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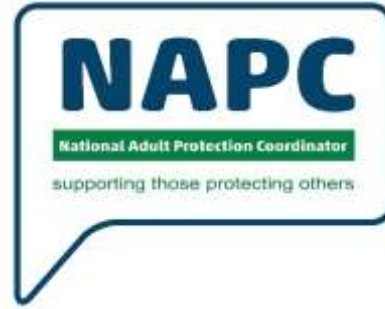
# National Adult Support and Protection Conference

Hosted by Social Work Scotland

Wednesday 2 October 2019

**#naspcnf19**





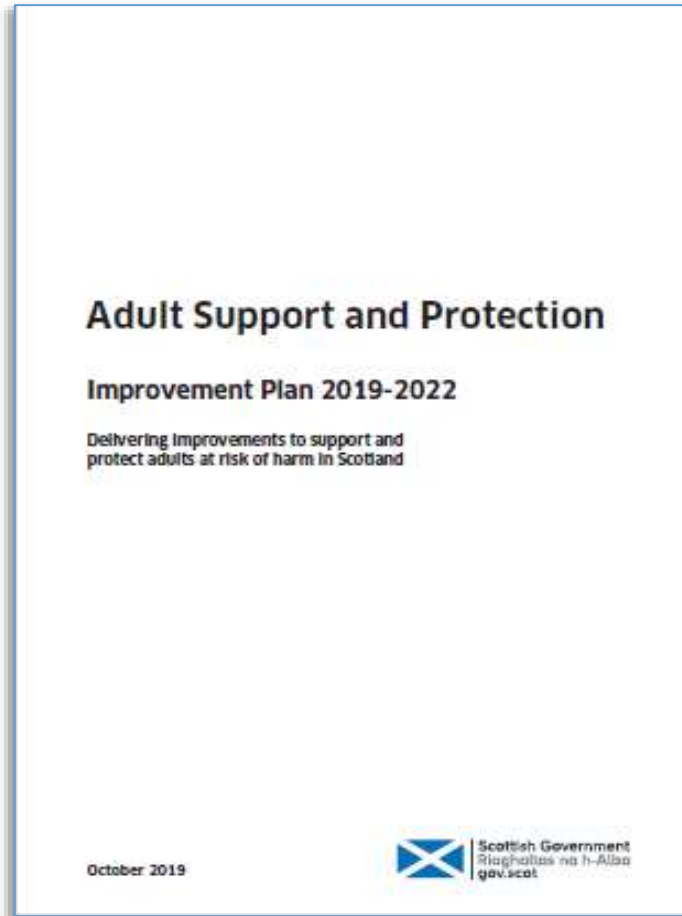
# Welcome

Louise Long  
Conference Chair

# Opening statement

Jamie MacDougall  
Deputy Director – Social Care Support Division  
Scottish Government

# Scottish Government ASP Improvement Plan



- Assurance
- Governance
- Data & Information
- Policy & Guidance
- Practice Improvement
- Prevention

<http://www.gov.scot/ISBN/9781839602085>

# Perspectives on Adult Support and Protection

Iona Colvin

Deputy Director – Social Care Support Division  
Scottish Government

# Achievements

- Multi-agency collaboration
- Mature local arrangements
- Stronger governance
- Involvement of service users and carers in ASP governance structures
- Local scrutiny and self-evaluation activity
- Focus on practice, learning and development, constantly evolving
- Understanding the impact for adults at risk and using this to develop practice
- Creativity and innovation – use of intelligence gathering

# Thematic Joint Inspection of ASP



- Good progress since commencement of the Act
- Positive safety and protection outcomes for most adults at risk of harm
- Positive role of the Fire & Rescue Service and Police Concern Hubs
- Differences in how partnerships give effect to supporting and protecting adults at risk of harm

# What next?

- Multi-agency inspection
  - Learning from inspection findings and SCRs
  - Practice development
  - Evidence and research development
  - Support for our leaders to understand ASP so they can better support us
  - Public awareness – how to know and what to do if they think an adult is at risk of harm
- 
- And... the day job of supporting and protecting vulnerable people





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# Mental Health legislation in context of Adult Support and Protection

Bob Leslie  
Chair of Social Work Scotland's  
Mental Health subgroup

## Session aims:

- Explore interface between MHCTA & ASP Legislation
- Explore common problems encountered by staff working in this field
- Reflect on the challenges and practice uncertainties beyond the legal dichotomy of capacity / incapacity
- Promote reflection on practice

# Capacity:

- No clear lines between having or not having capacity, and ASPA now gives explicit duties for people with capacity.
- Revised Code of Practice; is someone choosing not to safeguard themselves?
- Bergeron (2006): effects of ongoing abuse or neglect can lead to compromised autonomy- person feeling that his or her situation was not solvable.
- ASPA practice re-emphasises the importance of relationship-based practice and skilful engagement when trying to determine a persons capacity and decision making ability; and ability to put that decision into action.

## Mental Health and ASP:

- The Mental Health (Care & Treatment)(Scotland) Act 2003 (as amended 2015)
- Provides for protection of individuals with a mental disorder in both a hospital or community setting.
- Local Authorities – duty to investigate – S33
- Local Authorities – power to seek warrant requiring entry S35
- Further powers available for emergency – S293
- Other public bodies have duty to co-operate under this act S34 similar to that duty under ASP.

## Situations where MHCTA may be considered:

- Where the person needs treatment for a mental disorder and is suffering harm. This could be where an individual is not able to take care of their personal well-being or property, because of a mental illness, and appropriate treatment would prevent the harm continuing.
- Where someone is already subject to a compulsory treatment order, for example, the adult might be in breach of a condition that they require to take prescribed medication or attend medical appointment, or
- Someone has a mental disorder and needs to be detained for their own protection or the protection of others. This covers situations where the primary reason for detention is protection rather than treatment.

## Rights of adults, relatives and carers:

- LA's have duty to investigate harm and abuse
- When action is taken under the Act individuals have clearly defined legal rights to be heard and represented, as well as to appeal decisions.
- Families , carers and friends may also have an independent right to be heard as the nearest relative of named person

# Consent in ASPA:

- The person has to consent to any proposed action except where there's undue pressure
- So what is consent?
- Consent – permission or agreement
- Informed consent – agreement after consideration of the options and alternatives and the possible consequences that may result
- Consent means 'free agreement' (Sexual offences Scotland Act 2009)

## Scenario:

Social Work had Appointeeship for this person who had financial problems:-

‘all I knew what happened is, the social worker came to the day centre and said, I need you to sign this. And I said, not so fast please, I’ve got to read it. And she went, No you Don’t just sign it. And I felt under pressure.’

(Mackay et al 2011)



## Key questions around consent:

- How explicit does it have to be?
- Can it be tacit?
- How far do we go with initial enquiries to see a reluctant person?
- Who and what can we draw on to help us determine informed consent?
- How about ongoing consent: can we cajole or control too much rather than negotiate with the person about what you can and cannot do?

# Self Determination:

- Self Determination is viewed as an individual's right to make decisions affecting his or her life
- As a social worker / social services worker , you must promote the independence of service users while protecting them as far as possible from danger or harm' (codes of practice for Social Services Workers)

# Self Determination – think!

Many books written on subject argue:

- Principles of self-determination and autonomy are oversimplified
- Social Work research and serious case reviews suggest an overemphasis on rational choice – making and the critique of welfare interventions as paternalistic
- Need to refocus in relation to autonomy within the inter-dependence of daily life.

# When is consent not required:

- Criminal prosecution
- Interventions under Adult Support & Protection Act where the adult is under (demonstrable) undue pressure to refuse consent ***or the person lacks capacity***
- Mental Health (Care & Treatment) (Scotland) Act 2003
- AWI (Scotland) Act 2000
- Appointment of / changes to DWP Appointee
- Anti-Social behaviour order
- Environmental health access
- Reporting to professional body
- Action under the Protection of Vulnerable Groups Act

# Practice challenges

- Getting the balance right between human rights to privacy and the duty to inquire and investigate under ASPA.
- Addressing quality of life issues – what seems like poor choice may have actual or perceived benefits for the person.
- Assessment of capacity – obtaining this.
- Unpicking physical, emotional and psychological, historical and familial dynamics that can affect capacity and consent.
- Trying to foresee, and take account of, possible repercussions within person's life and relationships maybe some interventions won't benefit them.

## Stating the obvious:

- The importance of the worker's attitude and approach to a successful outcome.
- Why should someone subject to potential harm trust in an unknown professional enough to let them in their house or to share their thoughts or personal details and experiences with them?

# Practical example

## Final thoughts:

“Understanding that the bigger the anger you see,  
the bigger the fear it is concealing.”





# Q&A's for the panel



**Refreshment break**  
**Back at 11.20**

# Capacity, consent and supported decision-making

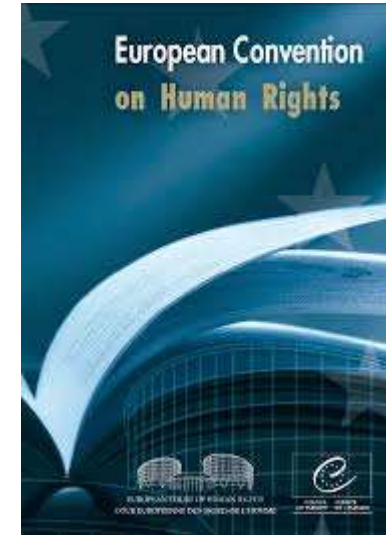
Professor Jill Stavert  
Edinburgh Napier University  
Centre for Mental Health & Capacity Law

## Outline:

- Role of 'supported decision-making' in adult support and protection
- Human rights background and imperative for supported decision-making
- What is meant by 'supported decision-making'
- How supported decision-making can be used to enhance adult support and protection policy and practice

# Human rights background and imperative for ‘supported decision-making’:

- All devolved legislation content and implementation in Scotland must be human rights compliant (Scotland Act 1998/Human Rights Act 1998)
- ECHR and (UN)CRPD - increased emphasis on individual autonomy in the face of interventions



# ECHR:

- Expansive view of autonomy of persons with capacity issues.
- Presumption of capacity and functional capacity assessments.
- A person's autonomy must only be limited in exceptional circumstances.
- However, subject to strict safeguards, a person's autonomy may be limited where diagnosis of mental disability and related impairment (lack capacity). ['medical model' of disability]



# CRPD

- Interprets individual autonomy even further.
- Social model of disability – promotes enabling exercise of rights rather than defining limits of rights.



## New approach to human rights and equality for persons with disabilities

- Cannot justify different treatment of persons with physical and mental disabilities on the basis of disability or related impairment (e.g. mental incapacity assessment).
- Break with 'reasonable and objective' justification principle tradition.

## Support for persons with disabilities to enjoy rights equally

- Recognising that not everyone starts from the same baseline.
- Need to create environment so persons with disabilities can genuinely equally enjoy rights.
- Supported decision-making, reasonable accommodation and universal design.

# CRPD supported decision-making:

- Article 12 CRPD (equal recognition before the law)
  - Right to exercise legal capacity
    - The ability to make one's own decisions and have these respected, under the law if necessary.
    - Is integral to autonomy and being the driver of one's own life.
    - Must be enjoyed equally by all.
- Thus, access to appropriate support for exercise of legal capacity ('supported decision-making') is essential.



# CRPD committee stance and working with this:

- CRPD Committee General Comment No. 1 (2014):
  - Allowing others to decide what is in someone's interests on the basis of a diagnosis of mental disability or related mental impairment/incapacity = discrimination and unequal exercise of legal capacity.
  - All substituted decision-making must therefore be replaced by supported decision-making.
- Some debate over CRPD Committee substitute decision-making stance ***but what is important in any scenario is:***
  - The purpose of supported decision-making (respect for will and preferences transcends capacity assessments); and
  - Achieving equal and non-discriminatory enjoyment of rights.

# Purpose of CRPD supported decision-making:

- To give effect to (respect) the rights, will and preferences of individual.
- To achieve equal and non-discriminatory enjoyment of rights.
- Therefore:
  - To support someone to know:
  - What the decision to be taken is
  - What their **real** options are
  - To ascertain what an individual's will and preferences are.
- It includes, **but goes further than**, participation and shared decision-making – the individual's views are paramount, not one of a number of competing factors.

# CRPD myth busting:

Article 12 CRPD compliance does not mean that an individual's wishes always trump everything else. It means:

- Person supported to exercise their legal capacity/equally enjoy their rights
- This means help making decisions and giving effect to them
- No discriminatory limiting of the rights
- 'best interpretation' of will and preferences where impossible to ascertain these

## In other words:

- Actively provide support so that person's will and preferences (or best interpretation of these) are respected and acted on; and
- Interventions without person's consent (which may involve overriding their will and preferences) must be on the same basis as for others (diagnosis/impairment not applicable)

## So, which is it in Scotland – ECHR? CRPD?

- What does ‘human rights compliant’/’human rights-based approach’ mean?!
- ECHR carries greater legal weight in Scotland BUT CRPD is highly influential and is here to stay!
- ECHR and CRPD can work together though culture change essential.

# Nature and types of CRPD supported decision-making

- General Comment No 1 (para 17)
  - Perimeters for how should operate and also broad types suggested.
  - *““Support” is a broad term that encompasses both **informal and formal support** arrangements, ...**peer support, advocacy** (including self-advocacy support), ...**assistance with communication...universal design and accessibility...provide information in an understandable format** or to provide professional **sign language interpretation ...diverse, non-conventional methods of communication, ...plan in advance is an important form of support,...***”
  - Must give primacy to the person’s rights, will and preferences on an equal basis with others
  - Multi-faceted/can take many different forms
  - Substance and uptake must be in person’s discretion
  - Provision and operation must not be conditional on mental capacity assessments

# Scottish supported decision-making (in legislation):

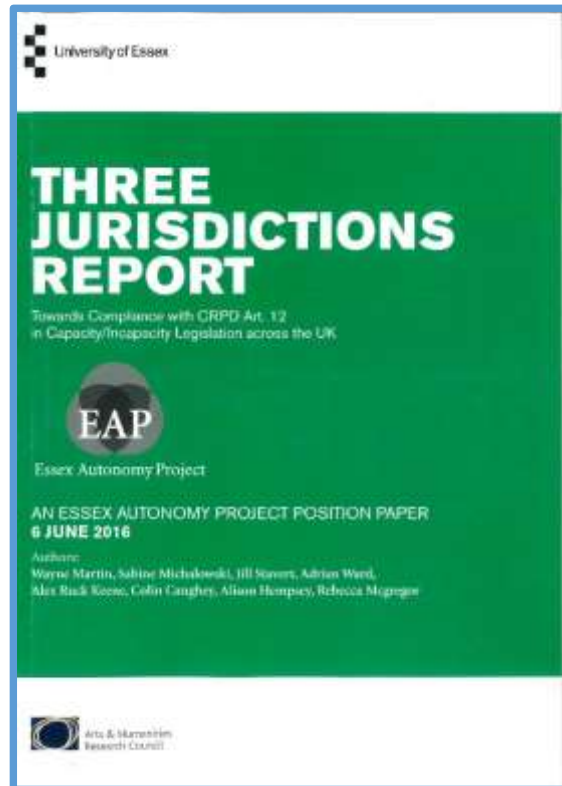
- Adults with Incapacity (Scotland) Act 2000 (AWIA)
- Mental Health (Care and Treatment) (Scotland) Act 2003 (MHA)
- Adult Support and Protection (Scotland) Act 2007 (ASPA)
  
- Forms of support formally recognised:
  - Advance Statements – MHA (ss. 275-276C)
  - Power of Attorney – AWIA (ss.15-24)
  - Independent advocacy (ss. 259-259A)– MHA independent advocacy role acknowledged in AWIA (ss. 3(5A)) and ASPA (s.6))

# Scottish supported decision-making (other):

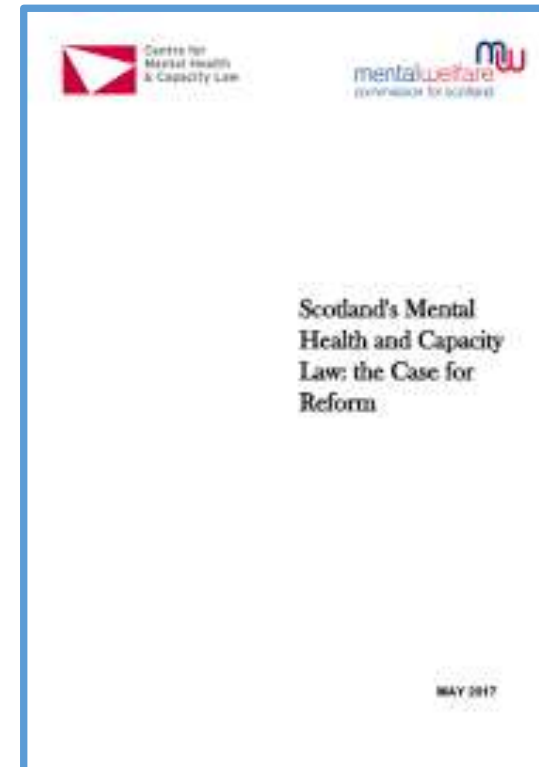
- Other forms of SDM used alongside legislation
  - Trusted person/s
  - Peer support
  - Advocacy (broader than ASPA/MHA/AWIA)
  - Community and neighbourhood support
  - 'circles of support'
  - Assistance with, and clear, communication
  - Technological support
  - Advance planning (broader than recognised in legislation)
  - Others?.....
- Mental Welfare Commission for Scotland (2016) Good Practice Guide: Supported decision-making [https://www.mwcscot.org.uk/media/348023/mwc\\_sdm\\_draft\\_gp\\_guide\\_10\\_post\\_board\\_jw\\_final.pdf](https://www.mwcscot.org.uk/media/348023/mwc_sdm_draft_gp_guide_10_post_board_jw_final.pdf)

# Scottish supported decision-making: issues and considerations

<https://autonomy.essex.ac.uk/resources/eap-three-jurisdictions-report/>



[https://www.mwscot.org.uk/media/371023/scotland\\_s\\_mental\\_health\\_and\\_capacity\\_law.pdf](https://www.mwscot.org.uk/media/371023/scotland_s_mental_health_and_capacity_law.pdf)





# Scottish supported decision-making: issues and considerations

- **Operational issues:**
  - Lack of clarity of use
  - Acts' Codes of Practice – focus on assistance with communication
  - Who provides and how provided?
  - Lack of empirical evidence on supported decision-making
- **Considerations**
  - Legislation:
    - Linkages with diagnosis/mental capacity assessments
    - Wishes and feelings no primacy/presumption in favour of these
    - Legislative changes proposed but in practice, need not be impediments

# Scottish supported decision-making: issues and considerations

- Considerations (continued)
  - Non-discrimination - don't target victim, target perpetrator/harmful environment – turning around traditional interpretations of 'support' and 'protection'
  - Capacity assessments
  - Realities of conflict of interest and undue influence
  - Risk
    - Pivotal criterion for intervention under all three Acts
    - The ASPA measures are designed to support and protect 'adults at risk'
    - This potential discrimination is addressed to some extent by the ASPA
    - Importance of considering extent to which capacity assessments influence perceptions of risk

# Delivering supported decision-making (1)

- Greater evidence base/research required but key elements of delivery identified so far:
  - Presume capacity
  - No undue influence and conflict of interest
  - 'Family' involvement
  - Individual discretion about acceptable and type of support
  - Clarity about support provider
  - Honesty about what support can/cannot achieve

# Delivering supported decision-making (2)

- Options available
- Allow for risk-taking
- Record keeping
- Importance of taking time, environment and time of day
- Building and developing relationships
- Education/training
- Specialist advice/information

# The way forward: “Old ways won’t open new doors”

- Rethinking approaches - CRPD requires focusing on actively maximising a person’s autonomy and capabilities (restrictions not at forefront) – supported decision-making a valuable tool here.
- More needs to be done to rationalise and provide greater synergy between the ASPA, MHA and AWIA Acts to ensure effectiveness and consistency.
- Much can be achieved by bearing the equality, non-discrimination and support requirements in mind when deciding whether/which protective measures and implementing these – working with and reinforcing ASPA etc principles
- Supported decision-making is about ensuring individual’s wishes are respected (even where formal incapacity assessment).
- Inescapable fact of resourcing/reallocation of resourcing and time! But, that’s a human rights-based approach.



# Adult Support and Protection: a carer's perspective

Video, introduced by  
Conference Chair Louise Long

# Workshops

**Cuckooing & County Lines**

**Learning Disability & Gender-based violence**

**MASH in context of ASP**



**Lunch**  
**Back at 2.10pm**



# A service user perspective

Graham Morgan  
Mental Welfare Commission

# Overarching themes in significant case reviews

David Crawford

Former Director of Social Work and author of SCR's



**Questions?**

# Reflections & close

Louise Long  
Conference Chair



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# Thank you for coming!

Don't forget to leave us your  
evaluation form