SMHLR

SCOTTISH MENTAL HEALTH LAW REVIEW

Final Report

Executive summary and recommendations

September 2022

Contents

Chapter 1: A law built on equality and human rights

1.1:Human Rights

The Review was tasked with improving the rights and protections of people who may be subject to mental health, incapacity or adult support and protection legislation because of a mental disorder. We had to consider how equal and non discriminatory enjoyment of rights can be achieved and make recommendations that give effect to the rights, will and preferences of the individual

To achieve this , we recommend going beyond changes to the law as we currently know it. We consider more radical change is needed to deliver mental health, capacity and adult support and protection law that is grounded in human rights.

Human rights law and principles do not exist in a vacuum. To be meaningful and effective, they must be known, understood and put into practice at all relevant moments. Often, rights are inter-related and incapable of enjoyment without effective realisation of other rights, for example, social and economic rights often underpin meaningful enjoyment of civil and political rights.

Our work involves improved awareness (for the public and practitioners), participation by those with all types of relevant lived experience, dissemination of good practice (not requiring changes in the law) and improved and shared vocabulary (continuing to move away from the language of deficit and discrimination). Finally, it will require changes in the law. Our work may well lead to significant change, but it is also likely to require some changes to be made in stages,

Throughout the report we explain what we think these changes should be and how they could be achieved. We need to remember, however, when considering all these

changes is that we are talking about people. People who are impacted by changes made to legislation and practice in mental health, capacity and adult support and protection law. People who should be treated with care and compassion.

We are looking for a shift in the law from one which is primarily focussed on authorising and regulating actions which may limit a person's autonomy, to one where a person's rights are respected, protected, enabled and fulfilled. This will require a culture change, building on legislative changes, to develop safe compassionate respectful relationships between professionals and people with lived experience including unpaid carers, between professionals and other professionals and with respect to relationships between people with lived experience.

The recommendations for change made throughout this report need to be developed and taken forward with full and equal participation of people with lived experience of mental or intellectual disability, including unpaid carers. It is only by sitting alongside and learning from people with such experience that we can truly improve the daily experience of those affected by the issues we are trying to resolve.

We are aware that resource is huge issue. Our recommendations will require significant input in staffing and service delivery. We recommend consideration be given to human rights budgeting by the Scottish Government across mental health and capacity law and practice.

1.2: Equality

The right to equal treatment for those with protected characteristics such as race, disability or sexuality is enshrined in law in the Equality Act 2010. Despite this we heard from many people who had worked with , or been subject to mental health and incapacity legislation, many of whom felt discriminated against due to a protected

characteristic. The consistent message we heard was that much more needs to be done to achieve equal and non discriminatory enjoyment of rights.

All the groups we spoke to described a shared general experience of discrimination, hate and harassment. Although they may have different needs, they have encountered similar experiences under mental health and incapacity law.

The Mental Welfare Commission Racial Inequality in Scotland report is the first such research into the experiences of ethnic minority people in the mental health system. It provides a stark insight into the multiple barriers faced by people. The findings from our discussions reflected the findings of the MWC and reinforce the disparities about how the law is applied to ethnic minority communities.

Our engagement has shown us that ethnic minority people are more likely to experience poor mental health and need interventions from services, but because of certain barriers, they are less likely to receive the support and treatment they need. The reasons for poorer physical and mental health are multifaceted and it is critical that services understand the reasons behind this in order to provide appropriate support.

We discuss in chapter 9 how orders under the Mental Health Act have been used disproportionately with different ethnic communities. Steps need to be taken to address this issue. There may also be a need for targeted approaches for other communities which are discriminated against. For each community, there will be a need to link developments to that community's own sense of identity and culture, in addition to universal approaches to improving the application of the law and experiences of services for all.

There are also challenges around language and communication, cultural awareness and stigma. We reflect on the need for training and awareness raising, diversity in the workforce and in the third sector. And the need to ensure the Public sector

equality duty is fully adhered to, and public bodies held properly accountable for doing so.

Chapter 1: recommendations

Recommendation 1.1: The Scottish Government in taking forward recommendations from this Report, should do so with the full and equal participation of persons with lived experience including unpaid carers with lived experience.

Recommendation 1.2: The Scottish Government should work with people with lived experience, including unpaid carers, to reach agreement as to how our recommendation for full and equal participation of people with lived experience, including unpaid carers, can be achieved in the future.

Recommendation 1.3: The Scottish Government should provide resource to ensure people with lived experience and unpaid carers with lived experience can participate in work to implement recommendations on an equal footing with others.

Recommendation 1.4: The Scottish Government should adopt a human rights-based approach to budgeting for mental health and capacity law and services.

Recommendation 1.5: The Scottish Government should ensure that all recommendations in this report be implemented in such a way as to protect, respect and fulfil the rights of those with protected characteristics equitably.

Recommendation 1.6: The Scottish Government should consider addressing racial discrimination in relation to coercion in mental health services through a

targeted approach which develops the PCREF approach , with monitoring and enforcement through the Equality and Human Rights Commission, the Mental Welfare Commission, the Care Inspectorate and Healthcare Improvement Scotland.

Recommendation 1.7: The Scottish Government should consider legislation which requires public authorities to ensure that practitioners and paid carers are adequately trained to recognise and address racism, including structural racism.

Recommendation 1.8: The Scottish Government should promote the Equality Act and UNCRPD duties to collect data on protected characteristics and should ensure this data is disaggregated in a way which evidences the inequalities experienced by geographically and culturally distinct groups.

Recommendation 1.9: The Scottish Government should strengthen accountability for public bodies delivering mental health services where they fail to demonstrate progress in relation to equality outcomes in accordance with Regulation 4 of the Equality Act 2010 (specific duties) (Scotland) Regulations 2012.

Recommendation 1.10: The Scottish Government should consider steps to improve the recruitment and retention of ethnic minority staff, across different professions within mental health services.

Recommendation 1.11: The Scottish Government should consider the additional needs for remote and rural communities to enable delivery of mental health services on an equitable basis.

Recommendation 1.12: The Scottish Government should resource and empower leaders of Scotland's minoritised ethnic communities to lead in finding, developing and implementing solutions which ensure access to mental or intellectual disability services for their communities.

Chapter 2: What is the purpose of the law and who is it for?

2.1:What is the purpose of the law and who is it for ?

The primary focus of mental health and capacity law at the moment is on authorising and regulating actions which encroach on an individual's autonomy, such as detaining them for treatment, or appointing another person to make financial and welfare decisions on their behalf. It is generally not concerned with ensuring that wider human rights are met.

We believe this should change, to reflect Scotland's new approach to human rights, as described in the introduction to this report which, for the first time, puts in a single place the range of internationally recognised human rights-civil, political, economic, social, cultural and environmental.

Our consultation proposed a new purpose for mental health and capacity law: **to ensure that all the human rights of people with a mental or intellectual disability are respected, protected and fulfilled.**

Our consultation found almost universal support for a human rights approach to the law , and strong support for the proposed purpose.

Our suggested purpose is ambitious, but we believe it is right to be so. We have been told by many of the 'implementation gap ' between the stated aspirations for mental health services and the reality on the ground. We believe this is an argument for stronger legal duties, not the status quo.

People suggested to us that law to secure wider human rights for people with mental disabilities is unnecessary or even discriminatory when the Scottish Government has plans to secure human rights for everybody. This does raise complex issues both of principle and of practicality.

We do not know yet exactly how the proposed Human Rights Bill will work. It may be that some of the changes we want to see will be addressed by it. But we do not think that will be enough.

We have received compelling evidence of the discrimination and unmet need affecting people with mental disabilities. Even in access to health care, the longstanding commitment to 'parity of esteem' remains an ambition rather than a tangible reality.

And we know people with mental disabilities face particular barriers in accessing their rights and, however the law is framed, are more likely than others to have decisions taken on their behalf. It is a core principle of human rights practice that human rights are indivisible so we believe that any legal framework governing non-consensual care must accommodate wider human rights requirements.

So we believe mental health and capacity law will need explicitly to address and enshrine human rights – but the precise balance and relationship between the universal human framework to be developed in the proposed Human Rights Bill and the specific provisions of mental health and capacity law will need to be worked through over the next few years.

2.2:Who is the law for ?

At present the law is predicated largely on the concept of 'mental disorder'. If you come within the definition of mental disorder the legislation may apply to you. If you

do not, it does not. Mental disorder however is regarded by many as a stigmatising and offensive term. And the diagnostic criterion of mental disorder has been criticised as being a violation of the UNCRPD anti-discrimination requirements in relation to the right to exercise legal capacity (Article 12) and the right to liberty (Article 14). However for detention to be lawful under Article 5 of ECHR, it must fall within one of the specified categories where detention is allowable – in this case because of 'unsound mind'. ECHR caselaw (the Winterwerp ruling) has established that lawful psychiatric detention requires objective medical evidence of a 'true mental disorder'.

We believe that mental health and incapacity law needs to be reformed as a supportive piece of legislation and based on non-discriminatory grounds. We recommend removing the current capacity and SIDMA tests and replacing them with a test of Autonomous decision making as detailed in Chapter 8 . The threshold for compulsory measures of care and treatment is set out in Chapter 9

The gateway to access the rights anticipated to be provided by new legislation should be wide enough to ensure those in need of help and support can access it appropriately. Access to these rights and related support must not be conditional on an "incapacity test" or other similar threshold being met. We need to move away from a definition focussed on a diagnosis the gateway to legislation that includes support and other measures relating to persons with mental or intellectual disability should be something like :

A person with a mental or intellectual disability whether short or long term.

We intend this to be an inclusive definition. It could apply to anyone who needs support arising from any aspect of their mental health or cognitive functioning. This would include people with a diagnosis of mental illness (including dementia), personality disorder, or an intellectual disability. It could potentially apply to an

autistic person, or a person without a diagnosis who is experiencing an emotional crisis. Of course what help a person should receive under the legislation will depend on their individual needs and the barriers they face. Any diagnosis maybe highly relevant to determining that.

We do not believe it is necessary for the legislation to retain the three sub-categories of mental illness, learning disability and personality disorder. However, it will be important for monitoring purposes that any particular diagnosis is recorded when an intervention is made, particularly around non-consensual care.

Chapter 2: recommendations

Recommendation 2.1: The law should apply to persons with a mental or intellectual disability (and otherwise included under AWI) whether short or long term.

Recommendation 2.2: The new purpose for mental health and capacity law should be to ensure that all the human rights of people with mental and intellectual disability (and otherwise included under AWI) are respected, protected and fulfilled.

Chapter 3: What should the law look like ?

Principles and unified legislation

3.1:Unified legislation and Principles

We consider that the ultimate long term goal for mental health and capacity law should be a single Act. This would provide one consistent and non- discriminatory framework. The Human rights enablement approach, with its framework of Human rights enablement, Supported decision making and Autonomous decision making should underpin this. Detail on this framework is provided in chapters 4 and 8.

We do not believe the case has been made to include adult support and protection legislation in unified legislation at this time. The scope of adult support and protection law encompasses more than persons with a mental disorder diagnosis and capacity issues. Combining the 3 laws could risk the scope and reach of adult support and protection legislation.

We recommend that mental health and capacity legislation should be more closely aligned, incrementally. We also believe that these is scope for a considerable degree of alignment with Adult support and protection legislation. For people with mental or intellectual disability, adult support and protection procedures are often the gateway to actions under mental health or particularly capacity law, and it is important that these frameworks operate well together. Also, although our remit is mental and intellectual disability, many of the key recommendations we make, including around Human rights enablement, Supported decision making, a new model of Autonomous decision making, and moving the definition away from a medical diagnosis, are potentially applicable to ASP law and practice. We discuss this further in Chapter 14 on Adult Support and Protection.

The areas most consultees felt would most benefit from alignment were harmonised language, a shared definition of who the law applies to ,the Human rights enablement framework, including Supported decision making and Autonomous decision making to apply across all 3 pieces of legislation ,and information sharing

In addition we recommend a single judicial forum for mental health and capacity legislation, and for this forum to be an extended version of the current Mental Health Tribunal for Scotland . It was felt that the tribunal lends itself better to participation by the adult, is more conducive to a person centred approach and is less intimidating than the sheriff court.

3.2:Principles

We recommended in our consultation that a new approach to principles may be required. The current law is mainly about protection people from undue influence in their lives. We want future legislation to be more about helping people with a mental or intellectual disability to live well and enjoy their lived without stigma or prejudice. Principles need to reflect this wider aim. We have concluded that we should retain a detailed set of principles drawing on the existing principles of mental health, capacity and adult support and protection law, including autonomy, respect for carers and a principle reflecting children's rights. These should be updated to give a stronger focus on respect for the autonomy of the individual, and to include principles of dignity and inclusion which should guide the positive duties we propose for public bodies.

We have recommended a set of principles which could be applied across mental health and capacity law, and could inform aligned or unified legislation. These draw on the existing principles and the wording of the principles in the UNCRPD. Some of these principles are intended to apply to any actions taken under the Act, including the duties of public bodies to respect Economic, Social and Cultural Rights. Others are specifically directed at situations where it may be felt that the person lacks autonomous decision making ability, and some kind of intervention may be required.

3.3:Adults with Incapacity – intermediate recommendation

We anticipate that our complete agenda for legislative reforms legislation will take several years to develop In the meantime, urgent reforms are needed to the Adults with Incapacity Act. Detail on this is provided in chapter 13

Chapter 3: recommendations

Recommendation 3.1: Fused, or unified, mental health and capacity legislation should be the ultimate long term goal in Scotland.

Recommendation 3.2: To support the above recommendation, active steps should be taken to align existing mental health, capacity and adult support and protection law. Such alignment will require the Scottish Government to:

- **work with professionals and people with lived experience, including unpaid carers, to overcome barriers and misunderstanding regarding information sharing.**
- **move towards a joint set of principles across all 3 Acts.**
- **develop the Human rights enablement approach, Supported decision making and Autonomous decision making systems across all 3 Acts.**
- **expand the jurisdiction of the Mental Health Tribunal for Scotland to include capacity cases, including sustained and appropriate resourcing to accompany this extended remit of the Mental Health Tribunal for Scotland.**

3.2: Principles

Recommendation 3.3: Future mental health, capacity and adult support and protection law should expressly provide that anyone discharging a function under it should have regard to the following principles:

1. **Dignity: The importance of respecting the inherent dignity of any individual who may seek or be offered support for a mental or intellectual disability.**

2. **Inclusion: The importance of facilitating full and effective participation and inclusion of people with a mental or intellectual disability in society and in all decisions affecting them individually and collectively.**

3. **Autonomy: Respect for the individual autonomy of people with a mental or intellectual disability, and their will and preferences including past and present wishes. This should include the freedom to make one's own choices.**

4. **Equality: Respect for difference, and acceptance of people with a mental or intellectual disability as part of human diversity and humanity who retain the same rights and entitlements as those with other health needs.**

5. **Non-discrimination: The need to avoid discrimination on the basis of disability or any other characteristic, including age, gender, sex, sexual orientation, religious persuasion, racial origin, ethnic group and cultural and linguistic heritage.**

6. **Respect for carers: Consider the needs of anyone who is a carer (as defined in the Carers (Scotland) Act 2016 and the importance of providing them with such information as may assist them to care for the individual and engaging with any unpaid carer in the care planning process, where this is practicable to do so.**

7. **Respect for the rights of the child: Any interventions concerning a person aged under 18 shall respect the rights of that person under the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities. (see also chapter 12)**

For non-consensual treatment

Anyone considering or making an intervention with a person who has not consented or may be unable to autonomously consent to that intervention shall have regard to the following principles:

8. **Benefit: The intervention must provide benefit to the person which could not reasonably be provided otherwise and which can be justified with respect to the human rights of the person overall.**

9. **Least restrictive alternative: The intervention is the least restrictive alternative of the options likely to fulfil the aims of the intervention.**

In addition, the following principle shall apply to the NHS and any local authority or other agency defined in regulations who may have powers or responsibilities to provide care, treatment or support to the person:

10. Reciprocity: Where an individual is required under the legislation to comply with a programme of treatment and care, there shall be a parallel obligation on health and social care authorities to provide suitable care and support, including, but not restricted to, after compulsion.

Chapter 4: Supported decision making

The UNCRPD has provided an impetus for a shift in how states respond to disability rights. Fundamental to this is Article 12 CRPD which asserts the right of disabled people to equal recognition before the law and requires states to take appropriate steps to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

In the UNCRPD context, support for the exercise of legal capacity means providing support for a person to put their decisions into effect and can include support to challenge barriers that disable the person. We refer to this as Supported decision making (SDM) .

This chapter considers what needs to be put in place to develop a wide ranging SDM regime for Scotland which ensures the decision maker is at the centre of the process, with respect given for their autonomy.

The use of SDM allows for the individual's views to be given effect to the extent that this would occur with others without disabilities. Where meaningful communication is genuinely impossible the UNCRPD Committee recognises that supported decision making does include the ability for others to make a non-discriminatory best interpretation of the person's will and preferences.

SDM is not some new special thing which is different from everything done before, but an approach which encompasses a whole range of ways of operating, some of which are well established and some of which are newer.

We have heard from many in our consultation that supported decision making is already built into their work. Powers of Attorney, advocacy, advance statements all contribute to enabling people to have their voices heard and it is undoubtedly the case that part of the focus on supported decision scheme must be aimed at improving existing practices, making them easier to engage with. But in its response

to our March 2022 consultation the Mental Welfare Commission indicated that data it has collected demonstrated that the current legislation's promise regarding advocacy and advance statements has not delivered and there is a need for change to ensure that options are offered and acted on.

The UNCRPD recommends formal and informal means by which support can be provided as follows:

- Support from one or more trusted persons, peer support and independent advocacy

- Assistance with communication as appropriate to the needs of the individual, particularly for those who use non-verbal forms of communication to express their will and preferences

- Advance care planning – including providing support to a person to complete an advance planning process.

- Specialist support in legal and administrative proceedings

- Communities and support (collective advocacy)

There is a need for common understanding of SDM rights and principles. We are proposing a new framework which includes enabling respect for human rights, Human Rights Enablement (HRE) (see Chapter 8). This framework will also include Supported Decision Making (SDM) to ensure focus on respect for the will and preferences of people with mental or intellectual disability. It will also include an Autonomous Decision Making (ADM) test to allow for non – consensual intervention in situations when this is necessary to protect the person's or others' rights.

Collectively these elements of the framework will:

a. Ensure and protect the rights of persons with a mental or intellectual disability; and

b. Ensure that persons with a mental or intellectual disability receive appropriate support at the right time (whether in an emergency or non-emergency); and

c. Ensure that the rights of others are also protected.

Central to this is the Supported decision making regime which aims to ensure that the person's will and preferences are heard and given effect on an equal basis with others even at times when the person is unable to express such will and preferences.

How do we achieve this?

We recommend that there needs to be clear commitment from the Scottish Government to take this forward. SDM needs to be built into processes , training and resource provided for this. There should be a central point of development, promotion and oversight. And SDM must be developed with the full and equal partnership of people with lived experience, including unpaid carers.

The types of support we think are needed include :

Advance statements – the current advance statements should be changed to a a new type of advance choice document, which is more flexible and wide ranging than the current advance statement.

Powers of attorney and Decision Making Supporter – these are considered in Chapter 13.

Independent Advocacy – the role of Independent Advocacy(IA) is to speak up and stand alongside individuals or groups, to help ensure a person's rights are recognised, respected, and secured. It helps empower people so they have more

control over their lives. We recommend IA should be more widely available, including for people who are being supported by the adult support and protection legislation. Independent Advocates should be trained, IA should be better funded, subject to proper scrutiny and a national register established

Collective Advocacy - Collective advocacy groups are groups of people with shared experiences who come together to try and improve issues that affect their lives. They are run by and for their members and are independent. They are not like the other methods of supported decision making we mention here in that they do not take on individuals' issues but identify and seek remedies to issues that are affecting more than one person, including influencing policy and practice in their area. The role of collective advocacy is discussed in Chapter 11.

Aids to communication - Assistance with communication as appropriate to the needs of the individual should be a guaranteed right. This is particularly necessary for those who use non-verbal methods of communication to express their will and preferences.

Chapter 4: recommendations

Recommendation 4.1: The Scottish Government should develop a comprehensive scheme of Supported decision making (SDM) which should apply across mental health, capacity, and adult support and protection legislation, and especially where non-consensual interventions are needed. The scheme should build on existing good practices already in use across Scotland.

Recommendation 4.2: The Scottish Government should progress the SDM scheme with a central point for development, promotion and oversight determined as the first step in this process. This could be developed as part of the new mental health model within the National Care Service .

Recommendation 4.3: The development of the SDM scheme must take place in with the full and equal participation of people with lived experience, including unpaid carers.

Recommendation 4.4: The SDM approach needs to be built into all training for practitioners at every level in the delivery of care, support and treatment in the field of mental health, capacity, and adult support and protection law.

4.2: Advance statements

Recommendation 4.5: The Scottish Government should change Advance Statements to a model of Advance Choices, reflecting an individual's will and preferences.

This new model should apply to any support , care or treatment the person may need across all areas of their life and should operate as follows:

If a person, having been given appropriate support, is not able to make an autonomous decision and an Advance Choice exists, the Advance Choice should normally be respected. It should have the same status in law as a decision taken at the time by a competent adult, unless one of the following reasons justify it not being followed:

- **The person has acted in a way which is clearly inconsistent with the Advance Choice, which suggests it may no longer be their fixed view.**
- **The person's current will and preferences seem to be more pertinent than those expressed in an earlier Advance Choice.**

- **A position on the person's will or preferences on a given matter cannot reasonably be concluded from matters included in the Advance Choice.**
- **There are reasonable grounds for believing that circumstances exist which the person did not anticipate at the time of making the Advance Choice, which would have affected their decision had they anticipated them.**
- **There is evidence that the person's ability to make an autonomous decision at the time of the Advance Choice was compromised, for example because of significant illness or undue pressure being applied.**
- **Treatment which is inconsistent with the Advance Choice is necessary to save the patient's life or to prevent serious suffering on the part of the patient.**
- **It should not be possible to refuse normal hygiene, nutrition, hydration or the relief of severe pain.**
- **An Advance Choice refusing treatment is not applicable to life-sustaining treatment unless it makes clear that this is intended.**
- **An Advance Choice would not require a treatment to be offered where it isn't available or clinically justified but should be given significant weight as to the preferences of the granter.**
- **Except in an emergency, a clinician should not be able to overrule an Advance Choice at their own initiative. We propose a model based on s50 of the AWI Act, that an independent clinician be appointed by the MWC to review whether a ground for not following the Advance Choice has been made out. In addition to this, any interested party could seek a ruling from a judicial body (short to medium term)**
- **In advance of the introduction of this wider model, the Scottish Government should work with the Mental Welfare Commission, the NHS, local authorities and advocacy and peer support**

organisations to promote awareness of advance statements and to support people in making them.

- **The Mental Welfare Commission should issue further guidance on the circumstances in which it is acceptable not to follow an advance statement and should continue to monitor the system.**

4.3: Independent advocacy recommendations

Recommendation 4.6: The Scottish Government should align legislation and policy to ensure consistency regarding the definition of Independent Advocacy, the right to access it and how it is commissioned and funded for adults. This should include consideration of an opt -out service of Independent Advocacy. An equivalent process should take place for children and young people.

Recommendation 4.7: The Scottish Government should ensure independent individual and collective advocacy is sustainably funded. The Scottish Government must ensure culturally appropriate independent individual and collective advocacy provision.

Recommendation 4.8: The Scottish Government should consider a national advocacy service.

Recommendation 4.9: The Scottish Government and the Scottish Independent Advocacy Alliance, working with other independent individual advocacy groups should develop a national register of independent individual advocates.

Recommendation 4.10: The Scottish Government and the Scottish Independent Advocacy Alliance, working with other independent individual advocacy groups should develop a national training programme for independent individual advocates that recognises the need to ensure access to all those who would wish to work in this field.

Recommendation 4.11: The Scottish Government should assure an existing or new organisation should have responsibility for monitoring and continuing development of independent individual advocacy.

4.4 Aids to communication recommendations

Recommendation 4.12: Assistance with communication as appropriate to the needs of the individual should be a guaranteed right . This is particularly necessary for those who use non-verbal methods of communication to express their will and preferences. Work in developing this must be done in partnership with relevant sectors such as the deaf community.

Chapter 5: Specialist support in legal and administrative proceedings

The Review has explored what needs to happen to ensure that people can participate in the judicial process as fully as possible and how we can remove barriers to give effect to this. We recommend a formal scheme of support, of intermediaries for the accused and witnesses in criminal proceedings and should provide support from start to finish in justice processes in the long term.

One of the biggest barriers to participation within the forensic population is communication. Currently communication needs of people within the forensic system are not being met. So an intermediary must have an understanding of how mental health diagnosis can limit communication and they should be specifically trained to assist persons in understanding the judicial process and their options to give them the best chance of being able to be considered fit to plead. This role would ensure that Autistic people and people with intellectual disability would have a right of access to an intermediary to support them through the criminal process, but such an intermediary would also be available to anyone who is charged with a crime or prosecuted for a crime and needs help with communication.

We recommend starting with the use of the existing appropriate adult scheme**.** This role is already established. Appropriate adults already have an understanding in mental or intellectual disability. This should be enhanced with additional use of speech and language therapists. But not everyone who needs an appropriate adult currently gets one. This scheme should be developed in tandem with a quality assurance framework to support self-evaluation of appropriate adults services, to be embedded by the Care Inspectorate.

The Review also recommends an extension to the role of Independent Advocacy**.** This was felt appropriate given that this is an established role and the basis for developing a relationship of mutual trust.

5.1:Named Persons/Listed Initiator

The Mental Health Act (Scotland) Act 2015 abolished the default named person and the role of listed initiator was created.

Despite a lack of awareness around the role of the named person, there was a widely held view that the role of the named person was critical to protecting the interests of the patient. Individuals who did not have a named person were not always equally protected in the tribunal setting. This unfairly disadvantages people who were less likely to have access to a named person due to cultural, social, environmental or gender identity factors.

We recommended improved guidance for named persons. Where no named person has been appointed , the option of the Tribunal appointed a named person should be explored. Consideration of the need for a named person within the power of attorney process should be encouraged.

There has been very little uptake of the listed initiator role. There is a lot of confusion about this role. It didoes not afford the same protections as a named person. We recommend subject to the other changes taking place , the role of the listed initiator should be abolished.

5.2:Curators ad litem

A curator ad litem is appointed where the patient is incapable of understanding judicial proceedings and does not have a representative to represent their interests. The Review recommends creating a statutory obligation to report on actions taken to ascertain the will and preferences of the individual and an obligation to evidence the support given to the individual to facilitate participation in the proceedings of the tribunal. This should be introduced along with mandatory training setting out these minimum standards.

5.3:Safeguarders

Section 3(4) of the Adults with Incapacity Act 2000 provides that the Sheriff should consider whether to appoint a person to safeguard the adults interests in each case. investigate are not clearly understood. The Reviews recommends changes to appointment of safeguarders, clarity around their role and national standards and levels of remunerations.

Chapter 5: recommendations

Specialist support in legal and administrative meetings

Recommendation 5.1: The Scottish Government should introduce intermediaries. This should be subject to review and assessment of an expanded use of the Appropriate Adult scheme and independent advocacy

- **The use of the existing Appropriate Adult Scheme should be expanded to increase the support for individuals throughout current justice processes.**

- **Work should be done to explore the possibility of using independent advocates to assist in providing support for individuals going through justice processes.**

- **Subject to the review of whether the expanded use of appropriate adults and independent advocates set out above proves sufficient to provide the necessary support, a scheme for the use of intermediaries should be introduced to provide support from start to finish in justice processes.**

Named Person Recommendations

Recommendation 5.2: Where no named person has been appointed the Scottish Government should consider allocating powers to the tribunal to appoint a named person.

Recommendation 5.3: Subject to changes above being carried out, the Scottish Government should abolish the role of the listed initiator

Recommendation 5.4: Scottish Government should ensure that that named persons have access to

- **independent advocacy and legal representation**
- **accessible guidance**

Recommendation 5.5: The process of appointing of Power of Attorney (POA) or guardian should include consideration of appointment of a named person, should that become necessary.

Curator ad litem recommendations

Recommendation 5.6: The Scottish Government should increase governance over the role of a curator ad litem. This should include:

- **a statutory duty on the curator ad litem to report the actions they have taken to ascertain the will and preference of the individuals**
- **mandatory training for curators**

- **establish a process for ensuring that there is no conflict of interest where a curator ad litem also acts as a solicitor**

Safeguarder Recommendations

Recommendation 5.7: The Scottish Government should:

- **Review guidance to ensure that there is a consistent approach to appointing safeguarders between sheriffdoms**
- **Review guidance to ensure that the role of the safeguarder is unambiguous**
- **Create a uniform training programme with a requirement that the training is completed before being accepted as a safeguarder.**
- **Create a system of national standards for the work being done which would enable best practice to be shared across the country .**
- **Revise the payments system for safeguarders to place it on a more equitable footing.**

If the above changes have occurred, the Scottish Government should undertake a further review to consider if the combination of roles available meets the needs of mentally or intellectually disabled individuals appearing in court or before the MHTS.

Chapter 6: Economic, social and cultural rights - enabling people to live fulfilling lives

The Scottish Government intends to incorporate several United Nations human rights treaties directly into Scots law, including treaties which address economic, social and cultural rights (ESC rights). This will require a significant change in how the Scottish Government and public authorities understand and discharge their duties across areas including health, independent living and standard of living, for example. Scotland's National Taskforce for Human Rights Leadership recommended legislation which would introduce a range of concepts to Scots law. Those concepts would apply to health and social care and would include:

- Immediate realisation of ESC rights. This includes meeting minimum core obligations, obligations which are defined through a participatory process.
- Progressive realisation of ESC rights. This involves taking steps to fully realise ESC rights to the maximum of the available resources, and avoiding regression.

In our March 2022 consultation, we proposed system-wide changes to mental health services. There was almost universal support for these proposals, with differences of views on the place of legislation. We recognise that prevention depends on the wider social determinants of poor mental health, and that this requires a broad societal approach and a wide strategic response. Our consultation highlighted specific human rights issues of concern to people with mental disabilities. We make recommendations on those issues. The Scottish Government's duties on ESC rights require some system-wide changes to culture, to training, and to the way services are commissioned and organised.

We recommend changes to mental health law, including legislation which requires: the establishment of minimum core obligations and progressive realisation of ESC rights; clear and attributable duties on public authorities to provide or secure support, equivalent duties towards prisoners, and monitoring of these duties; and a duty on

Scottish Ministers to address awareness-raising requirements of Article 8 CRPD, to deal with attitudinal barriers including stigma.

We also recommend wider changes: recasting the Scottish Mental Health Strategy to set out a clear human rights framework and to address other government policies and strategies; full participation of people with lived experience including unpaid carers in all developments, including progressive realisation and developing minimum core obligations; and reframed duties on health and social care, expressed in terms of human rights standards.

Chapter 6: recommendations

Changes to mental health law including new duties

Recommendation 6.1: There should be a legal requirement for the Scottish Government to establish minimum core obligations to people with mental or intellectual disabilities to secure their human rights, including but not restricted to the right to the highest attainable standards of mental and physical health, and the right to independent living, alongside a framework for progressive realisation of those rights.

Recommendation 6.2: Sections 25 to 27 of the 2003 Act should be extended and reframed to set out clear and attributable duties on NHS Boards, local authorities and integration authorities to provide or secure support to individuals with past or present experience of mental or intellectual disability. The duties should include:

- **Personal care, support and treatment to maximise mental and physical health**
- **Housing which is appropriate for the person's needs**
- **Provision to support living and inclusion in the community and prevent isolation or segregation**
- **Education, training and support for employment**
- **Assistance with travel to any of the above supports**

- **Access to financial advice and anti-poverty initiatives.**

Recommendation 6.3: NHS Boards, local authorities, integration authorities and the Scottish Prison Service should be under a duty to secure similar supports to people with mental or intellectual disabilities who are in prison or being discharged from prison.

Recommendation 6.4: There should be a systematic process of monitoring to assess whether these obligations are being met.

Recommendation 6.5: The duties under sections 260 and 261 of the Mental Health Act should be extended to ensure that people with mental or intellectual disabilities have effective access to information about their rights whenever they need it, including translation or interpretation where required.

Recommendation 6.6: There should be a legal duty on Scottish Ministers to adopt specific measures to address the requirements of Article 8 of CRPD (Awareness raising) in respect of people with mental or intellectual disabilities, including fostering respect for their rights and dignity and combating stereotypes, prejudices and harmful practice. The duty should be supported by specific actions in the minimum core obligations.

Recommendation 6.7: In line with the recommendations of the National Taskforce for Human Rights Leadership, there should be accessible, affordable, timely and effective remedies and routes to remedy where any of the above duties to provide services, support or information are not upheld. This should include the ability of individuals to raise a legal action in the civil courts.

Wider changes

Recommendation 6.8: The Scottish Mental Health Strategy should be recast to set out a clear human rights framework including the development of minimum core obligations and the progressive realisation of economic, social and cultural rights for people with mental or intellectual disabilities.

Recommendation 6.9: This should not be confined to health and social care services, but address other relevant government policies and strategies, including housing, poverty, social security, employment and community support.

Recommendation 6.10: The development of these minimum core obligations and the framework for progressive realisation should be carried out with the full participation of people with mental or intellectual disabilities and their representative organisations.

Recommendation 6.11: As the minimum core obligations are developed, the Scottish Government should identify any other public bodies who should be subject to a specific responsibility to fulfil the economic, social and cultural rights of people with mental or intellectual disabilities.

Recommendation 6.12: Duties to provide health and social care should be reframed in terms of human rights standards, including the AAAQ (availability, adequacy, acceptability and quality) framework set out at paragraph 12 of ICESCR General Comment Number 14 (United Nations, 2000). Since many of these duties apply more widely than to mental or intellectual disability, this may require to be considered as part of the general implementation of the proposed Human Rights Bill.

Chapter 7: The role and rights of unpaid carers

The Carers (Scotland) Act 2016 (the Carers Act) set down the rights of unpaid carers to involvement in the care and treatment of those they care for. This Act defines an unpaid carer as someone who provides care for another individual for which they are not paid. Neither do they provide this care as part of a contract or as voluntary work. It does not include people caring for young people under 18 (or 18 and still at school) if the reason they are being cared for is their age. It defines a young carer as someone who is under 18 (or 18 and still at school).

There are believed to be over 880,000 people providing unpaid carers in Scotland (Carers Week Report 2020). It is hard to know how many are providing care to a person with a mental or intellectual disability. This is because there is stigma around. Also, many do not see themselves as an unpaid carer. They see it simply being part of what they do for a partner, sibling, parent or child.

We heard from a cross section of unpaid carers of all ages during our engagement activities and in response to our consultations. We heard from people providing support to people with intellectual disabilities. Some were caring for people experiencing mental illness. Others were caring for autistic members of their family. People were caring for their parents, siblings or children and young people. Our recommendations are for all these unpaid carers. We also asked practitioners within mental health, learning disability, autism and dementia services for their views on their engagement with unpaid carers.

Many people felt the necessary rights for unpaid carers already existed, but that more needed to be done to recognise and realise them. The key message was that the realisation of unpaid carers' existing rights should take priority over new legislation or rights. We heard ways in which despite the rights unpaid carers have, they are often not appropriately involved in the care and treatment of the people the care for.

A key area of concern was around information sharing. We heard repeatedly how the unpaid carers voice is often ignored, marginalised or not even sought. Responses clearly demonstrated ethical challenges, legal obligations and complexities around information sharing. And an understanding of the need to balance an individual's right to private life and respect for confidentiality, with protection and respect for the rights of family and friends.

The legislative provisions within the Carers (Scotland) Act have not yet resulted in consistent change in the way unpaid carers are involved in the care and treatment of the people they are caring for. People told us the existing rights are sufficient, they are just not consistently recognised or respected. Therefore, our recommendations focus on administrative steps that can be taken quickly to further protect, promote and fulfil the existing rights of unpaid carers.

We are recommending **that Carer Awareness Training should be developed**. We think **this should be become best practice in pre-registration training for professionals across health and social care settings**. We also think it should become best practice as part of the induction process for people in third sector. People were clear that for such training to be meaningful and worthwhile, unpaid carers must be involved in its development and delivery. It must also respect and value the diversity of unpaid carers, including cultural differences and the needs of young carers. We agree.

We are **recommending the development of a national framework to ensure the identification and meaningful engagement of unpaid carers.** People recognised the need for this. They emphasised the need to appropriately identify and support young carers. This framework is for all services supporting people with mental or intellectual disability including Child and Adolescent Mental Health Services

To enable to unpaid carers to better understand their rights and be supported to realise them, we recommend **a dedicated advocacy service for unpaid carers**. For many people this was seen as a way of ensuring the rights of unpaid carers, and especially young and ethnic minority carers were protected. Therefore, **this service must be designed to meet the needs of all unpaid carers, including culturally**

specific advocacy. We also recommend **the development of culturally appropriate respite services**.

Chapter 7: recommendations

Carer Awareness Training

Recommendation 7.1: NHS Education for Scotland in partnership with unpaid carers and National Carers' Organisations should develop Carer Awareness Training for all staff working with people with mental or intellectual disability across health and social care settings.

This training should:

- **Cover the rights of all unpaid carers as enshrined in legislation.**
- **Have local unpaid carers and carer services involved in its delivery at local levels where this is possible.**
- **Become best practice within pre-registration requirements for professionals across health and social care settings.**
- **Become best practice in the induction process for staff in third sector organisations.**
- **Become best practice in continuing professional development**

- **Respect and value the diversity and intersecting characteristics of unpaid carers, including cultural differences and the needs of young carers.**

- **Be supported by the development of measures to monitor and assess its effectiveness in improving outcomes for carers and staff, including levels of staff awareness, knowledge and confidence in protecting, promoting and fulfilling the rights of unpaid cares of all ages, and the difference it makes to the experience of unpaid carers.**

Best practice engagement framework

Recommendation 7.2: The Scottish Government should support the development of a national framework to ensure the identification and meaningful engagement of unpaid carers to be used in all services supporting people with a mental or intellectual disability, including Child and Adolescent Mental Health Services. Its development and implementation should be coordinated by Carers Trust Scotland with support from National Carer Organisations, including Scottish Young Carers Services Alliance.

The framework should:

- **adopt and extend the Triangle of Care.**

- **include quality indicators for monitoring impact, compliance and criteria which reflect the rights of unpaid carers, enshrined in the Carers (Scotland) Act and human rights entitlements. Healthcare Improvement Scotland should be involved in the development of**

these quality indicators in partnership with Carers Trust Scotland and inform an improvement approach to implementation.

Involving, valuing and supporting unpaid carers

Recommendation 7.3: The Scottish Government should support the development of a national dedicated independent advocacy service for unpaid carers. This service should include culturally accessible advocacy for carers of ethnic minority people.

Recommendation 7.4: The Scottish Government must ensure the development of culturally appropriate respite services.

Chapter 8: Human rights enablement, Autonomous decision-making and Deprivation of liberty

8.1:Human Rights Enablement

In this section we explain the approach we recommend to enable human rights to be actively respected. We call this human rights enablement. Which is abbreviated to HRE. HRE will work within a framework which also includes Supported Decision Making, which we cover in Chapter 4 and Autonomous Decision Making which we talk about in the next section in this chapter.

We see the role of HRE as being the means by which to determine the most appropriate strategy of overall care and support for an individual. It will provide a framework within which to make decisions with and concerning persons with a mental or intellectual disability that best ensures that the whole range of the person's rights are respected and therefore enjoyed to the same extent as others.
We set out the essential components of the HRE approach and the trigger points which would generate an HRE review. We acknowledge concerns that HRE does have significant implications across all areas. We recognise it is a radical change and will need a lot of time to realise. There is need for further development with practitioners and service users, those with lived experience and their carers. Our recommendations in respect of HRE are below.

8.2:Autonomous decision making

We recommend that Supported Decision Making and respect for the whole range of human rights becomes the tenet of our mental health and capacity law but we accept there will be a limited number of occasions when it is necessary to act without a person's consent, when this is not available at the time. Currently, justifying such non-consensual intervention is predicated on, amongst other criteria, a test of

capacity (under the Adults with Incapacity (Scotland) Act 2000) or significantly impaired decision making (SIDMA) (under the Mental Health (Care and Treatment) (Scotland) Act 2003).

These tests have been subject to criticism, we list in the chapter a range of concerns about them, including that of the United Nations Committee on the Rights of Persons with Disabilities who find them discriminatory because they are decided on the basis of diagnosis of mental disability. There is much more detail about the United Nation's position in the chapter.

Acknowledging these concerns, a substantial change in approach is needed to strengthen respect for the autonomy of people with mental or intellectual disabilities. An alternative test which assesses a person to make an autonomous decision is therefore recommended. The chapter explains what an autonomous decision is and when the autonomous decision-making test is relevant. We discuss how one assesses autonomous ability and the essential points of such a test, considering this is both urgent and non-urgent situations. Our recommendations in respect of a test of autonomous decision-making are below.

8.3:Deprivation of liberty

We recognise that there is a human rights gap in Scots law around the deprivation of liberty for persons who lack capacity to consent to this, which there is an urgent need to address. In this section of the chapter we recommend a process to authorise lawful deprivations of liberty, which is at the same time proportionate and does not discriminate against disabled people relative to others. We recommend a process to challenge the lawfulness of a deprivation of liberty, which is genuinely accessible to a person who has decision-making challenges.

We recommend a judicial process as suggested by the Scottish Law Commission in their 2014 report under which one can apply for a standard or urgent deprivation of liberty order. The chapter offers more detail on these applications.

The deprivation of liberty arrangements will take place within the Supported Decision-Making, Human Rights Enablement, and Autonomous Decision-Making framework, and the amended Power of Attorney, Section 47 and replaced guardianship arrangements (see Chapters 4,8 and 13).

Any authority for a deprivation of liberty should be granted only to the extent it is needed and only for as long as needed to achieve the protection required. The authorising of the order should include a review date, which should be commensurate with the likely duration of the loss of the person's ability to autonomously decide about the restrictions imposed on them. There would be a right of appeal at the time of granting.

Any deprivation of liberty authorisation would need to cover getting a person to an establishment for care and treatment, preventing them from leaving an establishment, including their own home, unaccompanied, detaining them there, as may be required, returning them should they leave and transferring them as required.

There were a number of concerns expressed at consultation to the deprivation of liberty proposals which we outline in the chapter. Our recommendations in respect of the deprivation of liberty process is below.

Chapter 8: recommendations

Human Rights Enablement

Recommendation 8.1: The Scottish Government should develop and adopt the HRE approach.

HRE maximises a person's ability to make an autonomous decision and thereby ensuring that priority or 'special regard' is given to a person's will and preferences. An HRE approach

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 considered, including all relevant economic, social and cultural rights, not just those limited to care and treatment;**
d) **Weighs advantages to human rights against harms to human rights. Significant harms to certain human rights would be justifiable only exceptionally, on the basis of very significant advantages in the respect, protection and fulfilment of the person's human rights overall;**
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.**

Recommendation 8.2: The HRE approach should be developed with the full and equal participation of people with lived experience, including unpaid carers, and practitioners.

Recommendation 8.3: The HRE approach should cover the full range of a person's rights and operate as a framework together with SDM and ADM.

It should be accompanied by guidance, Codes of Practice and training

Recommendation 8.4: The Scottish Government should ensure sufficient resourcing to realise this HRE approach.

Autonomous decision-making

Recommendation 8.5: The Scottish Government should replace the existing capacity and SIDMA tests with the test of ADM to provide a more rights-based criterion for non-consensual intervention.

- **The new ADM test would offer a more rights-based criterion for non-consensual intervention. The test should establish whether the person is able to make an autonomous decision on the matter in question, having regard to:**
- **The ability of the person to understand information relevant to the decision.**
- **The ability of the person to use or weigh the information in order to make a decision.**
- **The ability of the person to communicate the decision.**
- **The ability of the person to act on their decision, or otherwise act to safeguard themselves from harm.**
- **The extent to which any apparent decision, or expression of will and preferences, may be undermined by one or more of the following controlling influences, if they cannot be sufficiently mitigated.**
- **Undue influence by another person or persons.**
- **The impact of any illness, disability or health condition, including a health care crisis.**
- **The impact of any situational or environmental factors.**

Recommendation 8.6: ADM should be developed with the full and equal participation of people with lived experience, including unpaid carers, and practitioners.

Recommendation 8.7: ADM should be accompanied by guidance, Codes of Practice and training.

Recommendation 8.8: The Scottish Government should ensure sufficient resourcing to realise ADM.

Deprivation of liberty

Recommendation 8.9: The Scottish Government should establish a legislative framework for situations where a person may be deprived of their liberty. This is a short-term recommendation. Longer term, this framework should be revised as the HRE, SDM, ADM are developed.

Recommendation 8.10: The framework should include provision as follows:

8.10.1: Where a person cannot make an autonomous decision but can, with support, express a will and preference to remain in their current living arrangements, even if these arrangements would otherwise constitute a DOL, this must be respected.

8.10.2: There must be a standalone right of review available to the adult, or a person acting on their behalf if they are not subject to any order but are or may in fact deprived of their liberty.

8.10.3: The MWC may intervene in such cases if they have concerns. This ability to challenge the lawfulness of this actual or perceived DOL must be practical and effective.

8.10.4: A POA, with prescribed wording, may grant advance consent for the attorney to deprive the granter of their liberty, where the deprivation is proportionate and will demonstrably lead to more respect, protection, and fulfilment of the person's rights overall. This should be accompanied by regular review and registration with an external body such as the MWC or the OPG.

8.10.5: A court or tribunal may authorise a Decision making representative (DM representative), or an intervention order, to deprive the person of their liberty. The court or tribunal should also be able to grant this power in advance to a DM Representative but only where the need for this can be reasonably foreseen. This power must not be automatically included in a grant of powers to a DM Representative.

8.10.6: Where a person cannot consent to their care arrangements, even with support, and is being deprived of their liberty but does not have a welfare attorney or a DM Representative, a court/tribunal may grant a Standard Order for Deprivation of Liberty in order to preserve the person's overall human rights or an Urgent Order for Deprivation of Liberty in order to preserve life or health.

8.10.7: A carer, proposed DM Representative, local authority, allocated clinician for a residential care home, hospital clinical staff (where the matter is outside section 47 AWI Act and The MWC should all be entitled to apply for the order.

8.10.8: The order must be granted only to the extent it is needed and only for as long as needed to achieve the protection required, with regular review dates and a right of appeal at the time of granting.

8.10.9: The details of the duration of both orders will be for subsequent legislation to determine but should be aligned to commensurate timescales in mental health legislation.

8.10.10: Before proceeding to apply for a standard order for deprivation of liberty, an evaluation of the human rights implications must be completed as set out in earlier in this chapter.

8.10.11: The record of any DOL order, its duration and review date should be stored in the person's records in accordance with the HRE approach.

Recommendation 8.11: The Scottish Government must ensure that the above framework is supported by clear and targeted guidance, Codes of Practice and training detailing processes, and roles and responsibilities in relation to the range of different settings.

Chapter 9: Reduction of coercion

9.1:Reduction of coercion

Following consultation, we continue to believe that ‘coercion’ is a valid and necessary description of part of the approach to support, care and treatment of people with mental or intellectual disability. We propose an approach to understanding coercion - and work to further define coercion - as part of a national approach to reducing coercion. Law reform can help with this process and can lead to shifts in practice through new duties and safeguards, in a context where we change how we ‘do’ mental health as a society. We cannot end coercion at a stroke, but we need to go as far and as fast as we can to reduce the use of coercion within mental health services and the wider care system. This requires a ‘full spectrum’ approach across law, policy and practice. Scotland can and should be a leader in this approach.

Specific approaches will be required to reduce the use of coercion. We need a stronger sense of belonging, connection and trust in society. That will require Scottish Government to invest in infrastructure and services which enable communities to develop their own forms of support through full and equal participation. A systematic improvement programme is also needed, led by Scottish Government and involving services, people with lived experience and regulatory bodies, over several years.

9.2:Safeguards

Stronger safeguards are required when compulsion is authorised. We outline further work to determine what those safeguards should be. Scotland also needs law reform to deliver a scrutiny system with sufficiently wide scope to gather and consider all relevant evidence and data, to identify underlying reasons for coercive treatment, and to drive learning and improvement. A national register of restraint

is needed, and work is needed to define various forms of coercion across settings, drawing from work in England, the Netherlands and Ireland on coercion in healthcare settings, care homes and community care. The Mental Welfare Commission should be empowered to co-ordinate the development of consistent and effective approaches to the reduction of coercion across health and social care settings.

9.3:Rates of detention

This review was commissioned to consider rising rates of detention and community-based compulsory treatment. In relation to these, there is a major issue about structural racism in the use of orders in Scotland. This problem appears to be no less significant in Scotland than in England, and an explicitly anti-racist approach to this problem is required.

In relation to increasing rates of detention and compulsory treatment in general, and variation in the use of orders across Scotland, it is not currently possible to know with confidence what the reasons are behind these because of a lack of research. This Review was not resourced to commission research which could explain these trends. We make a range of recommendations for future research in this area. In addition to the number of people on orders, the length of those orders is important. It appears that many orders are allowed to lapse instead of being ended as soon as possible. We make recommendations for research to determine how the law should be reformed to ensure that orders are reviewed and ended when they should be.

9.4:Community based compulsory treatment orders

Community-based compulsory treatment orders (CCTOs) were introduced in Scotland through the 2003 Act. The level of use of CCTOs in Scotland is much higher than was expected when that Act was created. In effect, compulsion has been driven into the community. There are benefits of community-based treatment

over hospital treatment, but we are approaching the point where compulsion in the community becomes part of life for the majority of people who are made subject to orders. Also, the evidence on the effectiveness of CCTOs is mixed and in many respects is weak. We recommend that community-based compulsory treatment should continue to be allowed in Scottish mental health law and incapacity law. However, research, monitoring, inspection and individual scrutiny of CCTOs should be greatly enhanced. The use of these orders should now be closely and continuously interrogated, both for individuals and at a national level.

9.5:Approaches to recovery

There is also a pressing need to reduce the impact of crises on individuals including mental health emergencies. Recovery approaches and person-centred safety planning, including joint crisis planning, should be further developed in Scotland. Assessment in the community for detention requires greater resourcing, guidance and co-ordination. Law reform should require the development and equitable provision of non-hospital mental health crisis services across Scotland.

Chapter 9: recommendations

Reducing coercion, including reducing the use of involuntary treatment

Law reform to drive reduction of coercion

Recommendation 9.1: We recommend that the Scottish Government should make reduction of coercion a national priority over a period of years.

Recommendation 9.2: The Scottish Government should ensure effective recording, monitoring and action to reduce coercion across settings. This should include:

- **Mainstream alternatives to coercion with a view to legal reform**
- **Develop a well-stocked basket of non-coercive alternatives in practice**
- **Develop a road-map to radically reduce coercive medical practices, with a view to their elimination, with the participation of diverse stakeholders, including rights holders**
- **Establish an exchange of good practice between and within countries**
- **Scale up research investment and quantitative and qualitative data collection to monitor progress towards these goals**

Recommendation 9.3: The Scottish Government should set standards for trauma-informed mental and intellectual disability services, including access to psychology or other services which provide support for trauma that results from coercion.

Sense of belonging, connection and trust in society

Recommendation 9.4: The Scottish Government should ensure that:

- **Communities are enabled to develop their own forms of peer and community support**
- **Community wellbeing hubs are established to serve every community, both for people with a mental illness and to support the wellbeing of the general population**
- **A range of open, flexible and accessible crisis and crisis-prevention services is established**
- **Community mental health teams are fully integrated within communities**
- **Community and in-patient mental health services, and strategies for these, are developed through co-production by people with lived experience including unpaid carers**

Support, services, and approaches which reduce the use of coercion

Recommendation 9.5: The Scottish Government should lead a systematic improvement programme with the full and equal participation of people with

lived experience, including unpaid carers, and services and regulatory bodies. This should include:

- **Support, services and approaches which have been successful in reducing coercion in other countries are piloted, developed and then implemented across Scotland**

- **Ward-level interventions which reduce coercion including restraint, such as Safewards, are implemented**

- **Academic research which is led by people with lived experience is commissioned on approaches to reducing coercion**

Recommendation 9.6: The Scottish Government should ensure that all new buildings and services should be universally designed. Design and redesign processes should aim for the highest quality, as defined with the full and equal participation of people with lived experience including unpaid carers.

Recommendation 9.7: In practice, the general approach to mental health care and treatment should reflect the recovery approach as expressed by the WHO and also as developed by the lived experience movement.

Stronger safeguards when compulsion is authorised

Recommendation 9.8: The Scottish Government should undertake a detailed review of the safeguards for treatment contained in Part 16 of the Mental Health Act.

During this review, the following changes should be considered

- **Requiring authorisation by a DMP of any restraint, seclusion or covert medication, except in an emergency**
- **Broadening the category of who may act as a DMP, including the possibility of a suitably qualified psychologist reviewing restraint or seclusion**
- **Establishing safeguards derived from the Mental Health Units (Use of Force) Act 2018 for the Scottish context (see recommendation 9.10 below)**
- **Stronger duties on the DMP to consider and seek to give effect to the will and preference of the patient wherever possible**
- **A possible appeal to the Tribunal against the decision of a DMP to authorise treatment for some particularly serious interventions**
- **MWC monitoring and reporting on the use of restraint, seclusion and covert medication, whether authorised by MHA or AWI**
- **It should not be possible to give a specific treatment without the consent of a patient if the patient is able to make an autonomous decision about that treatment.**

Recommendation 9.9: Section 44 of the Mental Health Act (short-term detention) should be amended to separate out authorisation for detention and authorisation for the giving of treatment, with each being separately considered and justified on the short-term detention certificate, and it being possible to be detained without authorisation for non-consensual treatment.

Monitoring and scrutiny

Recommendation 9.10: The Scottish Government should establish a scrutiny system with sufficiently wide scope to consider evidence and data, and to identify underlying causes of coercive treatment. This should include:

- **Measures to address those underlying causes through systemic measures and measures for individual institutions**

- **Stronger requirements for services to record, reflect on and reduce coercive practices, and national monitoring of coercive practices which drives learning and improvement; and**

- **No undue bureaucracy and no perverse consequences**

Recommendation 9.11: The Scottish Government and relevant public authorities should consider other countries' laws and approaches for monitoring and regulating the use of coercive measures when developing a new system.

Recommendation 9.12: The Scottish Government should propose legislation for a national register of restraint to be set up and maintained by a central public authority which is capable of hosting the exchange of data between multiple public authorities, and which is capable of reporting publicly on trends in data from all of those authorities.

Recommendation 9.13: The Scottish Government should commission and resource the Mental Welfare Commission, and propose legislation where necessary:

- **to work with partner agencies and deliver recommendations on which further powers the Mental Welfare Commission requires to ensure that co-ordinated work delivers reductions in coercion across settings**
- **to co-ordinate the development of consistent and effective approaches to the reduction of coercion across health and social care settings which serve people with mental or intellectual disability**
- **to provide system leadership for data monitoring on reduction of coercion**

Rising rates of detention and community-based compulsory treatment

Racism and anti-racism

Recommendation 9.14: Legislation should require monitoring and scrutiny which specifically tracks and addresses ethnicity in rates of detention and compulsory treatment.

Recommendation 9.15: For people from ethnic minority communities, a human rights enablement approach should routinely consider whether:

- **all of the standard safeguards have been applied in full**
- **all assessments have been made on the same basis as for all people, and without any assumptions which could be related to race or ethnicity**

- **any challenge to the validity of assessments has been considered and resolved**
- **the person has been offered at least the same level of support for decision-making as for any other person**
- **the person's cultural, linguistic and, religious or belief requirements have been identified and professionals can show how these needs will be met**
- **if the person or their supporters have indicated that racism or cultural insensitivity may be present in relation to the order or in relation to relevant services, these issues are being addressed**

Criteria for detention and involuntary treatment

Recommendation 9.16: The criteria for detention and involuntary treatment under the Mental Health Act; or for involuntary measures under the AWI Act, should be that:

- **a person has a mental or intellectual disability or for the purposes of an AWI intervention is unable to communicate because of a physical disability, whether short or long term,**

and is unable to make an autonomous decision as set out in Chapter 8;And for the purposes of a Mental Health Act intervention that:

- **treatment which would alleviate symptoms or prevent the disorder worsening is available, and**
- **without such treatment there would be significant risk to the health, safety or welfare of the patient or to the safety of any other person, and**

- **the order is necessary.**

Recommendation 9.17: In the longer term and in the context of fusing mental health and capacity law, other tests for detention and involuntary treatment under the Mental Health Act and for involuntary measures under the AWI Act should be redefined to fit with the new principles and the Human Rights Enablement framework.

Rising rates of detention and compulsion

In taking forward the following recommendations to address rising rates of detention and compulsory measures, the Scottish Government should be informed by the international human rights framework, including the ECHR and relevant UN treaties. These recommendations should be read with recommendations on accountability.

Recommendation 9.18: The Scottish Government should ensure that the Mental Welfare Commission and the Scottish Human Rights Commission, as independent bodies and in collaboration, are sufficiently empowered and resourced to monitor the extent to which future law meets its purpose of respecting, protecting and fulfilling human rights.

Recommendation 9.19: The Scottish Government should work with the Mental Welfare Commission and the Scottish Human Rights Commission to determine new requirements for data collection on detention and compulsory measures which should be set in law.

Recommendation 9.20: The Scottish Government should invest in establishing or developing a coherent, integrated system to achieve data collection on

rates of detention and compulsion, with local authorities, health boards and other public bodies sharing data, and should ensure public access to significant data and analysis.

Recommendation 9.21: The Scottish Government should commission ongoing monitoring, analysis and research on the effects and effectiveness of detention and compulsion for public protection in Scotland.

Recommendation 9.22: The Scottish Government should commission research to understand rising rates of detention and rates of community-based compulsion, and the large variation in the use of orders across different areas of Scotland. This work and research should be carried out with the full and equal participation of people with lived experience, including unpaid carers.

Recommendation 9.23: The Scottish Government should ensure that data is collected and analysed on the economic, social and cultural barriers that prevent or discourage people for using and benefitting from services, including people from diverse communities and people with protected characteristics.

Time limits on compulsory measures

Recommendation 9.24: In relation to approval for orders:

- **Professionals should ensure that people who are on orders, or who may be put on orders, are aware of Human rights enablement (HRE). Professionals should provide access to support to request or challenge HRE.**

- **Responsible Medical Officers (RMOs) and Tribunals should ensure that CTO care plans include a revocation strategy that outlines what needs to happen for that person to come off the CTO and what benefits the person is deriving from staying on it, expressed in terms of the Human rights enablement approach .**

Recommendation 9.25: In relation to review points for orders:

- **In advance of legislation, the Scottish Government should commission the Mental Welfare Commission to work with a health board or boards, to test the practical effects of short time-limits for reviewing orders, or other processes for internal review during the life of an order.**

Recommendation 9.26: On post-legislative scrutiny:

The Scottish Government should propose law reform which includes provisions that enable future innovations to be developed through research and implemented across law, policy and practice, before major reforms to law.

Community-based compulsory treatment

Recommendation 9.27: Community-based compulsory treatment should continue to be allowed in Scottish mental health law and incapacity law. However, research, monitoring, inspection and individual scrutiny of CCTOs should be enhanced and should all be based on the international human rights framework as it applies to Scotland.

Recommendation 9.28: The Scottish Government should define a new purpose for community-based compulsory treatment: CCTOs should ensure access to recovery-focussed, trauma-informed, community-based services.

Recommendation 9.29: The Mental Welfare Commission should lead on embedding the new purpose of CCTOs in practice, through work with other organisations and through continuing scrutiny of the operation of CCTOs.

Recommendation 9.30: The Scottish Government should commission substantial and innovative research:

- **To explain why the use of CCT has continued to increase in Scotland**
- **To understand the circumstances which make CCT effective or ineffective**
- **To show which groups of people CCT tends to work for**
- **To understand the experiences of those who receive regular voluntary treatment in the community and who are not on a CCTO**
- **To explain why so many individuals are now being placed directly onto CCTOs with no previous order**

The findings of this research should be used to determine whether further law reform is needed in this area.

Suspension of detention and other transitions

Recommendation 9.31: The Scottish Government should revise statutory guidance to give direction to practitioners on how to involve family members and other unpaid carers in suspension of detention and other transitions. This is to ensure that transitions are effective and are respectful of all relevant human rights, such as the right to privacy including data protection.

Emergencies: reducing the impact of crises

Recommendation 9.32: Through the mental health strategy, Scottish Government should:

- **ensure adequate resourcing and multiagency training for detention in the community**

- **work with health and care agencies to develop alternative places of safety for people who are in distress and at risk, and whose needs are not met by in-patient psychiatric care**

- **further develop approaches to recovery**

- **develop person-centred safety planning, including joint crisis planning**

Recommendation 9.33: The Mental Welfare Commission should work with stakeholders to develop practice guidance on assessment in the community for detention.

Recommendation 9.34: The Scottish Government should propose legislation which creates duties on public authorities to provide or commission non-medical, age-appropriate and culturally-appropriate crisis support services.

Recommendation 9.35: The Scottish Government should review whether the place of safety powers should extend beyond suspected mental or intellectual disability to other people who may be at serious risk.

Recommendation 9.36: Health Boards should submit updated Psychiatric Emergency Plans every 2 years to the Mental Welfare Commission to be reviewed against the Commission's guidance.

Chapter 10: Forensic Mental Health Law

We believe that it remains appropriate and justifiable at present to keep the option of a different judicial route with different disposals for those who have offended who have a mental or intellectual disability, if the consequences of that disorder have implications for either the person's culpability or the appropriate disposal. Within this context, we consider that implementation of the United National Convention of the Rights of Persons with Disabilities should be about making sure that any limitations imposed on people in this separate system result in equal treatment, and with regard to the State's duty of reasonable accommodation under Article 5 which addresses equality and non-discrimination.

We are recommending changes to the mental health legislation that applies to people with a mental or intellectual disability who offend. It is an area of law that applies to only a relatively small number and percentage of those touched by mental health law. Indeed, it only applies to a small percentage of those with an identified mental or intellectual disability who offend. However, it remains an area of importance, given the significant impact which may follow in terms of deprivation of liberty.

We considered how people with a mental or intellectual disability can be diverted from prosecution entirely or diverted into the forensic mental health system. We heard concerns that they may not always be appropriately identified and/or diverted. We recommend a number of steps around **raising awareness and training to support the expansion of appropriate use of diversion**.

We are concerned about people who are being remanded to prison while waiting on appropriate health provision for a mental or intellectual disability. We heard that a lack of capacity on a systemic level is often at the heart of this. We think, however, that remanding a mentally unwell person to prison should be seen as a failure to respect their human rights. We are recommending a new power for **a court to require the appropriate provision for a mental or intellectual disability for any remanded prisoner**. We also recommend a time limit for treatment orders.

We think more should be done to **understand and address why supervision and treatment orders are not used more often**.

We considered the differences between the criteria used to make civil orders and forensic orders. Here ‘forensic orders’ means orders imposed by criminal courts that relate to those with mental disorders who have offended or the transfer of prisoners from prison to the mental health estate. The Millan Committee originally proposed having the same criteria between civil and forensic mental health orders. We think any differences between these regimes must be justified. We are recommending **the removal of the ‘harm to self’ test from the criteria for forensic orders (excluding transfer for treatment directions and hospital directions)**.

We think **a lack of ability to make an autonomous decision about treatment should be considered as a criteria for forensic orders once the autonomous decision making test we propose has been suitably embedded in civil orders.**

We considered the potential for a discriminatory impact on a person who is diverted into the forensic mental health system rather than continuing under the judicial system. Currently people who are found unfit for trial or are acquitted by reason of mental disorder can be given a forensic order depriving them of their liberty for offences they could not be imprisoned for. We think **that forensic orders that deprive someone of their liberty should only be for offences that are punishable by imprisonment.** We think **a more systemic process of assessment should be developed for recommending restriction orders**.

Like other independent reviews before us, we heard concerns from people that being diverted into the forensic mental health system can result in a loss of their liberty for a longer period of time than had they been sent to prison. This is concerning from a UNCRPD compliance perspective. Our main concern was for people who are subject to a very long period of detention. We are **recommending that compulsion orders (with or without a restriction order) should be time limited**.

In 1999, emergency legislation amended the criteria for the detention for people on a restriction order. The criteria is known as the ‘serious harm test’. It allows people to

be detained under mental health legislation even if they are not receiving treatment. We agree with concerns that been raised about this. It is being applied to a wider group of patients than originally intended, particularly patients with an intellectual disability. We recommend that with careful planning, **the 'serious harm test' for detention for compulsion orders with a restriction order should be removed.**

We considered the role Scottish Ministers have in the ongoing management of restricted patients. The Millan Committee recommended ending this Ministerial role. We think their involvement in the progression decisions for individual restricted patients is anomalous. They are not involved in the same way in other criminal cases. We are **recommending the roles of Scottish Ministers and the Tribunal in decisions about restricted patients should mirror those of Scottish Ministers and the Parole Board for Scotland have about life sentence prisoners.**

We are recommending further specific powers for the Mental Health Tribunal for Scotland (the Tribunal) relating to the conditional discharge of restricted patients. We recommend that **the Tribunal should have the power to vary the conditions under which they had previously discharged a restricted patient**. Only Scottish Ministers can do this just now. We are also recommending that the Tribunal should have **the power to discharge a restricted patient into conditions that amount to deprivation of liberty**. People told us that this was needed in the interests of clarity and legal certainty. However, the use of this power should not become routine practice. Its use must be governed by clear criteria and monitored.

There are currently people in prison who are not seen as suitable for prison by the prison authorities, but also not seen as suitable for hospital by the hospital authorities. These people are often highly vulnerable, with complex histories of abuse and trauma. We believe the State owes a duty to such individuals. We are recommending **a duty on the Scottish Ministers to ensure that people are accommodated in a place which is safe and appropriate for their needs.**

People detained under forensic orders are not entitled to vote. As similar blanket restriction on prisoners right to vote was successfully challenged at the European Court of Human Rights since 2005. The Scottish Parliament addressed this in the

Scottish Elections (Franchise and Representation) Act 2020 We are **recommending that voting rights should be extended to people detained under forensic orders**. We consider this part of the necessary cultural change required to recognise individuals as rights-bearers and tackle the stigma too often associated with mental ill-health.

Chapter 10: recommendations

Diversion of those who have offended

Recommendation 10.1: The Scottish Government should ensure that processes and procedures to identify people with mental or intellectual disability who come into contact with the criminal justice system are effective in allowing for appropriate diversion to be considered. This should include the Scottish Government:

- **working with the Law Society of Scotland to ensure training programmes that increase solicitors' awareness and confidence in issues relating to representing people with a mental or intellectual disability. Similar training should be developed for other justice practitioners.**
- **reviewing the opportunities for screening and assessing people for a mental or intellectual disability within the criminal justice system, with particular attention paid to the earliest interactions with the person.**
- **overseeing better co-ordination and ethical data-sharing between justice and health partners.**
- **the development of community based interventions for offenders with mental health needs as an alternative to prison or diversion into the forensic mental health system.**

Recommendation 10.2: The Crown Office and Procurator Fiscal Service (COPFS) should develop and publish guidance on the prosecution of those with mental or intellectual disability who offend.

Pre-sentence

Changes to pre-sentencing orders

Recommendation 10.3: he court should be given the power to require the appropriate provision for the mental or intellectual disability of any remanded prisoner, including as to placement in a medical setting rather than prison.

> **Prior to legislative change existing arrangements and powers should be used to their maximum extent. Data should be kept about remands for inquiry into mental and intellectual disability and the outcomes of such cases.**
>
> **The legislation to introduce such a power should be, subject to an appropriate lead-in period for training, co-ordination between different parts of the justice systems and ensuring that legitimate concerns have been addressed prior to implementation.**

Recommendation 10.4: Time limits should be introduced for treatment orders. We recommend a time limit of six months to bring them in line with compulsory treatment orders.

Sentencing

Supervision and treatment order

Recommendation 10.5: The use of supervision and treatment orders should be monitored by the Mental Welfare Commission.

Recommendation 10.6: The Scottish Government should engage with the judiciary and the Judicial Institute to better understand any barriers to the use of these orders.

Criteria for forensic orders – overarching drive towards standardisation

Criteria for forensic orders: SIDMA (or ADM)

Recommendation 10.7: The Scottish Government should consider whether a lack of ability to make an autonomous decision about treatment should be added to the criteria for forensic orders once the Autonomous decision making test proposed by the Review has been suitably embedded within civil orders.

Criteria for forensic orders: harm to self

Recommendation 10.8: The removal of the 'harm to self' test from the criteria for forensic orders, excluding transfer for treatment directions and hospital directions. This should be subject to the following careful planning by the Scottish Government:

> **A mapping exercise of existing services for those who are at risk of harm to themselves – what and where they are; what criteria are currently used for access; how they operate.**
>
> **Planning across services to prepare for the recommended change and ensure that there are no gaps.**
>
> **Legislation introduced to remove this test.**

Criteria for forensic orders: seriousness of offence

Recommendation 10.9: That forensic orders should be reserved to offences punishable by imprisonment.

Criteria for restriction orders

Recommendation 10.10: The wording of the criteria for imposing a restriction order under Section 57 of the Criminal Procedure (Scotland) Act 1995 should be brought up to date and revised to remove any ambiguity about what these provisions mean.

Recommendation 10.11: A standardised process of risk assessment should be developed as a requirement for recommending restriction orders. This should be developed by the Scottish Government working alongside the Risk Management Authority, and relevant justice and health partners.

Ongoing management of people under forensic orders

Standardisation of effect

Recommendation 10.12: That compulsion orders (with or without a restriction order) should routinely be time limited. This time limit should be set by the sentencing judge to reflect the maximum reasonable time to address the risk presented by the offender. It should also take account of the gravity of the offence and ensure a degree of proportionality associated with that factor. For the avoidance of doubt, the order would end earlier than this if the criteria for the order are no longer met.

> **At or shortly before the expiry of the time limit for a compulsion order (with or without a restriction order), the offender could be referred by the Responsible Medical Officer to the Mental Health Tribunal for Scotland for consideration of whether a compulsory treatment order should be imposed**
>
> **A compulsion order should only ever be without limit of time where evidence is provided, under a systematic process of assessment, that the offender is likely to continue to present a serious risk of harm for an indefinite period.**

The 'Serious Harm' Test

Recommendation 10.13: That Section 193(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 should be repealed, thereby removing the 'serious harm' test.

Restricted Patients – role of Scottish Ministers

Recommendation 10.14: The involvement of Scottish Ministers and the Mental Health Tribunal in the progression management, conditional discharge and recall of restricted patients should mirror the respective involvement of the Scottish Ministers and the Parole Board for Scotland in the management of life sentence and Order for Lifelong Restriction prisoners. This should include:

Review any data and other evidence on the current role of Scottish Ministers, to include information about delays and the impact on outcomes.

Using data and other evidence on the current role of Scottish Ministers, in conjunction with the Mental Health Tribunal for Scotland and other relevant justice partners, examine any gaps that might be caused by reducing the role of Ministers and consider alternative options through the Tribunal.

Amend the roles of Scottish Ministers and the Mental health Tribunal for Scotland.

Restricted Patients – conditional discharge and recall powers

Recommendation 10.15: That the Mental Health Tribunal for Scotland should have the power to vary the conditions under which they have previously discharged a restricted patient.

Recommendation 10.16: That the Mental Health Tribunal for Scotland should have the power to discharge a restricted patient into conditions that amount to deprivation of liberty. The use of this power should be:

- **governed by clear criteria that can be understood and are accessible to patients and their unpaid carers and**
- **monitored by the Mental Welfare Commission.**

Duty on Scottish Ministers to ensure appropriate accommodation

Recommendation 10.17: There should be a duty on Scottish Ministers to ensure the safe and appropriate accommodation of prisoners with significant mental health needs.

Voting rights

Recommendation 10.18: That voting rights should be available and the blanket disenfranchisement ended for individuals detained under forensic orders provided for under of the Representation of the People Act 1983 should be ended. Appropriate legislation should be introduced, together with a comprehensive communications policy to raise awareness of the change.

Chapter 11: Accountability

We believe accountability is one of the most important features of human rights. A clear accountability framework is needed to make sure we know who is responsible for protecting, respecting and fulfilling our rights. There must be ways we can challenge violations to our rights and seek a remedy or solution. The United Nations requires us to make sure that these routes to remedy are accessible, affordable, timely and effective. We must also have sufficient oversight and understanding of our services and systems to allow us to identify breaches to human rights and discriminatory practices, and address them. There will be merit in considering the recommendations alongside the ongoing development of provisions for the new Human Rights Bill and National Care Services (Scotland) Bill.

We think that scrutiny bodies have a critical role to play in modelling and holding others accountable for embedding human rights based approaches into our culture. We recommend a **duty on scrutiny bodies and complaint handling bodies to enhance access to justice and ensure human rights obligations are given effect by all public authorities.**

There is no one scrutiny body with oversight and accountability across services for people with mental or intellectual disabilities. People told us that it can good to have more than one set of eyes across a system. But it can also appear confusing and fragmented. We recommend **a formalised network for the bodies involved in the scrutiny of mental health services** to provide greater co-ordination, clarity, focus and leadership among the different scrutiny bodies. It will need to develop a cross-agency framework for monitoring outcomes and ensure greater meaningful involvement of people with lived experience in scrutiny processes.

This network requires a lead organisation which is responsible for overall co-ordination and reporting to Scottish Ministers. We think this should be the Mental Welfare Commission. To support this, we are recommending **changes to the Mental Welfare Commission's governance and responsibilities**.

We need data to allow us to the extent to which our mental health and capacity legislation does (or does not) ensure people's human rights are protected, promoted and realised. It needs to allows us to identify any discriminatory impacts on different groups, so we can address these in timely and transparent ways. We recommend a duty on Public Health Scotland to lead work **to determine what needs to be monitored across mental health services to ensure human rights obligations are being met.** We also recommend a duty on organisations holding data to work together to make available the **structured, disaggregated, researchable data needed to monitor mental health services effectively and drive change**

A recent research project which involved one of our Executive Team looked at the experiences people had of the Mental Health Tribunal for Scotland (the Tribunal). It includes recommendations for the Tribunal, the Scottish Government and this Review. They align with the human rights approach that underpins this Review and our own recommendations. We recommend the **Scottish Government and the Mental Health Tribunal for Scotland consider the recommendations of this project.**

We recommend that **non-means tested legal aid representation should apply to all of the new legal remedies we are recommending**.

The Scottish Government are considering proposals made by the Mental Welfare Commission to improve the way that the deaths of people under compulsory care and treatment are investigated. We make a number of recommendation to strengthen these proposals.

We are recommending that **the Tribunal's power to make recorded matters should be strengthened and extended**. The Tribunal should be able to require relevant services to provide the care and support a person needs, in certain circumstances. We are extending this power to cover the care and support of people under both civil and criminal orders.

We also recommend that **the rights people have to appeal against conditions of excessive security should be extended**. Currently, only people in high and

medium secure hospitals have the right to appeal against the level of security they are being held in. We recommend **the right to appeal against unjustified restrictions is extended to all patients subject to compulsion**. We believe this is consistent with the developing approach to human rights. Regulations should set out the nature, severity and duration of restrictions which could be subject to an appeal.

We think that the informal routes to remedy are the foundation for the protection, promotion and realisation of people's rights. Like all remedies they need to be accessible, affordable, timely and effective. We heard is that the current complaints system does not meet these standards for people in the mental health system. We recommend legislative **changes to allow the Scottish Public Services Ombudsman to oversee a more holistic and human rights based approach to considering complaints for people with a mental or intellectual disability across health, social care and other public services.**

The UNCRPD's Committee General Comment No. 7 says governments need to strengthen the capacity of these groups to allow them to participate in all phases of policy making. It also says resources should be prioritised for those groups that focus on advocacy for disability rights. We make **a number of recommendations to develop and strengthen collective advocacy**.

There is currently no place for people to take collective complaints to. These are complaints about an issue that is affecting more than one person. Without a place to take collective complaints, each person facing this same issue is required to take individual action. Within a human rights based accountability framework, it should not be for an individual to tackle known systemic issues that breach their rights. We recommend **individual and collective advocacy groups should have the explicit right to raise a court action for human right breaches**. We also recommend less formal ways for these groups to **raise systemic human rights concerns to the Scottish Public Services Ombudsman and the Mental Welfare Commission**.

Chapter 11: recommendations

Scrutiny and the regulatory landscape

The scrutiny landscape

Recommendation 11.1: There should be a duty on scrutiny bodies and complaint handling bodies to enhance access to justice and ensure human rights obligations are given effect by all public authorities involved in the provision of services for people with mental or intellectual disability. The Scottish Government should ensure these bodies are fully supported to build their capacity and confidence to play this part. (medium)

Recommendation 11.2: There should be a formalised network of bodies involved in the scrutiny of mental health services. This should include Healthcare Improvement Scotland, the Care Inspectorate, Audit Scotland, the Mental Welfare Commission, the Office of the Public Guardian, Public Health Scotland, the Scottish Public Services Ombudsman and collective advocacy organisations. Other members may include professional regulatory and training bodies.

Recommendation 11.3: The network should work with the Scottish Government to identify and remove any legislative barriers to this approach, such as unnecessary constraints on sharing information, or restrictions on the full involvement of people with lived experience, including their unpaid carers.

Recommendation 11.4: The Mental Welfare Commission should be the lead organisation for this network, with responsibility for co-ordination and reporting to Ministers and the Scottish Parliament.

Recommendation 11.5: This network should develop a cross-agency framework for monitoring outcomes in mental health and should ensure that:

- **the promotion, protection and realisation of people's human rights is a common aim for scrutiny bodies across the mental health landscape.**
- **there is development and support for sufficient human rights expertise within all scrutiny bodies.**
- **there are mechanisms to identify, report and address systemic issues across the work they do.**
- **people with lived experience, including unpaid carers play a leading role in determining what defines 'quality' in services as the foundation for each scrutiny body's monitoring, evaluation and inspection processes.**
- **effective monitoring of the extent to which scrutiny bodies are meaningfully fulfilling their duties under section 112 to 113 of the Public Services Reform Act 2010 in relation to user focus.**
- **there is a single entry point for the public to access the appropriate scrutiny body for any information, support or issue they want to raise.**

The Mental Welfare Commission for Scotland

Recommendation 11.6: The powers and responsibilities of the Mental Welfare Commission should be strengthened in legislation. The changes we recommend are:

- **Its core remit should be to protect and promote the human rights of people with mental or intellectual disabilities. This should include both protection of the rights of individuals and promoting systemic change.**

- **The MWC should have a statutory responsibility to monitor the operation of the adults with incapacity legislation.**
- **There should be a substantial increase in the statutory requirement to include people with lived experience as service users, or family carers on the Board of the MWC.**
- **The MWC should strengthen the involvement of people with lived experience in their management, staffing and wider engagement, and should have a responsibility to co-operate with collective advocacy organisations.**
- **The MWC should increase its work in community settings.**
- **The legislation should include a level of accountability directly to the Scottish Parliament. This would include the power to make a report to Parliament if there is a serious failure by a public body, including the Scottish Government, to follow a recommendation.**
- **The MWC should have the power to initiate legal proceedings to protect the human rights of any person or group covered by mental health and capacity law.**
- **Consideration should be given to a change of name for the MWC to reflect its focus on human rights**.

Data Collection

Recommendation 11.7: There should be a duty on Public Health Scotland to actively lead work with the Mental Welfare Commission, groups representing people with lived experience, other agencies holding data and the research community to determine what needs to be monitored across mental health services to ensure human rights obligations are being met.

Recommendation 11.8: There should a duty on organisations holding data, including Public Health Scotland, the Mental Welfare Commission, the Care

Inspectorate, Health Improvement Scotland, the NHS, the Office of the Public Guardian, local authorities, Police Scotland, the Scottish Prison Service and any other relevant organisations to work together to gather and make available the structured, disaggregated, researchable data needed to monitor mental health services effectively and drive change.

The Mental Health Tribunal for Scotland

Recommendation 11.9: The Scottish Government and the Mental Health Tribunal for Scotland consider and respond to the recommendations of the research project: Mental Health Tribunal for Scotland: the views and experiences of Patients, Named Persons, Practitioners and Mental Health Tribunal for Scotland members.

Remedies and access to justice

Recommendation 11.10: Individuals who are subject to or wish to initiate legal proceedings under our proposals, or their unpaid carers or representatives, should have access to non-means tested expert legal representation. The Scottish Government, working with the Scottish Legal Aid Board and the Law Society of Scotland, should ensure that there is an adequate supply across the country of expert legal advice and representation.

Investigating Deaths

Recommendation 11.11: The Scottish Government make a timely response to the Mental Welfare Commission's proposals to allow improvements to be made to the investigation of deaths of people under compulsory care and treatment as soon as is practical.

Recommendation 11.12: The Scottish Government should ensure that the role of the Mental Welfare Commission in investigating these deaths is explicitly placed in legislation.

Recommendation 11.13: The Scottish Government should ensure there is a mechanism to monitor and review the investigations into these deaths using the experiences of the families of those who have died as a key measure.

Recommendation 11.14: The Scottish Government should ensure that the development of any independent body to investigate deaths of people in custody and the development of the proposals for investigating deaths of people under compulsory care and treatment progress together to ensure opportunities for further alignment and equity between the two processes are not missed. (short)

Recommendation 11.15: The Mental Welfare Commission's powers to request information and co-operation from other authorities should be amended explicitly to cover any organisation with which it needs to collaborate for the purpose of these investigations.

Recorded Matters

Recommendation 11.16: The existing powers of the Mental Health Tribunal for Scotland to make recorded matters under Section 64(4)(a)(ii) of the 2003 Act should be strengthened as follows:

The Mental Health Tribunal, in the event of non-compliance with a recorded matter should be given powers to direct the relevant provider to provide within a specified time such care and support as may be required to:

- **avoid the need for an individual's compulsion; or**
- **ensure that compulsion respects the human rights of the patient.**

In reaching a decision as whether to issue such a direction, the Mental Health Tribunal will have due regard to:

- **the core minimum obligations and any other relevant standards in place for the provision of mental health services,**
- **the Human Rights Enablement approach taken with the individual,**
- **and the wishes of the individual.**

The service provider will have an appeal to the Upper Tribunal against such a direction.

Continued non-compliance with a direction will be a breach of a statutory duty which is justiciable in the Court of Session.

Excessive security appeals

Recommendation 11.17: All patients subject to compulsion should have a right to appeal against being subjected to unjustified restrictions.

- **This right should extend beyond a person's right to move to a less restrictive care or treatment setting. People would also have the right to challenge the level of restrictions while staying in the same place.**

- **This right should extend to restrictions imposed by a Community-based Compulsory Treatment Order, or a Deprivation of Liberty under the AWI Act, as well as detention in hospital under the Mental Health Act or Criminal Procedure (Scotland) Act.**

- **The appeal procedures would be modelled on sections 264 to 273 of the Mental Health Act. However, there should be no need for the appeal to be supported by a medical report by an approved practitioner. Instead, there should be a sift process to ensure that groundless appeals are not pursued.**

- **Regulations should set out the nature, severity and duration of restrictions which would potentially be subject to an appeal.**

- **The use and outcome of these provisions should be monitored by the Mental Welfare Commission to identify whether there are any systemic issues giving rise to appeals which require wider investigation or action**.

Recommendation 11.18: The appeal process should ultimately replace the 'specified person' procedures in sections 281 - 286 of the Mental Health Act. Before then, the Scottish Government should urgently progress reforms to the specified person procedures to ensure they appropriately cover modern technology and better reflect human rights.

Complaints

Recommendation 11.19: The Scottish Public Services Ombudsman remit should be extended to allow it to:

- **Oversee and drive a more holistic and human rights based approach to considering complaints for people with a mental or intellectual disability across health, social care and other public services.**

- **Share learning and best practice on complaint resolution and handling across Scotland.**

Recommendation 11.20: The legislative restriction whereby the Scottish Public Services Ombudsman can only accept complaints in alternative formats 'in exceptional circumstances' should be removed.

Recommendation 11.21: The Scottish Public Services Ombudsman should work with provider organisations, the Care Inspectorate, Healthcare Improvement Scotland, the Mental Welfare Commission and the Office of the Public Guardian, to support a lived-experience led change project to design a

complaints system that better meets the needs of people with mental health and capacity issues and which is based in human rights. To support this:

We recommend an improvement methodology for testing this new model.

Our work has shown that to be based within a human rights approach and to address barriers people experience in the current system, it should:

- **Have complainants as active, trusted and valued participants in a dialogue about the decisions that affect them.**
- **Be developed by complainants and their families, with complaint handling bodies as partners.**
- **Look towards more solution-focused and collaborative ways to share concerns without necessarily having to escalate them to complaints.**
- **Have meaningful processes to monitor, follow-up and report on issues raised which allow us to:**
  - **Know the outcomes in terms of what difference was made to the individual or what changes were made to the services.**
  - **Identify patterns or themes which may indicate systemic issues and be fed back into the system for learning and development.**
  - **Gather equality data to understand and monitor who the system is working for and who it is excluding.**
- **Support people to share their experiences in the way that works best for them. This could include the involvement of peer workers, having access to specialist clinicians, or providing people with additional training on communication methods, mental illness or anti-racism.**
- **Have a single point of access for the system.**

Independent collective advocacy

Recommendation 11.22: People with mental or intellectual disability should have a right to collective advocacy.

Recommendation 11.23: There should be a legal duty on the Scottish Government to secure and support effective collective advocacy organisations for people with a mental or intellectual disability at a local and a national level.

Recommendation 11.24: The Scottish Independent Advocacy Alliance (SIAA) and collective advocacy organisations should work with 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. It may build on the existing SIAA standards.**
- **an opt-in programme of advocacy related learning to support the development of more advocacy workers and peer leaders. This will include training on anti-racism, intersectionality and human rights.**

Collective complaints

Recommendation 11.25: Individual and collective advocacy groups should have an explicit right to raise a court action for human right breaches.

Recommendation 11.26: This right must be supported by access to legal advice, guidance and support for groups who wish to take this step.

Recommendation 11.27: Individual and collective advocacy groups should be able to refer systemic human rights concerns to the Scottish Public Services Ombudsman. The Ombudsman's role should be extended to allow them to investigate these as a collective complaint.

Recommendation 11.28: The Mental Welfare Commission and advocacy groups should develop a participatory referral process to escalate human rights issues that remain unresolved and unaddressed by services to the Mental Welfare Commission to investigate and, if appropriate, initiate legal action.

Chapter 12: Children and Young People

This Review' recommendations generally apply to children, but there are many additional factors which are specific to children. There is a lot of evidence that the mental health system for children is under great pressure. The Review considered what the UNCRC and UNCRPD mean for mental health law for children in Scotland.

There was widespread, though not universal, support for the retention of a specific principle for children in future law. We concluded that there is a need for a principle of respect for the rights of the child, with particular reference to the UNCRC and UNCRPD.

There should be clear statutory duties reflecting the human rights of children and young people who need support for mental health needs, or learning disability or other neurodevelopmental differences. There was support for a statutory duty on Scottish Ministers and health and care agencies to provide for children the minimum standards needed to secure the human rights set out in international treaties. The way in which minimum core obligations and duties of progressive realisation are designed must also reflect a human rights-based approach, with the full and meaningful involvement of children and their families.

Mental health services are being asked to fill in for gaps elsewhere in the system for children in crisis. There is an urgent need for Scottish Government to deliver on systemic reform of services available to children and young people who are experiencing acute mental distress, including the provision of safe and child-centred alternatives to admission to psychiatric care.

Children, like adults, can be subject to emergency detention for up to 72 hours in hospital. Medical practitioners should generally obtain the consent of a Mental Health Officer for this, but Mental Health Officers (MHOs) may often not be involved in emergency detentions. This is an a context of a rising number of detentions of young people aged 16 and 17 for mental health care and treatment in Scotland with self-

harm as a key characteristic, particularly for young women. Towards meeting UNCRC requirements, we consulted on whether the safeguards for children should be strengthened by a requirement that a Mental Health Officer should always consent to emergency detention, and a provision requiring a formal review within 24 hours. A number of respondents were in support of the suggested additional safeguards. However, several respondents highlighted concerns about practicality, particularly in the current context. We recommend improved monitoring, increasing provision of MHOs with relevant specialist expertise, a review by an MHO within 24 hours where an MHO did not give consent, and access to independent advocacy within 12 hours of emergency or short term detention.

The UNCRC, and the Mental Health Act's child welfare duty, apply up to the age of 18, but we were told of inconsistencies in access to CAMHS for 16 and 17 year olds. We considered whether there should be an entitlement for children to access CAMHS where needed, at least up to the 18th birthday. Concerns about this proposal included current levels of resource and transitions to adult services. young people should have a right to expect that they will have access to CAMHS up to age 18 at least, if that is what is right for them, but we concluded that there should not be arbitrary age-based cut-off dates for CAMHS. We recommend increased flexibility in rights of access to CAMHS, improved monitoring and a programme of improvement to transitions.

Interactions between child and adult legal provision can be complex. The Scottish Government should take forward detailed analysis of the implications of changes in age limits in the child welfare system for the interface with adult support and protection.

We also considered the needs of children and young people as these interact with the needs of parent carers. What we heard from children, young people and carers influenced our recommendations, including in relation to choosing a 'named person'.

We proposed that the recommended SDM / HRE /ADM framework could apply both to adults and to children. There was very wide support for developing Supported decision making for children. There was more tentative support for using the Human

rights enablement approach with children, and the area of Autonomous decision making was most contentious for children. We recognise that there are additional complexities for children, particularly in the application of the ADM test. We recommend a detailed process of further policy development, involving children with lived experience, their families and professionals. Following that, Supported decision making, Human rights enablement and Autonomous decision making should apply to children who are subject to mental health law.

There is inadequate provision for mental health advocacy for children and families, despite the existing duties on NHS and local authorities in the Mental Health Act. Also, collective advocacy for children with mental or intellectual disability is even less prominent than for adults. We recommend stronger duties to ensure access to advocacy, a streamlining of advocacy duties across all areas of children's lives, and a new duty on Scottish Ministers to support collective advocacy for children.

We were concerned that the accountability framework for children with mental health needs may be fragmented, leading to gaps in accountability. We recommend a scrutiny network in Chapter 11 on accountability. That network should also oversee the scrutiny of outcomes for children with mental and intellectual disabilities across health, care and education settings, with additional membership.

We received a lot of evidence that autistic children and children with other neurodevelopmental differences such as ADHD were particularly poorly served by the care and support on offer in mental health services, and that CAMHS were not designed with their needs in mind. Ensuring access to economic, social and cultural rights will be particularly important for children with neurodevelopmental differences, alongside a stronger right to services that are appropriate for their needs, rather than being slotted into services designed for other people. We recommend that the statutory duties flowing from a Co-ordinated Support Plan should extend to all statutory agencies in the plan, and should be subject to review by the Additional Support Needs Tribunal.

Part 16 of the Mental Health Act contains safeguards in relation to some kinds of treatment when given to someone who is subject to compulsory treatment under the

Mental Health Act. Those safeguards apply to children in the same way as adults, and we make recommendations in Chapter 9 about strengthening these safeguards, including in relation to restraint and seclusion. A review of safeguards under Part 16 of the Mental Health Act should also consider whether further safeguards may be necessary for children being treated under the Mental Health Act, or as informal patients. Scottish Government should co-ordinate further work on the use of restraint and isolation to ensure consistent standards across education, healthcare, childcare and justice settings, which reflect human rights- based best practice.

On provision for perinatal mental illness, there has been encouraging progress but a stronger duty and a stronger accountability framework are required.

On relationships between parents and children, the Mental Health Act imposes a duty on the NHS, local authorities and others to take steps to mitigate the impact of detention on family relationships. It is not clear that this duty is effective. The duty should be strengthened and broadened to apply in considering alternatives to compulsion, not only after compulsion has been authorised, and to fully reflects the obligations of the UNCRC and UNCRPD. A related duty is require to ensure that services support the family life of children or adults with mental or intellectual disabilities.

We also considered whether there is a need to explore the integration of child law and mental health law. There was agreement that there are systemic problems for children whose needs do not fit into one legal framework, but there was concern that seeking to subsume mental health law for children into a wider child law framework risked losing much for an unclear benefit. We concluded that there is not currently a consensus which would justify the complex work involved in seeking to join mental health law for children with other measures which authorise compulsory interventions. However, the problem we identified is real, and there was support for greater alignment between systems. If our recommendations for reforming mental health law to give more weight to economic, social and cultural rights are taken forward, the overlap with other parts of the legal framework for the protection and

support for children will be even greater. We therefore recommend that the Scottish Government and its partners develop a holistic and child-centred system of care and support for children, including the implementation of the Promise, and the incorporation of the UNCRC. This should include a focus on how to better align care and support for children and young people with mental or intellectual disabilities, including where compulsory measures are required. This work should include consideration of a unified tribunal jurisdiction for different compulsory interventions or provisions to enforce the rights of the child.

Chapter 12: recommendations

Principles

Recommendation 12.1: That the principles of future mental health and incapacity legislation include one of Respect for the rights of the child: Any interventions concerning a person aged under 18 shall respect the rights of that person under the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities .

Recommendation 12.2: Before finalising the wording of the principle of respect for the rights of the child, and developing related guidance, there should be a process of consultation and engagement with children and young people.

Rights to support

Recommendation 12.3: There should clear and attributable statutory duties on Scottish Ministers and on NHS Boards, local authorities and integration authorities, to provide or secure such care, support and services as are needed to secure the human rights of children with mental or intellectual disability, including but not restricted to the right to the highest attainable standards of mental and physical health. This should include specific care and support for children who have, or have had, a mental or intellectual disability, alongside measures to prevent mental ill-health and promote the wellbeing of all children.

Recommendation 12.4: These duties should reflect agreed minimum core obligations developed through engagement with experts including experts by experience, alongside duties and a framework for progressive realisation of those rights. The development of these duties and associated standards should draw on human rights approaches including applying the PANEL principles and use of the AAAQ framework. Services should be age-appropriate.

Recommendation 12.5: In line with the recommendations of the National Taskforce for Human Rights Leadership, there should be accessible, affordable, timely and effective remedies and routes to remedy where any of the above duties are not upheld. This should include the ability of individuals to raise a legal action in the civil courts.

Recommendation 12.6: Education authorities should have a duty to secure appropriate education for all children with mental or intellectual disabilities, including but not restricted to children in hospital or subject to compulsory care. This should be enforceable at the Additional Support Needs Tribunal.

Crisis services

Recommendation 12.7: The Scottish Government should lead systemic reform of services available to children and young people experiencing acute mental distress, including the provision of safe and child-centred alternatives to admission to psychiatric care.

Emergency detention safeguards

Recommendation 12.8: Section 36 of the Mental Health (Care and Treatment) (Scotland) Act 2003 should be amended to make clear that emergency detention without MHO consent should only take place in exceptional circumstances. These circumstances should be recorded and monitored by the Mental Welfare Commission

- **Scottish Ministers should, as part of the duty of progressive realisation, ensure that there are sufficient MHOs with expertise in child and family services to realise this expectation**

- **In any case where an MHO has not given consent, there should be a review by an MHO within 24 hours**

- **Within 12 hours of emergency or short term detention, a child should be given access to an experienced independent advocate**

16 and 17 year olds in CAMHS

Recommendation 12.9: The existing service standard that CAMH Services should be available to children who require them up to age 18 should be considered for inclusion in the minimum core obligations for those services.

Recommendation 12.10: As already happens for the placement of children in adult wards, any decision to transfer someone to adult services before age 18 should be recorded and subject to oversight by the Mental Welfare Commission.

Recommendation 12.11: In defining those duties subject to progressive realization, consideration should be given to ensuring that young people who have accessed CAMH Services continue to have access to support if they require it up to age 26.

Recommendation 12.12: There should be a programme of improvement to transitions between CAMHS and adult services, to ensure that transitions are well planned, maintain relationships which are important to the young person, and reflect the developing capacities and needs of the young person.

Interaction between child and adult legal provision

Recommendation 12.13: The Scottish Government should take forward detailed analysis of the implications of changes in age limits in the child welfare system for the interface with adult support and protection.

12.6: Supported decision making, Human rights enablement and Autonomous decision making

Recommendation 12.14: Our proposals regarding Supported decision making, Human rights enablement and Autonomous decision making should apply to children who are subject to mental health law.

Recommendation 12.15: Before legislation on SDM / HRE / ADM is introduced, there should be a detailed process of further policy development, involving children with lived experience, their families and professionals, to address particular issues affecting children, including the interaction between the ADM test and the Age of Legal Capacity (Scotland) Act 1991.

Independent Advocacy

Recommendation 12.16: The duties in the Mental Health Act to secure advocacy should be strengthened to ensure that any child with a mental or intellectual disability is made aware of their right to independent advocacy and is able to obtain this when needed.

Recommendation 12.17: 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

Recommendation 12.18: There should be a new duty on Scottish Ministers to support collective advocacy for children with mental or intellectual disability.

Accountability

Recommendation 12.19: The scrutiny network which we propose at recommendation 11.2 [Chapter 11] should also oversee the scrutiny of outcomes for children with mental and intellectual disabilities across health, care and education settings. In doing so it should add agencies including Education Scotland, the Children and Young People's Commissioner Scotland, and collective advocacy organisations representing children and young people.

Autism, intellectual disability and other neurodevelopmental differences

Recommendation 12.20: 12.19: The statutory duties flowing from a Co-ordinated Support Plan should extend to all statutory agencies in the plan, and should be subject to review by the Additional Support Needs Tribunal.

Safeguards for treatment

Recommendation 12.21: The review of safeguards under Part 16 of the Mental Health Act which we propose at Recommendation 9.7 should also consider whether further safeguards may be necessary for children being treated under the Mental Health Act, or as informal patients.

Recommendation 12.22: The Scottish Government should co-ordinate further work on the use of restraint and isolation to ensure consistent standards

across education, healthcare, childcare and justice settings, which reflect human rights-based best practice.

Perinatal mental illness

Recommendation 12.23: The duty in section 24 of the Mental Health Act to support mothers in hospital with postnatal depression and similar conditions should be broadened to ensure a wider range of in-patient and community supports for parents who need perinatal mental health care and their children.

Relationships between parents and children

Recommendation 12.24: Section 278 of the Mental Health Act should be strengthened and broadened to provide that

- **The duty to support family relationships should apply in considering alternatives to compulsion, not only after compulsion has been authorised**
- **It fully reflects the obligations of the UNCRC and UNCRPD.**

Recommendation 12.25: There should be a related duty on Scottish Government and health and social care agencies to ensure services are provided and co-ordinated in such a way as to reflect the requirements of the UNCRC and UNCRPD to support the family life of children or adults with mental or intellectual disabilities.

Exploring integration of child law and mental health law

Recommendation 12.26: The work of the Scottish Government and its partners to develop a holistic and child-centred system of care and support for children, including the implementation of the Promise, and the incorporation of the UNCRC, should include a focus on how to better align care and support for children and young people with mental or intellectual disabilities, including where compulsory measures are required.

Recommendation 12.27: This work should include consideration of a unified tribunal jurisdiction for different compulsory interventions or provisions to enforce the rights of the child.

Chapter 13: Adults with Incapacity proposals

Chapter Summary

This chapter considers proposals for amending the current Adults with Incapacity (Scotland) Act 2000 (AWI). The chapter contains various sections, which follow the order of the AWI commencing with the AWI consultation of 2018.

The 2018 AWI consultation sought views on changes to the legislation, aiming to address both the need to reflect the requirements of the UN Convention on the Rights of Persons with Disabilities, and concerns that many of the processes within the legislation had become overly cumbersome and were no longer fit for purpose. There is a link in the text to the responses received. Views expressed in the 2018 consultation are being considered as part of this Review.

We make recommendations relating to ensuring the will and preferences of the adult are prioritised, powers of attorney (POA) which includes increasing uptake, without reducing protections, increasing awareness both of the importance of a POA, as well the role of an attorney, recommending increased guidance and a helpline. A review of costs as well as a more consistent investigatory framework is recommended.

It is recommended that Parts 3 and 4 of the current Act, Access to Funds and Management of Residents' Finances, are subsumed within a new Decision making model which should replace guardianship. The model recommends, in addition to person appointed as an Attorney, two 'tiers' of supporting agent, which would apply in respect of finance and/or property and/or welfare decisions. It is recommended that the model should allow for the grant of a specific or one-off order (currently called an intervention order). Applications, where these are required in respect of the model, should be to a Tribunal.

There are changes recommended to Part 5 of the AWI, Medical treatment and research, primarily improving protections and aligning them more closely to those in the Mental Health Act.

Chapter 13: recommendations

Recommendation 13.1: The Scottish Government should as a priority , amend the Adults with Incapacity (Scotland) Act 2000.

Recommendation 13.2: Principles:

Section 1 of the AWI Act should be amended in line with the recommendations of the Three Jurisdictions Report to give greater priority to the will and preferences of the adult.

Recommendation 13.3: The Scottish Government should amend the Power of Attorney scheme as follows:

13.3.1: The granter should state when a POA should come into force.

13.3.2: A person's ability to grant a POA should be carried out in accordance with the ADM test in Chapter 8, within the framework of HRE and SDM.

13.3.3: The certificate accompanying a POA should be called a 'Certificate of Autonomous Decision Making Ability'.

13.3.4: The act of a GP completing a POA certificate should be included as an NHS funded service.

13.3.5: A comprehensive investigatory framework should be developed with OPG, Local authorities, the MWC and Police Scotland and full and equal participation with persons with lived experience including unpaid carers.

13.3.6: Provision should be made in law for an attorney to be subject to supervision should an investigation determine this is required.

13.3.7: As per the recommendation in chapter 3 updating of the AWI Act principles is required.

Recommendation 13.4: The Scottish Government, together with the OPG, MWC, local authorities and such other agencies as necessary, along with the full and equal participation of persons with lived experience including unpaid carers, should develop support , training and guidance for attorneys. This should include

13.4.1: Awareness of the role and obligations of an attorney.

13.4.2: Information on the new HRE/SDM/ADM framework.

13.4.3: Provision of an advice helpline/ online support.

13.4.4: Consideration of ways in which access to granting a power of attorney may be eased.

13.4.5: Consideration of ways in which the cost of a POA can be eased.

Recommendation 13.5: The Scottish Government should ensure there is increased awareness of the importance of a POA, with targeted engagement, and multimedia involvement, with focussed messaging for groups who may benefit more from having a POA, actively encouraging all citizens to grant a POA early, as part of lifestyle planning.

Access to funds and management of residents' finances,

These matters, which form part 3 and 4 of the current AWI Act respectively, are dealt with below under 'guardianship'.

Medical Treatment and Research

Recommendation 13.6: The Scottish Government should ensure that Part 5 and associated guidance and forms should require a certifying practitioner to demonstrate that they have considered and adhered to the principles of the AWI Act when issuing a section 47 certificate.

Recommendation 13.7: The Scottish Government should ensure that guidance gives greater clarity on the support that is required to be given to the person in assisting them to make an autonomous decision, before engaging section 47.

Recommendation 13.8: NHS Education Scotland should review the training of doctors and other professionals who are authorised to grant section 47 certificates. This should include their understanding of relevant human rights issues, and the principles of the legislation.

Recommendation 13.9: Section 47, 47A and associated regulations should be amended as follows:

13.9.1: The authority currently granted by section 47 should be reframed to make clear that treatment which is authorised should be that which would reflect the best interpretation of the adult's rights, will and preferences.

13.9.2: To specify the circumstances in which it is not necessary to complete AWI Act documentation when treating a patient who is unable to consent, and make clear that in all cases the principles of the legislation apply.

13.9.3: To widen the categories of healthcare professional who can assess incapacity and issue a section 47 certificate, including registered psychologists where appropriate.

13.9.4: To provide a process of electronic recording and auditing of section 47 certificates, overseen by the Mental Welfare Commission.

13.9.5: To provide that force, detention, or covert medication should require explicit authorisation by a legal process with a right of appeal to the tribunal, unless there is a genuine emergency.

13.9.6: Section 47 should operate within the Human Rights Enablement, Supported Decision Making and Autonomous Decision Making framework.

Recommendation 13.10: Scottish Government should undertake further consultation to develop

13.10.1: A clear process to authorise conveying an adult to hospital for physical treatment or diagnostic tests where they are unable to make an autonomous decision

13.10.2: An extension to s47 to authorise restrictions on a person leaving hospital while they are receiving treatment for a physical condition or diagnostic tests, with provision for review after 28 days, and an appeal process.

Recommendation 13.11: In all cases, including emergencies, force, detention or covert medication should be recorded and subject to monitoring and audit, overseen by the MWC.

Recommendation 13.12: The MWC should issue guidance on the use of force, detention and covert medication which should have the same legal effect as the statutory Code of Practice.

Recommendation 13.13: An adult, or someone acting on their behalf, including a carer or advocate should have practical and effective access to a court or tribunal by a simple procedure to challenge a decision to grant a section 47 certificate, or a treatment authorised under that certificate.

Recommendation 13.14: The safeguards for specified treatments under s48 should be adjusted so that the same safeguards apply as under the MHA for

a. **ECT, vagal nerve stimulation and transcranial magnetic stimulation**

b. **(Subject to further consultation) artificial nutrition and hydration: we propose these should be the same as under the MHA**

c. **Drug treatment for mental and intellectual disability given for more than two months to a person subject to a deprivation of liberty.**

Recommendation 13.15: It should be lawful to give treatment which is reasonably necessary to a patient under Part 5 (section 49) where an application for a Decision Making Representative is in train, provided the application does not involve a dispute regarding the particular treatment.

Recommendation 13.16: The law should make clear that a decision-making representative cannot override the adult in relation to a decision where the adult is able to make an autonomous decision regarding the particular treatment.

Recommendation 13.17: We recommend that the reformed system should include a straightforward process by which an adult who believes they can take an autonomous decision about their medical treatment can access the tribunal. [See chapter 5 on support that is available where an ability to instruct a solicitor is limited]. In addition, any stated opposition to a particular treatment by the adult should bring into play the same safeguards as opposition by a decision-making representative.

Recommendation 13.18: Scottish Government should ensure adequate resourcing to realise these recommendations.

Intervention Orders and Guardianship

Recommendation 13.19: The decision-making model should replace the current guardianship system.

13.19.1: The current access to funds and management of residents' finances processes should be subsumed within the model.

13.19.2: The application for a specific issue intervention order should be retained, authorised by a judicial body.

Recommendation 13.20: The Decision-Making model should operate within the Human Rights Enablement, Supported Decision Making and Autonomous Decision Making framework.

Recommendation 13.21: The Scottish Government should develop Codes of Practice and guidance to support the operational detail which offers clarity about processes, rights, roles and responsibilities, scrutiny and monitoring and includes information on managing and resolving conflicts of interest and disagreements between the person and/or D.M.Supporter, D.M.Representative, or attorneys.

Recommendation 13.22: The Mental Health Tribunal for Scotland should be the judicial body to whom such applications are made.

Recommendation 13.23: This work should be developed with key practitioners and the full and equal participation of people with lived experience including unpaid carers.

Recommendation 13.24: There should be adequate resourcing to ensure the effective delivery of this new model.

Miscellaneous AWI Act minor amendments

Recommendation 13.25: The Scottish Government should refer to Appendix B as a check list when drafting adjusted primary, or secondary, legislation and updating Codes of Practice to ensure that all matters are incorporated as may remain relevant.

Chapter 14: Adult Support and Protection Act

The Review's Terms of Reference asked us to consider the need for convergence of mental health, incapacity and adult support and protection legislation. This chapter considers if, and if so, how far, the three Acts should be fused, or if not, how they may be better aligned.

The Adult Support and Protection (Scotland) Act 2007 (the ASP Act) provides for a range of measures to protect 'adults at risk'. We initially focused on the possibility of the ASP Act converging with mental health and adult capacity legislation. Of course, at present, mental health and, to a large extent, capacity law, only apply to people with a mental disorder, while the ASP Act includes other people in its scope. However, since our reforms seek to move away from a focus on a diagnosis, it seemed possible that we could ultimately develop a single legal framework to support protective interventions for people whose ability to make autonomous decisions may be compromised. Our framework of Human rights enablement, Supported decision making and Autonomous decision making might lend itself to a single system.

There was however a broad consensus that bringing the ASP Act together with adult capacity and mental health legislation into one Act would be a retrograde step. However, there was agreement about the need for the legislation to work better alongside mental health and capacity law, and that some changes are needed to enable this to happen.

We accept this argument and agree that for now, reform should concentrate on those areas where the law can be better aligned, for example the definition of 'mental disorder', and equity of access to independent advocacy .

We advocate that a more systematic approach to Supported decision making (SDM) and a new approach to Human rights enablement (HRE) can, and indeed should, be applied generally across systems of care and support.

We advocate too that, in principle, the Autonomous decision making test outlined in Chapter 8 could be incorporated into the ASP Act but we recognise that more detailed work is needed on the drafting of any such provision, and on subsequent guidance and training.

Areas that we do not recommend any specific changes to the ASP Act, but suggest things are kept under review, include changes to the ASP Act principles and the judicial forum for ASP cases.

We considered too some discrete changes to the ASP Act that we had heard may be of benefit, these include a review of powers and timescales and consideration as to whether the ‘3 point test’ was still fit for purpose.

14.1:Chapter 14: recommendations

Recommendation 14.1: Adult Support and Protection legislation should not be fused with mental health and capacity legislation but the Scottish Government should ensure that wherever possible there is alignment of principles and definitions, timescales and procedures.

Recommendation 14.2: The Scottish Government should ensure that the term ‘mental disorder’ in the ASP Act should be replaced by ‘mental or intellectual disability, whether short or long term’.

Recommendation 14.3: The ASP Act principles should be reviewed as part of the implementation of the Human Rights Bill, to ensure they fully reflect the requirements of international human rights law, particularly the UNCRPD

Recommendation 14.4: The Scottish Government should ensure our recommended approach of Human rights enablement and Supported decision

making (chapters 4 and 8) should be adopted in the practice of Adult Support and Protection

Recommendation 14.5: The Scottish Government should consider amending the provisions regarding 'consent' in the ASP Act to reflect our proposed test of Autonomous decision making

Recommendation 14.6: We do not recommend that ASP interventions transfer from the sheriff court to a tribunal, but this should be kept under review by the Scottish Government.

Recommendation 14.7: Legislation should provide for the power to seek an urgent court order suspending some or all of the powers of a welfare or financial guardian or attorney as part of ASP proceedings.

Recommendation 14.8: The Scottish Government should consider whether banning orders under the ASP Act should be extended where the court is satisfied this is necessary to protect the adult.