



## SIAA Consultation Response | May 2022

# Scottish Mental Health Law Review: Response to Phase 3 recommendations

### Introduction

**The Scottish Independent Advocacy Alliance (SIAA) advocates for independent advocacy.** We are the national intermediary organisation for independent advocacy in Scotland. SIAA promote, support, and defend the principles and practice of independent advocacy. Our aim is to raise awareness about the [value and impact of independent advocacy](#), and influence decision makers ultimately with a view to widen access to independent advocacy for all who need it in Scotland. Read more about [how SIAA advocates for independent advocacy](#).

As the only national organisation with a remit to promote, support and defend independent advocacy we have been following the provision, quality, availability, and accessibility of independent advocacy for many years. Our response to the Phase 3 recommendations focuses on the elements of the recommendations paper that focus on independent advocacy and how it could help enhance the rights of people under mental health legislation.

Independent advocacy happens either individually or collectively. To understand how independent advocacy, both individual and collective, works in practice please visit the '[Independent advocacy in practice](#)' page. Independent advocacy is an important mechanism to defend the human rights of people using mental health services and independent advocates and collective advocacy groups are often referred to as human rights defenders.

SIAA is a membership organisation that has members providing independent advocacy across Scotland. [SIAA members](#) are a diverse range of organisations and groups that provide independent advocacy to different groups and in a variety of settings including:

- individual independent advocacy in the communities, hospitals, and prison settings,
- organisations specialising in citizen advocacy,
- carers advocacy organisations,

- collective advocacy groups based in hospitals, care homes and the community, and
- organisations providing independent advocacy to remote and rural communities.

Each SIAA member works to the [Independent Advocacy Principles Standards and Code of Best Practice](#), which is the foundational document for independent advocacy in Scotland. The majority of SIAA members provide independent advocacy under the Mental Health (Care and Treatment) (Scotland) Act and have done so for many years meaning they have extensive expertise to contribute to the Independent Review and its recommendations consultation. This SIAA consultation response is informed by engaging and consulting with our members. SIAA members and colleagues from the Scottish Mental Health Law Review team joined SIAA to discuss the recommendations made in the [Consultation Paper](#) around independent advocacy at a roundtable in April 2022.

## General comments on recommendations

Recommendations on independent advocacy within the Scottish Mental Health Law Review consultation paper were generally welcomed by SIAA members. A theme of member feedback was resourcing issues for independent advocacy organisations and collective advocacy groups. Members felt that although many of the recommendations around independent advocacy would be positive steps that would support people to have their rights upheld there would need to be significant steps to address the resourcing issues for independent advocacy that have become even more acute since the Covid-19 pandemic.

A concern was raised that although there are detailed recommendations made for strengthening collective advocacy, which were welcomed, there was less detail in the recommendations on individual independent advocacy. SIAA has previously made recommendations to the Law Review following contributions from member organisations, which are available [in this evidence paper available on our website](#).

Finally, members commented that they were aware of many legislative and policy changes that would be upcoming in the Scottish policy landscape over the next few years and wished to emphasise the importance of these recommendations being part of a broader picture of moving towards greater human rights realisation in Scotland.

## Chapter 3: Supported Decision Making

### **Recommendation: Independent advocacy (IA) offered on an opt out basis across mental health and incapacity law.**

- Members were positive and supportive of offering independent advocacy on an opt-out basis. Members felt this gave the power to the people using mental health services or coming into contact with the system, and in so doing addressed the power imbalance that is inherent between people using services and service providers.

- How potential advocacy partners are told about IA is very important, members commented that the best people to explain IA is independent advocates themselves. This should be factored in when thinking about an opt-out approach to independent advocacy.
- Resourcing of opt-out IA should be carefully considered, expertise must be sought from current local providers and SIAA members in the current landscape to help address what this might look like to ensure that the current gaps in provision do not continue.
- The importance of maintaining the independence of advocacy was raised, the independence of advocacy organisations and groups was essential in the provision of advocacy, and this should be supported within the recommendations. More information about three components of independence needed for independent advocacy to be robust and effective: structural, financial and psychological, can be found in the [Independent Advocacy Principles, Standards and Code of Best Practice](#).
- Members felt an opt-out for independent advocacy would mean they could reach people before crisis point and independent advocacy could show its worth in being there as a preventative option rather than just in statutory processes, for example Mental Health Tribunals.
- Members said that they were supportive of the opt out basis recommendation and emphasised the importance of maintaining IA standards and potentially looking at a qualification for independent advocates so that the quality of independent advocacy in Scotland could be measured and maintained.
- Members highlighted that independent advocacy should be for everybody and the opt-out basis would reflect that and prevent people from missing out on advocacy.
- Members expressed concerns about the impact the opt-out basis would have as it would increase demand on independent advocacy if it was not supported by new and robust funding models that were created in consultation with independent advocacy organisations and groups across Scotland. Members emphasised that new resources would be needed to make this feasible.

**Recommendation: Non-instructed independent advocates are allocated to all persons who are not able to instruct an independent advocate.**

- Members supported this recommendation as they believed it would help to safeguard people and help people that are vulnerable to have their human rights realised. People without capacity would be supported in decision making and be able to better coproduce life outcomes.
- Members felt the recommendation would allow space for people to be involved in decision making and would provide opportunity for a more balanced approach to decision making.
- Members had questions around capacity assessments and increasing non-instructed independent advocacy. The review team responded that they were looking at moving away from a clinical model of capacity assessment that was often based on

diagnosis, taking a lead from the UNCRPD around capacity and further information about the approach could be found in the consultation paper around the human rights enablement framework.

- Members raised concerns that the communication aids element of the consultation was conflated with non-instructed advocacy, explaining that there would be many people with capacity that used communication aids and some people deemed to have lacking capacity that would not need communication aids.
- Referral routes for non-instructed advocacy were currently not consistent across Scotland with some areas providing more non-instructed advocacy than others and little provision for children and young people. Members noted that strong referral routes for this should be considered as part of the recommendations.
- Members emphasised the importance of non-instructed advocacy and the time needed to ensure non-instructed advocacy was to the highest possible standard. Members mentioned that more training and development opportunities around this would be essential.
- Members were keen to see more work being done around a definition of non-instructed advocacy for children and young people, as this was an area that guidance and practice was lacking. SIAA are currently at the early stages of beginning these conversations with members and the Scottish Government.

**Question: Should there be legal duties on public bodies to secure SDM for people who need it? If so, given that advocacy is a form of SDM, what should be the relationship between that and the existing duties in respect of advocacy?**

Members were keen to see an increase in supported decision making and decrease in substitute decision making, as this would be in line with the UNCRPD and upholding human rights. Members shared their view that an increase in legal duties to provide independent advocacy, and therefore recognition of the important role independent advocacy can play in supported decision making would be very welcome. However, members also shared that independent advocacy should not be the only route to supported decision making and that local authorities and the NHS should also be working towards a supported decision-making framework that includes independent advocacy but also has responsibilities on a variety of professionals to create a system wide approach.

## Chapter 8: Accountability

**Collective advocacy recommendations:**

- **Collective advocacy groups should have an explicit right to raise a court action for human rights breaches. This right must be supported by access to legal advice, guidance and support for groups who wish to take this step.**
- **There should be an alternative way for collective advocacy groups to be able to escalate human rights issues that remain unresolved and unaddressed by services**

to another scrutiny body/Commissioner to investigate. This would need to be supported by a participatory process of referral and consideration within the identified scrutiny body.

- **A duty on the Scottish Government to secure and support effective collective advocacy organisations. This should be at a local and a national level. The need for an obligation to ensure that collective advocacy for children and young people is supported is discussed more in chapter 9.**
- **There should be a duty for NHS Board/local authorities to provide and resource this. However, collective advocacy groups cannot be ‘mandated’ into existence, they must continue to emerge from the needs, wants and views of their potential members.**
- **Collective advocacy members and workers to lead on the development of a system for supporting, monitoring and evaluating collective advocacy groups. This system needs to respect their independence and be meaningful to the groups, commissioners and the public.**
- **The co-production of ‘Standards of Engagement’ between services and scrutiny bodies, and collective advocacy groups to ensure they have the opportunity to be involved in all aspects of service delivery that impact their members. We do not propose any reciprocal duty on groups to take these opportunities. They remain accountable to their members.**
- **Development of an opt-in programme of advocacy related learning to support the development of more advocacy workers and peer leaders.**
- **A national strategy for raising awareness and understanding of collective advocacy.**
- Members commented that collective advocacy takes time and it can currently be seen as an ‘add on’ and these recommendations would go a significant way to addressing this and bring parity of esteem between collective and individual independent advocacy.
- Members acknowledged that because of the current provision of collective advocacy there would likely need to be upskilling and learning across independent advocacy organisations to support more collective advocacy as it was not currently embedded in the way individual independent advocacy is.
- Recommendations were supported by members as it was felt collective advocacy would help address systemic issues and create longer term change. Members felt it was important to acknowledge that individual advocacy cannot address systemic issues in the same way as there is not the same concerns about individual repercussions in collective advocacy settings.
- It is fundamental to independent advocacy practice that independent advocacy should support people to be able to speak out in whichever way suits them best,

more collective advocacy would mean more options for people wishing to have their voices heard and rights upheld.

- As with the recommendations around individual advocacy, funding and legal aid would be crucial for supporting the recommendations to be realised in practice.
- Members said that collective advocacy was important for carers, but there was currently very little provision.
- Members welcomed the recommendations but emphasised that it was crucial that agendas were set by collective advocacy groups themselves and not dictated to by public bodies or commissioners looking to make improvements. The recommendation around 'standards of engagement' coproduction would be key to this.

## Chapter 9: Children and young people

### Independent advocacy for children and young people recommendations

- **The duties in the 2003 Act to secure advocacy should be strengthened to ensure that any child with a mental disorder is made aware of their right to independent advocacy and is able to obtain this when needed.**
- **The various duties in respect of advocacy (in mental health, in Children's Hearings, and in additional support for learning) should be streamlined to ensure comprehensive, holistic and child-centred individual advocacy services.**
- **These duties should be integrated with broader duties to ensure support for decision making, which is discussed below.**
- **There should be a new duty on Scottish Ministers to support collective advocacy for children with mental disorder.**
- Members mentioned how little provision of independent advocacy there was for children and young people, despite their right of access in the current Mental Health Act.
- Members commented that they were supportive of recommendations but that, again, resourcing needed to be available to provide IA at a local level.
- IA for children and young people needed to be addressed across different policy areas and MH law would only be one aspect of this.