

# Consultation Response: ASP Proposed Legislative Changes

## SUBMISSION FROM SOCIAL WORK SCOTLAND, TO SCOTTISH GOVERNMENT CONSULTATION

**10 February 2022**

Social Work Scotland is the professional body for social work leaders, working closely with our partners to shape policy and practice, and improve the quality and experience of social services. We welcome this opportunity to comment on the proposed changes to the Adult Support and Protection (Scotland) Act 2007. The reflections within this consultation response are drawn from the experience of our membership of social workers, the lead professionals taking forward duties under the Adult Support and Protection (Scotland) Act 2007 (ASP/the Act)<sup>1</sup>.

Social workers are uniquely placed as a profession to offer insight and contribution to this consultation and to support the effective interaction and joint working of partner professionals in the ASP process. Working within this multi-agency context social work can offer perspective to ensure the protection of adults at risk of harm remains proportionate and in line with a human-rights and person-centred approach.

It is recognised that Scottish Government have recently consulted on an the ASP Code of Practice, the Guidance for Adult Protection Committees, and the Guidance for General Practitioners and primary care teams, for which Social Work Scotland has previously provided feedback and recommendations. In addition to this, Social Work Scotland have provided a comprehensive response to the National Care Service Consultation<sup>2</sup>, with attention drawn to the particular and unique role of the social work profession across the legislative framework. It is recommended that the comment and feedback provided in relation to this consultation is read alongside the above consultation responses, the ongoing review of Mental Health Legislation, the new child protection guidance, and the suite of supportive documents to guide practice across the protective legislations to ensure continuity of content and recommendations made within are embedded in any change to the Act going forward.

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<sup>1</sup> Adult Support and Protection (Scotland) Act 2007,  
<https://www.legislation.gov.uk/asp/2007/10/contents>

<sup>2</sup> SWS National Care Service Consultation Response, Summary, 8 November 2021,  
<https://socialworkscotland.org/consultation/a-national-care-service-for-scotland/>

Social Work Scotland recommendations reflect the involvement and feedback of the Chief Social Work Officer network, the Adult Standing Committee, and the Adult Support and Protection Network, and were provided to Scottish Government colleagues through a dedicated session held on 8 February 2022.

The leadership in social work have raised concern that the proposed actions to amend the ASP Act would disrupt the continuity across the protective legislation and accompanying welfare legislation if looked at in isolation. It remains the strong view of social work leaders that these proposals should not be considered in isolation and therefore should not be progressed at this time. The NCS Consultation has not determined to what extent social work will move into the NCS structure or where social workers (who, alongside, nurses and occupational therapists- are all named in the Act as eligible to become council officers) will be employed. Suggesting changes to one piece of legislation risks disruption across all, and the recommendation would be to consider the collective impact of changes within the ASP Act in line with other legislation placing duties upon local authorities in relation to welfare, protection and human rights.

Highlighted below are two key areas from the proposed changes to the **ASP (Scotland) Act 2007** that social work leaders wish to provide more detailed comment around as they relate to the professional social work role.

### **Council and Council Officers**

- We would like the Council and Council Officer functions and duties in the 2007 Act to all transfer to the NCS and its officers. It is anticipated that local delivery bodies will have delegated responsibility for ASP activity.
- “Council Officers” are specifically designated as being individuals employed by the council and registered in the SSSC register for social workers or social care workers or registered occupational therapists or nurses, all with at least 12 months post qualifying experience of identifying, assessing and managing adults at risk. We would like NCS officers to be similarly defined. We would like them to be nominated as “Adult Support and Protection Officers” (ASP Officers).
- We would like the duty in [section 4](#) (Council’s duty to make inquiries) to be undertaken by ASP Officers. Currently the duty is on the Council but on occasions it is carried out presently by non-registered staff. Going forward we would like this duty to be undertaken by only ASP Officers.

The view of social work leadership is that the role of the Council Officer should only be held by social workers, as is the case in other public protection areas such as child protection, and that the legislation should be changed to reflect this. The 2010 published Role of the Registered Social Worker<sup>3</sup> paper outlines social works

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<sup>3</sup> The Role of the Registered Social Worker in Statutory Intervention, 2010, <https://www.gov.scot/publications/role-registered-social-worker-statutory-interventions-guidance-local->

responsibility for legislative duties and how governance arrangements should be organised to ensure social work oversight. The ASP Act and the role of the Council Officer is specifically referenced in the paper, with the recognition that social work governance is required for decisions made by those not holding social work qualification.

While the Human Rights Act 1998<sup>4</sup> places duties on public authorities, the local authority and the NHS, to uphold human rights, social workers are unique in comparison to nursing and occupational therapy in that their training is rooted in a rights-based approach to intervention. Taking forward duties under the Human Rights Act necessitates a wider and nuanced understanding of the duties and responsibilities incumbent upon local authorities across the legislative spectrum. Social workers regularly engage with and apply such considerations in ways that colleagues in nursing and occupational therapy do not. Safeguarding and adult protection considerations need to be undertaken through a human rights and person-centred approach, and the level of risk management experience and understanding of connecting legislation required to do this sits well within the social worker role.

Regarding the section 4 Duty to Inquire in the Act and the proposed recommendation that this be a protected duty for the Council Officer. We would refer to the considerations detailed above with regard to approaching intervention through a rights-based and person-centred approach, the acknowledged requirement for social work governance arrangements of statutory duties taken forward, and the previously more detailed response provided by Social Work Scotland to the ASP Code of Practice<sup>5</sup>, as duties which should be aligned to the professional social worker. Social workers are trained to balance human rights and the right to self-determine, against presenting risk through a person-centred approach, while ensuring the principles of intervention (being the least restrictive and of most benefit to an individual), are adhered to.

### **Definition of an adult at risk**

“Adults at risk “are defined in [section 3](#) of the 2007 Act as adults who –

- a) are unable to safeguard their own wellbeing, property, rights or other interests.
  - b) are at risk of harm, and
  - c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.
- We are concerned that some of the wording such as “mental disorder “ and “mental infirmity” has caused confusion in the past and led some to think that a mental health diagnosis or mental health support is actually required to be given before the 2007 Act provisions will apply. This is not the intention. Accordingly we would like to modernise these terms and bring them more into

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[authorities/pages/2/#:~:text=Why%20a%20Registered%20Social%20Worker&text=Social%20workers%20are%20trained%20to,protect%20either%20individuals%20or%20communities.](#)

<sup>4</sup> Human Rights Act 1998, <https://www.legislation.gov.uk/ukpga/1998/42/contents>

<sup>5</sup> ASP Code of Practice Consultation, Social Work Scotland, 28/09/2021, <https://socialworkscotland.org/consultation/adult-support-and-protection-code-of-practice-guidance/>

line with current word usage in the disability / human rights context, and thereby hopefully making our intention clearer. We would like “mental disorder” to be replaced with “mental health” and “mental infirmity” to be replaced by “experiencing mental health and wellbeing challenges”.  
*[Suggested wording for c): because they are affected by disability, illness or challenges to physical or mental wellbeing, are more vulnerable to being harmed than adults who are not so affected]*

We would recommend that further consideration be given to the proposed change of the definition for an Adult at Risk. If there is confusion within the social work workforce in a shared understanding of the current definition, then we would recommend attention and action being taken to meet that gap in understanding. Social Work Scotland and its membership would be happy to support any such activity in clarifying how the 3 point test can be applied through a balanced consideration of human rights, welfare, and protective legislation.

Changing the language within the 3 point test to “mental health” and “experiencing mental health and well-being challenges” has the potential to cause confusion and may lead to more referrals being looked at under the ASP Act. As the 3 point test allows social work to make inquiries into a person’s life without their consent, this would also be a human rights issue that should be thoroughly considered against the rights enshrined in Article 8 of the Human Rights Act<sup>6</sup>.

Mental well-being is individual to a person and a subjective measurement of a person’s circumstances. Undertaking such an assessment without the opportunity to engage the person in a discussion to ascertain their perception of their circumstances is concerning. Instances of referrals for perceived poor decision-making or risk taking may lead to increased opportunity to intervene using the ASP Act. This potential increase in the use of the ASP Act over other legislation does not take into account that the Social Work (Scotland) Act 1968 is the entry point for social work engagement with an individual, supporting proportionate and necessary engagement rooted in a human rights-based approach. Broadening the scope of the 3 point test as proposed would risk more referrals being viewed through a protective lens, with the potential increase in such work obscuring and delaying response to those ASP referrals with higher risk. Social Work Scotland provided a full response to the suggestion in the review of the ASP Code of Practice to assess referrals coming into social work services for potential ASP risk and this should be referred to for further detail<sup>7</sup>.

Our view would be that any referral coming into social work services would be assessed (or overseen) by a professional social worker, drawing on appropriate statutory intervention based from a rights-based approach and adhering to the principles of least restrictive and where the intervention would be of most benefit for the individual. Safeguarding activity should seek to be necessary and proportionate as per the ASP Act, and the Act should not be used if there are other, less restrictive means available to engage with someone. The proposed changes to the definition of

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<sup>6</sup> Human Rights Act 1998, Article 8,  
<https://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/I/chapter/7>

<sup>7</sup> ASP Code of Practice Consultation, Social Work Scotland Response, 28/09/2021,  
<https://socialworkscotland.org/consultation/adult-support-and-protection-code-of-practice-guidance/>

an adult at risk could therefore increase ASP work in services and reduce professional ability to determine less restrictive and potentially more appropriate legislation to engage with someone.

In addition to the human right concerns, the impact that a change in language will have on how the ASP Act aligns with the Mental Health Care and Treatment (Scotland) Act 2003 and the Adults with Incapacity (Scotland) Act 2000 should be considered. Crossing the Acts when assessing risk in accordance with human rights is a balanced consideration and changing the thresholds of involvement in one, should involve consideration of impact on the others. Changes in definition should be made in alignment with the current Mental Health Law Review underway to ensure continuity across the Acts.

### **Additional areas to consider:**

- The recent Child Protection Guidance<sup>8</sup> and recommendations around Interagency Referral Discussion (IRD) for all children should be considered in the context of young adults aged 16 and 17. This has been a thorny issue in practice and has come up in ICR discussions historically. It would be useful to consider if the legislation could be clearer, or state more plainly, how young adults at risk should be supported and through which legislation. The definition of a child in the Child Protection Guidance: *“In general terms, for the purposes of this Guidance, the protection of children and young people includes unborn babies, and children and young people under the age of 18 years.”*

In addition to the definition, there is the following reference to UNCRC:

*1.3 It is important to note that for the purposes of the UNCRC, the rights apply to anyone under the age of 18. Article 1 states that this is the case unless majority is attained earlier under the law applicable to the child. Scottish Government intends to incorporate UNCRC within domestic law”*

- Further connection and linkage around how the changes proposed to the ASP Act connect to the other protective legislation and the wider public protection responsibilities of local authorities would be beneficial. Given the potential structural changes for all or some areas of social work practice, this will be necessary and should engage with the wider public protection agenda. Solace are meeting with Chief Officers and CSWOs now to consider the protective legislation and how duties will be carried forward in the future. We would recommend that this piece of valuable work should connect to the review led by Solace as an opportunity to join these up for clearer connections.

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<sup>8</sup> <https://www.gov.scot/publications/national-guidance-child-protection-scotland-2021/>