SMHLR

SCOTTISH MENTAL HEALTH LAW REVIEW

Final Report

Implementation of the recommendations

September 2022

Contents

Implementation of the recommendations

The Review was tasked with making recommendations for law reform. It is now for the Scottish Ministers to consider how they wish to take these recommendations forward. We are mindful given the number of recommendations, that this is a considerable task.

We suggest however that some of the changes we have in mind, that can be achieved without legislative change , should start in the short term, that is in the next 1- 3 years. Such a move would clearly demonstrate the Scottish Government's commitment to mental health and capacity law and practice based on human rights.

In addition, we suggest that there may be a need for amending legislation in the short term to address some more urgent concerns, particularly around the Adults with Incapacity(Scotland) Act 2000, and the increasingly urgent need to ensure that there is a process to authorise lawful deprivations of liberty and to challenge the lawfulness of a deprivation of liberty.

Some of the changes we recommend will however require many months, if not years, to develop the level of detail needed for legislation and the culture change we consider will be required . We have therefore suggested timescales for each of the recommendations , on a short term, medium term or long term basis. That is, within 1-3 years, 3-5 years or 5- 10 years.

The full of recommendations is in Chapter 15 of the Final Report. These are replicated here, in the order they appear in the report, with a short, medium, or long timescale suggested. Some recommendations are described as over arching. This means we think they apply across the whole report and should be taken forward as soon as possible.

Chapter 1: A law built on equality and human rights

Chapter 1 recommendations

Recommendations 1.1 to 1.5 are overarching recommendations, that should be considered across the whole of the final report and should be acted on in the short term.

The remainder of the recommendations in this chapter are short term recommendations, with the exception of 1.7, which is a medium term recommendation.

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?

Chapter 2 recommendations

These recommendations form part of the wider changes we recommend to the purpose of the law and are medium to long term recommendations.

Recommendation 2.1: The law should apply to persons with a mental or intellectual disability (and otherwise included under the 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

Chapter 3 recommendations

Recommendation 3.1 is a long term recommendation. We anticipate the list of recommendations in 3.2 can be started in the short term, with the implementation of recommendation 3.2.1, much of which can be taken forward on an administrative basis and the remainder taken forward in the medium to long term.

Recommendation 3.3 contains medium to long term recommendations but regard should be had to the need for changing recommendations when any legislative change is made to existing legislation considered under this Review.

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. 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

Chapter 4 recommendations

All the recommendations in this chapter are short to medium term recommendations. Some can be taken forward on an administrative basis, others will require amending legislation.

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.**

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.

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

Chapter 5 recommendations

All the recommendations in this chapter are short to medium term recommendations, with particular note to be given to the recommendations for review in 5.1 and 5.7 once initial changes have been made to assess the impact of those changes.

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

Chapter 6 recommendations

Recommendation 6.4 is an overarching recommendation that should be considered across the whole of the final report and should be acted on in the short term. All the other recommendations in this chapter should also be treated as short term 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

Chapter 7 recommendations

All of the recommendations in this Chapter are short to medium term recommendations. They are all administrative recommendations requiring no legislative changes. Work can begin to address them in the short term. However the work itself will take time.

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

Chapter 8 recommendations

Recommendations 8.1 to 8.8 are medium to long term recommendations to be taken forward with the wider changes to legislation proposed in the Review. Recommendations 8.9 to 8.11 concerning proposal for Deprivation of Liberty should be taken forward in the short term, ideally as soon as possible given the longstanding nature of the issues we seek to address with these recommendations.

Human rights enablement (HRE)

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

Chapter 9 recommendations

Recommendations 9.1,9.2,9.3, 9.4,9.5,9.6,9.7,9.13 and 9.27 should be treated as overarching recommendations for the whole Report and work should start on them in the short term.

We suggest that the following recommendations should be completed within the short term : 9.8, 9.9, 9.14, 9.15, 9.16, 9.18, 9.19, 9.25, 9.26, 9.28, 9.31, 9.33, 9.35 and 9.36.

And the following recommendations should begin in the short term and be completed in the medium term 9.10, 9.11, 9.12, 9.20,9.21, 9.22, 9.23, 9.24, 9.29, 9.30, 9.32 and 9.34.

Recommendation 9.17 is a long term recommendation.

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

In the medium term, 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 9.16: 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 9.17: 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 9.18: 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 9.19: 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 9.20: 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 9.21: 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 9.22: 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 9.23: 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 9.24: 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 9.25: 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.
9.2.5: Community-based compulsory treatment

Recommendation 9.26: 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 9.27: 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 9.28: 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 9.29: 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

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 9.30: 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 9.31: The Mental Welfare Commission should work with stakeholders to develop practice guidance on assessment in the community for detention.

Recommendation 9.32: 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 9.33: 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 9.34: 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

Chapter 10 recommendations

The legislative changes required by recommendations in this Chapter should be taken forward in the medium to long term along with the wider legislative changes being proposed in this Report. Recommendations requiring legislative change are : 10.3-10.4, 10.8-10.10, 10.12-10.18. A number of these require steps to be completed before the recommended change can happen. These can begin in the short to medium term . These recommendations are 10.3, 10.8, 10.13 and 10.14.

Recommendation 10.7 is a longer term recommendation dependent on the implementation of our proposals for wider reform.

The remaining recommendations are administrative recommendations . Work should begin to address these in the short to medium term. However the work itself will take time. 10.1 has additional recommended steps to assist with implementation.

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: The 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.**

Cross-border transfers

We make no recommendation on this issue.

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

Chapter 11 recommendations

The legislative changes required by recommendations in this Chapter should be taken forward in the medium to long term along with the wider legislative changes proposed in the Report. Recommendations requiring legislative change are: 11.1,11.6-11.8,11.12,11.15-11.17,11.19,11.20 11.22 11.23, 11.25 and 11.27. The scrutiny bodies who are named in these recommendations however should be considering in the short to medium term what they can do prior to the legislative changes recommended.

Recommendation 11.1 could be realised earlier if it is incorporated into the proposed Human Rights Bill.

All other recommendations are administrative recommendations . For most, work can begin to address them in the short to medium term. However two need to begin as soon as possible :11.24, if we are to have the strengthened independent advocacy groups we need to support the legislative and cultural change we are recommending overall; and 11.18 to urgently update the specified person procedures. We anticipate that recommendation 11.2 and 11.3 on the development of a formalised network can also be immediately considered as part of the existing work being done in this area by the Scottish Government.

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. (medium)

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

Chapter 12 recommendations

All the recommendations in this Chapter are short term recommendations . Recommendations 12.26 and 12.27 should begin in the short term but will need to carry on beyond this.

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 realisation, 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: 12.14: 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 13 recommendations

All the recommendations within this chapter are short to medium term 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:

- **The granter should state when a POA should come into force.**

- **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.**

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

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

- **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.**

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

- **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

- **Awareness of the role and obligations of an attorney.**

- **Information on the new HRE/SDM/ADM framework.**

- **Provision of an advice helpline/ online support.**

- **Consideration of ways in which access to granting a power of attorney may be eased.**

- **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

These are all short-term recommendations.

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:

- **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.**

- **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.**

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

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

- **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.**

- **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

- **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**

- **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

- **ECT, vagal nerve stimulation and transcranial magnetic stimulation**
- **(Subject to further consultation) artificial nutrition and hydration: we propose these should be the same as under the MHA**
- **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

Chapter 14 recommendations

All the recommendations within this chapter are short to medium term recommendations with the exception of recommendation 14.2 which should be taken forward when the definition of mental disorder is changed across all mental health, capacity and adult support and protection legislation to ensure consistency.

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.