Scottish Mental Health Law (Scott) Review: Additional Proposals RCN Response

Scottish Mental Health Law Review – Consultation June 2022 – Additional Proposals | Scottish Mental Health Law Review

Independent Advocacy

We accept that there may be a 'lack of awareness or understanding of IA (Independent Advocacy) amongst Health & Social Care staff' (p.16) and regardless of whether there is to be an opt-out system for independent advocacy we see value in the provision of 'Training… to help practitioners across health and social care to understand what IAOs (Independent Advocacy Organisations) can do and how IA can help improve communication, relationships with patients and unpaid carers and can help secure better outcomes for patients' (p.18).

What we are less able to accept is that 'There remains a 'suspicion' or mistrust of IA on the part of some staff who believe they are more 'appropriate' advocates for the person they are treating or supporting without proper regard for the conflict of interest created' (p.16).

This claim should only have been included in the consultation document if accompanied by evidence. As it stands, the authority of the review has been used to cast aspersions upon unidentified types and numbers of members of the mental health workforce in way that is, in the absence of evidence, unfair and divisive. We do not know if the review intended nursing staff to be included in the term 'some staff' but given nursing is the biggest proportion of the mental health workforce, it seems likely that that was the review's intention. This is unfortunate.

The claim also demonstrates a lack of understanding of the responsibilities placed upon Registered Nurses under the profession's governing code and standards. There are a number of provisions in the code that touch on the concepts of advocacy and conflicts of interest, but two examples unequivocally show that nurses are obliged to have an advocacy role and to balance different interests:

- "3.4 act as an advocate for the vulnerable, challenging poor practice and discriminatory attitudes and behaviour relating to their care
- 4.1 balance the need to act in the best interests of people at all times with the requirement to respect a person's right to accept or refuse treatment"

For a nurse to act in the way characterised by the above claim would mean they were acting in contradiction to their professional responsibilities. Whilst we accept that there will be incidents of poor practice, we object to the way that the review emphasised this possibility, without, as we note above, evidencing its extent.

In its March 2022 consultation, the review posited an imaginary scenario in which a staff member used inappropriate coercion. In response we wrote, "The relationship (between a patient and a professional) is most egregiously

caricatured by the imagined line from an imagined professional: 'if you try to leave, or if you don't take your medication, we'll detain you and make you take it' (p. 93). We need to get beyond these stereotypes in publications such as this consultation."

Sadly, the above claim has a similar effect and paints a picture of an adversarial attitude on the part of staff which is not representative of mental health professionals in general and certainly not of nursing.

Given the breadth of the changes proposed to the provision of independent advocacy, if they are implemented as envisaged, there must be clear guidance provided by Scottish Government on how the role of an independent advocate relates to the professional responsibilities and duties of nurses under the code and the standards.

We agree that 'the Scottish Government should… commission a training programme and awareness raising for the public and other relevant groups on SDM (supported decision-making)' (p.24).

Advance Statements

In our response to the March 2022 consultation, we wrote the following:

"Given that our original submission said that 'the legislation (on advance statements) could be more rights based and the importance and implications of making an advance statement strengthened', we are comfortable with the proposal to introduce a 'statement of rights, will and preferences' to replace advance statements, for the reasons given. We cannot see that the proposal will, as described, present any challenges for nursing. However, we note that this proposal is to be the subject of a 'targeted consultation'; and trust that we will be included in that consultation so that we can properly examine and comment upon the detail."

Now that we have seen more detail, although we broadly support the ambition for the statement of rights, will and preferences or 'SWAP', we are concerned that the nature of a SWAP as detailed in the 'additional proposals' is complex and could, contrary to the review's presumed intention, engender dispute between professionals and others associated with the person to whom the SWAP applies (for example, family members) and/or between members of that latter group. Depending on the circumstances such disputes could also involve the person to whom the SWAP applies. We understand that there are circumstances, such as certain of those noted on pp.32-33, where it may be appropriate not to follow a SWAP but in general, a health and care professional should be able to rely on a SWAP rather than be the one to have to decide if it should apply by making judgements about the type of criteria set out in the consultation paper – with the exception of the circumstance noted on p.34 to do with urgent medical treatment, where a health and care professional is best placed to make that call. For example, there is little chance that such a professional would have been involved in the drawing up of the SWAP and be able to make a call on whether 'there is evidence the person's autonomous decision making was compromised when they made the SWAP'.

A format for, or template of, a SWAP should be created so as to stress its authoritative nature except in certain circumstances, which should be identified on the face of the SWAP. There may also need to be accompanying guidance. Examples of what might need to be covered follow:

- If 'a person has the ability to make their own decision at that time' (i.e., the time of treatment) the SWAP might clearly say that it only applies where this is not the case.

- If 'a person is not able to make their own decision' but it still can be the case that 'the person's will and preference seems to be more

pertinent than those expressed in an earlier SWAP' (p.32) there must be guidance on who has to balance these consideration and in what way. After all, if a person who 'is not able to make their own decision' can still be judged to have 'will and preference… more pertinent than those expressed in an earlier SWAP' it rather begs the question 'in what way can they not make their own decision?' and, to an extent, undermines the SWAP as a concept by making advance wishes, made when the person had capacity, subordinate to present wishes where the person is apparently lacking capacity ('not able to make their own decision').

- It should not be possible for a SWAP to require something of a professional that conflicts with that professional's duties at law or under their professional regulatory requirements.

It is unclear what scenario is imagined in the example of conflict whereby 'respecting the SWAP… may disrespect a third party such as an unpaid carer' (p.34). This is surely a matter solely for the person to whom the SWAP applies, to be considered when the SWAP is being drawn up, and not for anyone else.

In any case, if the model proposed were to be implemented, the process of arbitration and dispute resolution described on p.34, involving the Mental Welfare Commission and the Mental Health Tribunal, would need to be one capable of real expedition. We do not want to see a situation where disputes about SWAPs lead to any damaging delay in care and treatment.

Forensic Proposals

No comment.