Mental health law review. Second consultation

Independent Advocacy

What is the current landscape and how can we improve it

While independent advocacy can be an extremely valuable tool, it is our experience that the provision across Scotland is varied. Resource, availability and capacity does not meet demand, which is leading to inequity of access. Furthermore, as independent advocacy is not a normal part of people's expectations in relation to health there can be misunderstanding from professionals about the role of the advocate, and patients do not have knowledge about how an advocate could help them, or how they can access advocacy.

In the spirit of improving the system, SAMH is supportive of alignment across different pieces of legislation and areas of policy along with appropriate resource allocation to support. The intersection of someone's mental health with other areas of their life – social security, housing, social care or education – would lead us to conclude that one advocate to support someone through multiple systems and policies would bring great benefit to that person. That said, the advocate would need to have the ability and knowledge to navigate across multiple policy areas in support of that person, rather than have particular knowledge or expertise in one area. Advocate training would be an essential ingredient to the successful delivery of this proposal.

We hear time and time again how challenging it is for someone to repeat their story for multiple people across systems, this proposal would certainly ease that burden.

How do we improve access to advocacy

Do you think there should be an opt out system for independent advocacy?

SAMH is cautiously supportive of an opt out system. Advocacy should be available on the basis of need and want. Any decision on using advocacy should ultimately rest with the person being advocated for but a rights-based system that provides advocacy for everyone who is eligible and wants it, is a positive ambition.

Moving to an opt out system should be done gradually, once the quality of and access to advocacy can be guaranteed across Scotland.

SAMH would press for opting in or out of the system to be an informed choice, with people being given clear information about what to expect from advocacy and how it works within the health system. Furthermore, we urge that people are able to opt-back-in again if their circumstances change, and they feel their previous need for advocacy has changed with it. If someone chooses to opt out there should a trigger system in place to promote advocacy at regular intervals to that individual.

It is worth noting that currently children and young people lack advocacy options, even though Local Authorities have a duty to provide it. It is important to make sure that considerations for children and young people are also included in any future plans on improving access.

Evaluation and quality assurance of independent advocacy organisations

We think that an independent body should be created by the Scottish Government with a specific remit to evaluate independent advocacy organisations, or responsibility be given to an existing organisation to do this.

Resource should be given to independent advocacy organisations to collect data in a uniform way across Scotland, so issues can be tracked at structural and strategic level.

Who can be an independent advocate?

To achieve the best outcomes for people, we believe independent advocates should reflect the range of diversity and characteristics within the general population. Some people may feel more confident in an advocate if they can demonstrate understanding of their own experiences whether that is due to race, faith, gender, sexuality or disability.

The proposal for a national qualification is welcome and would go some way to support these proposals. It will also be important to ensure independent advocates have access to continual professional development opportunities and are well supported to meet professional standards.

Do you think there should be a national fund for the provision of independent advocacy in Scotland?

Yes.

Sustainable funding would improve access to independent advocacy across Scotland, quite simply these proposals won't work without it.

Alongside supporting provision, any national fund should also promote advocacy. In our experience access to advocacy is limited because of a lack of understanding about who, how, why and when a person can access advocacy. Very often the opportunity is missed by the most vulnerable people. Any increase in the availability of advocacy should be accompanied by clear communications so that people using advocacy and those interacting with advocates can understand the purpose and boundaries of advocacy.

Please give us your views on the proposals for training and your reasons for these?

As previously stated, we believe advocates should be well trained and can access continuous professional development throughout their advocacy career. A standardised level of training which all advocates have undergone will help people to be confident around the skills and knowledge of their advocate, and help other health professionals feel confident in the ability of those they are talking with.

The status of advocates and how they are perceived by health professionals will be crucial to the success of this programme. There is an opportunity to address stigma and build positive cultures in mental health settings.

This move towards a formalisation of the professions of advocacy will be strengthened by having national outcomes, as well as a review of standards.

Scrutiny/accountability of Independent Advocacy Organisations at a strategic level and at a micro level?

SAMH agrees with the proposal for a scrutiny body for independent advocacy organisations that brings a mechanism for remedy and redress if things go wrong, and a system which can take in learning from those experiences.

SAMH welcomes the premise that any body needs to be overtly human rights based.

It will also be important before any roll out of a new advocacy offering to make sure that staff across health and social care understands and value the role of advocacy to help establish a positive culture.

10. Do you have additional proposals for change?

The 2003 Act makes clear that anyone with a mental disorder should have the right to access advocacy support. However, we know having the right to a service does not necessarily translate into being able to access it in practice. This is true even when someone is subject to compulsory treatment or detention.

In 2021, a Mental Welfare Commission review of 100 Compulsory Treatment Order forms found only four mentioned the patient having any form of supported decision-making, including advocacy. While recording the presence of advocacy in these forms is not a requirement, the MWC found the its absence notable. 2021-01_SIDMA-brief.pdf (mwcscot.org.uk) In the same year, the Commission's research found the consent of a Mental Health Officer (MHO), an important safeguard for emergency detention, was at the lowest seen in a decade. Between 2020 and 2021, the average across Scotland was just 42.5%, with the rate between health ranging from 26.4% to 81.2%. MentalHealthAct_MonitoringReport_Sep2021.pdf (mwcscot.org.uk)

While the Scottish Government may choose to roll out Independent Advocacy across the health and social care system and beyond. SAMH strongly believes that mental health should be the area which is prioritised in any roll out. This is especially important to mental health as it is the only area of health where someone can have their right to liberty temporarily taken away from them, and can be subject to coercion.

While it is out with the scope of the review, we would suggest that for Scotland to become a country in which people know their rights, and are able to advocate for themselves and others, the work also needs to start in the education portfolio. Conflict resolutions skills, mental health awareness and rights awareness being taught from primary school age could be of huge benefit over the course of a lifetime.

We would also be interested to hear how the proposals for Independent Advocacy will integrate with the newly published National Care Service Bill.

Advanced Statements

What are your views on the proposed system, any significant omissions and on other steps that might be taken to strengthen advance planning as part of the supported decision making framework in our wider proposals?

In general, SAMH is supportive of the new system proposed. Based on service user experiences, advance statements are considered regressive as they often

arise in the context of looking at what has gone wrong in the past. SAMH would welcome SWAPs being positive, forward looking and part of the recovery journey.

However, for the intention of SWAP to come to fruition we caution that there will need to be clear communication to people about what a SWAP is, how it works, and reassurance that it will be adhered to so people can fully realise their rights.

To avoid low uptake as is currently the case with advanced statements, it is crucial that SWAPs are well promoted and communicated to the point where they are widely accepted as a positive part of someone's recovery. This process must include the professionals who will be a vital part of encouraging people to create a SWAP, as well as abiding by them.

What are your views on the application of the 'statement of will and preference' (SWAP) to treatment under Mental Health Law, other medical treatment and other welfare issues?

SAMH believes that across the social care and medical fields the use of SWAPs could provide clarity, as well as stimulating people to consider scenario's that otherwise may not be planned for.

However, we believe the unique nature of mental health treatment as the only area of health where a person can be deprived of their liberty, brings an imperative that for any roll out of SWAPs, mental health is the priority.

What do you think of the general approach to a 'statement of will and preference' (SWAP)?

We agree with the general approach, and look forward to seeing more detail. Furthermore, we would urge that any approach is shaped by those who have expertise by experience.

What do you think of the possibility that a SWAP could give advance consent for something the person might refuse when they are unwell?

There are many factors to consider here. We believe it is essential the voices of those with lived experience of mental health problems, especially those who are experienced in the system where detention is part of their recovery, are consulted ahead of making any decisions on this question.

What are your thoughts on the process for making a SWAP and the requirements for its validity?

SAMH believes that for the SWAP to be valid each individual making the SWAP would need to have been fully appraised of their rights to independent advocacy, and the purpose and application of a SWAP. We would also suggest that there would need to be proper safeguards put in place to make sure that there was no undue influence being applied when people are making their SWAPs, and to ensure that they are a true reflection of that individuals wishes. A right to review, and amend a SWAP should also be built in so that individuals can have the comfort of flexibility should their circumstances and wishes change.

We would be interested to hear more about how the proposals around independent advocacy will intersect with the proposals around SWAPs.

We would also suggest that to avoid the similar lack of use with advance statements that any new legislation could include a duty to inform patients of their right to have their own SWAP, and assistance with creating it, as well as clear communication of their rights around this area.

What do you think of the proposals as to who can decide if a SWAP should not be followed?

We believe a SWAP should be followed whenever possible, not only in crisis situations.

For this to happen, it will be essential staff know when someone has a SWAP in place. It will also be important they have a clear understanding of the expectations on them when someone has a SWAP, as well as the capacity and resource to meet them.

In deciding who can decide not to follow a SWAP, it will be essential to listen to the voices of those with lived experience of mental health problems, and especially those who have an experience of the system where detention has been part of their treatment.

We would like to know your views on the overruling process proposed and if there are any others you think might be authorised to review certain decisions.

We agree the overruling of a SWAP should be subject to independent review. There should also be a clear process that sets out how the decisions made will

be learned from, particularly in the case of a SWAP that is judged to have been wrongly overruled.

We would also want anyone whose SWAP may be, or has been, overruled, to be guaranteed an offer and provision of Independent Advocacy support

What do you think about the proposals for dealing with conflict?

An important part of conflict resolution is clear communication, and we hope that the use of SWAPs would be clearly communicated to all in health and social care so that there was a good understanding of the validity and purpose.

We all bring our own interpretations of words and phrases, from our unique and individual experiences, and it may be suitable to offer mediation or conflict resolution services including independent advocacy to any parties in disagreement. In particular, before taking the step of going to tribunal.

Tribunal experiences can be very stressful, and sometimes retraumatising, so we believe there should be intermediate steps taken to resolve conflict before tribunal stage.

Do you have additional proposals for change?

Mental health problems should not be a barrier to people exercising their right to vote. It may be worth considering if a SWAP can contain the preferences of someone when it comes to voting in Westminster, Holyrood and Local Authority elections. Including if the person does not wish to vote, wants a postal vote, or a proxy vote, and their voting preference.