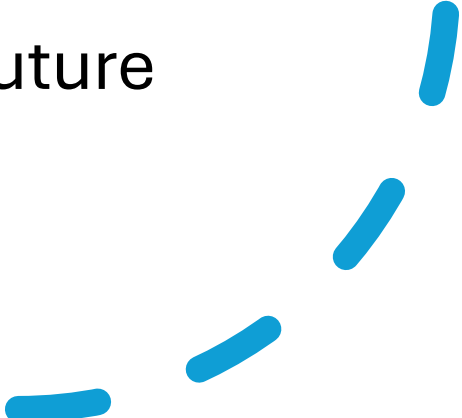


# Safeguarding in Mental Health – Scottish Perspective and Research

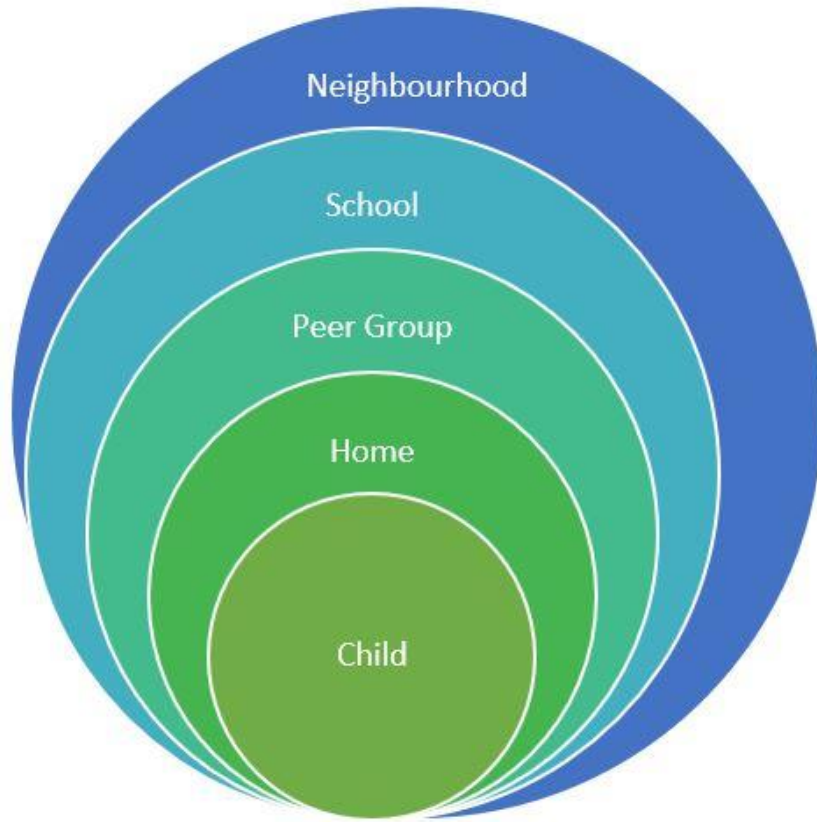
Vicky Soutar, Lecturer in Social Work  
University of Stirling (with contributions  
from Dr Kathryn Mackay, Lecturer in Social  
Work University of Stirling)

IASW mh conference 19.4.24

# Aims of talk

- Think about a Human Rights context for safeguarding in mental health (CRPD, supported decision-making)
  - What can be taken from Scottish experience over past 15 years?
  - Consider concepts of relational autonomy and ethics of care in relation to safeguarding in mental health
  - Human rights enablement – a future approach?
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# Considering...



- Relational autonomy – “*highlights the social context within which all individuals exist and acknowledges the emotional and embodied aspects of decision-makers*” (Walter and Ross, 2014 p.16)
- Contextual Safeguarding - diagram from Kirkless SCP (2024)

# Development of legislation

- Adult Support and Protection legislation was implemented in 2008 in Scotland
- Code of Practice provides associated guidance
- Adult Protection Committees across Scotland
- We often refer to a 'triad' of mental health legislation, but ASP covers mental health AND other background issues (of this more later)
- Critique of the word 'vulnerable' led to term 'adult at risk of harm' eg Sherwood-Johnson and Mackay (2019)



**3 Mental Health:** Imposed care and treatment of people in community or hospital

**2 Mental Capacity:** How substitute decision making can be planned and addressed if capacity already lost

**1 Adult support and protection:** Assess where adult might be being harmed, abused or neglected and need for intervention

**General welfare:** Assess need for support and consideration of whether needs require provision, guidance around support options

**Human Rights and Rights for Persons with Disabilities:** Dignity, liberty, security, private life, fair legal hearings, equality of access to rights

ASPSA as 'triage legislation'  
(Stewart, 2012:39)

# more pieces of the jigsaw...

Wilful neglect and ill-treatment – a criminal offence (under the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 ('the 2016 Act'))

Corporate Homicide – a criminal offence (under the Corporate Manslaughter and Corporate Homicide Act 2007)

Duty of Candour procedure – a legal duty implemented 2018

Part 21 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ('the 2003 Act') - criminal offences related to sexual abuse of those with a 'mental disorder'

## The Three Point Test (Adult Support and Protection (Scotland) Act 2007 ((the 2007 Act))

- that they are unable to safeguard their own well-being, property, rights or other interests;
  - that they are at risk of harm; and
  - that because they are affected by disability, mental disorder, illness or physical or mental infirmity they are more vulnerable to being harmed than adults who are not so affected.
- It should be noted and strongly emphasised that the three criteria above make no reference to capacity. Capacity is not, and never should be, a consideration in the three-point test.**



# Revised Code of Practice 2007 Act (2022)

- All adults who have capacity have the right to make their own choices about their lives and these choices should be respected if they are made freely. However, for many people the effects of **trauma and/or adverse childhood experiences** may impact upon both their ability to make and action decisions, and the type of choices they appear to make. In this context it is reasonable to envisage situations in which these experiences, and the cumulative impact of them through life, may very well have rendered some people effectively **unable**, through reliable decision making or action, to safeguard themselves.



# Rough guide to 2007 Act Powers

- Duty to Inquire (also corresponding one under Mental Health legislation)
- Applies individually or institutionally (large scale investigations)
- Investigatory Powers, including right of entry with a range of possible warrants
- Corresponding rights on part of person whose circumstances are being investigated
- Protection Orders (not widely used, but ARE used) – Banning Orders; Removal Orders; Assessment Orders
- These ENCOMPASS but are not EXCLUSIVE to mental health

# Why revise this guidance?

- We have found, in common with other jurisdictions (Usher and Stapleton 2018), that training on decision-making assessment, in the context of pressures does not always ensure good practice
- Confusion over processes
- Common issues include an over-focus on capacity (the criteria for the 2000 Act) rather than on ability to safeguard; a simplistic and non-relational analysis of autonomy eg 'lifestyle choice' and 'unwise decisions' or 'least restriction' being used to gatekeep
- A lack of focus on chronology in risk assessment – e.g. risk assessment starting from point of referral only

# Why do we have these issues?

'Professional Curiosity' often seen as lacking – however this in context of care crisis, cost of living crisis, significant pressures eg Burton and Revell (2018)

Decision making heuristics under pressure – intuitive vs reflective thinking (Gigerenzer and Gaissmaier 2011) –

Confusion about complexity of legislation

ASPA often seen as having 'no teeth' (anecdotal!) –

# Mackay and McCusker (2024) 'navigating the borderlands'

- This paper argues that the 2007 Act *'provides a necessary safety net between the borderlands of mental health, capacity and social care law'* (Mackay and McCusker, 2024, p.1)
- In context of debates about how best to further align with UNCRPD, tensions between Article 12 (right to legal capacity) and Article 16 (rights to live free of exploitation, violence and abuse)
- Suggests ways we can go further based on the Scott Review's concept of human rights enablement (HRE)



# Scott Review (2022)

- Wholescale review of ‘mental health legislation’ in Scotland – included Adult Support and Protection legislation (the 2007 Act)
- Whilst mental health legislation and adults with incapacity legislation may merge in future, the 2007 Act is not currently in line for a blended approach
- Principles will align across all three pieces of legislation
- Human Rights Enablement (HRE) is an approach endorsed by the Review – Supported Decision Making (SDM) and Autonomous Decision Making (ADM) also endorsed

# Autonomous Decision Making assessments (proposed)

- In line with ratification of UNCRPD – the idea that it is potentially discriminatory to base interventions around capacity or decision-making assessment upon disability or diagnosis
- Proposes a positive assessment of a person's ability to make an autonomous decision on each occasion
- Still includes the familiar action on; communicating; using/weighing; understanding; acting on decisions BUT
- Also includes consideration of controlling influences, situational/contextual and other factors such as impact of illness.

# HRE (proposed)

- a) Ensures that the person's will and preferences are known in respect of the given issue;
- b) Identifies what rights, if any, are in need of protection, including the rights of others or another;
- c) Considers whether all relevant human rights been weighed,
- d) Weighs advantages to human rights against harms to human rights.
- e) Provides a plan of action for giving effect to such identified right or rights in order to meet the person's needs at that time.

# Ethics of care

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- 'Ethics of care' - An ethics of care directs our attention to the need for responsiveness in relationships (paying attention, listening, responding) and to the costs of losing connection with oneself or with others. Its logic is inductive, contextual, psychological.. (Gilligan 2011)





# Conclusion

- Rights-based, supported decision-making models are highly complex, requiring legal literacy and resourcing to be meaningful
- Social workers need time to think both intuitively and reflexively (both important) to make relationship-based, thoughtful judgements in safeguarding
- Safeguarding in mental health can fall foul of an over-focus on 'capacity' or 'mental disorder' even when legislation is in place to 'navigate the borderlands' (Mackay and McCusker 2024)
- We need to take great care making individualistic, quick judgements about 'unwise choices' or 'lifestyle choices'
- Multi-disciplinary buy-in is absolutely crucial

# References

- Burton,V. and Revell,L. (2018) 'Professional curiosity in child protection: Thinking the unthinkable in a neo-liberal world', *The British Journal of Social Work*, 48(6), pp. 1508–23
- Ethics of Care (2018). *Carol Gilligan*. [online] Ethics of care. Available at: <https://ethicsofcare.org/carol-gilligan/>.
- Gigerenzer, G. and Gaissmaier, W. (2011). Heuristic Decision Making. *Annual Review of Psychology*, 62(1), pp.451–482.
- Mackay,K and McCusker, P (2024) 'Adult safeguarding legislation: Navigating the borderlands between mental capacity, mental health and social care law and practice', *International Journal of Law and Psychiatry*,Vol 94 (Awaiting publication – available on request)
- Scottish Government (2011). *Adult Support and Protection (Scotland) Act 2007*. [online] Legislation.gov.uk. Available at: <https://www.legislation.gov.uk/asp/2007/10/contents>.
- [Stewart, A.](#) and [Atkinson, J.](#) (2012), "Citizenship and adult protection in the UK: an exploration of the conceptual links", [The Journal of Adult Protection](#), Vol. 14 No. 4, pp. 163-175
- Usher, R. and Stapleton, T. (2018). Overview of the Assisted Decision-Making (Capacity) Act 2018. *Irish Journal of Occupational Therapy*, 46(2), pp.130–140.