Journal Article:

Adult Protection in Scotland in 1857 and in 2015: What have we learned?

(Conceptual paper)

Abstract

Purpose: The purpose of this paper is to compare recent developments in adult protection legislation, policy and practice in Scotland in 2015 with the first attempts at adult protection of adults at risk of harm, in 1857-62, with a particular focus on people with learning disabilities.

Design/methodology/approach: The paper uses comparative historical research, drawing on primary archive material from 1857-62 in the form of *Annual Reports of the General Board of Commissioners in Lunacy for Scotland* and associated papers.

Findings: Growing public awareness of the extent of neglect and abuse, and the need for overarching legislation were common factors in the development of both the "The Lunacy Act" of 1857 and the Adult Support and Protection (Scotland) Act of 2007. Both pieces of legislation also had the common aim of "asylum", and shared some other objectives.

Practical implications: Total prevention of abuse of vulnerable adults is an aspiration in law and in policy. There is an evidence base of effectiveness however in protecting adults at risk of harm from abuse. Some ecological factors recur as challenges to effective safeguarding activity. These include problems of definition, uncovering abuse, enforcing legislation, evaluating impact, and protection of people who are not a risk of harm to others.

Originality/value: This paper compares common themes and common challenges in two separate time periods to investigate what can be learned about development of legislation and practice in adult protection.

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Keywords: Adult protection, legislation, historical research

Introduction

This paper will discuss the following questions:

- What lessons can be learned from first attempts to regulate care for adults at risk of harm in Scotland?
- What are the common themes and recurring challenges of adult protection across the two time periods?

Background to the legislation

Scotland has developed overarching legislation for the protection of adults at risk of harm. This is built on existing legislation, filling gaps relevant to adult safeguarding to make provisions that overcome the acknowledged failings. (Campbell, Hogg & Penhale, 2012). There are some common themes in the principles underpinning legislative change in the 1850s and the early part of this century, and there are also some long standing challenges to implementing effective adult protection in both periods. The success of the safeguarding activity in reducing risk is one measure of such effectiveness.

The concept of "asylum" is common to both pieces of legislation, in the original meaning, denoting protection, from the Greek *asylos* ("inviolable, safe from violence"). In 1857 legislators reviewed the evidence and were confident that building regional asylums would improve the quality of life for "lunatics" in Scotland and place them, "*in a position of comfort and protection*" (1859, Journal of Mental Science). The 3rd Annual Report of the Commissioners in Lunacy for Scotland (1861) noted that:

> "*an asylum becomes the best security for the provision of humane and appropriate treatment, by facilitating their removal from the influences of unfavourable circumstances whenever, through the ignorance or callousness of parochial authorities or the perverse conduct of relatives" (p.181,* General Board Of Commissioners In Lunacy For Scotland, 1861)

Similarly, the Scottish Government were convinced of the case of a change in legislation in 2007, "*for the purposes of protecting adults from harm*", (Scottish Government 2007) including those with mental health problems and learning disabilities.

There is an existing, well detailed literature on the history of adults at risk of harm and their treatment and care in Scotland, in relation to what we now know as adult protection (for example: Campbell, 1932; Anderson & Langa, 1997; Atkinson, Jackson, & Walmsley, 1991, 1997; Bartlett & Wright, 1999; Brigham, Atkinson, Jackson, Rolph & Walmsley, 2000; The Open University, 2013; Barfoot, 2009; Clapton, Cree & Smith, 2013; Burham, 2012). This paper is not an attempt to summarise this work, or to comment on it.

Instead, some parallels will be drawn here between policy and practice around the time of the introduction of 1857 The Lunacy Act and now, with use of illustrative examples. Historically, policy and practice have tried to minimise prevalence of abuse in two ways;

principally by increasing the reporting of abuse, and by raising public awareness about the risks of harm. The total prevention of abuse of vulnerable adults is an aspiration in law and in policy. Although this may not be an achievable goal in practice, there is an increasing evidence base of effective strategies to protect adults at risk of harm and a number of ecological factors have been identified as important in making abuse more or less probable (Hollomotz, 2009; ADASS, 2011; Penhale, Perkins, Pinkney et al, 2007).

Identifying common elements that contribute to abuse and its prevention is one of the best ways of developing effective adult protection policy and practice. This is a shared finding from research on abuse of children, adults and older adults Cambridge et al (2006); Biggs et al. (2009); Campbell-Reay & Browne (2001); McCarthy & Thompson (1996).

The Act for the Regulation of the Care and Treatment of Lunatics, and for the Provision, Maintenance, and Regulation of Lunatic Asylums in Scotland (known in short as "The Lunacy Act") was received Royal Assent on the 25th of August, 1857 and came into operation on 1st January 1858. The Act resolved unworkable inconsistences in existing legislation of 1815, 1828 and 1841, set clear definitions of "lunacy" and obligated public institutions to keep statutory books and registers. It also set forward a programme for building of asylums.
The Act was a result of an Inquiry Report by Her Majesty's Commissioners. (Royal Lunacy Commission, 1857). This report was written between 1855-57 following growing concern about provision and treatment of people with mental illness and learning disabilities, in public asylums and at home, and the inability of the existing law to protect them. For example:

Mr B. Ellice, MP for St Andrews, speaking in parliament on 29th May 1857 said of the inquiry report:

> *"He was ashamed to admit that in Scotland unfortunately the state of things had been lamentably different [from England]. In Scotland, instead of a Board of Commissioners specially appointed to take care of lunatics, their charge had devolved upon the Sheriffs of counties and the Board of Supervision, …….Although no doubt the abuses which had sprung up were in part to be attributed to the unsatisfactory and unprecise state of the law, … he should have unfortunately to charge the authorities to whom he had referred with an almost total neglect of the duties which were incumbent upon them under the law*." (*p.1021*, Hansard, 1857)

The Inquiry Report (1855-57) was prompted by detailed accounts of abuse and organisational incompetence, observed and reported to the British Government by Dorothea Dix, an American campaigner who had visited the existing royal asylums and private

madhouses in Scotland (Tiffany, 1890; Gollaher, 1995). Her influence led to the formation of the General Board of Commissioners in Lunacy for Scotland to oversee reforms in services.

The Adult Support and Protection (Scotland) Act was introduced in 2007, 150 years later, again following growing public concern about treatment of people with mental illness and learning disabilities, in long term NHS and local authority provision and at home. The 2007 Act was developed in response to several high profile cases and the awareness of the prevalence of abuse of vulnerable adults over a number of years throughout the UK. Over the 150 years, there has been evidence in the literature of the endemic and systematic abuse in long term institutions, the scale and severity of which was only formally recognised when definitions and public attitudes towards people living in these institutions changed (Kitson, 2008; Fyson, Kitson & Corbett, 2004; Cooke, 1989; Cooke & Sinason, 1998; Blatt,1969, 1970; Dept. of Health and Social Security,1969; Benbow, 2008; Plomin, 2013). The Scottish Law Commission published a report in 1997, making recommendations to protect the welfare and property of "*vulnerable adults*" (*p.iv,* Scottish Law Commission,1997). Although this report highlighted shortcomings in the law in relation to adult protection, it did not result in a change in legislation. The call for changes increased steadily however, with an increased recognition of abuse and a significant research and practice focus (NHS Scotland, 2004; Wishart, 2003).

A watershed enquiry into the case of a woman with learning disabilities brought the concerns of practitioners, policy makers and the public to a head (MWC/SWSI, 2004). The woman was living in a domestic setting and had suffered physical and sexual assaults over several years. It became apparent that Scottish agencies including the police, social services and the NHS had been aware of chronic abuse but had taken no action. In the enquiry that followed, three men were convicted of rape and assault and imprisoned, and failures came to light about lack of communication, failure to respond to harm and abuse, and failures in multiagency collaboration that had allowed three people to be seriously sexually abused and another to be seriously physically neglected over a period of 30 years (MWC/SWSI, 2004; SWSI/MWC, 2005; Hogg, Johnson, Daniel & Ferguson, 2009, 2009a).
The implementation of the 2007 Act has had a profound impact on how safeguarding activity is organised in Scotland, as it *obliged* agencies to work together in prescribed ways on safeguarding activity, and to report systematically on the effectiveness of this activity. Legislation, policy and practice in this area continues to be developed (e.g. Scottish Government, 2015, 2015a).

Context and terminology

Although some common themes in the two pieces of legislation will be identified, it is necessary at the outset to highlight some fundamental differences between the Lunacy Act of 1857 and the 2007Act, including the context in which they were written and the terminology used.

Many of the terms used in the 19th century to classify individuals are today shocking and derogatory, e.g. lunatic, imbecile, idiot, maniac, mad and insane person. It is important to remember however that this was the medical and political terminology of the day and the classifications on which policy was devised. A comparative historical approach has been used in this paper. Although primary sources have been used, and quoted where appropriate, the content and emphasis in these reports will reflect the views of authors. So although the factual content may be accurate, the selection of facts may be influenced by social and political attitudes of the time.

Issues of capacity and consent, so central now to definitions of abuse and protection, were never considered in the 1857 Lunacy Act. It was assumed that if a person had a mental disorder they would be incapable of making any decisions or of managing their affairs. We have moved from that to a position where protection interventions are assessed on whether they are lawful and least restrictive of the adult's freedom.

The 1857 (Scotland) Lunacy Act, and the English Lunacy Act 1845 which preceded it, did not differentiate between people with a mental illness and those with a learning disability. There was an acknowledgement of different *classes* of lunatics, and there were some differences in treatment, but specific services for people with learning disabilities, for example, was only legislated in The Mental Deficiency and Lunacy (Scotland) Act, 1913.

The 1857 Lunacy Act defined those covered under the Act as:

> "*persons who by reason of mental unsoundness are unfit for the management of themselves or their property are termed (1) furious or (2) fatuous persons and (3) lunatics, the first of these terms applying to maniacs the second to imbecile persons and idiots and the last to insane persons generally" (p3,* Royal Lunacy Commission, 1857*).*

Four "classes" of lunatics are distinguished in this report: dangerous, pauper (including fatuous paupers), criminal, and foreign paupers. A further distinction is made, which is relevant to people with learning disabilities:

> "*Weak minded persons (under Poor Law Amendment Act) are a different class from fatuous persons classed with the insane as proper subjects for confinement in madhouses*" (*p24*, Royal Lunacy Commission, 1857).

The term "*fatuous persons*" recurs in much of the early papers leading up to and including 1857 Lunacy Act. A distinction is sometimes made between "fatuous" and other classes of lunatics, but this is not always the case. There are references to the definition in Statute to "*mean and include any mad or furious or fatuous person*" and the requirement for annual licences "*for the reception and the care and confinement of furious and fatuous persons and lunatics*" (General Board of Commissioners in Lunacy for Scotland, 1859).

The lack of clear differentiation between mental illness and learning disabilities makes it very difficult therefore to make direct comparisons in the law, as it relates to adults, in policy and in practice with the services in 1857 and now. It is possible to review some of the discussion and statistics however, and to analyse the early development of adult protection services for people with learning disabilities as a distinct strand.

> "*There is however this essential difference between the treatment of such imbeciles and that or recognised lunatics, that whereas the latter are detached in asylums in accordance with the Statute the imbeciles are deprived of liberty….weak minded paupers are either deprived of liberty without proper warrant, or they are left at large, to sink, in too many cases, into abject misery*." (*p.479*, General Board of Commissioners in Lunacy for Scotland, 1859)

Differences

The 1857 Lunacy Act and the 2007 Act were written and introduced for very different reasons. The development of the Lunacy Act in 1857 had little to do with collective social conscience or assessed clinical need and much to do with public outcry, economies of scale, political considerations and a fight for control between the Royal College of Physicians of Edinburgh and the Royal College of Surgeons of Edinburgh. Both of these professional bodies sought recognition as the main authority for diagnosing and investigating lunacy, and for inspecting lunatics who had been "confined" in public and private settings (Barfoot, 2009).

In the planning stages of the Lunacy Act, the cost of the new model of services was of prime importance, but other factors were taken into account also: "*Treatment ought not to be considered from the sole point of view of economy, but to be tested by humanity and medical science*" (*p.xiv*, Royal Lunacy Commission**,** 1857).
Two years later, when it came to the actual building and development of regional asylums however, it is more apparent that both the evidence base and the value base of the Commissioners in Lunacy for Scotland were very different from what we now consider best

practice. Financial considerations played a crucial role in the arguments for change, for example:

> "*With due arrangements there is not, in our opinion, the slightest sanitary objection to massing six hundred patients together, while economically the gain is self-evident*." (*p.475*, General Board of Commissioners in Lunacy for Scotland, 1859)

The development of designated "lunatic wards" within existing poorhouses, as a temporary measure, and the building of district asylums in the longer term were both seen as savings to the costs being paid by local parishes. This was the main motivation in most cases, rather than any humanitarian rationale. Another crucial difference between the development of the legislation, in 1857 and in 2007, was the powerful influence of socio-economic class in the 19th Century (General Board of Commissioners in Lunacy for Scotland, 1859).

In Scotland on 1st Jan 1858 the total number of insane persons was given as 5748, consisting: 2380 in Public Asylums, 745 in Private Asylums, 839 in Poorhouses, and 1784 in private houses (1859, Report of Commissioners First Annual Report). The building of public or "district" asylums proposed in the 1857 Act was *in addition* to the existing private and charity-funded royal asylums, in which patients were from upper social classes.

In The Lunacy Act, commonly held assumptions about a relationship between lower social classes and mental illness and learning disabilities are evident:

> *"In a population of 79887 paupers, 3904 were insane or fatuous poor, showing the powerful affinity that exists between poverty and mental disease. Each is reproductively productive of the other, and alternatively cause and effect."* (*p.37*, Royal Lunacy Commission, 1857)

There are, therefore, some significant and fundamental differences between the 1857 Lunacy Act and the 2007 Act in terminology, in the rationale and objectives of the legislation and in the context of attitudes to mental illness and learning disabilities. So what are the common themes that emerge in legislation, policy and practice from an analysis of the two time periods?

Common themes

Given the 150 year gap between the two Acts and the changes in attitudes, care services and social conditions that have occurred during that period, it is not surprising that there are more differences than similarities between the two pieces of legislation. There may,

however, be some lessons to be learned by a comparison between the first and the most recent attempts to protect adults at risk of harm.

The overarching aims of both pieces of legislation have similarities. The 1857 Act repealed existing statutes and established a new code, "*framed to meet the many pressing wants of the community*" (*p.255*, Royal Lunacy Commission**,** 1857). The "*wants of the community*" is a reference to the growing need for services for vulnerable adults. The 2007 Act made new legislative and multi-agency provision to protect adults who are unable to safeguard their own interests and who are at risk of harm, self harm or neglect.

One of the main objectives for both the Lunacy Act (and the Lunacy Inspection Reports which followed) and the 2007 Act was to make the case to protect individuals from neglect or abuse where they lived. In the Lunacy Act, there was assessment through the visits of Medical Commissioners or Deputy Commissioners (Lunacy Act Inspectors), and removal to the asylum where necessary; in the 2007 Act there are assessment orders (allowing an adult at risk of serious harm to be taken to a more suitable place in order to conduct an interview and/or a medical examination), removal orders (allowing an adult who is likely to be seriously harmed to be moved to a suitable place for up to 7 days) where the person is at serious risk in their existing accommodation, or banning orders, (to prevent individuals who pose a serious risk of harm to the person from visiting that accommodation) (ASP Act, 2007). The multi-agency processes of assessment and removal are carefully regulated by the 2007 Act, whereas there was greater risk of abuse in the processes of removal from the home, admission and detention in asylums under the Lunacy Act as decisions were taken by individuals rather than teams.

There are shared issues also in trying to evaluate the "success" of implementing the Lunacy Act and the 2007 Act. By definition, it is not possible to show empirically that any actions as a result of enacting legislation have resulted in prevention of harm, i.e. although we may believe it to be the case and have case study evidence, there is no experimental method of demonstrating that harm has *not* happened because of interagency implementation of the 2007 Act, or because of inspection and other actions by Commissioners implementing the Lunacy Act previously.

An evaluation of the effectiveness of safeguarding activity must ask the question: "Do those at risk of harm feel safer because of this activity?" The best evidence available to evaluate success or benefits of the 2007 Act are reports that follow cases from referral through to outcome, and evaluate self-reported improvements in the quality of life for the individuals involved. These are reported in Self Evaluation Reports in the Scottish Adult Protection

Committees' Biennial Reports. See for example, City of Dundee Adult Support & Protection Committee (2014); Hogg, & May (2011).

There are "degrees of success" in adult protection, and it is rarely clear cut or complete. For example:

> "*In the one case in which the perpetrator was prosecuted and gaoled, police moved swiftly on allegations by the social work department searching the perpetrator's premises and interviewing a number of people with intellectual disabilities.*" (*p.41*, Hogg et al 2009)

> "*No alleged perpetrator in family settings was prosecuted though three were interviewed by the police and two had their case referred to the procurator fiscal*." (*p.22*, Hogg et al 2009)

In the period 1857-60, evaluation of "success" of safeguarding activity was less sophisticated, and with a different emphasis. There were comparisons made with costs to individual Parishes (Parochial Boards) before and after the Lunacy Act and there were also statistics recorded for the increased numbers of individuals in District Asylums, for whom it was argued there was more protection from neglect and abuse. One other measure used was "*mortality, the surer test of good management*" (p472, General Board of Commissioners in Lunacy for Scotland, 1860). The rates of mortality in lunatic wards of poorhouses and in the (new) District Asylums were compared between 1858-1860 and were found to be significant lower for both men and women in the asylums. In 1860 mortality was 10.3 per 100 Residents for men in asylums, 7.5 for women; in poorhouses it was 22.5 and 11.3 respectively (General Board of Commissioners, 1861). These may be shocking by modern standards, but as comparative improvements they were significant.

As with the 2007 Act, the most convincing evaluation measure for the period was detailed case study reports. Although these are not organised or evaluated collectively, as in the Adult Protection Committee Biennial Reports, each General Board of Commissioners report contains a large number of individual case studies, as illustrative examples of what Commissioner found, and any "success" of their actions in adult protection activity (Given as appendices in, "*General Reports on the Condition of Single Patients*" in each of the General Board of Commissioners Reports 1859-62).

These are narrative reports and the style of writing varies by Commissioner. In justifying the inclusion of these reports the Commissioners state in the 1859 Annual Report:

> "*It may possibly appear that we have described an unnecessarily large number of cases, but we consider it of great importance that the extent and magnitude of the evil should*

> *clearly appear*." (*p.447*, General Board of Commissioners, 1859)

It is clear from these reports that the extent of neglect and abuse is worse, much worse, than what Commissioners expected to find and many of the cases are truly shocking, by any standards.

Similar to the evaluation of success of modern-day adult protection activity, positive outcomes for the "*Condition of Single Patients"* can be seen in varying degrees on a spectrum of success, rather than in black and white. There are some cases where the Commissioners appear powerless to make any change:

> "*our endeavours to remove MM who has been strapped down in bed for a period of more than ten years have proved abortive, and the patient appears destined to drag out a painful existence in a manner disgraceful to humanity*." (*Appendix E* (Visits to single patients) General Board of Commissioners, 1861)

> *"their condition is frequently most deplorable; and we (Commissioners) were too often painfully conscious of our inability to improve it."* (*Appendix E* (Visits to single patients) General Board of Commissioners, 1859)

There are accounts of many cases where safeguarding and quality of life, as we would know them now, have been improved, for example by making recommendations for simple improvements in existing care arrangements or by employing a carer, usually a neighbour.

> *"Case DH: Living in Lybster (age 20). At age 14 he was "greatly alarmed at sea". Now imagines that people are trying to poison him. Moved to a small cottage, where he prepares his own food and uses his own well/water supply. Mother receives 12s 6d per quarter."* (*p.70*, Wick Parish Records, 1859)

In more serious cases, the recommendation has been to protect the person by removing him/her to the nearest available asylum. In 1860 there were 1229 applications for admission to public asylums under the Lunacy Act; 250 were refused and 979 were granted (General Board of Commissioners, 1861).

In reading all of these case studies in Commissioners reports, it is important to remember that then, as now, improvement is relative, rather than absolute.

> Visit by Lunacy Act Deputy Commissioner 18th August 1860, subsequent to first visit 24th February 1860: "*A great improvement*

> *has taken place in the accommodation provided for this patient, living at home. The pig has been removed [from his room].*" *Appendix E* (Visits to single patients) Extract from Inspectors Report, General Board of Commissioners, 1860

Ongoing Challenges

Perhaps the most valuable comparisons between the two Acts, in 1857 and 2007 come from an analysis of the challenges to successful adult protection legislation and practice which faced Commissioners in 1857 and still persist today.
In reading reports on the implementation of both pieces of legislation it is clear that there were and are difficulties in defining those adults who are to be protected and the mode in which the law is to be administered (Royal Lunacy Commission**,** 1857; General Board of Commissioners, 1858, 1859, 1860; Scottish Government, 2012).

Although the 2007 Act has assessment, banning and removal orders and a clear code of practice on how these are to be implemented, it has no compulsory powers, requiring adults at risk of harm to accede to these protective powers of the legislation. (These orders can be implemented without the vulnerable adults' consent, however, in cases in which the victim is under "undue influence" or has been "unduly pressurised" by the perpetrator. In such cases, where an adult has capacity and refuses to consent to the order**,** the local council must prove that the adult has been **"**unduly pressurised**"** (Sections 35 (3) and (4) of the 2007 Act). These elements have been commented on as a potential weakness in this legislation and the Code of Practice (Keenan, 2011, Scottish Government 2009).

The Commissioners of 1860 commented on similar problems of administering the Lunacy Act.

> "*notwithstanding the difficulties which have occurred in carrying out the provisions of the Statute. The difficulties referred to relate principally to the statutory definition …. and the wont of compulsory powers…" (p.472,* General Board of Commissioners, 1860)

This quote also makes reference to difficulties in defining the "target" population who were the intended beneficiaries of the legislation. Although the Lunacy Act made provision for protection of individuals, "*as regards [his] own personal safety and conduct, or the safety of the persons and property of others or of the public*", it was much more difficult to apply the law effectively in cases where an adult's behaviour posed a risk of harm to him/herself, rather than a risk to others.

In other cases where the degree or seriousness of the harm was an issue, it was difficult for Commissioners to act:

> "*No one seems accountable, unless in those exceptional cases where there is such gross neglect as to call for the intervention of the common law….When treatment does not amount to a crime although it may come close to it, you have no power whatever*." (*p.191*, Royal Lunacy Commission, 1857)

Besides making arrangements for local support, there were three main "removal" recommendations made following visits by Medical Commissioners or Deputy Commissioners (Lunacy Act Inspectors). These were removal:

- *"to asylum of curable cases who could be restored to sanity, or improved in mental health."*
- *"of those who were a danger to themselves or to others."*
- *"of those who could not be cared for at home."*

If individuals were not defined as "*dangerous*" however, they were, in practice less likely to receive support. In the Commissioners reports there is reference to cases of "lunatic imbeciles" and "harmless idiots", in the language of the day, living in dire circumstances. Both the 1861 and 1862 reports repeat the point from the 2nd Annual Report (1860) about problems of definition; if a person was not classified as a danger to others he/she was often not treated or supported under the 1857 Act. Similarly there was a considerable discrepancy between the number of people reported as meeting the criteria for inclusion under the Act by Board of Supervision Inspectors and the number initially reported by local Constabulary (Royal Lunacy Commission,1857).

There are parallels here with the 2007 Act and its implementation. Under the Act, "adults at risk" are those who:

(a) are unable to safeguard their own well-being, rights or other interests *and*

(b) are at risk of harm, *and*

(c) because of disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected. (ASP Act 2007 Part1 3 (1)

It is important to note here that all *three* of these criteria must be met in this definition for a person to be defined as an "adult at risk".

Reports from Adult Protection Committees make it clear that Police are the main referring agency in most areas in Scotland with respect to adults at risk of harm (Scottish Government, 2012). In one study of police referrals to adult protection teams, (Campbell, 2013) it was found that a significant proportion (40%) of Cause for Concern reports from Police result in "*No Further Action*" decisions by adult protection teams. The main reason for no further action was that all three of the threshold criteria ((a)-(c)) above had not been met. There were some variations in interpretation of these criteria also. Of the three criteria used to decide if a referral should result in further adult protection measures, criterion (b), the person being "at risk of harm," was very seldom cited. Many of the cases referred by Police involved individuals who were at risk of self harm, and neglect, rather at risk of harming others. Misuse of alcohol and a combination of alcohol/drug misuse and mental health issues were major contributory factors in a number of Cause for Concern referrals from Police. Similarly, referrals involving threats of self-injury and/or suicide featured in a significant number of referrals. In relation to this, there is an emerging literature on adult protection in relation to self-neglect and self-harm in Scotland and elsewhere (SCIE, 2001; Braye, Orr & Preston-Shoot, 2015a, 2015b, 2015c).

In the Biennial Reports produced by each Adult Support and Protection Committee for the Scottish Government there is also evidence that this lack of appropriate support is an issue for some. For example, in an audit of practice conducted by one of the largest of the Adult Protection Committees areas it is noted that:

> "*there was a perception held about there being a number of 'inappropriate' ASP referrals, most of which came via the Police. A large volume (1,049 (72%)) of the Police referrals were related to vulnerable clients without clear protection issues being recorded*." (*p.60*, Glasgow City Council, NHS Greater Glasgow & Clyde et al. 2012)

Similarly in the Dundee City Report of 2012 it is recommended that Police and the Social Work Department should develop a referral system that "*clearly differentiates cases that meet the three criteria defining an adult at risk of harm under the Act from those involving other adult concerns*" (*p.2*, ASP Committee Dundee, 2012).

There are also several other, more minor comparisons to be made between the 1857 and the 2007 pieces of legislation. The introduction of the Lunacy Act in 1857 brought very variable progress in implementation across Scotland. For the purpose of the 1857 Act, Scotland was divided into eight "Districts", with the intention of an asylum being built or adapted in each. There were considerable changes to this initial plan, some related to procuring land and the building of asylums, and some to the practicalities of having eight

districts. Following changes allowed under one clause of the Act, the local Prison Boards acted to split the country into 21 districts (General Board of Commissioners in Lunacy for Scotland, 1859).

The 29 Biennial Reports produced for the Scottish Government the Adult Protection Committees in Scotland in 2010 and 2012 identified regional and practice variations in how the 2007 Act was being implemented and how data was being collected and used. There have been further developments, with the establishment of a number of *joint* Adult Protection Committees, combining smaller areas, and joint Adult/Child Protection Committees in some local authorities.

This paper began by stating that Scotland has a well-developed, overarching legislation for protecting adults at risk of harm. The policy frameworks that led to the current legislation in Scotland and in England have significant differences. At the heart of Scottish legislation has been the protection of *individual* rights; The Scottish legislation has been praised for bringing to the attention of care services individuals who would otherwise have remained "hidden" from care services. Some of the innovations of the Adult Support Act in Scotland will be incorporated in the new Care Act (2014) in England. It introduces new safeguarding measures, for example, to make adult safeguarding boards statutory, similar to the Scottish model, and to make it a duty of local authorities to make safeguarding enquiries.

In the 1860s the positions regarding innovative legislation were reversed: the Lunacy Act of 1845 and the County Asylums Act the same year reformed English law, introducing the regulation of asylums and the important concept of "patients", and the Scottish legislation took this as a lead in 1857.

The ease with which the legislation was introduced in Scotland was commended in England:

> "*The Commissioners have successfully applied the powers in trusted to them ....Our countrymen north of the Tweed are not so tied in red tape, and seem to trust more to their own unaided common sense and good intentions, than we are permitted here in the south to do."* (*p.465*, British Journal of Psychiatry, 1860)

Although the difficulties of implementing the new law in more rural Scotland were also recognised by English policy makers:

> "*[the Scottish Commissioners] have to hunt the misery in its humblest retreats, in the wretched wynds of old burghs, in the shanties of the inhospitable mountain side, or the hovels of the bleak and desolate islands of the*

western coast" (*p.180*, British Journal of Psychiatry, 1861)

Summary

Evaluating the impact of the Lunacy Act in Scotland almost 160 years after its introduction, it is easier to identify the many deficiencies of the law and its implementation than to see how it pioneered adult protection activity and individual rights. It is difficult not to be distracted by the terminology and level of neglect and mistreatment in the 19th century and to focus instead on the advances achieved by the Lunacy Act.

The Lunacy Act introduced in 1857 and the Adult Support and Protection (Scotland) Act in 2007 both had the aim of offering "asylum" in the sense of protection and both had a significant impact on the level and organisation of safeguarding activity in Scotland. Asylums, as long term institutions, became discredited, some of them the very antithesis of humane protection, between 1860-1960 and beyond. The term asylum now has very negative connotations in relation to people with mental illness and those with learning disabilities.

This conceptual paper has attempted to draw some parallels between the introduction of the Lunacy Act of 1857 and the Adult Support and Protection Act of 2007. Common ground in the circumstances that led to the introduction of the two pieces of legislation have been identified, and a comparison made between how the two have been administered and evaluated.

Ongoing challenges for the 2007 Act include difficulties in definition and lack of compulsory powers. There is also the issue of the continuing vulnerability of those who individuals who are principally a danger to themselves rather than to others, through self neglect and self harm. All of these challenges were also faced in administering the Lunacy Act in 1857.

In conclusion, there is a growing evidence base how adults at risk of harm can be protected. Some factors recur as challenges to successful adult protection and there may be lessons from history that can help policy makers and practitioners to focus resources to reduce abuse of adults at risk to the greatest extent possible.

Optimistically, what was said in relation to the 1857 Act could apply equally to the 2007 Act:

"*The work is already well forward, and has only to be persevered with in the same spirit in which it has hitherto been carried out*."
(*p.478*, *The Journal of Mental Science,* 1859,*).*

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