.

Which of these proposals do you not agree with (if any), please tell us why?

We have no further comments.

Is there anything else that we should consider in relation to social security?

We have no further comments.

Section 10: Justice

Which of these proposals do you agree with (if any), please tell us why?

We broadly agree with all of the proposals, and we express particular support to Proposals 3 and 4 (inclusive communications and mandatory training). We would highlight the following points:

1. Improved training for Police, COPFS and Justice Social work – see recommendations in the Joint Review of diversion from Prosecution (Feb 2023): <https://www.gov.scot/publications/joint-review-diversion-prosecution/>. The Joint Review revealed considerable gaps in knowledge and understanding of what diversion is, its aims and the process. Police Scotland, as gatekeepers to the criminal justice process, must become more effective at identifying learning disabilities, autism or neurodivergence. Admittedly this is not always easy as not



all alleged offenders are co-operative and may refuse to give any personal information that might lead COPFS to marking a case for a suitability assessment. Sometimes the alleged offender will disclose their diagnosis if they have one. In other cases, the alleged offender may choose not to disclose.

2. Training on neurodivergence, learning disabilities and autism for all staff in COPFS (if they do not already receive training) would assist in decision making at the ICP stage and where court proceedings are taken, in assessing whether and which adjustments require to be made to ensure that the person's Art 6 rights are respected.

3. We consider relevant the recommendations in the Joint Review on the need for improved communication at each stage of the diversion process –referral for initial assessment, intimation that diversion to proceed and intimation of outcome. Template letters provide a useful framework but should be capable of being adapted to meet the needs of people with learning disabilities, autism or neurodivergence person (if their condition is known).

4. Case marking decision should continue to be made in accordance with COPFS prosecution policy and desk instructions. See the Prosecution Code and para 121 of the Joint Review. The existence of a learning disability or autistic spectrum disorder, for example, should not of itself result in the accused person being referred for a diversion assessment. Equally they should not be deemed unsuitable for diversion because their needs are too complex for diversion to be completed in the standard 3-month period.

In terms of proposal 2 we have doubts as to how the Scottish Government intends to ensure that the Vulnerable Person's Database is a reliable source of information and is used in all cases.

We also have some concerns on how the COPFS would apply a neurodivergence screening test when victims or witnesses come forward. Identification of support needs at the earlier stages is always going to rely on either self-disclosure or high-quality training for frontline staff to help them recognise presentational cues.

We identify similar problems with accused persons with neurodivergence or learning disabilities. The current system is based on self-disclosure, and there is not standard way in which any information disclosed is then passed on to COPFS . Asking more Vulnerability Questions may help. However, that is only if the accused person is engaging honestly. Matters may have transgressed so far by the time the person is at the charge bar that they will not see the Police as people who are trying to help them. As we indicated earlier, we have doubts as to how common screening tools would be applied. The onus should be at the first point of contact. If the Police are trained, they may identify neurodivergence or learning disability very quickly. Accused persons could also be asked if they agree to Police contacting a health or care provided to gather further information.



The Police are the first people involved and full training should be in place to help prevent things escalating due to the Police not realising the person is neuro diverse.

In terms of proposal 4, we agree with the proposal to extend mandatory training to police, prison, COPFS and relevant courts and tribunals staff. Consideration should also be given to extending training to all court users such as GeoAmev, defence solicitors, and, with the agreement of the judiciary and Judicial Institute for Scotland, Sheriffs and Judges. In our view, the training should be universal and mixed to bring different experiences to the learning process.

In terms of proposal 5 and as noted above we consider it hugely important that advocacy be universal. It would not be fair if access to advocacy was determined by postcode or Sheriffdom, for example.

Finally, in relation to proposal 6, we identified that the PF can only work on the information they have. If they do not know the Accused is neuro diverse or autistic, they can't offer a DfP. Therefore, training needs to be front loaded. Thereafter, COPFS have to understand the cause and effect on the "offending" and what DfPs are available. Training for all members of the Criminal Justice System is needed.

Which of these proposals do you not agree with (if any), please tell us why?

We have no specific comments.

Is there anything else that we should consider in relation to justice?

As a general comment related to the reach and definition, we consider it important for the bill to cover those with and without formal diagnoses. The issue lies in the fact that professional diagnosis requires the input of a psychologist. We are aware that prisoners are presently experiencing considerable difficulty accessing psychology withing SPS. In practical terms, any gatekeeping using diagnosis as a criterion will deny individuals within the criminal justice system support for extended periods of time.

We do not object to Proposal 2 on improving identification of people with learning disabilities and neurodivergence, but this does not address the problem that, even if this is identified, the system is not well placed to address the needs of these groups. This requires more comprehensive and radical action. There have already been several reviews which could inform this, including the SMHLR (Chapter 10), work by the MWC on the police and prison system (for example, see: <https://www.mwcscot.org.uk/news/mental-health-services-scotlands-prisons-urgent-action-needed>), the Barron review of forensic mental health services (<https://www.gov.scot/publications/independent-forensic-mental-health-review-final-report/pages/1/>), and the review of mental health support in prison (<https://www.gov.scot/publications/understanding-mental-health-needs-scotlands-prison-population/>).



A particular change which might benefit from being in legislation would be the introduction of intermediaries in courts, as recommended by SMHLR recommendation 5.1.

To that end, we would favour the development of a strategic approach across the justice system, as in Proposal 1, but we believe this should address all forms of mental disability, rather than just learning disability and neurodivergence.

We would recommend that after consultation with the relevant authorities (i.e. the Police, the COPFS, the Scottish Prison Service and those working in the civil justice system (such as in the tribunal and courts service)) have been concluded to consider the viability of statutory provisions, that Proposals 2, 3, 4, 5 and 6 be strengthened to prescribe rather than improve, explore, consider or analyse each of the relevant issues. Moreover, any legislative provisions in relation to Proposals 1 to 6 should at all times have the needs and requirements of neurodivergent people and people with learning disabilities as the key factor, including with regard to mechanisms introduced to ensure organisational compliance with these obligations (as in the case of the Police, the COPFS, the Scottish Prison Service and those working in the civil justice system (such as in the tribunal and courts service)) as well suitable mechanisms for redress where duties are not met.

Section 11: Restraint and Seclusion

[Do you agree with this approach? Please tell us why?](#)

Whilst issues of restraint and seclusion might disproportionately affect adults and children with learning disabilities and neurodivergent people, we understand the rationale for the proposal to deal with this as part of a comprehensive consideration of restraint and seclusion in schools and by care providers.

The proposal mentioned only covers educational settings, when the discussion acknowledges that restraint occurs in adult settings too. We accept that the LDAN Bill may not be the right place for legislation but we would strongly suggest that the Government engage with the full spectrum of SMHLR recommendations on restraint/seclusion/coercion, including recommendations 9.5 (SG to lead systematic improvement programme) 9.8 (stronger safeguards) 9.12 (national register of restraint) and 9.13 (MWC to lead work on approaches to reduction of coercion).

Section 12: Transport

[Which of these proposals do you agree with \(if any\), please tell us why?](#)

We see benefit in RTPs being required to set out in their transport strategies how the specific needs of those with learning disabilities or neurodivergent people will be met (Proposal 1). This requirement has the potential to assist in the elimination of discrimination etc. and the advancement of equality of opportunity for those



with a disability, as required by the public sector equality duty. Mandatory training for transport staff (Proposal 2) will promote understanding and therefore go some way to fostering good relations, as also is required by the Public Sector Equality Duty.

Which of these proposals do you not agree with (if any), please tell us why?

We have no further comments.

Is there anything else that we should consider in relation to transport?

We have no further comments.

Section 13: Education

Which of these proposals do you agree with (if any), please tell us why?

A focus on reporting in the NIF plans and in the Children's Services Plan Annual Report on needs and actions pertaining to neurodivergent children/young people and children/young people with learning disabilities (Proposal 1) may assist relevant bodies to comply with their Public Sector Equality Duty obligations through active engagement with impact and formulation of remedial measures. Addressing relevant data gaps through additional data collection (Proposal 3), meanwhile, may also assist relevant bodies to identify impacts which will support them in their Public Sector Equality Duty compliance and anticipatory reasonable adjustment duties. Mandatory training (Proposal 2), meanwhile, has the potential to support relevant personnel in embedding inclusive learning and teaching strategies into their practice, advancing equality of opportunity for all.

Which of these proposals do you not agree with (if any), please tell us why?

We have no specific comments.

Is there anything else that we should consider in relation to education?

Proposals pertaining to inclusive communications made in other areas, will also be relevant in the area of Education.

Section 14: Children and Young people – Transitions to Adulthood

Do you agree with this proposal, please tell us why?

We have previously engaged with the Disabled Children and Young People (Transitions to Adulthood) (Scotland) Member's Bill (see: <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-input-to-parliamentary-bills/bills-202223/disabled-children-and-young-people-transitions-to-adulthood-scotland-bill/>)

Given the myriad of existing law and policy relevant to children and young people's transition to adulthood and the potential for proposals already made in this



consultation which affect e.g. employment, education, housing etc. (as well as those which relate to inclusive communications, training, advocacy and strategies) to impact positively on such transition, it would appear sensible for further measures to be targeted at specific areas of need as borne out through data collection.

Do you not agree with this proposal, please tell us why?

We have no further comments.

Is there anything else that we should consider in relation to Children and young people – Transitions to adulthood?

We have no further comments.

Part 4: Accountability

Which of the 5 options set out above do you think would best protect, respect and champion the rights of neurodivergent people and people with learning disabilities? You can select multiple options if you wish.

Option 1

Option 2

Option 3

Option 4

Option 5

Please give the reason for your choice(s).

We prefer Option 2 (wider powers for existing Commissions) to Option 1 (a new bespoke Commissioner for LDAN). Our response to the consultation on a Disability Commissioner said:

“Scotland already has a rather crowded landscape of Commissioners and of organisations with roles which do, could or should discharge functions relevant to the purposes of the Bill. Such organisations include in particular the Mental Welfare Commission for Scotland, Equality and Human Rights Commission, and Scottish Human Rights Commission. The Scottish Government has also committed to creating a Learning Disabilities, Autism and Neurodiversity Commissioner. The Bill as presently proposed could become a recipe for confusion, overlapping responsibilities, and inefficient use of resources. The present proposal does not appear adequately to address those concerns. We recommend that there be a clear policy decision as to what the future landscape should look like, and how it should fulfil the requirements of CRPD in relation to all people with disabilities in accordance with the definition in CRPD, effectively, efficiently and in particular without confusion and duplication as to roles.” (see:



<https://www.lawscot.org.uk/media/5q2pam5b/22-08-03-mhd-proposed-disability-commissioner-scotland-bill.pdf>)

Similar considerations apply here. We are concerned that establishing a new Commissioner will increase confusion and an overlap in responsibilities, and broadly accept the analysis of the SHRC in their discussion paper 'At A Crossroads' of the risks of a proliferation of Commissioners for specific subject areas (see https://www.scottishhumanrights.com/media/2456/crossroads_what-next-for-human-rights-protection-in-scotland-shrc-june-2023.pdf)

We believe that, between them, the SHRC and Mental Welfare Commission are well placed to protect and promote the human rights of people with learning disabilities, autism and neurodivergence, provided they have the necessary legal powers and resources. We support the analysis and recommendations of the SMHLR – see pages 493-515 and recommendations 11.1-11.6, including a greater role for the MWC in community settings, greater involvement of lived experience and increased accountability to the Scottish Parliament.

We accept that the SMHLR was not solely concerned with LDAN, and that it would be important that the SHRC and MWC receive additional resource to increase their impact in this area. This would, in our view, be a more effective use of resources than creating a wholly new Commissioner. We also acknowledge that the name of the MWC should probably be changed.

We strongly support Option 4. See our comments above on Collective Advocacy. We support SMHLR Recommendations 11.22-11.24 on a right to collective advocacy, a duty on the Scottish Government to support collective Advocacy, and development of systems of support and development.

We have no difficulties with Option 3 and Option 5 in principle, but are not sure that legislation is the best way to bring them about.

[Are there any other options we should consider? Please give details.](#)

We have no further comments.

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