



Law Society  
of Scotland

# Consultation Response

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

November 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

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 in the Mental Health Act's consultation. We have the following comments to put forward for consideration.

## General comments

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As the membership body for all Scottish solicitors, the Law Society of Scotland represents a very wide range of legal practitioners. However, we are not responding to this consultation from the perspective of our members' experience in this area. Individual members have been encouraged to respond to the relevant survey in their own capacity.

We have restricted our comments on this review to the general principles and legislative framework relating to the area of review.

## Benefits of autism and learning disability being included in Scotland's Mental Health Act

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There are situations where an individual poses a real risk to themselves and/or others, and a significant intervention is required. It is important to have a legal basis for such interventions in order to comply with both the criminal law and human rights obligations. We are aware that the UN Committee on the Rights of Persons with Disabilities considers that interventions against the will of the person (whether by way of placement or treatment) do not comply with our obligations under the Convention on the Rights of Persons with Disabilities.<sup>1</sup> However, we are equally aware that the Committee's interpretation is not shared by all

<sup>1</sup> See the concluding observations of the Committee on the United Kingdom (October 2017).

UN bodies; we are also aware that the European Court of Human Rights has held that such interventions can be justified – in least in the case of an incapable adult – for purposes of the ECHR.<sup>2</sup> We proceed on the basis that compliance with the CRPD (in particular Articles 12 and 14) does not require the abolition of involuntary treatment or placement, although it undoubtedly requires clear procedural safeguards to ensure that those measures are taken as a last resort and in a fashion that respects the person's rights, will and preferences. It is also important to recognise that these rights must be enjoyed, and when necessary limited, on an equal basis with others and without discrimination. This means that an individual must not be assumed to be a risk to themselves on the basis of diagnosis but rather on objective criteria which would be applied to all persons. In addition, where the risk emanates from a third party or factor then it would be discrimination to target the victim rather than the third party or factor.<sup>3</sup>

It may be possible to include certain relevant powers in a power of attorney or guardianship order. However, it will not always be possible to exercise such powers, and it may also clearly be against the will of the individual involved, such that reliance upon those powers would simply be inappropriate having regard to procedural safeguards surrounding powers of attorney and guardianship.

The Mental Health Act, in principle, provides a formal basis and framework in such situations, including proper processes and built in reviews. It is able to address the complex needs of individuals who may have multiple issues in addition to autism or learning disability. In 2018, around 60% of those in learning disability wards in hospitals had two or more diagnoses.<sup>4</sup>

However, it is important to ensure that the safeguards offered by this framework are able to be effectively accessed by and are meaningful to people with learning disability or autism. It is also important that they do not simply represent the application of legal fixes for problems of funding and other barriers to the provision of tailored support with the community. Further, as highlighted below, it is important that focusing solely on the Mental Health Act does not mean that sight is not lost of the wider legal issues at stake.

## **Disadvantages of autism and learning disability being included in Scotland's Mental Health Act**

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There are strong arguments that autism and learning disability should not be grounds for use of the powers contained in the Mental Health Act. These are not conditions that are expected to improve under compulsory treatment, and, indeed, it frequently makes little sense to talk of 'treatment' in this context, as opposed to the provision of care and support. Further, it may well be unhelpful to risk conflating issues of

<sup>2</sup> *N v Romania* (2017): deprivation of liberty; *A-MV v Finland* (2017): steps being taken on the basis of incapability. In both cases, the Court has been influenced – rightly – by the CRPD approach to impose greater safeguards to secure compliance with Articles 5 and/or 8 ECHR.

<sup>3</sup> See CRPD Committee General Comments Nos 1, 5 and 6.

<sup>4</sup> Scottish Government, *Mental health & learning disability inpatient bed census* (2018)

mental ill health and autism or learning disability. Again, the comments about the equal and non-discriminatory enjoyment of rights made above are relevant here.

## **What should change or continue in Scotland's mental health law to promote and protect the human rights of autistic people and people with learning disability**

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The number of individuals with autism or learning disability who come into contact with the Mental Health Act is small, but the impact on these individuals can be significant. Around three percent of cases under the Mental Health Act relate solely to learning disability, but these individuals often remain on orders for longer than average. Of the 3,385 adult patients covered by the 2018 Mental Health and Learning Disability Inpatient Bed Census, 8% had a diagnosis for either learning disability or autism (including 2% who had a diagnosis for both). The average delay in discharge from hospital from a learning disability ward is 384 days, compared to the overall average delay of 72 days.

We also know that a significant number of people with learning disability or autism are in care placements far from their home areas, not at the request of the individual or their family. In many of these cases, it is accepted that this is not an appropriate placement for the individual, who should be supported to live in their local community.<sup>5</sup> Many of these individuals will be detained under the Mental Health Act.

An additional cause for concern is that some people with learning disabilities and autism may be inappropriately subjected to segregation or exclusion. We are aware of major current concerns on those grounds in England but, unfortunately, partly as seclusion and restraint do not have any special status in the 2003 Act, we do not have the robust statistics for Scotland about how widely they are used in relation to people with learning disability or autism.

These issues make the current review an important and necessary step to ensuring that the rights of these individuals are respected and protected through our legislation and practice. The reasons for orders lasting longer than average for those being treated for learning disability must be investigated to ensure that the application of the current system is not discriminatory and is meeting the needs of these individuals.

Above all, it would be helpful for the issues being considered by this review also to be looked at as part of the ongoing review and reform of the Adults with Incapacity (Scotland) Act 2000. That would allow the questions to be asked in the right order:

- (1) What are the needs of persons with learning disabilities and autism?
- (2) What legal framework best supports those needs, and ensures that the steps taken under that framework:

<sup>5</sup> Dr A MacDonald, *Coming Home: a report on out-of-area placements and delayed discharge for people with learning disability and complex needs*, Scottish Government (2018)

- a. Respects their rights, will and preferences; and
  - b. Secures them against exploitation, violence and abuse.
- (3) If part of that framework remains the Mental Health Act, what 'upgrades' are required to that Act in order?
- (4) Repeat comment about equality and non-discrimination made above.

As part of that review, we have recommended that a single jurisdiction be created for cases under the Mental Health Act, the AWI Act, and the Adult Support and Protection Act. Even without fusion of these three pieces of legislation (or any two of them), having a single jurisdiction would allow rapid and proportionate consideration of the position of an adult who is, or may be, subject to more than one them.

## Criminal justice system

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Those with mental health issues, autism, and learning disabilities are especially vulnerable within the criminal justice system whether as an accused (and at all its stages from arrest to conviction) or a witness. All Scottish criminal justice organisations recognise the need to respect the principles of fairness and dignity. However, there are issues around identification of those that are vulnerable as well as their needs. One size does not fit all as each is an individual caught up in a system that is strange and frightening to them. That is equally so whether they are a witness or an accused.

There is a perception that there is a lack of co-ordination and recognition of good work and practice currently being undertaken by the Scottish criminal justice organisations. Transferring information between such organisations dealing as they do with personal sensitive data is challenging.

The Law Society of Scotland is in the process of considering how to improve how individuals who come into contact with the criminal justice system are assessed for vulnerabilities and the processes in place to assist them. We would be happy to provide further information on this work if it would be of assistance to the Review.

**For further information, please contact:**

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