



[Scottish Mental Health Law Review –
Consultation June 2022 – Additional
Proposals | Scottish Mental Health Law
Review](#)

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).

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

pertinent than those expressed in an earlier SWAP' (p.32) there must be guidance on who has to balance these considerations 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.

No comment.