The independent review of
Learning Disability and Autism
in the Mental Health Act

Final report

December 2019

This report was written by Andrew Rome, Catherine Evans and Simon Webster. We were the executive team for this independent review.

A report called ‘How we did this review’ will acknowledge the many individual people, organisations, experts in law and experts in practice who gave us evidence in this review. The review also had advisors with lived experience, professional experience or both who advised the executive team on how to run the review process. We are very grateful to all of these people for contributing to the review.

The executive team asked for perspectives from some legal experts near the end of the review process, to help us to test the ideas for law reform that we developed from the review’s evidence. The experts volunteered their time. They did not give legal advice or opinion and are not responsible for this report or its recommendations. We thank these experts, who were:

Cathy Asante

David Cobb

Ronald Franks

Andrew Lennon

Alex Ruck Keene

Leo Starrs-Cunningham

Professor Jill Stavert

What is in this report

Introduction

Welcome to the final report of this independent review.

This review set out to include everyone who had an interest in this area. Individual people of all levels of ability and a very wide range of organisations took part. It has been the most accessible review of a law that we are aware of. At the end of the process, as we expected, there were areas of disagreement between individuals and groups who had the most different views. However, most people with lived experience and most professionals agreed that change is needed in the direction that we recommend.

When it was created, the Mental Health (Care and Treatment) (Scotland) Act 2003 was a leading law in terms of human rights. Since then, there have been developments in case law from the European Court of Human Rights, which have clarified how Scotland should implement the European Convention on Human Rights. The Scotland Act 1998 requires all Scots laws to comply with the European Convention on Human Rights (link). Also, the Human Rights Act 1998 requires all public authorities to act in ways that comply with the European Convention.

The United Nations Convention on the Rights of Persons with Disabilities was created and was ratified by the United Kingdom after our current mental health law was created. The Scottish Parliament agreed in 2016 that 'the Scottish Government should be firmly committed to implementing the UN Convention on the Rights of Persons with Disabilities in full so that disabled people in Scotland can realise all of their human rights' (link, 4). The Committee on the Rights of Persons with Disabilities concluded its first review of the United Kingdom's compliance with this convention in 2017. It is clear from that report that Scotland must seriously reconsider its mental health legislation, and must do this in close consultation with organisations of persons with disabilities (link, 31). That is what this review has aimed to do.

The duties that we discuss all lie with the Scottish Government, which delegates many of those duties to public services. In Scotland, the public and professionals working in health, social care and justice settings care deeply about those of us whose human rights are most at risk.

In essence, we think that the positive approach of the Convention on the Rights of Persons with Disabilities can be used to enhance the rights in

the European Convention on Human Rights. That convention does not deal with all of the rights that relate to mental health. For example, there is no right to health in the European Convention. The rights in the European Convention only give minimum standards.

The process in this review was important. It was a human rights-based approach, and we will describe that process in another report. We aimed to give equal value to the views and evidence of people with lived experience and professionals throughout the whole review. We chose advisors to help us run the review process well. Half of those advisors had lived experience, and half had professional experience. We heard from a wide range of people with lived or professional experience.

The first stage of the review looked at people's experience of Scotland's Mental Health Act. We met with people in hospitals across Scotland and in the community, and we took evidence online and by post. People's stories also told us that, even when good care is provided, the Mental Health Act sometimes fails to protect people's rights (link). This confirmed that reform is required in Scotland's mental health law, for autistic people and people with intellectual disability (learning disability).

In the second stage, we invited organisations of people with lived experience and professional organisations to suggest how Scotland's law could better promote and protect human rights in future. We also spoke with experts from all part of the United Kingdom and Ireland, and from four other countries. This gave us a very large number of suggestions, which we developed into proposals with comment from mixed groups of people with lived experience and professionals.

That work led to the proposals for law reform that we consulted on in our third and final consultation. We met with a range of organisations of people with lived experience or professionals, representing groups that might be most affected by our proposals. Our proposals were made in relation to all autistic persons and persons with intellectual disability, with or without mental illness or personality disorder. Most individuals and organisations who commented on the review's human rights-based approach supported this approach.

In the final consultation, we invited all respondents to give full comments, and also to give their level of agreement or disagreement with each of our proposals. Across all formats for response to the final consultation, there was strong support for most of our proposals. We have considered all comments from respondents, both positive and

negative. These responses have had a definite effect on this final report and its recommendations. Scotland now has an opportunity to shift its law for autistic people and people with intellectual disability, into a new paradigm which promotes and protects the human rights of these citizens. Scotland has committed to do this by accepting the Convention on the Rights of Persons with Disabilities. This convention challenges all nations. Many human rights treaties apply to Scotland, and some parts of these treaties may sometimes be difficult to reconcile. However, this review has found very many ways in which Scotland's future mental health law could advance the right to health and many other rights of autistic people and people with intellectual disability.

Crucially, this report recommends a set of legal and practical changes which can reduce or remove the discrimination that autistic people and people with intellectual disability have experienced under Scotland's current Mental Health Act.

In January 2020, we will publish three more reports. First, there will be an easy read version of this report. The report that you are reading refers to all of the evidence that supports our recommendations. There will also be a report which gives an overview of the evidence that we gathered, and there will be a report on the process that we developed and used for this review. We will show how evidence influenced the review process.

Scottish Government may choose to continue the reform of mental health law for autistic people and people with intellectual disability within broader law reform processes. If so, it will be important to fully include the autism and intellectual disability communities in discussions with other communities. Autistic people, people with intellectual disability, unpaid carers and professionals who support these communities should have clear opportunities to form and share their distinct perspectives.

We suggest that Scotland has an opportunity to face its challenges, and to become a leader in implementing human rights in mental health law and in practical reality. This report gives recommendations on how Scotland can do this for autistic people and people with intellectual disability, based on what we have heard from the people of Scotland and from around the world.

Andrew Rome, Independent Chair of the Review

A summary of our recommendations

This review of mental health law for autistic people and people with intellectual disability recommends major change to comply with human rights law.

The recommendations aim to put the human rights of disabled citizens at the heart of our mental health law. They focus squarely on positive change which is needed to promote the rights of people with intellectual disability and autistic people and prevent discrimination.

Key recommendations in law

The review's executive team makes a large number of recommendations. Some fundamental recommendations for law include:

- That learning disability and autism are removed from the definition of mental disorder in the Mental Health Act.
- That changes in law and improvements in services are put in place before this happens. A date should be set for this.
- That Scotland works towards law that removes discrimination in detention and compulsory treatment on the basis of disability.
- That a new law is created to support access to positive rights, including the right to independent living.

Other recommendations for law include:

- That the law includes the description of disability from the Convention on the Rights of Persons with Disabilities.
- That the law allows professionals to support people who are experiencing serious adverse effects on their human rights, in a way that does not discriminate.
- Equity and fairness in decisions about support, care, treatment and detention, both for people who need support and for people in the criminal justice system.
- Introducing a human rights-based system for all decision making, including human rights assessment as a key tool for ensuring human rights are promoted and protected.

A new model for professional roles in making decisions with and for autistic people and people with intellectual disability.

A “rebuttable presumption” that all professionals will work to enact a person’s will and preferences, in the context of human rights.

A right to independent advocacy on an opt-out basis.

Recommendations aimed at strengthening carers’ rights whilst maintaining focus on the rights of the individual.

Duties on public authorities to provide a range of services, environments and professionals to meet the needs of autistic people and people with intellectual disability.

The introduction of a disability model to the criminal justice system to ensure fair access to trials, fairness in responsibility, fair punishment and fair access to support and treatment.

Implementing the recommendations

The review’s executive recommends leadership and full involvement by autistic people, people with intellectual disability and their organisations to take forward these recommendations. Human rights law requires this.

The review also recommends investment in community-based professionals, so that people can remain in the community, or move back to the community from hospital as quickly as possible.

Implementing these recommendations will support the Scottish Government in their commitment to implementing the United Nations Convention of the Rights of Persons with Disabilities and other human rights treaties.

Timescale for implementation

The review team recognises that there is a need for some immediate action, and also that some changes will take time. Within the report, the review identifies next steps where action could begin.

Some of the review’s recommendations will need to take effect after the current independent review of mental health and incapacity legislation, which is led by John Scott QC.

There will need to be a process of transition which must include clear deadlines for change in law and for human rights issues to be resolved.

1 What Scotland needs to do

This section gives an overview of the review. It also gives our main recommendations.

We make recommendations on how Scotland can reform its law for autistic people and people with intellectual disability, to move towards full compliance with our duties in international human rights law.

The recommendations in this section fit with recommendations in other sections of this report. They are also influenced by responses to the proposals that we made in our final consultation.

1.1 About this review

An independent review

This review was about a law called the Mental Health (Care and Treatment) (Scotland) Act 2003. In this report, we will call this law the Mental Health Act. There is a list of words and phrases with their meanings at the back of this report.

The review was carried out at the request of Scottish Government and it was independent. The independent chair was self-employed. The secretariat for the review was employed at the Mental Welfare Commission for Scotland, but it was directed by the independent chair.

This review had three stages. Before the first stage began, we chose advisors for the review. We had the same number of advisors with lived experience as professional advisors. The advisors helped us to make sure that the review was accessible to people and that the review could get the evidence that it needed. The advisors did not decide what the review should do. Only the review's executive group made decisions. The executive group was Andrew Rome, the Chair, Catherine Evans, the Project Manager, and Simon Webster, the Secretary. That group wrote this report and its recommendations, based on a large amount of work to understand experiences, practice and the law in this area.

The review's remit

After a scoping study (link) Scottish Government set the remit for this review. The remit is the list of things that we had to talk about and report on. Scottish Government said:

"The review will need to gather evidence from a wide range of sources and engage widely with those who have an interest, whether that interest is personal or professional and reflect this evidence in its final analysis and recommendations.

The objectives of the evidence-gathering and analysis will focus on:

The operation of the 2003 Act – are people with autism and learning disability well served?

Increasing the role of psychologists in relation to the 2003 Act (we looked at *the role of psychology* in the 2003 Act, to be neutral).

The definition of mental disorder under the 2003 Act in relation to learning disabilities and autism

The criminal justice system and the interaction with the Act

The use of psychotropic medication (current prescribing practices)”

It was very important that we fully involved people with lived experience in this review. We had to do this to really understand things. Also, the United Nations Convention on the Rights of Persons with Disabilities told us that we had to do this (link). In all aspects of this review, we tried to give the same importance to what people with lived experience told us as to what professionals told us. To make this possible, we tried to make every part of the review accessible to all people.

The review was independent and involved people with lived experience and professionals equally.

1.2 The challenge for Scotland

What we recommend

We recommend a new law for autistic people and people with intellectual disability (learning disability). This is to ensure that human rights are protected and promoted for these groups of people, in the context of mental health.

We recommend some changes in mental health law for autistic people and people with intellectual disability, which could also be relevant to other people. We think that our recommendations should be considered for other groups of people also, to avoid discrimination between those people, and autistic people or people with intellectual disability.

We recommend changes to criminal law, and further work to develop some concepts in law in this area.

Why Scotland needs to do this

Scotland has commitments in international human rights law through many legal agreements. These commitments come through the United Kingdom's acceptance of the European Convention on Human Rights and several United Nations human rights conventions. Scotland's law has to reform when new commitments are made, and sometimes when new judgments or interpretations are made for those conventions. Many of these commitments are highly relevant to this review.

What this would mean for the law

The Convention on the Rights of Persons with Disabilities makes it clear that people with disabilities should enjoy their rights on the same basis as everyone else. The rights of people with disabilities can be limited, on the same basis as for other people. In this Convention, how decisions are made is very important. All decision making has to make sure that a person's rights, will and preferences are respected on the same basis as other people's rights, will and preferences.

When people's human rights are limited, this must be done in a proportionate way. As for everything in the Convention on the Rights of Persons with Disabilities, limits to rights must be used equally for all people. Limits must not discriminate against people with disabilities in any way.

An important reason for this change is the ‘paradigm shift’ that the Convention on the Rights of Persons with Disabilities requires around the world (link). The United Nations requires us to understand disability differently and to improve how we relate to and support people with disabilities. Dignity and equality are very important in this, across all areas of life at all times. We need to understand disability as something that happens when people with impairments meet barriers in attitudes and in their environment. We need to see all people as equal citizens who hold rights, not as people who might receive charity to meet some of their needs. We also need to recognise all people as citizens who have equal standing before the law and support all people to make full use of their rights.

What should happen in practice

We think that many changes will be needed for Scotland to comply with all of its human rights duties. We think this will need to include changes in culture, practice and use of resources. New resources may be needed.

Scotland should fully involve autistic people and people with intellectual disability in developing, implementing and monitoring the laws and policies that support Scotland’s commitment to the Convention on the Rights of Persons with Disabilities.

Throughout the report, we will talk about what may need to happen next.

To meet Scotland’s commitments in international human rights law in this area, law reform is required.

1.3 Autism and learning disability redefined

What we recommend

We recommend that in future, autism and learning disability should not be defined as forms of 'mental disorder' under the Mental Health (Care and Treatment) (Scotland) Act 2003 or in other mental health law.

We recommend that autism and learning disability should be defined in a new law. That law is discussed in section 1.4.

Why Scotland needs to do this

The Convention on the Rights of Persons with Disabilities requires Scots law to incorporate the human rights model of disability, which includes the understanding of disability that is described within that Convention.

However, the European Convention on Human Rights requires Scots law to allow for the possibility of detention and compulsory treatment, for the protection of human rights. In general, this will require a professional to confirm that the person has a medical diagnosis.

What this would mean for the law

New definitions would be placed in a new law that we describe in section 1.4. That would include the following, which we explain in section 2.1:

Professionals should use this description in their understanding of autism and learning disability:

'Disability results from the interactions between persons with impairments, and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'

We recommend that the law states that:

An autistic person is a person who has a professional diagnosis of autism.

A person with intellectual disability is a person who has a professional diagnosis of intellectual disability.

What should happen in practice

In section 2.1, we recommend this approach for practice:

The law would enable autistic persons, persons with intellectual disability and unpaid carers to use whatever words they want to use to describe the person.

Professionals would use people's preferred words when they interact with people who have lived experience.

Professionals would also use professional definitions of autism and of intellectual disability. They would do this when communicating with public services, legal services and professionals.

Planning for individual people and groups of people should be based on the model of disability from the Convention on the Rights of Persons with Disabilities.

What may need to happen next

Scottish Government might choose to propose these changes for law within a bill of the Scottish Parliament.

A new law should incorporate the human rights model of disability and the concept of disability that it uses.

That law should also define autism and intellectual disability in relation to professional diagnoses.

1.4 A law on support for people with intellectual disability and autistic people

What we recommend

We recommend the creation of a new law on support for people with intellectual disability (learning disability) and autistic people.

We recommend that changes in law and improvements in services are put in place before autism and intellectual disability are removed from the definition of mental disorder in Scotland's Mental Health Act. A date should be set for this. Definitions of autism and intellectual disability should not be removed from Scotland's Mental Health Act now, with no other law in place. New law should also be created which aims to protect human rights on the same basis for everyone, to protect the rights of people who are at risk of serious adverse effects on their human rights.

Why Scotland needs to do this

Scots law needs to be reformed to comply more fully with the European Convention on Human Rights, and the Convention on the Rights of Persons with Disabilities.

The evidence from stage of 1 of the review told us that autistic people and people with intellectual disability have experienced indirect discrimination under Scotland's Mental Health Act. Indirect discrimination happens when a law or policy is applied in the same way to everyone but disadvantages a group of people who share a characteristic that is protected by law. (Direct discrimination happens when a person is treated worse than another person because they have a characteristic that is protected by law, such as a disability).

This review has found evidence of human rights issues in the context of Scotland's current Mental Health Act which have a worse impact on autistic people or people with intellectual disability than on other groups of people. We recommend a new law as a necessary, proportionate and non-discriminatory approach to addressing these specific human rights issues. We have referred to evidence throughout this review. In the following pages, we give some sources of evidence of specific impacts on these groups of people. The evidence all relates to Scotland and to the time in which the current Mental Health Act has been in use.

Specific negative effects on the human rights of autistic people or people with intellectual disability, in the context of mental health

These tables list evidence that is specific to Scotland and specific to intellectual disability or autism. All evidence is from the time of the Mental Health (Care and Treatment) (Scotland) Act 2003 (2005 to present). 'This review' means that people who took part in this review told us the information.

Effects on human rights	People with intellectual disability	Autistic people
Liberty is restricted for much longer than for other people with 'mental disorders'	The length of detention for people with learning disability only was almost double that for those people without learning disability. People with learning disability and other conditions were detained for longer than people with no learning disability. Mental Welfare Commission for Scotland 2017 (link)	The Mental Welfare Commission for Scotland does not monitor the use of the Mental Health Act specifically for autistic people. This review: People told us that no-one knows how many autistic people are subject to the Mental Health Act.

Effects on human rights	People with intellectual disability	Autistic people
Treatment is given without consent for much longer than for other people with 'mental disorders'	The same evidence as above. Hospital detention comes with compulsory care and treatment. Also: people with learning disability were on orders to receive compulsory treatment in the community for much longer than people with other 'mental disorder'. Mental Welfare Commission for Scotland 2017 (link)	The Mental Welfare Commission for Scotland does not monitor the use of the Mental Health Act specifically for autistic people.
Liberty is restricted for longer than for other offenders with 'mental disorders'	Supported by unpublished data. Data is unavailable for this report as it is being considered for publication. The length and nature of restrictions and detention are out of proportion to the offence that has been committed and are exaggerated by ideas about mental disorder. People First Scotland, 2011 (link)	The Mental Welfare Commission for Scotland does not monitor the use of the Criminal Procedure (Scotland) Act specifically for autistic people.

Effects on human rights	People with intellectual disability	Autistic people
People are compelled to be in environments that harm the person's rights	Based on visits to all 18 hospital units for people with learning disability in Scotland (excluding forensic units) in 2015. Twelve of the 18 units were thought to be not fully fit for purpose. Each was inadequate in some aspect such as the availability of indoor or outdoor space, adequate facilities to fulfil their assessment and treatment purpose, maintenance, decor or cleanliness. Many of these issues were identified in a report in 2011. Mental Welfare Commission for Scotland, 2016 (link)	This review: Many autistic people told us that the environment they were in was not helpful for them. Activities such as listening to music and watching films might be not allowed. Some of these activities might be especially important to autistic people as a way of coping with the hospital environment. Sometimes the ward environment made people's health worse. This can be a particular problem for autistic people. This could be because it is noisy and not suitable for them. Sometimes, the ward environment can be in a bad condition. Some people said they didn't get food that met their dietary requirements. Many autistic people experience pain and anxiety from sensory stimuli. Some may only function well in a highly structured environment with clear routines. Some people find psychiatric hospitals distinctly uncomfortable. Lights are bright and harsh, the noise far too difficult to put up with and the rules and regulations confusing or hard to understand. ARGH / HUG, 2011 (link)

Effects on human rights	People with intellectual disability and autistic people
Being compelled to stay in hospitals that feel unsafe	This review: Some people in hospital told us that they had experienced threats or attacks from other patients. Some people said they didn't like the other patients and that they had been bullied. Some said they had seen people being restrained which made them feel scared. Some people told us they had been treated with restraint or seclusion. These are restrictive practices. These might be used to control a person's behaviour. People told us that these restrictive practices feel like punishment. Some people told us about injuries that had been caused as a result of being restrained. Some autistic people and people with learning disability in hospital said they found it hard to tell someone when something happened to them, or they didn't tell someone when something happened because they were afraid that they would be punished if they did.

Effects on human rights	People with intellectual disability	Autistic people
No adjustments for access to primary care, despite much higher levels of co-morbid illness including mental illness	For adults with intellectual disabilities compared with the general population, more people have multiple diseases, this occurs at a much earlier age, and the profile of health conditions differs. This includes both mental health and physical health. Scottish Learning Disability Observatory, 2015 (link) People with intellectual disability do not have full access to the same health services that are available to other people and do not always have access to specialist health services. These barriers contribute to high levels of health needs and lead to avoidable and preventable deaths. Mental illness in people with learning disabilities may not be detected because of poor access to services. Also, poor access to social support and communication may increase the risk of developing post-traumatic stress disorder. Dr Maria Truesdale and Professor Michael Brown, 2017 (link)	The adult autistic population was significantly more likely to have additional health conditions when compared with the population without reported autism. Mental health conditions in 33% of all adults with reported autism. Scottish Learning Disability Observatory, 2018 (link) There are basic problems with access to GPs and mental health services for autistic people. AMASE, 2018 (link)

Effects on human rights	People with intellectual disability	Autistic people
Risks to health, to liberty, and to life, through inappropriate use of psychotropic medication	There is strong evidence that in many cases, antipsychotic medications are used to manage 'problem behaviours'. In the population of adults with learning disabilities, antipsychotic drugs are prescribed at much higher rates than there are people with psychosis. Scottish Learning Disability Observatory, 2017 (link)	This review: Some people said that autistic people can react differently to drugs and they thought that professionals often do not accept this. The absence of any data or monitoring of autistic people within the mental health system means that we don't know how many people are forced to take psychotropic medication, for how long, what drugs these are and what side effects they experience, or if they die from these drugs. Autism Rights, 2016 (link) Of 54 autistic people with complex care needs who were reviewed for a report, 26 were being prescribed antipsychotic medication for behaviour perceived as challenging. The Commission was very concerned by the scale of the use of these medications. Mental Welfare Commission for Scotland, 2019 (link)

Effects on human rights	People with intellectual disability	Autistic people
Long-term removal from family and community	453 people with learning disability were identified as being placed out-of-area not through choice. This includes people in hospitals in England, for example. Dr Anne McDonald, 2018 (link)	Of those 453 people, 109 were classed as 'priority to return', and around 50% of these people were autistic. Dr Anne McDonald, 2018 (link)
Long term denial of independent living	Of 67 people with delayed discharge from hospital, more than 22% had been in hospital for more than 10 years, and another 9% for five to ten years. The main barrier to discharge was lack of accommodation, followed by a lack of suitable service providers. Dr Anne McDonald, 2018 (link) Almost a third of inpatients with learning disability (32%) across Scotland were experiencing long waits for discharge. In one health board this applied to 46 per cent of inpatients. Mental Welfare Commission for Scotland, 2016 (link)	Of 67 people with learning disability who experienced delayed discharge from hospital, just over one-third were autistic people. Dr Anne McDonald, 2018 (link)

Effects on human rights	People with intellectual disability and autistic people
Loss of liberty leading to loss of independence	This review: Sometimes being in hospital means people lose the support they used to have in the community. They can lose their tenancy (home) and benefits. Some people couldn't do the activities they used to do before hospital. Some had lost skills and interests they used to have. People said they think that people with learning disability and autistic people generally have less opportunity to live independently than other people.
Inequality in the right to life	This review: People told us there are issues of inequality for both autistic people and people with learning disability in society. For example, both groups of people have lower life expectancy than other people. We heard that one reason for lower life expectancy for autistic people is because they have a higher risk of suicide. A literature review by Scottish Learning Disability Observatory looked at high-income countries and found that death was earlier by 20 years for people with intellectual disability. Accessible health care can improve this (link).
Barriers to challenging limits to human rights	This review: Some people said that people with learning disability and autistic people find it harder to challenge decisions. Some people said that the information about the Mental Health Act was not accessible. Some people said that people do not get information about their rights. Some people said that Tribunal papers were too hard to understand. This made it hard for them to understand what was happening to them and how to take part in decisions.

Effects on human rights	People with intellectual disability	Autistic people
Inaccessible criminal justice services	This review: Some professionals and groups said that people with learning disability might not get equal access to the criminal justice system. They said that the criminal justice system does not make adjustments for people with learning disability. Some people said the criminal justice system might not pick up on whether someone has learning disability.	This review: Some professionals and groups said that the criminal justice system does not make adjustments for autistic people. Some people said the criminal justice system might not pick up on whether someone is autistic.

Effects on human rights	People with intellectual disability
Culture that affects people's dignity	This review: People told us that the ward environment could be very controlled and regulated. There are a lot of rules which people said can feel stifling. Some people said they felt like children. A few people told us about feeling that they were treated as less than other people by staff because of their learning disability. It is easy for men and women with learning disability to be treated as though they are not really equal adult citizens. There is prejudice in society and in the general public. People First Scotland, 2011 (link)
Right to health not met because professionals do not have skills around learning disability	This review: Some people said that there are less specialist services available now and less specially trained staff. This means people have to go to general services where people do not have skills around learning disability. When people go to places where there are no specially trained staff, people told us that the care they get is not as good for them. Some people told us they had to go to England to get specialist treatment.

Effects on human rights	Autistic people
Right to life is at risk	Suicide rates in Scotland for people discharged from NHS hospital services between 2012 and 2017. (Rates of suicide are per 100,000 discharges from hospital, not per 100,000 of the population): Autism: 197 suicides per 100,000 discharges 'Mental health disorder': 146 suicides per 100,000 discharges Learning disability: 0 suicides per 100,000 discharges General population in 2017: 13 suicides per 100,000 people NHS National Services Scotland. Information request for this review, 2019
Right to health and right to life is at risk due to inaccessible services and lack of understanding	This review: We heard that a poor understanding of autism and poor care under the Mental Health Act made some autistic people's health worse. Sometimes care is given which is harmful for people, because staff don't understand autism. Many respondents experienced communication issues being a major barrier, with a number describing extreme distress (suicidal or in danger of self-harm) not being taken seriously because of differences in presentation in autistic people not being taken into account or understood by the professionals involved. AMASE, 2018 (link)

Effects on human rights	Autistic people
Staff attitudes to autistic people that cause harm to mental health	This review: We were told that in hospital, some autistic people had personal things taken away from them that they really needed, or they were stopped from doing the things that they needed to do to manage their autism. Some people told us that they had a diagnosis of autism, but professionals treated them as if they did not have autism. We were told that some autistic people experienced trauma as a result of these things.
Right to health being harmed by misdiagnosis	This review: We also heard that an autistic person may be misdiagnosed as having mental illness or personality disorder, and then be made to take powerful medication for a condition that they do not have. Some people said that autism is not diagnosed properly in women. This means they might not get the support they need.
Lack of monitoring to protect children's rights	No information is collected on the numbers of autistic children and young people who are given psychotropic medication. Autism Rights, 2015 (link) The context is that no high-quality research has shown that any psychotropic medication helps autistic children and young people with their core difficulties or with their outcomes. No psychotropic medications are licensed for use with autistic children and young people, and there is little research that directly compares psychotropic medication with other approaches. Healthcare Improvement Scotland, 2016 (link)

Effects on human rights	Autistic people
Lack of support, harming the right to health	This review: Some people said that poor support in the community has a bad effect on autistic people's health. Some autistic people said that they were not able to get any help for their mental health or their autism.
Right to health is limited by discrimination on the basis of disability	Over a quarter of respondents reported being denied access to mental health services due to having an autism diagnosis. AMASE, 2018 (link)

The evidence in the previous pages shows that the law is not adequately protecting the rights of these groups of people, and that there have been specific impacts on their human rights. A new law is required specifically to protect and promotes the rights of autistic people and people with intellectual disability.

For this law to be effective, the new law should protect and promote rights to support, care and treatment for **all** autistic people and people with intellectual disability, not just people whose rights are limited in some way. The new law should promote and protect the broad range of rights that relate to mental health. This includes rights to support, care and treatment that meet the needs of autistic people and people with intellectual disability. It should focus on 'positive rights' and on giving duties to public services so that these rights can be met. The law should give duties to provide what these groups of people require, in ways that allow people to choose to have access to what they need, in their own communities, and in the same locations as other people.

The law should protect and promote rights in areas of discrimination that autistic people and people with intellectual disability experience more than other groups of people. From our discussions with legal experts, we understand that Scotland can and should make some changes in law just for autistic people or people with intellectual disability. For example, change is needed where there are particular problems with getting access to support, care or treatment, and when these are specific problems for these groups of people. These problems can include direct or indirect exclusion from mental health services, for autistic people or people with intellectual disability.

Changes in law can also be needed, just for autistic people or people with intellectual disability, to address human rights issues that have a specific effect on autistic people or people with intellectual disability. This is about people who **do** have access to services. Those problems can include inappropriate environments that make people more ill, longer detention for these groups of people due to a lack of community services, and autistic people or people with intellectual disability being supported by staff who do not understand their needs.

This law should reduce and remove discrimination. Creating this law should not discriminate against other groups of people who are defined as having 'mental disorder', because this law would address

discrimination that autistic people and people with intellectual disability experience more than other groups of people.

What this would mean for the law

Autistic people and people with intellectual disability should retain protection for the rights that they currently have through other laws. This is to comply with Article 4(4) of the Convention on the Rights of Persons with Disabilities. Changes in law would be needed to protect those rights and to keep any relevant duties in law. ‘Mental disorder’ appears in around 25 Acts of the Scottish Parliament and also in regulations.

Although we are recommending a separate law for autism and intellectual disability, we are not suggesting that this law should be used to authorise detention or compulsory care or treatment for autistic people and people with intellectual disability. We recommend that those decisions should be made under future law which may replace our current mental health law and incapacity law **if** this law is developed to operate in ways that will promote and protect the human rights of autistic people and people with intellectual disability much more effectively than the current Mental Health Act.

What should happen in practice

We have discussed possible practical effects of a new law throughout this report.

What may need to happen next

Scottish Government might choose to propose a new law as a bill of the Scottish Parliament.

A new law should address all human right issues related to mental health and criminal justice that have a specific impact on autistic people or people with intellectual disability.

1.5 Criminal law

What we recommend

We make a range of recommendations in sections 8 and 9 on the future of criminal law for autistic people and people with intellectual disability.

Why Scotland needs to do this

For autistic people, a general issue is the lack of visibility of their human rights within the system. No one knows how many autistic people are within the criminal justice system. There is no evidence of ongoing monitoring specifically for the human rights of autistic people within any part of the system. We therefore saw no evidence that any part of the criminal justice system or forensic services in Scotland promotes and protects the human rights of autistic people in ways that meet the specific needs of these groups of people.

For people with intellectual disability, unpublished data with the Mental Welfare Commission for Scotland indicates that offenders with intellectual disability remain on forensic orders for longer than other offenders who are defined as having 'mental disorder'. We saw and heard evidence in this review which indicates to us that inaccessible communication in trial processes, determinations of unfitness to stand trial, and diversion to hospital with long durations of detention based on assessment of risk may all have disproportionately negative effects on the human rights of offenders with intellectual disability

We understand that Scotland could comply in full with its human rights treaty obligations in this area if some or all of these measures were developed for all persons who could benefit from them, including those people with any form of mental disability and any citizen who needs that support. For example, it could be most equitable and least discriminatory to offer access to intermediaries to everyone on the basis of a need for support with communication, not on the basis of a diagnosed disability.

What this would mean for the law

Some of our recommendations were developed in response to issues that have a specific impact on autistic people and people with intellectual disability in the criminal justice system. However, many of our recommendations are relevant to other groups of people within the criminal justice system. Our recommendations should be given effect for

autistic people and people with intellectual disability, but should also be considered for offenders with other conditions.

What may need to happen next

Some of our recommendations call for further review work very soon in this area. This is to complement the work of this review, the Scott review of mental health and incapacity law, and the Barron review of forensic mental health services.

Further work is needed to develop law in this area towards our current duties under human rights treaties.

1.6 Law for mental health and for disability rights

What we recommend

We recommend that Scotland works towards law that removes discrimination in detention and compulsory treatment on the basis of disability.

We recommend reform of the law towards ‘law for mental health’. We discuss this concept and other concepts below.

Why Scotland needs to do this

Scotland’s commitment to implement the Convention on the Rights of Persons with Disabilities in full requires a paradigm shift in law in this area.

The Convention on the Rights of Persons with Disabilities makes clear that laws should apply to everyone with a disability on the same basis that they apply to other people. This is a challenge to Scotland’s Mental Health Act, and to mental health law around the world. People are not detained or given compulsory care and treatment **solely** on the basis of disability under Scotland’s Mental Health Act. However, when people meet the criteria under the Mental Health Act, this **includes** disability (mental disorder). The Committee on the Rights of Persons with Disabilities has stated that this is detention on the basis of disability (link, paragraph 7).

What this would mean for the law

Law for mental health

Law may need to change towards ending discrimination on the basis of disability. In this context, it may be important to talk about ‘law for mental health’ instead of ‘mental health law’. For example, for Scotland to comply with duties in international human rights law, our law must be set up to ensure that autistic people and people with intellectual disability can get access to the support, care and treatment that they need to be mentally healthy, through choice and in their own communities. Our current mental health law does not enforce the protection and promotion of positive rights that are required to achieve all of this. This could also include a move away from ‘mental health law’ to law that applies to many groups of people who, for example, experience serious adverse effects on their human rights.

Scotland's Mental Health Act has over 300 sections and several 'schedules' at the end. Only a few sections of the current Mental Health Act (for example, section 25) deal with support services that promote well-being and social development. Those sections give duties to local authorities. We looked for evidence to tell us that these sections of the Mental Health Act had been enforced, using freedom of information requests. We did not find evidence for this.

In stage 3 of the review, legal experts expressed strong support for our proposals. Some suggested that changes might have to be made in law not just for autistic people and people with intellectual disability, but also for other people who are currently defined as having a 'mental disorder' in our Mental Health Act. We think that many of the changes in law that we recommend could promote and protect the human rights and mental health of other people, not just autistic people and people who have intellectual disability. For example, we have recommended human rights assessment, as part of a system in law. That system would make it possible to limit a person's rights only when this is shown to be a proportionate decision that respects the person's rights, will and preferences.

The Scott review of mental health and incapacity law is beginning its work (link). We think that it may be for that review to decide which of our recommendations, if any, would give similar benefit to the human rights of autistic people, people with intellectual disability and other people who are defined as having a 'mental disorder' such as mental illness or personality disorder. However, we do think that all of our recommendations should be made in law for autistic people and for people with intellectual disability by a defined date.

The aim of disability-neutral law for mental health

Disability-neutral law would not discriminate against people on the basis of disability. People with disability would not have their rights limited with worse effects than any other citizen would experience. Law, policy and practice would ensure that people with disability have their human rights promoted, protected and fulfilled to at least the same level as any other citizen. This approach would require that future law in this area does not only apply to people who would currently be defined as having a 'mental disorder'.

In the stage 3 consultation document, we discussed the criteria that have to be met before a Compulsory Treatment Order can be authorised

under Scotland's Mental Health Act. We are now recommending that decisions for detention and compulsory treatment should not be made on the basis of autism or intellectual disability, and should be made under future law that applies to people more generally. For this reason, we include some relevant suggestions in this report, but we are not proposing changes to criteria for detention and compulsory treatment. We think that this could be for the Scott review to consider, for people in general, including autistic people and people with intellectual disability.

Challenges in complying with international human rights treaties

There is tension between the European Convention on Human Rights and the Convention on the Rights of Persons with Disabilities, in the requirements of these treaties on deprivation of liberty. There may be less disagreement than there appears to be. Both treaties allow for deprivation of liberty to deal with civil matters. The Convention on the Rights of Persons with Disabilities does allow for rights to be limited, including deprivation of liberty, but it requires us to limit rights in the same way for persons with disabilities as for everyone else.

There is no unified United Nations position on the question of whether involuntary placement and treatment can be lawful under United Nations human rights standards. Different positions have been taken in different reports. One main position has been set out by the committee for the Convention on Civil and Political Rights. This committee is in favour of necessary and proportionate involuntary placement and non-consensual treatment of persons with disabilities as a last resort.

The other main position calls for an absolute ban on these. That position comes mainly from the committee for the Convention on the Rights of Persons with Disabilities. These two positions are inconsistent with each other. However, some reports from the United Nations seem to reflect work towards reconciliation of these two positions. The European Convention on Human Rights allows for the detention of people on the basis of disability when other criteria are also met (link, page 24).

At present, it does not seem to be possible to create fully disability-neutral law that would completely satisfy all of Scotland's duties under international human rights conventions. We recommend that Scottish Government instead take an approach of working to maximise compliance with these conventions to the greatest extent possible at this time, limited only by unresolved areas of disagreement between some

international treaties. Legal perspectives have confirmed to us that much more can be done. For example, we have proposed that Scotland should use the language of human rights treaties directly in Scots law. Rights would need to be interpreted in ways that fit with both the European Convention on Human Rights and the Convention on the Rights of Persons with Disabilities, amongst other human rights conventions. We understand that this is possible to a large extent. As another example, in the stage 3 consultation document (section 6.2) we suggested that the current police power to remove a person from a public place to a place of safety on suspicion of mental disorder (section 297 of the Mental Health Act) could be made disability neutral, by changing criteria and moving this power from mental health law to other relevant law. This could reduce disability discrimination in restrictions on liberty.

We suggest that limits on the rights of autistic people and people with intellectual disability could be made on the same basis as for certain groups of people in society who are **not** experiencing mental disability. We understand that it is possible to move closer to disability-neutral law, within limits set by the European Convention on Human Rights. That convention defines some groups of people who can be detained for social or medical reasons.

One way to create disability neutral law might be to combine public health law with mental health law, but we felt that it was outwith the scope of this review to develop that work. It may be easier to achieve full compliance with the Convention on the Rights of Persons with Disabilities in countries that are not party to the European Convention on Human Rights. All of Scotland's laws must comply with that convention, which puts some limit on how far Scotland's approach could go.

Another potential way to create disability neutral law was brought to our attention in stage 3. Work by Bach and Kerzner uses a concept (link) of 'serious adverse effects' as a basis on which to develop disability neutral criteria, to allow for state intervention on an equal basis across a wide range of civil matters. The Republic of Ireland has drawn on some aspects of the same work to develop its new law and system for decision support. We spoke with Michael Bach and with the Republic's Mental Health Commission on this in stage 2 of the review.

Applying this concept would mean that limits to human rights would be made to limit serious adverse effects on other human rights. The test of

whether these limits are necessary and proportionate could examine risk to human rights for the person, for people who have personal relationships with the person, and for affected members of the public including any victims. When we talk about 'risk to human rights', we mean actual serious adverse effects on people's rights which have happened or which are clearly about to happen. This includes serious risk to **all** relevant rights including the right to independent living, not only the right to life or the right to health.

Under the European Convention on Human Rights at present, it would be possible to use this concept, but we could only apply it to groups of people whom the European Convention says can be detained and have their rights limited for civil reasons.

Intellectual disability, self-injurious behaviour and behaviour that causes serious harm to others

There will continue to be a need for public services to act to protect the rights of autistic people and people with intellectual disability who do not have mental illness or personality disorder. Sometimes, that will have to be without consent. For Scotland to comply with its human rights duties, the law must allow for public services to intervene with persons with intellectual disability who seriously injure themselves or others, and who have no criminal intent. Of course, we do not think that this should be dealt with under criminal law. However, self-injurious behaviour is not 'mental illness'. Also, behaviour that causes serious harm to others is not 'mental illness'.

Scotland's Mental Health Act has included 'learning disability' as a form of mental disorder. This has allowed for detention and compulsory care and treatment of persons with intellectual disability in hospital, some of whom are autistic. Some of the indirect discrimination that we have seen against these groups of people, including very long term detention in hospital, has been enabled by the inclusion of 'learning disability' in the definition of mental disorder in this way.

We think that law reform such as we discuss above could help to resolve this issue in law. If in future a person with intellectual disability, or a person with another condition, would have their rights limited on the basis of the same criteria, we could be closer to compliance with the Convention on the Rights of Persons with Disabilities. That law might be appropriately used to enable public services to intervene with persons

with intellectual disability who seriously injure themselves or others, and who have no criminal intent. However, we would also need to consider the real effects of applying future law to people with intellectual disability and autistic people, in comparison with other people, to ensure that the law did not allow for indirect discrimination in practice.

Mental capacity

The independent review of Scotland's mental health and incapacity law, led by John Scott QC, will consider "how far capacity might be an appropriate and universal threshold for compulsory measures in both mental health and incapacity legislation". It will also consider "how 'capacity' and 'significantly impaired decision-making ability' is assessed by clinicians and practitioners, across both mental health and incapacity legislation." We understand that this is about the idea of using **impaired mental capacity** as the threshold by which to permit compulsory measures.

The development of new law that covers mental health and incapacity would need to involve 'testing' against the specific needs of autistic people and people with intellectual disability. Law should be developed **with** those groups of people, to ensure that future law will not indirectly discriminate against people. Our stage 1 evidence told us that the 2003 Act had led to indirect discrimination against these groups of people. The use of 'impaired mental capacity' as the threshold for interventions in mental health and incapacity law may in effect discriminate against autistic people and people with intellectual disability, by leading to over-use of the law to limit those people's human rights. As these conditions are lifelong, these groups of people may be at risk of being deemed to 'lack capacity' by practitioners at any time. Concerns about current practice in this area assessing mental capacity were raised in McKay and Stavert's paper on this topic. We understand that compliance with the CRPD requires a move away from decisions based on mental capacity.

The Scott review will also consider "the need for the convergence of incapacity, mental health and adult support and protection legislation". This is the idea of bringing several laws together into one law. For clarity, we are not raising a concern about that idea, but a specific concern about the use of impaired mental capacity as a criterion for intervention. In section 2.3, we recommend a move away from mental capacity assessments for autistic people and people with intellectual

disability in the context of mental health law. In our understanding, this move is needed for compliance with the Convention on the Rights of Persons with Disabilities. That convention requires us to focus instead on offering support to people to enable them to use their legal agency.

We think that this would be achievable by putting the approaches that Scottish and UK legal experts have developed into Scots law (link). Those approaches include the 'rebuttable presumption' that the role of professionals and other decision-makers is to give effect to the person's will and preferences. We have also made recommendations for changes to law which would put these legal approaches into practice. Those recommendations include human rights assessments, statements of rights will and preference, and independent advocacy on an opt-out basis. Mental capacity as a threshold for intervention may not work well with an approach which maximises the use of legal capacity. If a person is deemed to 'lack mental capacity' for a decision, their will and preferences may not be used to lead decisions about them.

Disability rights law

Some of the changes that we recommend could protect and promote human rights for many people with various forms of disability. Some changes might be effective in protecting and promoting human rights for people with other mental disabilities, or with sensory or physical disabilities. For example, human rights-based standards for accessible communication should help to reduce the disability that many people experience, across mental, sensory and physical disability. Intermediaries in the criminal justice system could reduce disability for a similar range of people.

In developing any future law on the basis of our recommendations, care should be taken to ensure that new law does not discriminate against other groups of people with disability by excluding people who would also benefit if they had access to those changes. However, we do suggest that all of our recommendations should be made in law soon for autistic people and for people with intellectual disability.

Developments in England

In this review, we spoke with experts in law, policy or practice from all parts of the UK and Ireland plus other countries (Canada, Australia, New Zealand and Switzerland). Many of these experts are based in England. We have considered current thinking on possible developments in law

for England for autistic people and people with intellectual disability, and we will give an overview of this in an additional report which we will publish in January.

We are not recommending that Scotland adopt the proposed changes for English law, for law in Scotland. None of the proposed changes in England attempt to meet the requirements of the Convention on the Rights of Persons with Disabilities in full, which presents the largest set of challenges for law reform in this area. There are some differences in relation to the current context in Scotland. The Scottish Parliament has clearly committed to implementing the Convention on the Rights of Persons with Disabilities in full (link, paragraph 4), an approach which is supported by Scottish Government policy which is clearly connected to the Convention on the Rights of Persons with Disabilities (link).

What should happen in practice

We are encouraged by the focus that England has chosen to give to issues in this area in recent years. We understand that not all initiatives have been as successful as was intended, but Scotland has had no equivalent to the Winterbourne Medicines Review (link), STOMP (link), or the Transforming Care programme (link). Scotland has had repeated notice of serious human rights issues for autistic people and people with intellectual disability in Scotland in the context of detention and compulsory care and treatment, and should act now to address these.

What may need to happen next

The Scott review of mental health and incapacity law is independent and will progress in its own direction.

Work could begin on the range of suggestions in this document under this heading of ‘what may need to happen next’.

There is more work to do in law reform, but practical action to address rights issues must begin now.

2 How we understand autism, learning disability and mental health

We are recommending that Scotland should understand autism and learning disability differently. This is so that Scottish Government, public services, the legal system and professionals can promote, protect and fulfil people's human rights. This should enable people to have the best mental health that they can have.

2.1 Disability

What we recommend

We recommend that Scotland's law should include the description of disability from the Convention on the Rights of Persons with Disabilities.

We recommend that autism and learning disability should be defined in a new law for autism and for intellectual disability. We talk about the new law in section 1.

A review of Scotland's mental health law and incapacity law (the Scott review) began after we started this review. That review is for all people who may be affected by mental health law or incapacity law. If Scotland continues to have a definition of 'mental disorder' in law in future, we recommend that autism and learning disability should be excluded from the definition of mental disorder in law. This should be done in a way that continues protection for people's human rights, on the same basis as for people in general.

We recommend that Scotland's law for mental health should allow professionals to support autistic people and people with learning disability who are experiencing serious adverse effects on their human rights. We write about this in section 1. This will include some autistic people and people with learning disability who do not have mental illness, and who may not want that support. Scotland may need to create new law in this area. To reduce or avoid discrimination on the basis of disability, this law would have to apply to other people also, not just to people who are disabled.

Why Scotland needs to do this

Scotland's law, policy and practice should fit with the human rights treaties that Scotland has agreed with.

This means that Scotland's professionals need to work with an understanding of autism and learning disability which fits with the understanding of disability in the Convention on the Rights of Persons with Disabilities. That convention is based on the human rights model of disability (link).

Scotland also needs to define autism and learning disability in ways that fit with the European Convention on Human Rights. In this area of law,

that means that our law also has to define autism and learning disability in terms that clinical professionals use.

For real understanding of autism and of learning disability, in services and in society in general, it is important that these conditions are no longer defined in the same law as mental illness.

What this would mean for the law

Professionals should use this description in their understanding of autism and learning disability:

‘Disability results from the interactions between persons with impairments, and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others’ (link, section 5)

We recommend that the law states that:

An autistic person is a person who has a professional diagnosis of autism.

A person with intellectual disability is a person who has a professional diagnosis of intellectual disability.

We understand that there are problems with getting access to diagnosis for autistic people. We have heard that getting a diagnosis may be especially difficult for women (section 4.6). In section 4, we recommend that access to screening and diagnosis for both learning disability and autism should improve. A person is autistic or has learning disability before they get a diagnosis. However, to define who is autistic or has intellectual disability in law, we need to refer to a diagnosis by a professional rather than self-diagnosis.

What should happen in practice

The law would enable autistic persons, persons with intellectual disability and unpaid carers to use whatever words they want to use to describe the person.

Professionals would use people’s preferred words when they interact with people who have lived experience.

Professionals would also use professional definitions of autism and of intellectual disability. They would do this when communicating with public services, legal services and professionals.

Planning for individual people and for groups of people should be based on the model of disability from the Convention on the Right of Persons with Disability.

What may need to happen next

For some of these recommendations, policy could be changed before the law is changed.

A shared new understanding of ‘disability’ is essential.

2.2 Human rights

What we recommend

We recommend that the law requires a human rights-based system for all decision making.

We recommend that law should directly use the language of human rights treaties that apply to Scotland in this area.

We recommend that a shared code of ethics is developed for mental health services for autistic people and people with intellectual disability.

Why Scotland needs to do this

In stage 3, we suggested that Scotland should introduce a human rights culture across all mental health services for autistic people and people with intellectual disability. There was broad support for this approach.

We continue to think that several different approaches will be needed. This is to support mental health and intellectual disability services to move towards a human rights culture. We recognise that this could be important for all people who use mental health services.

A human rights-based system for decision making should enable professionals to understand and show how their decisions promote and protect human rights. The system should support professionals to demonstrate reasonable decisions, and to demonstrate actions that are compatible with human rights. We make recommendations for several parts of this system in sections 3, 6 and 7.

What this would mean for the law

The rights and duties of the treaties that apply to Scotland would be directly reflected in law. Rights would need to be interpreted in ways that fit with the Convention on the Rights of Persons with Disabilities, the European Convention on Human Rights and other treaties.

What should happen in practice

We are recommending changes in law that should enable this sector to move to a human rights culture. In this culture, human rights would be well understood across all areas and rights would routinely be thought about in all practice. The Convention on the Rights of Persons with Disabilities is founded on a recognition that every person has inherent dignity. Using the principles and language of this convention and the European Convention in our law should enable this culture change.

What may need to happen next

We heard evidence of change towards a human rights culture from Police Scotland, who could be invited to share their experiences of this.

We think that a human rights culture would need to happen for all people who can benefit from this, not just autistic people and people with intellectual disability, so that the approach would be non-discriminatory. However, work could begin now to develop an accurate and accessible understanding of human rights. The aim would be for this to be shared by people with lived experience and professionals across all services.

Work could then begin towards changes in education for professionals, and towards training for people who are professionals now.

Law reform can make a human rights culture possible.

2.3 Legal capacity

What we recommend

Our recommendations are about mental health law for autistic people and people with intellectual disability.

In Scots law, it is already impossible to challenge a person's ability to **hold** rights and duties in law (legal standing). We recommend that the law should continue to respect the legal standing of autistic people and people with intellectual disability in future.

In Scots law, it is possible to limit how a person **uses** the rights and duties that they have in law. We recommend that it should only be possible to limit the person's ability to exercise their rights and duties (legal agency) in the context of a human rights assessment which shows that it is necessary and proportionate for the state to limit the person's legal agency in that way.

Why Scotland needs to do this

Under Scotland's mental health law, the legal agency of autistic people and people with intellectual disability can be restricted in ways that only apply to these groups of people and other people defined as having 'mental disorder'. This is discriminatory because it means that negative effects on people's human rights can happen through this law, only for people with disability. (People who are defined as having a 'mental disorder' under our Mental Health Act are persons with disabilities under the Convention on the Rights of the Persons with Disabilities).

There is no presumption in our mental health law that professionals and others should act in accordance with the will and preferences of autistic people of people with intellectual disability.

Individuals cannot enforce their right to independent advocacy in this law. Independent advocacy offers support for decision making and to give effect to a person's choices.

What this would mean for the law

Legal capacity is both the ability to hold rights and duties (legal standing) and the ability to exercise rights and duties (legal agency).

Legal standing is not what is in question here. In relation to human rights treaties that apply to Scotland, autistic people and people with intellectual disability in Scotland have a similar range of rights as other citizens.

In this review, our focus is on legal agency in the context of how decisions about support care and treatment for mental health are made and put into effect.

In this area, the human rights issues with Scotland's Mental Health Act are about the fact that the Act makes it possible to limit people in their exercise (use) of their own rights and duties, in different ways than from other citizens. This is discriminatory in the context of the Convention on the Rights of Persons with Disabilities.

To avoid this discrimination, the person's exercise of their rights and duties (legal agency) would only be limited on the same basis as for other people. Other people's legal agency would also be limited to a similar extent, in similar circumstances and for similar reasons. The limitation might be done differently to account for (to support) the person's disability, but with no more negative effect for that person than for anyone else. The European Convention on Human Rights restricts what our law can do to remove this discrimination. This is discussed in section 1.

In section 3 of this report, we recommend that the law should promote and protect people's rights to support for exercising their legal agency, including people with very limited communication and understanding who always need support to use their legal agency. Professionals and others have responsibilities to give effect to the rights, will and preferences of these people. In sections 6 and 7, we recommend changes in law to ensure accountability.

What should happen in practice

We recommend that the use of mental capacity assessments to justify limits on a person's human rights should end for these groups of people, in the context of mental health law.

What may need to happen next

It will be for the Scott review to make recommendations on the future of mental health and incapacity law more generally. We recommend that these changes are made in law for autistic people and people with intellectual disability, even if they are not recommended for everyone who has 'mental disorder' as currently defined.

Law should shift focus from impairment in mental capacity to support for the exercise of legal capacity.

3 Support for decision making

This section could also be called ‘support for the exercise of legal capacity’. Legal capacity is explained in section 2.3.

Support for decision making is support that helps a person to form a view about what they want to happen and to make that happen. It includes support for the person to put those decisions into effect, and can include support to challenge barriers that disable the person.

We understand that support for decision making can include all of the supports that are listed in the table on this page, and other forms of support too, such as communication aids or lawyers.

3.1 Statement of rights, will and preferences

What we recommend

We recommend that a statement of rights, will and preferences should replace the advance statement in the Mental Health Act, for these groups of people.

We recommend a right to challenge any professional decision that does not respect a person's will and preferences, and which may not be proportionate for their human rights.

We recommend a right in law to notify the Mental Welfare Commission when any statement of rights, will and preferences is not complied with, in addition to duties on professionals to report this.

Why Scotland needs to do this

The Convention on the Rights of Persons with Disabilities changes what can be given as an advance statement. For example, we understand that the person's recorded will and preferences should always be respected. These should not be disregarded because a professional thinks that the person does not have 'mental capacity' to make their own decisions. In section 6, we discuss how professionals should make decisions that may limit a person's rights.

We have heard that advance statements are not often used by people with intellectual disability, and that this might be because of the requirement for a person to have 'mental capacity' to make an advance statement. We have not seen any evidence of advance statements being used by autistic people.

What this would mean for the law

The law would allow a statement to be about anything that affects any or all of the person's rights, with any relevance to the person's mental health. The statement would not only be about crisis situations or medical treatment. It would be about the support, care and treatment that the person felt they need across all areas of their life, relevant to their mental health. We think that there is a broad range of rights that are relevant to mental health (link).

What should happen in practice

The statement of rights, will and preferences would work differently from the advance statement. Its validity would not depend on whether the person was believed to have enough mental capacity to make a

statement. Any statement would have to be directly and wholly addressed in any professional decision making that might limit the person's human rights. The statement would be expressed in any permanent way. This could be in writing, with pictures, or in a sound or video recording. An independent advocate or decision supporter would offer the person support to produce a statement. Independent advocacy is discussed in section 3.2, and decision supporters in section 3.3.

A person might choose not to have a statement. That person could still choose to express their will and preferences about any decision that affected them. The person's rights, will and preferences would have to be taken just as seriously in decision making.

Professionals should act to put each person's will and preferences into effect. It should become rare for professionals not to do this. If a professional thought that the person's will and preference for support, care or treatment would harm the person's rights overall, then the professional might be able to justify not following the person's will and preference. This justification would have to be made in terms of the person's human rights, and would have to show that the professional's decision was proportionate in that it gave benefit to the person's human rights overall. This is discussed more in section 6.

A person might write a statement of rights, will and preferences, but might change their mind about what support, care or treatment they want, at the time when they need it. If that happened, professionals would consider the statement, and the person's new will and preferences, in relation to the person's human rights. The professional would then decide to follow either the person's previous will and preferences or their current will and preferences. This should be reported to the Mental Welfare Commission for Scotland.

A professional should always offer to discuss a decision with a person and their supporter before acting against the person's will and preferences.

What may need to happen next

Work could begin to develop approaches to a statement of rights, will and preferences that could replace the advance statement for these groups of people.

A statement of rights, will and preferences should be introduced in law and in practice.

3.2 Independent advocacy

What we recommend

We recommend that independent advocacy be offered on an opt-out basis to autistic people and people with intellectual disability.

We recommend that non-instructed advocates are allocated to all persons who are not able to instruct an advocate due to the limits of their communication abilities.

We recommend duties on Scottish Government and local public services to provide resources for independent advocacy to meet the need.

We recommend that independent advocates should have powers to be able to support all people through the whole process of decision making and giving effect to those decisions.

Why Scotland needs to do this

There is an existing right of access to independent advocacy in Scotland's Mental Health Act, which should apply to all autistic people and people with intellectual disability. This access is not available to everyone in reality. However, for Scotland to give equal recognition before the law to these groups of people, support for the exercise of legal capacity must be made available.

Scottish and UK legal experts have made similar recommendations about independent advocacy, to enable the UK to comply with the Convention on the Rights of Persons with Disabilities (link).

What this would mean for the law

The law would place duties on Scottish Government and local public services to adequately resource independent advocacy, so that it is provided on an opt-out basis, and is also given to everyone who needs non-instructed advocacy.

The law would also make provision for the regulation of independent advocacy. The law would give independent advocates duties only to the person. The advocate would have powers to meet with the person whenever the person wanted this. The advocate would automatically get information for the person if the person chose this. The advocate would offer to support the person to make a statement of rights, will and preferences. The advocate would offer to hold that statement for them. The statement of rights, will and preferences is discussed in section 3.1.

What should happen in practice

Independent advocates should have the skills, and knowledge of autism, intellectual disability and human rights, that they need to be effective. They should question proposals and decisions from professionals against the human rights of each autistic person or person with intellectual disability, when the person wants this. In non-instructed advocacy, an independent advocate should always question proposals and decisions from professionals against the person's human rights.

Non-instructed advocates' work should include understanding each person's communication, and their will and preference. The advocate should give a best interpretation of the person's will and preferences. The advocate's independence will be important. Many unpaid carers would support non-instructed advocates in this part of their work (discussed in section 3.4). The independent advocate should give a 'best interpretation' of the person's will and preferences, in the context of the person's human rights. Professionals should use this information within their decision making.

The role of independent advocates is never to make decisions for a person. Independent advocates, and all professionals, work to promote, protect and fulfil the person's rights, will and preferences. Independent advocates focus only on their advocacy partner. Other professionals would also focus on the rights of the autistic person or person with intellectual disability, and relevant rights of others.

What may need to happen next

Work could begin to consider how all independent advocacy services would provide consistent support for these groups, and how services could support decision making at all times including times of crisis.

Work could begin to look at the training and support needs of independent advocates for work in this context.

Work could begin to further develop non-instructed advocacy in Scotland. Our proposals from stage 3 could be considered within this.

Work could begin to look at the powers, duties and regulation of independent advocacy in England and Wales, and in other jurisdictions. Our proposals from stage 3 could be considered within this.

Full access to independent advocacy is required.

3.3 Decision supporters

What we recommend

We make no recommendations about decision supporters, as the Scott review may look at this for Scottish Government.

We discussed decision supporters in the stage 3 consultation, so that we could begin to consider how independent advocacy and statements of rights, will and preferences might fit with the role of a decision supporter, whatever that role may look like in future. It is important to consider this role for compliance with the Convention on the Rights of Persons with Disabilities.

Independent advocacy, advance statements and carers all have clear roles in the current Mental Health Act, which is why we made recommendations on these in this review.

What may need to happen next

The Scott review of mental health and incapacity law has begun, for all groups of people who are affected by those laws. That review is considering what is required to achieve the highest attainable standard of mental health. This includes considering ‘maximising decision-making autonomy whenever interventions are being considered’ under all of Scotland’s Mental Health Act, Adults with Incapacity Act and Adult Support and Protection Act. This includes a focus on supported decision-making.

Support for decision-making is being considered in the Scott review.

3.4 Unpaid carers

What we recommend

We recommend that the rights of unpaid carers should be considered in human rights assessments. We discuss those in section 6.1.

We recommend that future developments in law should address the need for representation for autistic people and people with intellectual disability to be independent of representation for unpaid carers.

We recommend that carers should be allowed to take part in tribunals, in order to ensure their rights are considered.

In this review, we do not make any specific recommendations about the 'named person' role.

Why Scotland needs to do this

A human rights-based approach for autistic people and people with intellectual disability can only work well if it also protects and promotes the human rights of unpaid carers. The rights of carers are often affected by the actions and decisions of public services and the legal system. Carers are often the people with the highest level of experience and expertise in working with people who experience higher levels of disability.

What this would mean for the law

In developing any future law in this area, there should be an emphasis on the importance of the carer's role in the context of the carer's own human rights, their knowledge of the person's will and preferences, and their knowledge and expertise in communicating with the person.

What should happen in practice

As for professionals, future roles for unpaid carers in decisions for autistic people and people with intellectual disability should be focussed on implementing the person's will and preferences, in the context of the person's rights. Decision making for adults based on 'best interests' should end.

All professional and legal decisions that affect autistic people, people with intellectual disability, and unpaid carers should demonstrate respect for all relevant rights. This includes rights to privacy and to family life.

Unpaid carers have knowledge and understanding of a person's communication needs and support needs. We suggest that professionals should have a duty to accept and work with information from unpaid carers when the autistic person or person with intellectual disability wants this, when the person is a child, or when the person is receiving non-instructed advocacy. We would expect professionals to use this information in the development of human rights assessments and in care planning, for example.

Unpaid carers have an important role in working with non-instructed advocates. Those advocates need to understand each person's communication, and the person's will and preference. The advocate's independence will be important. Those advocates would not have a role to support unpaid carers, but many unpaid carers could support non-instructed advocates in this part of their work.

Unpaid carers may also need to put forward their own views and to address their own rights, including at tribunals. Representation to protect the rights of unpaid carers should be separate and independent from representation for autistic people and people with intellectual disability.

In section 5.4, we recommend that all non-mental health crisis admissions should be followed quickly by a case conference that includes the person's unpaid carers and representatives.

Opportunities to challenge decision are discussed in section 7. That section focusses on opportunities for autistic people, people with intellectual disability and their representatives to challenge decisions. Any developments in those areas should also consider the place of unpaid carers in challenging decisions.

What may need to happen next

The Scott review of mental health and incapacity law will consider the roles of named persons and other roles that unpaid carers can have.

The rights of unpaid carers should always be considered before decisions are made.

3.5 Information from professionals to support decision making

What we recommend

We recommend that Scotland set standards for accessible communication, for autistic people and people with intellectual disability.

Why Scotland needs to do this

To meet human rights duties on accessibility in the Convention on the Rights of Persons with Disabilities.

What this would mean for the law

There should be requirements in law which ensure that accessible communication standards are set and followed. The standards should be rights-based and informed by people with lived experience and professionals. They should be accessible to autistic people and to people with intellectual disability.

A commission or commissioner should have the authority to set these and other human rights-based standards along with powers to enforce compliance with these standards (see section 7.2).

What should happen in practice

Standards should be applied across all services and settings where communication could be a barrier to mental health or justice for autistic people and people with intellectual disability. In addition to all health and social care services, the legal system and education system should work to these standards.

For supported decision making to be possible, it will be important that professionals give people accessible information about support, care and treatment options. Professionals should offer accessible information to people at every time when they may need it. This includes all times where the person may need to make decisions, and all times when professionals may make decisions that affect the person's rights. Tribunals should be made aware of the information that professionals have offered to each person.

What may need to happen next

As for all other developments, standards should be developed with Disabled Persons Organisations and Autistic People's Organisations.

Work could begin on developing the possible content for human rights-based standards for accessible communication for autistic people and people with intellectual disability. This work could be led by lived experience groups with professional experts in communication.
This work could draw from the experiences in England, which has an accessible communication standard (link).

Training for professionals on developing and providing accessible information for autistic people and people with intellectual disability could be developed.

There should be an accessible information standard.

3.6 Decisions about psychological interventions

What we recommend

We recommend that decisions about using psychological interventions should usually be made by autistic people and people with intellectual disability, using support for decision making.

When professionals may have to make decisions about the use of psychological interventions, to promote and protect human rights, these decisions should be made in the context of a human rights assessment.

Why Scotland needs to do this

To prevent breaches of human rights, Scotland needs to become aware and stay aware of the potential negative effects of some psychological interventions on autistic people and people with intellectual disability, as individuals and as groups of people.

However, it will also be important for autistic people and people with intellectual disability to be able to choose to use psychological therapies that work for them. We make recommendations on rights of access to support, care and treatment in section 4.

What this would mean for the law

The law should require professionals to make all reasonable efforts to tell an autistic person or person with intellectual disability about the possible benefits and harms of any support, care or treatment. We include all psychological interventions in this, including therapies and Positive Behavioural Support

We recommend that the law in Scotland should place duties on all professionals to show that they have taken all reasonable steps to support a person's own decision making about support care and treatment.

In section 6.2, we recommend that the law should require separate authorisation for different categories of support, care or treatment. We recommend psychological interventions as one category for authorisation.

We discuss human rights assessments in section 6.1. We recommend that these should consider all evidence of any possible adverse effect on the person's human rights. We recommend that approaches should end when there is any evidence of adverse effects from that approach.

What should happen in practice

Professionals should offer evidence of expected benefit that is specific to the person, and evidence in general. For example, information based on SIGN guidance and research evidence should be made available to the person, their representatives, and the Tribunal.

Information on possible interventions should be made available and accessible to each person in advance of a decision to use a particular approach. The information should also be made available to independent advocacy where the person wants this, and to non-instructed advocates.

Psychological interventions should only be used without consent if this is demonstrated to be necessary and proportionate through a human rights assessment.

Where there is not the same standard of evidence on the safety of the approach that would be expected for people in general, this should be reflected in terms of increased risk to relevant human rights.

As for all areas, organisations of autistic people and people with intellectual disability should be involved in the development of law, including statutory guidance or regulations.

A similar approach should be taken in developing clinical and practice guidelines for with autistic people and people with intellectual disability in each professional area, including clinical psychology.

What may need to happen next

Organisations of people with lived experience may wish to work with psychologists, to begin work on practical approaches to decision making for psychological interventions that promote and protect all human rights. Also, Autistic People's Organisations may wish to address concerns about behavioural approaches with psychologists.

People should be offered support to make their own decisions about psychological interventions. If the person has not agreed to a psychological intervention, a human rights assessment should be done.

3.7 Decisions about prescribing psychotropic medication

What we recommend

We recommend that Scottish Government gets to a position where it is confident, on an ongoing basis, that psychotropic medications are being used appropriately with these groups. We recommend a **clinical** review on current prescribing practice in psychotropic medications.

Why Scotland needs to do this

Evidence from England, and evidence from one study in Scotland, suggests that Scotland may also have a significant issue with inappropriate prescribing of psychotropic medication. Some of these medications can harm human rights, including absolute rights (rights that should never be limited).

However, it will also be important for autistic people and people with intellectual disability to be able to choose to use psychotropic medications that work for them. We make recommendations on rights of access to support, care and treatment in section 4.

What this would mean for the law

The law should require professionals to make all reasonable efforts to tell an autistic person or person with intellectual disability about the possible benefits and harms of any support, care or treatment. We include all forms of psychotropic medication.

We recommend that the law in Scotland should place duties on all professionals to show that they have taken all reasonable steps to support a person's own decision making about support care and treatment.

In section 6.2, we recommend that the law should require separate authorisation for different categories of support, care or treatment. We recommend psychotropic medication as one category for authorisation.

We discuss human rights assessments in section 6.1. We recommend that these should consider all evidence of any possible adverse effect on the person. We recommend that approaches should end when there is any evidence of adverse effects from that approach.

We recommend that anyone who is given psychotropic medication should have rights to other supports, to regular reviews of their mental and physical health, and to a plan to come off psychotropic medication. The plan should be offered when medication is first prescribed and at every review of health. The person could request a plan at any time.

What should happen in practice

We recommend that the law and practice should take an approach to psychotropic medication that is equivalent to the approach recommended for psychological interventions in section 3.6 above.

Also, we recommend a clinical review of prescribing practice in psychotropic medication that is led by pharmacy or public health, and involves these specialisms in addition to psychiatry. The review should actively involve people with lived experience, including their representative organisations. The review should consider the evidence that we refer to in the stage 3 consultation document, but would also need to gather new evidence.

As part of this review, we recommend that Scottish Government should commission research to understand the health effects of current prescribing practice for autistic people and people with intellectual disability in Scotland.

The review should consider the human rights context. Some psychotropic medications can have life-limiting effects on physical health. There is evidence that some psychotropic medication is being used in Scotland to manage behaviour rather than the purposes for which it was developed and approved. All relevant rights should be considered, including absolute rights such as the right to life and rights to freedom from torture, inhuman and degrading treatment.

The clinical review should consider and make recommendations on the following:

- A Scottish national approach to the use of antipsychotic medication and other psychotropic medication for children and adults with intellectual disability and autistic children and adults.
- Stopping the use of antipsychotics to control behaviour in these groups of people.
- Requirements for supporting withdrawal from antipsychotic medication for these groups of people.

How to adapt and implement the effective aspects of STOMP, STAMP, any other effective campaigns, and Scotland's own work in other areas to end inappropriate prescribing of psychotropic medication.

The regulations and statutory guidance that are required to protect the human rights of these groups of people, in relation to medical treatments including psychotropic medications.

Any other clinical and legal requirements for a shift to appropriate psychotropic prescribing for these groups of people across their lifespan.

How the prescription of psychotropic medications should be monitored in future. Monitoring should be clinically meaningful, accessible to people with lived experience, and informative about effects on human rights.

Any other areas where the review feels that recommendations are needed.

We recommend that after this review, the Scottish Government should commission work that effectively promotes appropriate prescribing and use of psychotropic medications by doctors, nurses and other professionals, for autistic people and people with intellectual disability. As in England, an effective change programme will require national leadership. Autistic people and people with intellectual disability, including their organisations, should be involved in training professionals. Alternative supports must be made available within the multidisciplinary team.

We recommend that a public health observatory should monitor the prescribing of psychotropic medications for autistic people and people with intellectual disability in Scotland, including the benefits and disadvantages of this prescribing for these groups of people. Monitoring should include the extent of prescribing without the person's consent, for children under parental consent, and for adults without their consent. This work may require partnership working with the Mental Welfare Commission for Scotland. Monitoring should ensure that people have appropriate access to psychotropic medication and to supports, and that people are receiving benefit from medication and supports.

What may need to happen next

Organisations of people with lived experience may wish to work with psychiatrists, to begin work on practical approaches to decision making for psychotropic medications that promote and protect all human rights.

For psychotropic medications, people should be offered support to make their own decisions. If the person has not agreed to psychotropic medication, a human rights assessment should be done.

3.8 Decisions in crises

What we recommend

We make recommendations throughout this report that are relevant to times of crisis.

We recommend that Police Scotland considers a standard procedure of asking persons whether they have a disability, in situations where police find that they may need to intervene with an individual who is in crisis.

Why Scotland needs to do this

To enable the police and other crisis services to make reasonable adjustments to meet the needs of autistic people and people with intellectual disability at times of crisis.

What this would mean for the law

As the recommendation on police procedure would affect many people, any work in this area should involve autistic people and people with intellectual disability but also representatives of all groups that could be affected.

What should happen in practice

A standard procedure of asking all people whether they have a disability should make it possible for police to understand the support needs that an autistic person or person with disability may have.

We understand that there is a need for more involvement of mental health professionals in crisis situations which the police attend. In any developments in this area, all professionals should be supported to develop their skills in intervening with autistic people and people with intellectual disability.

We suggest that in developing an approach to statements of rights, will and preferences, Scottish Government considers what can be learned from joint crisis planning. This approach should not replace the approach that we discuss in section 3.1, as the joint crisis plan is created with clinicians and is not an independent statement of the person's rights, will and preferences. However, joint crisis planning aims to increase respect for people's will and preferences and may be one of very few effective ways of reducing hospital admissions due to mental health crises.

Even at times of crisis, people's rights, will and preferences should be respected. Failure to do this can of course escalate a crisis. In times of

crisis, professionals should continue to make decisions with human rights in mind. Professionals are currently required to take decisions in ways that demonstrate compliance with duties under the Human Rights Act 1998, to comply with the European Convention on Human Rights.

What may need to happen next

Police Scotland could be invited to contribute a perspective on how human rights considerations can be brought into crisis situations.

New developments should aim to make sure that rights, will and preferences are respected at times of crisis.

4 Support, care and treatment

This is a review of Scotland's mental health **law** for autistic people and people with intellectual disability. We are not reviewing support, care or treatment **in practice.** We are not comparing different types of support, care or treatment to say which types are better.

In this section, we make recommendations on how the law could change to ensure that autistic people and people with intellectual disability get the help that they need for their mental health, whatever that support, care or treatment may be.

4.1 Rights to support, care and treatment

What we recommend

Scots law should provide rights of access to the support, care and treatment that autistic people and people with intellectual disability need. We recommend a separate law to give effect to positive rights for autistic people and people with intellectual disability. We discuss this in 1.4.

We recommend that the law should require universal design in new buildings and in service design, along with reasonable adjustments, for autistic people and people with intellectual disability. In universal design, environments and services are designed to be usable by all people, to the greatest extent possible. At this time, universal design is not required in law.

We recommend that standards for accessibility for services are set and enforced, in the same way as for standards for accessible communication (discussed in section 3.5).

We recommend that standards for accessibility of buildings are set and enforced for autistic people and people with intellectual disability, in the same way as for people with physical disabilities.

Why Scotland needs to do this

In this review, we have seen evidence of specific discriminatory effects on these groups of people, in the context of services for mental health and in the context of criminal justice.

The Convention on the Rights of Persons with Disabilities requires universal design and reasonable adjustments. That convention also requires our law to move away from mental health law that focuses on detention and compulsory treatment. Scotland has to move towards law that gives people access to support, care and treatment that they choose to use.

What this would mean for the law

Separate measures will be needed in law to provide these groups of people with equity in mental health. We set out what we think those measures should be in many sections of this report. We recommend how the law could bring these measures together in law in section 1.

Changes in law should reflect the language and rights in the Convention on the Rights of Persons with Disabilities. Relevant rights include the

right to health, for example. The right to health is a right to the range of facilities, goods, services and conditions that people need to achieve the highest possible standard of health. Health care must be available, accessible, acceptable and of good quality.

What is ‘reasonable’ in human rights terms will be necessary and proportionate, as reflected in human rights assessment (section 6.1). Human rights assessments should aim to achieve equity in outcomes for individuals, not just access to services.

Universal design could not be put in law only for autistic people and people with intellectual disability, because it is design for everyone. Scottish Government could consider universal design in the context of broader disability rights law. This could include the design of health, social care, justice and education buildings and services.

What should happen in practice

Professionals with specialist understanding of autism and intellectual disability will be needed, to ensure that services can meet the needs of these groups of people. These professionals will also be needed to help to make universal design and reasonable adjustments possible.

We are not making specific recommendations on how services should be provided locally. Instead, in many sections of this report, we make recommendations on duties that should be put in law for public authorities such as Health and Social Care Partnerships. For example, in future, some services may continue to be specialist intellectual disability or autism services, supporting people to make use of mainstream services. Other services may include autism or intellectual disability specialists within mainstream services. What matters is that individuals’ rights are fulfilled, in line with their will and preferences, and within their own community.

What may need to happen next

Leadership by autistic people, people with intellectual disability and their organisations in this process will be very important. Work could begin to consider how autistic people and people with intellectual disability can be involved in setting standards for designing services and buildings.

Scotland does have access panels, which aim to involve people with a wide range of disabilities (link). However, we understand there are currently no statutory requirements to consult with access panels from the outset of planning processes.

Autistic people, people with intellectual disability and their organisations should lead in work to set standards for accessibility in the design of buildings and services.

4.2 Intellectual disability

What we recommend

We recommend that the law clarifies duties on NHS boards, Health and Social Care Partnerships and local authorities to provide reasonable adjustments to health and social care services which enable people with intellectual disability to make use of their rights, equitably.

This should include clarification of duties to give access to services, including screening and related services, to offenders in prison and in other settings.

Why Scotland needs to do this

The right to health requires Scotland to provide all of the support and services that people with intellectual disability need to achieve the highest standard of health that they can reach. In the context of mental health, these services include community and hospital health services. However, the Convention on the Rights of Persons with Disabilities also requires Scotland to act to prevent further disability. Rights of access to social support and other non-medical support are also relevant here.

People with intellectual disability in Scotland tend to experience much more mental and physical ill-health than other people in Scotland (link).

There is evidence of inequity in health outcomes for people with intellectual disability in Scotland, in the context of accessibility and the right to health. There are specific risks of health issues being misunderstood as ‘behavioural problems’. There are also risks of people not recognising their own symptoms or taking action on symptoms. There is evidence of life-limiting effects of some psychotropic medications.

There does not appear to be consistent access to screening for autism and intellectual disability in the criminal justice system, or to assessment and diagnosis services. There is a practical need to offer this, as it will only be possible for public services to meet their duties towards people with intellectual disability in full if those services ensure that people are offered an opportunity to know about and understand their intellectual disability. We understand that there should be no issue in principle with **offering** screening, assessment and diagnosis. Existing approaches to screening in healthcare in general are sometimes targeted to groups based on protected characteristics such as age or gender, where this is

associated with a specific risk of ill health. We think the evidence of increased risk to health overall for people with intellectual disability, along with evidence of inaccessible services, justifies this additional offer of screening.

What this would mean for the law

In other parts of the UK, people with intellectual disability have access to regular health checks. We think that public authorities should have duties in law to provide annual health checks to people with intellectual disability. The law should place duties to provide access to screening and diagnosis services to ensure that these are available to everyone including, for example, prisoners. The law should make clear that it is never acceptable to exclude people from support, care or treatment who have intellectual disability. Exclusion can be unintentional or indirect. For example, people may be excluded from services due to poor service design, rather than because of a decision to exclude people from services. A person may never go to see a GP due to communication barriers or complex systems for booking appointments, for example. Actions to address barriers can make a significant difference (for example, page 5 of this link, and other work.)

What should happen in practice

In practice, public services can support organisations to understand and act on their duties. For example, NHS England recognised that there were significant health inequalities for people with intellectual disabilities, and now promotes annual health checks as a reasonable adjustment that can be effective in detecting unmet health needs (link).

For general services to become more accessible to people with intellectual disability over time, training of more professionals would need to include opportunities to learn how to support people with intellectual disability well.

What may need to happen next

Professionals and people with intellectual disability could identify which approaches would be most effective for giving access to primary health care. This is for access to support for mental health in this group of people, and for any related physical health needs. Scottish Learning Disability Observatory has produced research evidence in this area, and the NHS in England has a current approach to this.

Scottish Government could consider how to make primary care more accessible for people with intellectual disability, across Scotland.

GPs and other health professionals would need training on how to make health checks accessible. Work could begin to identify existing approaches to training in this area.

Reasonable adjustments in health care are already required, including primary and prison health care.

4.3 Autism

What we recommend

We recommend the same changes in law for autistic people as the changes that we recommend in law for people with intellectual disability in section 4.2 above. Those recommendations are:

We recommend that the law clarifies duties on NHS boards, Health and Social Care Partnerships and local authorities to provide reasonable adjustments to health and social care services which enable people with intellectual disability to make use of their rights, equitably.

This should include clarification of duties to give access to services, including screening and related services, to offenders in prison and in other settings.

In addition, we recommend a duty in law on Scottish Government to ensure central provision of autism expertise, including lived experience, which enables local capacity building.

We recommend duties in law for health and social care partnerships to employ professionals who have specialist understanding of autism. It will be important to include autistic people and their organisations in the development and governance of local services.

Why Scotland needs to do this

From evidence provided by Scottish Learning Disability Observatory, we understand that the level of mental and physical health issues for autistic people is exceptionally high compared to the rest of the population (link).

In stage 1, we heard about a low level of understanding of autism across many mental health services in Scotland. We heard that people can be rejected from services because they have autism. We heard of some people experiencing harm, including trauma, in services that did not understand their autism. We also heard about specific issues in access to effective diagnosis for autistic women, with some health professionals dismissing the possibility of an autism diagnosis for those women who appear to be more socially able.

We also heard of a low level of awareness of autism within the criminal justice system in Scotland. Access to screening, assessment and diagnosis for autism appears to be limited in the criminal justice system.

The known population of autistic people is close to the size of the known population of people with intellectual disability (link). To meet the right to health for autistic people, professionals across Scotland will need to develop specialist understanding of autism.

What this would mean for the law

We recommend similar changes in the law to the changes that we recommend for people with intellectual disability in 4.2 above. We also recommend specific duties to provide services which enable local professionals to support autistic people well.

What should happen in practice

Local services should be designed and delivered with autistic people and their organisations. This could vary between local areas. For example, professionals with a specialist understanding of autism could be based within neurodevelopmental services, general mental health services or other services. There will already be some local differences in how services are delivered in general. However, duties to provide services should help to ensure that services across Scotland are capable of supporting autistic people well.

For general services to become more accessible to autistic people over time, more professionals will need to have opportunities to learn how to support autistic people well, as part of their basic training.

What may need to happen next

Scottish Government could consider how to set up and fund a central service to build capacity in services across Scotland, to develop their understanding of autism and their ability to support autistic people. People with lived experience should be involved in leading a development process.

Understanding of autism should develop across mental health services and criminal justice services.

4.4 Women

What we recommend

We recommend that human rights assessments should consider gender.

We recommend that decisions about support, care and treatment should consider gender.

We recommend that monitoring should include gender, including the interaction of gender with other characteristics.

Why Scotland needs to do this

Scotland's human rights duties require us to address discrimination that autistic women and women with intellectual disability experience, both as women or girls and as people with disability.

What this would mean for the law

We have made recommendations for changes in law on human rights assessments (6.1), about professionals' roles in decision making (6.3), and on monitoring (7.2). Statutory guidance on these changes in law should address gender and other protected characteristics.

What should happen in practice

There should be open discussion about any aspect of gender that an autistic person or person with intellectual disability wants to discuss, in relation to decision-making, support, care or treatment. Professionals should consider any possible discrimination seriously in all decision-making. For example, the possibility of forced separation of parents and children in the context of compulsory care and treatment should be considered very carefully in relation to all relevant rights, for the parent and for the child. Discrimination could happen in that context in relation to disability or gender, or in relation to several protected characteristics.

What may need to happen next

We heard from women with intellectual disability as individuals in this review. We heard from an Autistic Persons Organisation about the perspective of women. Organisations of people with lived experience may wish to consider how to represent the views and experiences of people of all genders.

Gender should be considered in all decision-making.

4.5 Children

What we recommend

We recommend that the law should require children's rights to be considered in human rights assessments, in monitoring, and in decisions about support, care and treatment.

We recommend that Scots law should directly include the additional rights that autistic children and children with intellectual disability have under the United Nations Convention on the Rights of the Child.

We recommend a change in law to ensure that children can have access to independent support for decision making.

We recommend rights to support for parents, along with duties to provide that support to parents.

Why Scotland needs to do this

Compliance with human rights treaties includes compliance with other treaties that apply to specific groups of people, such as children. The current Mental Health Act does make some specific provisions for children, but does not ensure that all of the duties under the Convention on the Rights of the Child are met for autistic children and children with intellectual disability, in relation to mental health.

What this would mean for the law

We have made recommendations for changes in law on human rights assessments (6.1), about professionals' roles in decision making (6.3), and on monitoring (7.2). Statutory guidance on these changes in law should address any specific aspects of these that relate to children.

For autistic children and children with intellectual disability, law for mental health should include rights and duties from the United Nations Convention on the Rights of the Child, when these add to the rights and duties in other conventions. Alternatively, if the United Nations Convention of the Rights of the Child is brought directly into Scots Law, we think that law for mental health should make direct links to that Convention.

In section 3.2, we recommend access to independent advocacy on an opt-out basis. Very few children at present are detained or made to receive compulsory treatment under the Mental Health Act. Many children's support needs should currently be addressed under the

Additional Support for Learning Act. We recommend a right of appeal to the Additional Support Needs Tribunal for any child who is not offered independent advocacy. Appeal could be made by them or their parent as appropriate in relation to their human rights.

For all autistic children and children with intellectual disability, the law should require all children's services planning to be based on children's rights in the United Nations Convention on the Rights of the Child. Planning should also be based on other relevant rights from relevant treaties such as the Convention on the Rights of the Persons with Disabilities, and the European Convention on Human Rights.

All autistic children and children with intellectual disability who need services for their mental health should have a right to be offered a Co-ordinated Support Plan. Statutory duties towards children who have a Co-ordinated Support Plan should extend to all agencies including NHS Boards, and Health and Social Care Partnerships.

Parents of autistic children and children with intellectual disability should have a right to support that is specific to their needs and their child's needs, to enable them to promote, protect and fulfil the rights of their children. Education authorities, and Health and Social Care Partnerships, should have duties to provide those services.

What should happen in practice

The 'best interests' approach to decisions does have a place for children with disabilities, to the same extent that this is appropriate for all children under the United Nations Convention on the Rights of the Child. However, autistic children and children with intellectual disability should be offered support for decision making on the same basis as adults. This includes access to independent advocacy, and statements of rights will and preferences.

What may need to happen next

Autistic children and children with disability could be offered support to establish their own organisations. These organisations are needed to influence the development of law, policy and practice in all areas for autistic people and people with intellectual disability, not just in areas that specifically affect children.

Public services have extra duties towards children.

4.6 Offenders

What we recommend

We recommend duties in law on NHS boards, Health and Social Care Partnerships and local authorities to provide similar access to support, care and treatment to autistic offenders and offenders with intellectual disability as for other autistic people and people with intellectual disability.

Why Scotland needs to do this

The right to health requires the provision of all the support and services that autistic people and people with intellectual disability need to attain the highest standard of health that they can reach. This includes autistic offenders and offenders with intellectual disability in all environments.

What this would mean for the law

The law should make clear that autistic offenders and offenders with intellectual disability have a right to the same standards of support, care and treatment as other autistic people and people with intellectual disability.

What should happen in practice

It will be important to find ways to give offenders access to specialist autism and intellectual disability support and services. We have recommended changes in law that would require developments in decision-making support, and in support, care and treatment for autistic people and people with intellectual disability. Offenders should be included in all of these developments.

What may need to happen next

No organisation in Scotland represents autistic offenders. Work could begin to find out how autistic offenders could be represented.

The right to health and many other rights are similar for offenders and non-offenders.

4.7 Duties on public authorities

What we recommend

We recommend duties on NHS boards, Health and Social Care Partnerships and local authorities to provide services, environments and professionals with specialist understanding, for autistic people and people with intellectual disability.

We recommend that planning duties should be set for Health and Social Care Partnerships and that these duties should be monitored against standards.

We recommend enforcement of compliance with the public sector equality duty under the Equality Act 2010.

Why Scotland needs to do this

There is an immediate need to provide environments and services that support the mental health of autistic people and people with intellectual disability. The European Court of Human Rights clarified this in relation to people who are detained, in its recent judgment on Rooman v Belgium. The Joint Committee on Human Rights at the UK Parliament has concluded that inappropriate treatment and hospital environments for autistic people and intellectual disability can give rise to serious breaches of human rights (link).

Services must demonstrate that they meet their existing duties under the Equality Act 2010. We have seen evidence that this is not happening consistently.

What this would mean for the law

Duties should be placed on Health and Social Care Partnerships, NHS Boards and local authorities to provide access to health and social care professionals who have experience and understanding of how to support autistic people and people with intellectual disability.

Duties should be placed on the same public authorities to provide access to health and social care environments that meet the needs of autistic individuals, and the needs of individuals with intellectual disability.

Scots law should give duties to Health and Social Care Partnerships to plan for the future health and care needs of the autistic people and people with intellectual disability to whom they are responsible. This

planning should project several years into the future. It should include detailed planning for the health and social care needs of all children who have a Co-ordinated Support Plan, including all children who are a few years away from their minimum school leaving age. Law should also give Health and Social Care Partnerships powers to require all relevant public authorities to provide them with information that they need for this planning.

What should happen in practice

Public authorities should involve Disabled Persons Organisations, Autistic People's Organisations, and autistic people and people with intellectual disability more generally, in the planning, development and governance of services for these groups of people. These organisations should also be involved in all processes that determine which professionals have experience and understanding of how to support autistic people and people with intellectual disability.

A commission or commissioner should set standards for services and environments that Health and Social Care Partnerships must have in place for autistic people and people with intellectual disability. Standards should include how these services and environments should be developed, including a requirement to involve people with lived experience, and direction on policies. Health and Social Care Partnerships would be required to give their policies to the commission. These services and environments should be inspected against those standards, and a commissioner, regulator or inspectorate should have enforcement powers in relation to these standards. This is discussed in section 7.2.

Many public services and judicial bodies have a 'public sector equality duty' because of the Equality Act 2010. As a minimum, we think that the Mental Welfare Commission for Scotland, the Mental Health Tribunal for Scotland, and mental health services with duties under the Equality Act 2010 should show publicly that they are meeting those duties. A commission should be given adequate resources to monitor compliance with the public sector equality duty.

Public authorities already have duties to do equality impact assessments. All planning and policies for health and social care services for autistic people and people with intellectual disability should be based on equality impact assessments that also include human rights. Public authorities should document and show this to the public.

What may need to happen next

Work could begin to consider which commission, commissioner, regulator or inspectorate would be best placed to have the responsibilities and authority that are discussed in this section. A new organisation may be required, as discussed in section 7.2.

Involvement of lived experience, planning, duties and enforcement are all needed to meet people's rights.

5 Where support, care and treatment happens

Autistic people and people with intellectual disability should be able to get the support, care and treatment that they need, wherever they are. In this section, we recommend rights and duties for law which should give people access to the environments that they need, wherever they are. In section 9, we discuss the places where offenders get support, care and treatment.

5.1 Independent living

What we recommend

We recommend that Scots law should recognise the right to independent living of autistic people and people with intellectual disability.

We recommend that Scotland should invest in more community-based professionals and support. This is needed so that people can remain in the community, or can move back to the community from hospital as soon as possible (see section 5.3).

Why Scotland needs to do this

Autistic people and people with intellectual disability have a right to independent living through the Convention on the Rights of Persons with Disabilities. At this time, some individuals are experiencing ongoing detention due to a lack of housing and appropriate support (link). This situation can involve serious breaches of several human rights, including the right to liberty. Where ongoing detention generates mental distress and ill health, this could even breach the absolute right to freedom from inhuman and degrading treatment.

Professional decision making, including Tribunal decisions, should be based on human rights in future, as discussed in other sections. It is important that the right to independent living is clearly defined in Scots law. This should enable people with lived experience and professionals to have a clear, shared understanding of what their decisions are working towards. The right independent living will be very important to very many people, including people whose rights may be limited through these decisions. In this review, we heard very strong support for more investment in community services.

What this would mean for the law

The right to independent living in the Convention on the Rights of Persons with Disabilities applies to people with disabilities in general. This right might best be placed in law that applies to people with disability more generally.

Law for autistic people and people with intellectual disability (section 1.4) should include duties and rights that enable autistic people and people with intellectual disability to exercise their right to independent living on an equal basis with other people. This is to meet their specific needs in

the context of independent living. In section 4.7, we recommend duties on public authorities to provide access to health and social care professionals who have experience and understanding of how to support autistic people and people with intellectual disability. We also recommend duties on the same public authorities to provide access to health and social care environments that meet the needs of autistic individuals, and the needs of individuals with intellectual disability. These duties should apply to all professionals and environments, including support and accommodation for independent living.

What should happen in practice

Planning for services at a local level should involve autistic people, people with intellectual disability and their organisations. Planning should be in line with duties as described in section 4.7. Planning should lead to decisions on how services will give effect people's will and preferences in the context of their right to independent living and other rights. This planning should lead to local decisions on how community-based services will be structured and staffed. Those services will need to include professionals who have experience of supporting autistic people and people with intellectual disability effectively.

Decisions about which services are made available to people should be based on the duty to fulfil the right to independent living. The risk to independent living caused by being detained in hospital should always be considered and balanced with other risks to human rights. Decisions should shift from considering risk in a general sense, to considering risk to human rights. For example, a person may be detained in a hospital far from home. The person may pose no risk of physical harm to themselves or anyone else. However, their human rights may be very seriously breached.

What may need to happen next

Work to return people home who are living far from home will require specific resources, to enable a shift from dependence on out of area services to local services. This will be essential if Scottish Government is to meet its duties under international human rights treaties.

Work could begin on a definition of independent living for Scots law which fits with the Convention on the Rights of Persons with Disabilities

The right to independent living should be clearly defined and should reflect our duties on human rights.

5.2 Safe places

What we recommend

We recommend duties on Health and Social Care Partnerships to provide access to specially designed places other than hospital for pre-emergency situations.

We recommend that Health and Social Care Partnerships should have clear responsibilities to determine the quality of delivery and to ensure sound governance.

Why Scotland needs to do this

Access to accessible and appropriate crisis support, offered to people as a choice, is necessary for compliance with both the Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights.

Public services must protect the right to life, and must also act in ways which are proportionate for the whole range of human rights. Making it possible for a person in crisis to choose a safe and therapeutic environment, without detention or compulsory treatment, will often be a most proportionate response in relation to human rights.

What this would mean for the law

To support Health and Social Care Partnerships in these duties, statutory guidance should be provided on commissioning and governance. Clarity would be required on which agencies had responsibility for regulation and inspection of safe places.

What should happen in practice

Safe places should help to prevent emergency admissions to hospital, and the negative effects of hospital that can happen specifically for autistic people and people with intellectual disability, including harm from the hospital environment and/or long term detention in hospital.

Safe places should be a form of short term crisis respite. They should be available for people to choose to use, and not compulsory for the person. Safe places should be specifically designed to provide a whole environment that is appropriate for each person’s needs for respite in crisis, in an environment led by staff who genuinely understand autism and intellectual disability.

Staff will be needed who have strong expertise in supporting autistic people and people with intellectual disability to overcome crisis situations. Sound leadership will be needed. People with lived experience should have important roles in the governance of these services. This provision should be 'socially led', by highly experienced professionals and with people with lived experience. By this, we mean that a sound understanding of the environment and support needs of autistic people and people with intellectual disability in crisis will be essential. We suggest that social workers, experienced social care managers and occupational therapists might typically manage this provision.

Safe places will also need to have ready access to health expertise. This is to support the ongoing health needs of individuals who come to safe places, and to ensure that links between safe places and hospitals work well.

Safe places may be provided directly by Health and Social Care Partnerships. Work with people with lived experience may identify models for safe places that should be provided by organisations other than Health and Social Care Partnerships.

What may need to happen next

Work could begin to define how safe places should operate. That work could draw from existing models of safe places such as crisis houses in Scotland, England and other countries. The relationship between safe places and places of detention should be clearly defined.

It is particularly important that autistic people and people with intellectual disabilities are involved in the design and development of safe places, as they are the people most likely to know what could work well in crisis situations. Individuals and organisations of people with lived experience should also have roles in governance, and some involvement in provision.

Safe places will enable public services to support people through crises with respect for human rights.

5.3 Community rehabilitation

What we recommend

We recommend duties on Health and Social Care Partnerships to provide community-based professionals with specialist understanding who work across all settings as required, including home and hospital.

We recommend duties on Health and Social Care Partnerships to provide community-based individual accommodation for longer-term crisis support, including crisis prevention.

Why Scotland needs to do this

The main aims of this approach are to provide more community options, to keep staff involved who people know, and to have more staff who are more highly trained in crisis prevention and intervention.

Accessible and appropriate crisis support is needed to comply with the Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights. Crisis support includes support which prevents crises from occurring

When public services must limit a person's right to liberty to protect other human rights, the restriction on liberty must be proportionate in order to be justified. Limits on liberty are discussed in section 7.6.

Public services must provide support and environments that meet the needs of the individual, for the detention to be justifiable under the European Convention on Human Rights.

Public services must protect the right to life, and must also act in ways which are proportionate for the whole range of human rights. Community rehabilitation should promote and protect the right to independent living and many other rights, and should minimise limits on the right to liberty.

What this would mean for the law

Duties would be set out in law to require services and accommodation that enable people to remain in, or return to, their communities.

The duties that we propose here build on the duties that we recommend in section 4.7 above.

What should happen in practice

Health and Social Care Partnerships might meet these duties by providing community rehabilitation teams led by professionals with

significant experience of preventing crises and resolving crisis situations. Teams would be led by professionals including social workers, occupational therapists, and nurses. There should be input from all health professionals who are needed.

Health and Social Care Partnerships should provide accessible and appropriate services and environments. These should promote inclusion and challenge discrimination in how they are designed and in how they operate. Full involvement of people with lived experience and their organisations will be needed to achieve this.

Support would be provided to people within their own homes, and when this is not possible, within their own communities. For some people, community rehabilitation would enable a gradual change between home and hospital. For other people, multiple changes would be harmful. Community rehabilitation would support people to remain at home or would minimise the impact of a move between home and hospital.

Health and Social Care Partnerships could also meet these duties by providing individual accommodation for crisis prevention and longer-term crisis support. All of this support would be designed to meet the needs of autistic people and/or people with intellectual disability. The accommodation should not be a hospital. For example, it may be provided by a Health and Social Care Partnership and managed by the community rehabilitation team. Staffing would need to provide the right balance of community rehabilitation professionals and professionals who are familiar to the person, for each individual. People using these services might use them voluntarily or they might be on community-based orders.

What may need to happen next

Meeting these duties would require new investment as well as re-targeting of current resources. Work could begin to identify what would be required. Learning and experience from areas which have been addressing these issues in Scotland will be important, including Midlothian, Moray, and Greater Glasgow and Clyde. Learning could also be drawn from England's experience of the Transforming Care programme.

Investment, individual accommodation, and duties to provide community rehabilitation teams are all needed.

5.4 Hospital admissions for mental illness or crisis

What we recommend

Below, we make recommendations on planning and admission, in the context of duties on NHS boards that we recommend in other sections.

We recommend universal design in new build hospitals, to ensure full accessibility for autistic people and people with intellectual disability. Adaptations will still be required for individuals within universal design.

We recommend a presumption against detention in mental health hospital for all non-mental health crisis admissions.

We recommend that for all hospital admissions, adequate adjustments must be made before admission.

Why Scotland needs to do this

The Joint Committee on Human Rights at the UK Parliament has concluded that serious harm to human rights can come with compulsory treatment and placement in hospital, for autistic people or people with intellectual disability (link).

The right to health gives autistic people and people with intellectual disability a right of access to appropriate hospital environments for treatment, for mental illness for example. They should not be excluded from hospitals. However, neither should autistic people and people with intellectual disability be compelled to be in environments or to receive treatment when this causes – or may cause - overall harm to their rights.

What this would mean for the law

We recommend that community-based alternatives should be shown to have been seriously considered, including the duties recommended at 5.3 above, before hospital admission is authorised.

We recommend a duty to plan for discharge before planned admissions to hospital, and a duty to plan for discharge immediately after a person is admitted in an emergency.

We recommend that all non-mental health crisis admissions should be assessed through a human rights assessment (section 6.1). These admissions should be followed quickly by a case conference that includes the person’s unpaid carers and representatives (such as independent advocate, decision supporter, and solicitor).

Section 4.7 discusses duties on NHS boards to provide access to health and social care environments that meet the needs of autistic individuals, and the needs of individuals with intellectual disability.

Section 4.1 discusses universal design and reasonable adjustments.

What should happen in practice

In the context of mental health, Scotland should make general hospitals and psychiatric hospitals accessible for autistic people and people with intellectual disability.

All community supports and non-hospital services should have been seriously considered, before hospital. Serious consideration includes offering available services to people. It also includes a demonstration, in terms of human rights, that those supports and services are not sufficient to promote and protect human rights. Authorisation for hospital detention should require a demonstration that the person's human rights will be better promoted and protected in hospital.

What may need to happen next

Work could begin to include autistic people, people with intellectual disability and their organisations in the next design processes for new hospital buildings in Scotland.

Work could begin to consider how autistic people, people with intellectual disability and their organisations can influence understanding, culture and service design within mental health and learning disability wards and units.

Hospital buildings and services need to be redesigned.

6 How professionals make decisions

There are times when a person's rights have to be limited, to protect all of the person's rights overall. For example, it can be appropriate to limit a person's liberty (freedom) to protect a person's right to life when the person could complete suicide.

Scotland's human rights duties include duties to protect all of a person's rights. Other people's rights also have to be considered. Any professional decisions that limit a person's rights must be proportionate and necessary at all times. All professional decisions should be clear and open to the person. It must be possible for people to challenge decisions that may not respect their rights, will and preferences. Monitoring and judicial authority (tribunal and court) are needed to deal with professional decisions that are not proportionate.

In this section, we suggest a new approach to making proportionate decisions based on human rights. We call this 'human rights assessment'. We suggest ways to improve Scotland's approach in law to detention on the basis of disability and to compulsory treatment. We also discuss professional roles.

6.1 Human rights assessments

What we recommend

We recommend that mental health law should introduce human rights assessments.

Why Scotland needs to do this

The European Convention on Human Rights and Convention on the Rights of Persons with Disabilities require the Scottish Government to safeguard people's human rights. Scotland's Mental Health Act was created with this intention. However, the Mental Health Act does not give a clear way for professionals to make, and show that they have made, proportionate decisions in terms of human rights.

Scottish Government and public services have a responsibility to protect all of each person's rights. Sometimes, public services might have to act against the person's will and preferences, so that they can protect all of the person's rights, and the rights of other people. This should be very rare. When this happens, it must be the most **proportionate** (balanced) way to protect all of the rights and freedoms that the person has.

For Scottish Government and public services to meet their human rights duties, there is a need to check how proportionate each decision is which may limit human rights. That check should include all relevant human rights. For example, the European Convention on Human Rights only allows deprivations of liberty that are proportionate (link, paragraph 31). Proportionality is defined in the list of words at the end of this report.

For example, it would not be lawful to restrict someone's liberty when a tribunal finds that this would not be proportionate. The tribunal might find that the person is disabled by their environment, and that if the environment was changed, then this would significantly reduce a risk of harm to the person's health. The tribunal might instead decide that public services should act to change the person's environment.

The Mental Health Act does require the 'least restrictive option' for each person, but does not directly require proportionality. Sometimes, only one option may be made available for a person. That option may be very restrictive, and may not be proportionate in relation to all of the relevant human rights. The Mental Health Act does not mention the concept of 'reciprocity', which is related to proportionality and which the Millan

committee wrote about (link, page 19 in the text). We understand that decision-makers such as tribunal members will strive to make proportionate decisions. However, we have not seen written evidence which clearly demonstrates that decisions made under the Mental Health Act are proportionate for autistic people and people with intellectual disability, in terms of their human rights.

What this would mean for the law

The law would require human rights to be considered in all decisions that professionals make. The law should give professionals an approach which enables them to make decisions and demonstrate decisions that are clearly necessary and proportionate. This approach should enable professionals to promote and protect all relevant human rights.

The idea of human rights assessments in this report is based on ideas from the Essex Autonomy Project's Three Jurisdictions Report. You can find that report here (link). Page 98 explains 'special regard'. The concept of a human rights assessment in our recommendations is based on this explanation. The report says that 'the application of special regard requires application of a proportionality test, weighing benefits against harms, with significant harms being justifiable only exceptionally, on the basis of very significant benefits.' Sections 7.2 and H.3 of the report are relevant to this review.

Human rights assessments should always be led by the person's will and preferences, in the context of rights. This does not mean that the person's will and preferences will always be given full effect. However, human rights assessments would help to ensure that there is special regard for the person's rights, will and preferences. Assessments would compare the possible benefits of a decision against the possible limits to the person's human rights from that decision. Serious limits to human rights should be rare. These limits on a person's human rights would only be allowed if there would be very significant benefits to the person's human rights overall.

All decisions should be necessary to protect, promote and fulfil all of the person's human rights. In some instances, decisions would be necessary to protect the human rights of other people. Human rights assessments would test proportionality. The human rights of other affected people such as unpaid carers would be part of this test.

Relevant human rights would be clearly identified and would be considered individually.

For any individual, detention, compulsory treatment, or other limits on rights could cause harm including trauma. The person's rights might be harmed overall. We recommend a presumption in law in relation to all decisions about limits on rights. The presumption is that limits on rights cause harm. This presumption would have to be overcome with evidence that overall benefit to the person's rights is probable.

What should happen in practice

Human rights should be used clearly in all professional decisions, not only in circumstances where rights may be limited as a result of an assessment. We recommend that human rights assessments should be used as a basis for decisions at Mental Health Tribunals, and as a basis for planning for support, care and treatment.

Human rights assessments should begin with the person's will and preferences, in the context of their rights. The person may have created a statement of rights, will and preferences, or they may choose to express their will and preferences in some other way. The person may also choose not to express their will and preferences for the purposes of human rights assessment. Where the person has had clear opportunities to express their will and preference and clearly does not wish to do so, human rights assessments should be done without this information.

Human rights assessment should always have positive aims overall. Those aims should be stated in terms of positive rights, which require duty holders to act to fulfil those rights. This should help to make sure that decisions which limit rights are proportionate and reciprocal. The intended effect of the human rights assessment should be to maximise the person's opportunities to exercise their legal agency (rights and duties) in relation to positive rights such as rights to independent living, family and private life, education, employment, and freedom of expression, for example.

In the context of criminal justice, there will be additional limits to the extent to which the person's own will and preference can be given effect. However, the person's rights, will and preferences are still relevant in the context of offences, as are the rights of people who are offended against.

What may need to happen next

Work will be needed to develop approaches to human rights assessment before human rights assessments can be required by law. Once approaches to human rights assessment have been developed, the law should require professionals to use these in all decision making that may lead to limits on a person's human rights, and in making decisions where a person's human rights have already been limited by other people's decisions. A culture of making decisions based on human rights should be encouraged and supported.

To be non-discriminatory, human rights assessments would have to be made available and used in at least some situations where there is no intention of limiting the person's rights. For example, a person with disability may currently have their rights protected and promoted in the context of secondary school. A human rights assessment might be offered to ensure that the person's rights would be promoted, protected and fulfilled after leaving school. Also, human rights assessments would have to be made available to persons who do not have a disability, in relevant situations. For example, human rights assessments are currently available for some individuals who have immigrated and who have 'no recourse to public funds'. The point is that the approach must not be used only to limit rights or only for people with disability. If that happens, discrimination happens because the approach would be 'done to' people with disability.

Human rights assessments could promote and protect the human rights of many people who have mental ill health, not just autistic people and people with intellectual disability. It may be that human rights assessments should be made available for other people also. It is for the Scott review of mental health and incapacity law to make recommendations on the future of mental health law. If that review does not recommend human rights assessments for everyone, we think that human rights assessments should still be made available for autistic people and people with intellectual disability. This is because compulsory detention and care and treatment can have a serious negative impact overall on the rights of these groups of people. Section 1.4 lists some current issues.

Human rights should be the basis for decision making in future, including human rights assessments.

6.2 Authorising limits on human rights

What we recommend

We recommend that each form of support, care or treatment without consent should be considered and authorised separately: psychotropic medication, psychological interventions, and the environment including social support.

We recommend separate authorisation for different aspects of deprivation of liberty: detention, use of restraint, and seclusion.

Why Scotland needs to do this

Scotland's human rights duties require that any form of placement, support, care or treatment for an autistic person or person with intellectual disability without their consent should be judged to be likely to alleviate any mental distress or mental illness that the person is experiencing. Separate authorisation for these forms of support, care and treatment, and for these forms of deprivation of liberty, will enable all people involved in decisions to carefully consider the different aspects of detention and compulsory treatment that are being considered for a person. Along with the human rights assessment, this approach will enable Tribunal members to ensure that they are only authorising limits on human rights when these should benefit the person's human rights overall. This is consistent with the requirements of the European Convention on Human Rights.

Under the European Convention on Human Rights, authority for a person to be detained does not automatically give professionals the authority to give compulsory treatment to that person (link to the decision in X v. Finland). Some orders under the Mental Health Act do not separate out authority to detain from authority to give compulsory treatment (Emergency Detention Certificates and Short Term Detention Certificates).

What this would mean for the law

The current definition of 'medical treatment' in the Mental Health Act should be reconsidered in this context. For example, the current definition does not specifically mention psychotropic medication (section 329 of the Act).

We recommend that the law in Scotland should place duties on professionals to show that they have taken all reasonable steps to support a person's own decision making about support, care and treatment. The law should make clear that this is part of what is necessary for professionals to be protected from legal liability in their decisions.

We have recommended separate authorisation for each aspect of deprivation of liberty. We also recommend that a clear distinction is made in law between seclusion, and voluntary withdrawal from social and environmental pressures as part of self-management. Voluntary withdrawal for self-management is very important for the mental health of many autistic people, for example. It is not the same thing as seclusion. Seclusion should not be thought of as a therapeutic intervention (link, page 6).

To ensure compliance with the European Convention on Human Rights (link), we recommend that the law should require assessment of whether location, support and care are therapeutic for each **individual**. An approach that is helpful or neutral for one person may cause harm to another person. For autistic people and people with intellectual disability, this requires public services to have a particular emphasis on the person's own will and preference, on the environment, and on staff knowledge, understanding and attitudes. In section 4.7, we recommend enforceable duties to make adjustments, with Tribunal oversight and authority for this (section 7.3).

What should happen in practice

Professionals and others should work to give effect to each person's will and preferences, within the limits of non-criminality and possibility. This is a different approach from the current professional approach of making decisions in the 'best interests' of the person. Professionals will still have to limit human rights at times, but a focus on giving effect to the person's will and preferences should change the dynamic of these decisions.

At Tribunal, there would be an expectation that professionals would already have informed the person about possible options for support, care and treatment. This information would also be set out with the application.

Separate authorisation for different forms of treatment, and for all aspects of deprivation of liberty, should enable the Tribunal to consider

each possible intervention carefully. This should also make it possible for the person to request or object to specific treatments and restrictions.

What may need to happen next

Changes in this area may have to wait for the outcome of the Scott review of mental health and incapacity law.

Each area of treatment, and each restriction on liberty, should be considered and authorised separately.

6.3 Professional roles in decisions

What we recommend

We recommend a new model for professional roles in making decisions with and for autistic people and people with intellectual disability.

Why Scotland needs to do this

The current Mental Health Act is based on a medical model of disability. It has a strong focus on medication, hospital and medical leadership. We understand that the current model of practice in Scotland is the biopsychosocial model. That model may be closer to the human rights model of disability than the model within our Mental Health Act. However, a stronger social and environmental focus is needed, as part of a strong focus on human rights.

The Convention on the Rights of Persons with Disabilities requires a paradigm shift – a major change in perspective – in how we understand disability (link). For this to happen, we will need a new model of professional roles in decision making. This is needed to work with the understanding of disability in the human rights model of disability. It is needed to bring about new approaches that reduce the disability which autistic people and people with intellectual disability experience through social and environmental barriers. The model should promote even more collaborative working, and should more fully support autistic people and people with intellectual disability to have their rights, will and preferences fulfilled.

In stage 3, we suggested a new model for sharing responsibilities amongst professionals. We have further developed this model, based on what we heard in stage 3. The multidisciplinary team is still important in the model that we describe here. In this model, a wide range of professionals directly support, treat and care for individuals. This is the same wide range of professionals as at present. This model is only about professional roles in making decisions. The model includes some new or varied roles for professionals. Within the multidisciplinary team, the model has a shift towards more leadership from professionals with social and environmental expertise. In the model, doctors, nurses and all professionals, and hospitals and medicine, continue to be necessary and important. Autistic people and people with intellectual disability have exceptionally high levels of

mental illness and physical illness (intellectual disability link, autism link) and all professions are important in meeting the health needs of these groups of people.

What this would mean for the law

We recommend that new roles should be fully defined with professionals, legal experts and people with lived experience and put in law, along the lines that we proposed in stage 3 of the consultation. These are listed below. We are recommending this model for all autistic people and people with intellectual disability, with or without mental illness or personality disorder, including offenders.

We recommend the roles that we describe below. In this model:

Care co-ordinators are responsible for co-ordinating the person's support, care and treatment. Care co-ordinators may be social workers, occupational therapists or nurses. This role requires expertise in autism, intellectual disability and human rights. The care co-ordinator begins the human rights assessment process by making a request to a human rights officer.

Human rights officers carry out human rights assessments. Social workers would develop expertise in autism, intellectual disability, human rights, and human rights assessments. The social worker is a human rights officer when carrying out these assessments.

Lead clinicians continue the current role of psychiatrists in giving a clinical opinion on whether the person meets the criteria for detention, to comply with the European Convention on Human Rights. This role would expand to include clinical psychologists. We also recommend that this role be open to nurses who have demonstrated 'objective medical expertise' for this purpose. Lead clinicians would keep care co-ordinators informed of the person's current state of health, including times when the person may meet criteria for detention or compulsory treatment. This role also requires expertise in autism, intellectual disability and human rights. Law and policy would be developed on how professionals would demonstrate 'objective medical expertise', and on how the lead clinician should be selected. People with lived experience should have important roles in the governance of this process. Scotland should look at England and Wales' experience of making the Approved Clinician role work in practice.

Responsible officers are Chief Social Work Officers. They would have final responsibility for orders made by the Mental Health Tribunal for Scotland. Currently, some autistic people and people with intellectual disability are the responsibility of the Scottish Ministers instead of local services. These people are ‘restricted patients’ who have offended. For those people, we recommend that the responsible officer should be the Chief Social Work Adviser at the Scottish Government.

We are recommending that it be possible for nurses to be either care co-ordinators or lead clinicians. We recommend that these roles should be held by two different practitioners, from different professions, for each autistic person or person with intellectual disability.

Within this model, there is a distribution of responsibilities that are currently combined within the Responsible Medical Officer role:

The care co-ordinator co-ordinates the person’s care, requests the human rights assessment, and keeps an overall perspective on the person’s rights, will and preferences.

The lead clinician uses ‘objective medical expertise’ to confirm that the person meets criteria for detention.

The Chief Social Work Officer has ultimate responsibility for orders.

What this would mean in practice

By a certain date, all professional education would need to include learning and experience in relation to autism, intellectual disability and human rights for this context.

Current professionals would need training on human rights assessment. There would also be a process to prove that the professional has expertise in autism and intellectual disability, and in human rights. People with lived experience should have important roles in the governance of this process.

The lead clinician may not be an expert in physical health. Physical health needs are significant in these groups of people and physical health problems can present unusually. There should be expertise in physical health for autistic people and people with intellectual disability within each person’s extended multidisciplinary team of professionals.

In the curator ad litem role, a lawyer gives their view on what is in the person’s best interests. We think that this role would need to change to

an approach based on the person's rights, will and preferences, if that role were to continue.

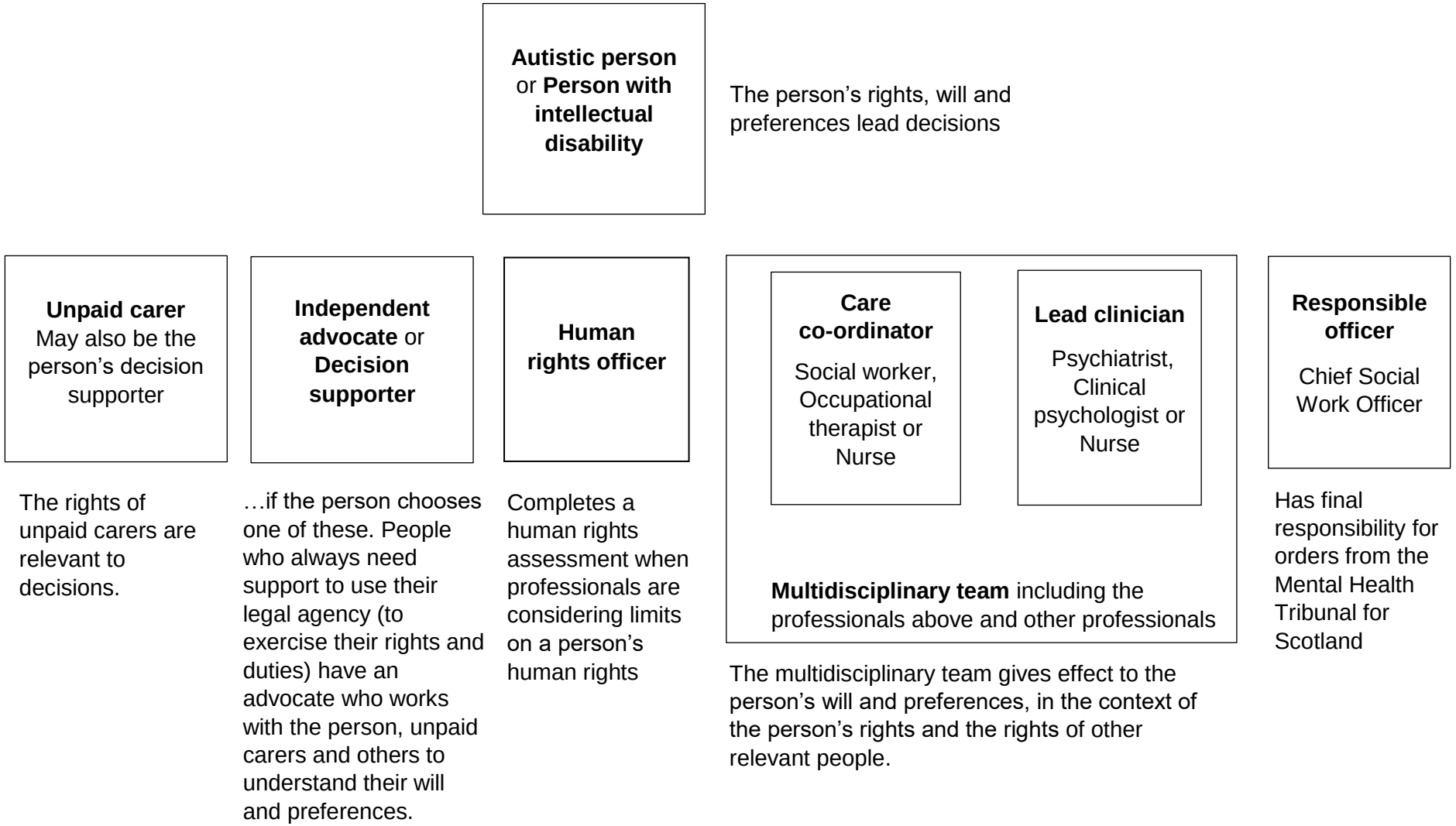
What may need to happen next

Approaches to human rights assessment (discussed at 6.1) will need to be developed with people with lived experience, legal experts and professionals.

The use of human rights assessments in law may have to wait for the outcome of the Scott review of mental health and incapacity law. However, work could begin now to develop possible approaches and tools for human rights assessment.

A new perspective on disability requires a new approach to professional roles in decision making.

People with roles in decisions about support, care and treatment



6.4 The role of psychologists in the Mental Health Act

What we recommend

We recommend changes to the role of clinical psychologists in mental health law.

Why Scotland needs to do this

The changes that we recommend are discussed in section 6.3 above.

What this would mean for the law

In section 6.3, we recommend a new model of responsibility for professionals in Scotland, for autistic people and people with intellectual disability. The model that we recommend should serve to implement the Convention on the Rights of Persons with Disabilities, by giving a clear emphasis to rights, will and preferences, and a clear emphasis on social and environmental factors in disability.

The model which we recommend does not include the Approved Clinician role as used in England and Wales. The Approved Clinician / Responsible Clinician experience in England and Wales has shown that a wide range of professionals can take on more responsibility for the support, care and treatment of autistic people and people with intellectual disability. Some individual clinicians have been very effective in this role, but less than 1% of Approved Clinicians are not psychiatrists, and we have seen no evidence about the perspectives of people with lived experience of this role. The Mental Health Act of 2007 which created the Approved Clinician role in England and Wales was created **before** the Convention on the Rights of Persons with Disabilities. The Approved Clinician role does not account for that Convention's requirements.

We agree with the view expressed some years ago by Westminster's Joint Committee on Human Rights, that clinical psychologists can be seen as professionals with 'objective medical expertise' in relation to the European Convention on Human Rights. As discussed in 6.3, we see a need for lead clinicians to have recognised expertise in autism, intellectual disability and human rights.

Clinical psychologists should have a new role in Scotland's mental health law.

7 How decisions are monitored

This section is about how the law can ensure that professional decisions respect people's rights, will and preferences.

We recommend that autistic people and people with intellectual disability should be routinely involved in developing, implementing and monitoring human rights-based mental health services.

We make recommendations on how human rights should be monitored, and how duties which support human rights should be enforced.

7.1 Disabled Persons Organisations

What we recommend

We recommend that Scottish Government should ensure that organisations run by and for autistic people and people with intellectual disability have the resources that they need to carry out their core functions. The organisations should have enough resources to represent those groups of people well in all aspects of the implementation of the Convention on the Rights of Persons with Disabilities and other human rights conventions.

We recommend that Scottish Government ensures that these organisations can have influence in mental health law, policy and practice that affects autistic people and people with intellectual disability, at national and local levels.

We recommend that duties be placed in law for Scottish Government and for all relevant public bodies to support, work with, and demonstrate respect in decision making, in relation to these organisations.

Why Scotland needs to do this

The Convention on the Rights of Persons with Disabilities requires early, direct and ongoing involvement of Disabled Persons Organisations in implementation and monitoring of all matters that relate to the Convention. To this end, we suggested that Scotland needs to ensure that organisations run **by** and for autistic people and people with intellectual disability have the resources that they need. The Convention's emphasis is on organisations led by people with disabilities, not on organisations that provide services or that are led by directors or employees without lived experience. This involvement is essential to develop support and services that promote and protect human rights effectively, and for public services to be accountable.

What this would mean for the law

The United Nations Committee on the Convention on the Rights of Persons with Disabilities has given guidance for governments (link). This guidance supports governments to develop approaches to involving organisations run by people with lived experience. This is in order to meet duties within the convention, including this involvement in implementation and monitoring of the convention.

What should happen in practice

It will be essential to meaningfully involve people with lived experience, including their representative organisations, from the start of all processes. Collective advocacy could also be considered in this context.

What may need to happen next

We recommend that work should begin now to ensure that autistic people and people with intellectual disability can be properly represented through their own organisations. All developments that we recommend in this report should be open to influence from autistic people, people with intellectual disability and their organisations.

Work could begin to consider how organisations of carers can work together represent the broad range of experience of carers of autistic people and people with intellectual disability, from across Scotland.

Work could also clarify the role of organisations which are not led by autistic people or people with intellectual disability, and which support those people to form and express views on law, policy and practice. These organisations are often third sector organisations which also provide services and which have positions on local and national policy.

This work should inform the development of Scots law and Scottish Government policy in this area.

Scottish Government will need to involve organisations of people lived experience in all developments.

7.2 How professional decisions are monitored

What we recommend

We recommend that a commission or inspectorate be given power to set human rights-based standards and enforce these in relation to mental health services, and a duty to report on the use of these powers. This may be the Mental Welfare Commission for Scotland.

We recommend that a new commission be established with authority to promote and protect the human rights of autistic people and people with intellectual disability across all settings.

Why Scotland needs to do this

To comply with the Convention on the Rights of Persons with Disabilities, Scotland requires a shift towards a human rights culture across services for these groups of people. This requires strong and focussed leadership at a high level, from an independent body or bodies with a strong human rights culture which sets human rights-based standards and ensures compliance with those standards. Scottish Government needs this to ensure that it is meeting the rights of autistic people and people with intellectual disability, as groups and individuals.

There has been no ongoing monitoring of whether or how the rights of autistic people have been met within mental health contexts in Scotland. The Mental Welfare Commission monitors the use of orders under the Mental Health Act and other law for people with intellectual disability. The Mental Welfare Commission has produced some reports on specific issues for autistic people and people with intellectual disability in these contexts, and will have taken action for some individuals. However, this Commission does not enforce standards.

There is evidence of severe impacts on human rights for these groups of people. There are particular accessibility difficulties for autistic people and people with intellectual disability in relation to public services, and there are additional barriers to access when it comes to addressing issues with those services. Issues can be complex, involving multiple services, and can be very difficult to address even with support. Effective resolution of human rights issues will require a national organisation with a human rights-based remit, with the ability to support people to address issues with the wide range of authorities, regulators and commissions that are relevant.

What this would mean for the law

Each person should have a right to challenge any professional decision that may not be proportionate for their human rights.

An independent commission should be set up in law. This commission should have the authority and responsibility that it needs to raise any issue of human rights. It should have the ability to take complaints from autistic people, people with intellectual disability and their representatives. The commission would not replace the functions of existing commissions but would support individuals to raise those complaints with the relevant authorities, regulators and commissions.

A new commission would need to have enough focus on disability issues for these groups to be aware of all issues that contribute to mental health, which is a very broad range of issues. The commission would also have to be sufficiently independent and to have sufficient authority to be able to challenge any organisation on any issue.

What should happen in practice

Individuals could challenge in person or through their representative. Any issue could be raised with the professional or the public authority first, to be addressed within a short time.

An independent commission would also oversee the accessibility of the Mental Welfare for Scotland and the Mental Health Tribunal for these groups of people, including the extent to which these bodies adjust to meet the needs of autistic people and people with intellectual disability.

Issues that are covered by mental health law for all people including autistic people and people with intellectual disability should still be addressed by the Mental Welfare Commission for Scotland.

What may need to happen next

As for the responsibilities that we recommend in section 4.7, work could begin to consider what commission(s), regulator(s) or inspectorate(s) would be best placed to have the responsibilities and authority that are discussed in this section. Work would need to clarify which new powers and duties would be needed, how these could set up effectively in law and in practice, and how the powers and duties of existing bodies may need to change.

For example, these functions might be held by a new office or body. These functions might be supported as part of the implementation of the Convention on the Rights of Persons with Disabilities, within a broader

disability commission, by existing human rights commissions and inspectorates in Scotland, or by another body.

All relevant functions should be considered. These functions include monitoring for compliance with human rights, intervening for individuals, intervening for groups of persons, raising local and national issues about law policy and practice, and regulation and inspection.

A new independent commission is needed to strengthen human rights protection and promotion for autistic people and people with intellectual disability.

7.3 How decisions are made and reviewed

What we recommend

We recommend new powers for the Mental Health Tribunal for Scotland.

We recommend that applications to the Mental Health Tribunal should include human rights assessments that make clear, separately, each of the rights that could be limited.

We recommend duties in law for the accessibility of the Mental Health Tribunal for Scotland.

Why Scotland needs to do this

For compliance with several human rights conventions, the law must ensure that autistic people and people with intellectual disability have a fair, accessible hearing that they can take part in full, when they may have their rights limited by professionals.

For compliance with these conventions, the law must serve to ensure that decisions have a proportionate effect on the human rights of autistic people, people with intellectual disability and other people.

The tribunal could approve an intervention which limits some human rights, where this intervention is expected to benefit the person's human rights overall. This approach would promote compliance with the European Convention on Human Rights, with section 6 of the Human Rights Act 1998, and with human rights treaties in general.

What this would mean for the law

We recommend changes in procedure for the tribunal, for autistic people and people with intellectual disability. In making its decisions, the tribunal would use the person's statement of rights, will and preferences (section 3.1) or the person's will and preferences, however, the person chooses to express these. The tribunal would also use the human rights assessment for the person as the main basis for its decision making (section 6.1).

We recommend that law should change to enable the following:

The tribunal would check whether professionals and services were promoting, protecting and fulfilling the person's human rights. The tribunal could refer to standards set by the independent body described

in section 7.2 above. At tribunal, the person could challenge any decision made by a professional or public service which could harm their rights, and which may not be proportionate or may be discriminatory.

The tribunal could compel public bodies to provide services that are required for decisions to be proportionate in relation to human rights.

The tribunal's remit would include accessibility, including primary care services.

If the services that a person will need are under threat, the person could go to tribunal about this. For example, a local authority may intend to remove a person's home or their support when they are detained. The tribunal could make an order to stop this, to protect the rights to independent living and to liberty.

The tribunal could make any decision, except about compensation. Appeals could be made to an appeal tribunal or a court, if there were grounds to challenge a decision. The Equality Act 2010 might have to be amended to give the Mental Health Tribunal some of these new powers. We understand that this would be possible in law.

The tribunal could make some decisions without a hearing, for example, on challenges to decisions to refuse services.

After a tribunal decision, the person, their representative or the Mental Welfare Commission could ask for a review. A person could ask for a review at any time when changes, or failures, may mean that the person's support, care and treatment does not fit with their human rights assessment. This could include situations where there may have been overall harm to the person's human rights.

We recommend a broader range of clinical members for the current medical member position, to strengthen the tribunal's ability to make effective decisions in the context of the new approach that this report recommends. We also recommend that it become common for people with lived experience to be employed as general members.

We discuss below what could happen in practice for accessibility at tribunals. Changes to law, including regulations, rules or guidance, would also be needed for this.

What should happen in practice

Here is a description of what might happen in future for tribunal hearings.

Before a tribunal is requested

The person has access to independent advocacy or a decision supporter if they prefer. The person may be able to choose to express their will and preferences in a statement of rights, will and preferences. When the person's care co-ordinator becomes aware of the possibility that the person's rights will be limited, they ask for a human rights assessment and make sure that the person knows that a tribunal may happen. They also discuss with the person and their representative what the options may be for support, care and treatment.

Accessible information

Before tribunal hearings, the tribunal would send out papers in an accessible format to the person, the person's lawyer, and their independent advocate or other decision supporter. This should happen at least two weeks before tribunal hearings or as soon as the hearing is called.

Rights, will and preferences

If the care co-ordinator applies to the Mental Health Tribunal, the tribunal receives the application, the human rights assessment, and the person's statement of rights, will and preferences if the person wants to send this. As for professionals in general, the presumption in law that professionals should give effect to the person's will and preference applies to tribunal members.

Discussions at tribunal

At the tribunal hearing, all forms of treatment and all forms of restriction on liberty are discussed. The tribunal members would test the evidence (ask questions about it) with the people at the tribunal hearing. They would give the person ongoing opportunities to express or change their will and preferences, to lead evidence (to give information to the tribunal) and to test evidence. Independent advocacy would also test the human rights aspects of evidence at tribunal for people who want their advocate to do this, and in non-instructed advocacy.

Giving a decision

The tribunal would make a finding in law on whether the care co-ordinator's application should be agreed as requested, should be amended on the basis of evidence led to the tribunal, or should be rejected. The tribunal would give its decision at the hearing in a way that is accessible for the person. The tribunal would explain its decision to the person on paper after the hearing, in an accessible way. This would show how the decision should promote and protect the person's human rights. It would explain how the person could challenge the decision.

Tribunal membership and accessibility

Tribunals would include members who understand autism and intellectual disability. At the tribunal, spoken language would be accessible to the autistic person or person with intellectual disability. Tribunal members would need training.

Timing of tribunals

Because of the particular impact of hospital detention on human rights for autistic people and people with intellectual disability, we considered the possibility of calling mental health tribunals very shortly after emergency detentions. For example, a person who is autistic or has intellectual disability may be taken to Accident and Emergency services with a mental health crisis. As we recommend in section 4, there would be duties to make adjustments with the environment and through professionals who are skilled in working with autistic people and people with intellectual disability. We recommend that an emergency compulsory admission should require a case conference (a meeting) a few days later, where the impact of the admission or detention on the person's human rights would be considered. We also recommend a review by tribunal before the end of a short term detention, if the person or their representative asks for this, and for all people who use non-instructed advocacy.

In section 5.3, we recommend that community rehabilitation services should be required in each local area. Services would sometimes support people in individual accommodation in the community, and the use of these services might require a community-based order. A type of order may be needed which enables people to be admitted to this accommodation in an emergency.

What may need to happen next

All developments should begin with people with lived experience.

The Mental Health Tribunal for Scotland should have powers to make and enforce human rights-based decisions and should model accessibility for services.

7.4 Professional review

What we recommend

We recommend that an independent public body hosts an independent professional review service, on support, care and treatment for autistic people and people with intellectual disability whose rights are limited or may be limited.

We recommend rights in law for access to independent professional reviewers who understand autism, intellectual disability and human rights.

Why Scotland needs to do this

Access to independent second opinion professionals would be an important part of access to justice for autistic people and people with intellectual disability whose rights might be limited by professional decisions, including tribunal decisions.

In the approach that we recommend in section 7.3, tribunal members would routinely review human rights assessments at Mental Health Tribunal hearings. Independent professionals would be needed for opinions on the effects on human rights of particular forms of treatment or particular forms of deprivation of liberty. Tribunal members would sometimes need these professionals' opinions to ensure that they made proportionate decisions, and to ensure that they authorised interventions which clearly protect and promote human rights. As at present, some professional decisions might not come to tribunal, but would require authorisation by these professionals. All of this would serve to ensure compliance with the European Convention on Human Rights in the context of the Rooman decision, and other treaties such as the United Nations Convention Against Torture.

What this would mean for the law

Law would set out duties on an independent public body to provide this service, rights of access to the service, the authority of professionals (including the range of services over which they would operate), and requirements for individuals to be eligible to provide this service. The law would also need to clarify the relationship between these professionals and relevant commissions, regulators or inspectorates.

What should happen in practice

These professionals would support the tribunal's decision making and would ensure that professional decisions respect human rights in practice. They would have some combination of legal expertise, practice expertise, or lived experience.

Some professionals would give opinions on whether limits to the person's rights are proportionate in practice. These professionals would visit the places where people are detained, or where their rights would be limited in future (such as proposed hospital placements). The professional would check the person's will and preferences, the human rights assessment as approved by the tribunal (or from the person's care co-ordinator, before a first tribunal heating). If the professional found that a proposed approach did not fit with these, they would not authorise that approach or they would recommend to tribunal to not authorise that approach.

Independent second opinion professionals could also be instructed by people with lived experience. This might be to challenge proposals made by professionals. These professionals might be from any independent source.

What may need to happen next

Work in this area could draw learning from current models of independent second opinion services. However, this model would require professionals with a broad range of understanding. Some experts would have medical expertise, but other forms of expertise would also be needed.

The future role of curators ad litem could be considered in this context.

Independent professionals would give opinions on risk to human rights from treatment and limits on liberty.

7.5 Dignity, accessibility, equality and non-discrimination

What we recommend

We recommend that the law require standards for dignity, accessibility, equality and non-discrimination, to apply to services for autistic people and people with intellectual disability across public services and the justice system.

We recommend that standards should be based directly on the Convention on the Rights of Persons with Disabilities, the European Convention on Human Rights and other relevant conventions.

Why Scotland needs to do this

Dignity, accessibility, equality and non-discrimination are all fundamental principles of human rights conventions that apply to Scotland. To demonstrate compliance with these principles, there will have to be shared understanding of the principles, and monitoring of compliance with these principles.

What this would mean for the law

Standards should reflect the meaning of these human rights principles as interpreted by human rights treaty bodies, courts, and legal experts

Compliance with these standards would be monitored in ways that are meaningful for autistic people and people with intellectual disability.

Any new commissioner, plus the Mental Welfare Commission and the Mental Health Tribunal, would be required to comply with these standards. These bodies would have duties to ensure that these standards are met across Scotland.

What should happen in practice

Professionals in public services and the justice system would be expected to work to these standards. Breaches of standards could be reported to the new commission that is proposed in section 7.2, or directly to any of the wide range of bodies that might be relevant. Breaches could be reported through complaints procedures, or to the relevant commissioner, regulator or inspection body, or to the Mental Welfare Commission and the Mental Health Tribunal. Each of those bodies would then act within their powers to address any breach. The

new commission would support people to take complaints through this large range of processes and public bodies.

A commission would be resourced to monitor accessibility of all public authorities for these groups of people at the level of the public sector equality duty.

Dignity, accessibility, equality and non-discrimination are some of the full range of rights that a person might choose to address in a statement of rights, will and preferences (section 3.1).

Dignity, accessibility, equality and non-discrimination would be addressed in each person's human rights assessment, and within care plans. Care plans would be expected to fit with human rights assessments (section 6.1).

With the new powers that we recommend in section 7.3, the Mental Health Tribunal could direct services to become more accessible for individual autistic people and people with intellectual disability, or to stop discriminatory actions.

What may need to happen next

Work could begin to develop standards. That work should be led by people with lived experience, with support from legal experts and other professionals.

Dignity, accessibility, equality and non-discrimination could be foundational principles for a human rights culture across all services.

7.6 Monitoring limits on liberty (freedom)

What we recommend

We recommend that all use of detention, restraint or seclusion, and any other limits to liberty, should be monitored consistently for autistic people and people with intellectual disability across public services.

Why Scotland needs to do this

The Committee for the Convention on the Rights of Persons with Disabilities is clearly very concerned about detention on the basis of disability, and all other limits to rights on the basis of disability. Also, this is an area that carries risk of inhuman and degrading treatment, which is prohibited by an absolute right in several conventions including the European Convention on Human Rights.

What this would mean for the law

We discuss the authorisation of deprivation of liberty in section 6.2 above. The law should include definitions of detention, restraint, seclusion, and any other limits to liberty.

The law should also set out monitoring requirements on public services including the criminal justice system.

There should be clear duties in law for monitoring deprivations of liberty, along with powers to act to address human rights breaches.

Law should make clear that detention, restraint and seclusion are not treatment. Statutory guidance should make clear that these can cause trauma for children and adults.

What should happen in practice

Monitoring should cover all public services where autistic people and people with intellectual disability may be restrained.

Health and social care services should develop approaches that reduce the use of restraint and seclusion with autistic people and people with intellectual disability. It is important to involve education services in this process, to share learning in both directions.

What may need to happen next

We are aware that Scottish Government has begun work to address the use of restraint in mental health contexts in Scotland. We are also aware of human rights-based work on restraint in schools by the Children and

Young People's Commissioner for Scotland. Approaches to monitoring could be developed that use shared language from human rights treaties and consistent definitions, across all public services.

In section 7.2, we recommend work towards a new commission or commissioner for autistic people and people with intellectual disability. Monitoring of deprivations of liberty might be done by that commission, to contribute towards national monitoring of all restrictions on liberty for people with disabilities.

Detention, restraint and seclusion all risk serious harm to human rights and must be monitored effectively.

7.7 Monitoring compulsory treatment

What we recommend

We recommend that all compulsory use of support, care and treatment should be monitored consistently for autistic people and people with intellectual disability across public services. Our recommendations in this area are equivalent to our recommendations in section 7.6 above.

Recommendations in other sections are also relevant:

7.2 How professional decisions are monitored

7.3 How decisions are made and reviewed

Compulsion in care and treatment risks serious harm to human rights and must be monitored effectively.

8 Offenders

This review looked at the criminal justice system and its interaction with the Mental Health Act, for autistic people and people with intellectual disability. We recommend changes to make the criminal justice system fairer for autistic people and people with intellectual disability.

Duties to make support and appropriate places of detention available are discussed in section 9 of this report.

In this section, we discuss how the human rights model of disability could be applied within the criminal justice system, for autistic people and people with intellectual disability. We make some recommendations for changes in law in practice, and some recommendations for further review of how this model could work.

There are different ways in which the human rights model of disability could have effect within the criminal justice system. The following information gives an idea of how our recommendations might work:

A person would be offered all necessary supports and adjustments in order to be able to stand trial. This could include registered intermediaries for anyone with communication difficulties (section 8.1).

The person's disability may be such that, even will all possible supports, they are not able to exercise their legal agency in a way that makes the prosecution or trial process fair. That person would not have to stand trial. An examination of facts could take place.

A defence of 'disability' could be made, indicating that the person did not have criminal intent (section 8.2). The effect of this could be that:

The defence is not accepted and the person is held responsible in full. The person receives a sentence as punishment.

The defence is accepted in full. The person is not held responsible, and is not punished.

The defence is accepted for limitation of responsibility, and the person is held partially responsible. This would mean that the person can receive punishment, but this can be reduced due to their limited responsibility.

Disability could also be taken into account in decisions about sentencing in terms of the impact of the sentence on the individual, in the context of their disability (section 8.3). We heard that this can already happen. In the human right model of disability, the impact of a sentence should be

no greater for someone with a disability than for an offender without a disability.

If support to stop offending is required (section 8.5) or if support, care or treatment are required (section 8.4), this could be authorised and monitored by the Mental Health Tribunal for Scotland.

The punishment element in sentencing would be recognised in orders used with these offenders across criminal justice settings including NHS and other services. Specific orders would be available, but all orders that exist for people without disabilities could also be used. Parole would be available. People would not be detained for longer than an offender without disability would be detained for an equivalent offence. Duties and enforcement powers would exist in law to ensure that support is made available during detention, habilitation, and return to the community.

8.1 Fair trials

What we recommend

We recommend giving suspects and accused persons a right of access to an ‘intermediary’ in law.

We recommend duties in law on criminal justice services to provide intermediaries.

We recommend that the law should retain the possibility of declaring that an autistic person or person with intellectual disability is unfit to stand trial, for those people who cannot fully take part in their own trial even with full communication support. The process for a decision on whether a person will be required to take part in a trial might require a change in law, in statute.

We recommend that the Mental Health Tribunal for Scotland has a role after sentencing, for all autistic offenders and offenders with intellectual disability.

Why Scotland needs to do this

In Scotland, autistic people and people with intellectual disability are not routinely offered full communication support to participate in trials. Other UK nations offer this support, which promotes and protect rights to accessibility and to a fair hearing, and which meets duties on public authorities to make reasonable adjustments.

For some autistic people and people with intellectual disability, a consequence of the failure to provide this support could be exclusion from the trial process and diversion to hospital. In effect, this would happen because of failures to fulfil the person’s rights, not for health reasons, and this could cause further harm to the person’s rights.

What this would mean for the law

Intermediaries should be made available for autistic people and people with intellectual disability who come into the criminal justice system as suspects or accused persons. To avoid discrimination, access to intermediaries should not be limited to groups of people with particular disabilities, and should not depend on having a diagnosis. Access should be available to everyone who is charged with a crime or who is prosecuted for a crime, and who needs support with their communication.

Although this support should make it possible for more people to take part in criminal proceedings against them, we recommend that the law should retain the possibility of declaring that an autistic person or person with intellectual disability is unfit to stand trial, for those people who cannot fully take part in their own trial even with full communication support.

The process for decision on whether a person will be required to take part in a trial might require a change in law, in statute. This process could include a form of human rights assessment, in the context of the person being offered all possible supports to enable them to take part in the trial.

Decisions about support, care and treatment, and about the nature of support to stop offending, should be remitted by the courts to the Mental Health Tribunal for Scotland when there is need to specify these and in the context of limits to the person's rights. This is for offenders in the community, offenders in units and wards, and also offenders in prison. To comply with the European Convention on Human Rights, it is necessary to ensure that the support provided meets the needs of the individual. The Rooman judgment was about an offender (link).

What should happen in practice

The criminal justice system should be made accessible for autistic people and people with intellectual disability. This includes the whole process leading up to trial, the trial itself, communicating the court's decision to the person, and any appeal process. The use of intermediaries should make the trial process much more accessible and should lead to more people having a trial. This would be instead of an 'examination of facts' where the accused person does not take part in the trial.

Lawyers and judges will need training to make the criminal justice system accessible. For lawyers, this might include training in signs of possible communication support needs for clients. Lawyers for autistic people or people with intellectual disability would need to understand how to work with people with these conditions. In practice, the intermediary can support the lawyer to understand how the person communicates. This may also support the person to be able to answer questions in court. The intermediary's support may make it possible for the person to be able to stand trial, in the judge's opinion.

For decisions about a person's ability to stand trial, there should be a shift in focus from assessment of the person's mental capacity and fitness to stand trial, to a focus on assessing the adequacy of the supports available for the person's communication in the trial process.

What may need to happen next

The recommendation on intermediaries is based on a model used in Northern Ireland. England and Wales also use intermediaries. We gave an overview of the Northern Irish model in the stage 3 consultation document.

Work could begin to understand how intermediaries could be brought into Scotland's criminal justice system, with learning from Northern Ireland, England and Wales. Work could consider what aspects of the Appropriate Adults scheme might be complemented or replaced by intermediaries.

Intermediaries should be used to make criminal justice proceedings accessible.

8.2 Fairness in responsibility

What we recommend

At present, some criminal defences are based on ‘mental disorder’. We recommend that equivalent criminal defences should be made available for autistic people and people with intellectual disability in future, based on ‘disability’. We recommend that defences should be developed, based on the concept of disability from the Convention on the Rights of Persons with Disabilities

We recommend that autistic offenders and offenders with intellectual disability who have criminal intent should receive disposals that reflect this criminal intent. We discuss possible disposals in section 8.3 below.

We recommend that, as at present, autistic offenders and offenders with intellectual disability who do not have criminal intent should not be held responsible for offences.

Why Scotland needs to do this

For Scotland to comply with the Convention on the Rights of Persons with Disabilities, non-discrimination is essential. It is important for equality that autistic people and people with intellectual disability can be held responsible for criminal actions on an equal basis with other people. However, it may be very difficult for some autistic people or people with intellectual disability to comply with the law. One reason for this may be that the person has not been taught social rules in a way that they can understand, for example. In effect, the responsibility for this offence may lie partly with the person, and partly with society.

We disagree with the position of the Committee on the Rights of Persons with Disabilities. That Committee believes that in all circumstances, an autistic person or person with intellectual disability should be held responsible for their offending behaviour (link). That position would include, for example, people with intellectual disability who break the law but who do not have enough cognitive ability to understand the law in any way.

To comply with the law, a person has to act responsibly in social contexts. In general, this may take more ability than when a person makes a decision and acts based on their own will and preferences (link, page 12). We think that applying punishment to people who have no

criminal intent may not respect the person's exercise of their legal agency, as they would be further restricted by punishment. Also, in our view, it would not be possible for punishment to cause a positive change in behaviour for at least some of those autistic people and people with intellectual disability who break the law but have no criminal intent. We believe that this approach could disrespect the person's dignity, and could lead to situations of inhuman and degrading treatment. In other words, we think that this approach would carry a risk of breaching an absolute right.

We believe that in order to respect people's legal agency, dignity, and right to freedom from inhuman and degrading treatment, the law should continue to allow for some offenders to not be held responsible for actions that would otherwise be criminal actions. Further work is needed in this area.

What this would mean for the law

We recommend further work on the use of the human rights-based concept of disability with a view to possible reform of the law. The concept of disability in the human rights model allows for the possibility that, for example, a person may have had no criminal intent in committing an offence, but may be able to stand trial with support.

In this model, disability may be the result of the person's impairment and a lack of appropriate support. For example a person with intellectual disability who was not given sex education may not know what lawful sexual behaviour is. Or, for example, an autistic person may have had appropriate sex education but may be simply unable to understand social rules about consent in real life. This person may not have understood that their behaviour was not lawful. However, the person may be able to stand trial.

In the next section (8.3), we recommend further development in the use of 'disability' for mitigation in the context of sentencing. That is about punishment, not about responsibility.

What should happen in practice

We understand that the Crown currently considers whether it is proportionate to prosecute a person with disability who is charged with an offence. We suggest that the same concept of disability discussed above would need to be considered by the Crown if this concept was introduced into law.

Fair trial and examination of facts

In Scotland at present, if a person is found unfit to stand trial then an examination of facts will take place instead, without the person present. This process will aim to determine whether the person committed the offence. We recommend examination of facts should continue, in situations where judges determine that these are necessary to protect human rights, and when the decisions are demonstrably proportionate with respect to all relevant human rights. 'Disability' and responsibility should be considered further in this context.

Criteria for responsibility

We have recommended that it should continue to be possible for autistic people and people with intellectual disability to not be held responsible for offending behaviour because of a lack of criminal intent. We think that such findings should not be based on having a diagnosis of autism or learning disability, nor on an assessment of general mental capacity. These approaches could lead to discrimination on the basis of disability.

We think that these findings could be based on assessment of the person's ability to understand and follow the law in relation to the specific offence. We see this as a reasonable adjustment within the prosecution or trial process. We think that the assessment of ability to have criminal intent in this context should serve to prevent inappropriate limits on legal agency. Further work may be needed in this area also.

A defence of disability

In future, an autistic person or person with intellectual disability who was prosecuted for an offence could ask their lawyer to raise their disability as defence. The judge or jury would decide whether to accept this defence. If a court found that the person had offended but the person was not responsible for the offence, the person would not be punished. If a court found that the person had offended but was not fully responsible for the offence, punishment could be reduced. In both cases, the person could be required to accept support to stop offending.

What may need to happen next

If the human rights model of disability is introduced to Scots law, we recommend a review of statutory defences in relation to criminal responsibility of autistic persons and persons with intellectual disability. This might be included as part of a wider review of criminal defences in law for people who are currently defined as having mental disorder. The

concept of disability within the human rights model would be important to this work. A future review should consider how to ensure that autistic people and people with intellectual disability are not disadvantaged in their defences, in comparison with other people with ‘mental disorder’. The review could further develop the issues that we discuss in section 8.

Criminal defences for people without criminal intent should continue, and be developed for ‘disability’.

Further work is needed to develop the human rights-based concept of ‘disability’ in this context.

8.3 Fair punishment

What we recommend

We recommend further development in the use of ‘disability’ for mitigation (reduced consequences) in sentencing.

For offenders with criminal intent, we recommend that detention after an offence should be recognised as punishment, and that time limits should be put on orders for detention as punishment. We recommend that these limits should not be longer than the time limits that other offenders have on the punishments they receive.

We recommend that the law separates out punishment, support to stop offending, and support care and treatment for disability into different orders. In practice, all of these orders may run together, at the same and in the same place.

The law should require Scottish Government and public services, including the criminal justice system, to ensure that autistic offenders and offenders with intellectual disability are given all of the adjustments and services that they need. This is to ensure that punishment does not happen in inappropriate environments or without appropriate support, care or treatment, and to avoid inhuman or degrading treatment.

Why Scotland needs to do this

Non-discrimination is a basic principle of the Convention on the Rights of Persons with Disabilities. This can be seen in the Convention’s principles and in Articles 12 and 14. Disability should never lead to more restrictive settings or durations than for offenders who do not have a disability. The management of risk should be approached on an equal basis for all offenders, with or without disability.

Detention of autistic offenders and offenders with intellectual disability can be discriminatory, in comparison with the detention of offenders in general, if the end of the detention is tied to a professional judgement on whether the person is likely to reoffend. Continued detention should not be justified by the state failing to provide the support that person needs to reduce their disability, to stop offending, and to live in the community. Continued detention would not be justified on that basis for offenders in general. We are recommending that autistic offenders and offenders with intellectual disability should be released at the end of a period of punishment, and that when they are released into the community they must be given the supports that they need.

What this would mean for the law

Mitigation

The use of ‘disability’ for mitigation in the context of sentencing would allow for reduction in consequences. This plea would not lead to acquittal. Acquittal would remove the person’s responsibility and all consequences. In technical language, disability might be a ‘rider’. We think that this defence could make it possible for the person to be held responsible for their actions. It could also make it possible to take into account factors that were not the person’s responsibility. Those factors could include aspects of the person’s condition, and failures of public services to give support or education that the person needed to be able to follow the law.

Orders

We recommend that orders under the Criminal Procedure (Scotland) Act should be reviewed. We recommend separation in orders, of punishment, support to stop offending, and support care and treatment for disability.

As at present, restrictions on liberty could be authorised by orders. The purposes of restriction would include public protection. For people with criminal intent, the purpose would also be punishment. Public protection professionals would be involved in planning processes for return to the community within the timescale of these orders.

Where a person had to be detained following an offence and that person had no criminal intent, the restriction on liberty would not be for punishment. The restriction on liberty would be used to manage risk to human rights for all persons. This would be for as short a time as is needed to set up the support for the person in the community, and for less time than a person would spend in detention as punishment.

Orders would also authorise support to stop offending. For people who had criminal intent, during the period of punishment, they would be required to accept support to stop offending. For people who did not have criminal intent, and for people who have completed their punishment, these orders would not place duties on the person, but would place duties on public services to provide the support that the person needs to stop offending.

Orders would also be needed to require public services to put that support, care or treatment in place and, in some circumstances, to have the person accept that support, care or treatment.

We heard that community payback orders, a mainstream alternative to imprisonment for offenders, can be used flexibly in sentencing and can include therapy, for example. Mainstream criminal justice orders such as community payback orders may need to be refined to address the requirements of the Convention on the Rights of Persons with Disabilities for autistic offenders and offenders with intellectual disability.

Limiting terms and return to the community

Current law makes it possible for an autistic offender or offender with intellectual disability to spend much more time in secure hospital wards than another person would spend in prison after a similar offence. Some parts of Australia set time limits for orders for autistic offenders and offenders with intellectual disability (link, page 21). The ‘limiting term’ is the best estimate of the sentence that the court would make as the outcome of a full trial of criminal proceedings, for an offence similar to the offence being considered. As in Australia, we recommend the use of time limits. These time limits would be no longer than the time limits which other offenders have on the punishments that they receive for similar offences. Under a limiting term, the person is entitled to leave any facility in which they were detained as an offender when the term ends. For some people, transfer to a civil order at the end of this time limit could be appropriate due to ongoing mental illness.

An offender who should not be in the community due to levels of risk could be considered for restriction in the same way as for other offenders. Orders will need to be developed that require restrictions on liberty to protect public safety, on the same basis as for other offenders. These orders may already exist for other offenders.

Sometimes, a person’s disability is mainly due to the absence of appropriate services. We suggest that there is a need for a type of order that does not restrict the person’s human rights, and which is an order for public services to provide the services that the person needs.

What should happen in practice

In the context of sentencing, ‘disability’ could be raised as part of a plea in mitigation. This plea would allow for reduction in consequences. The plea would not lead to acquittal. With this approach, a person could be held responsible for their actions, and sentencing could take into account factors that were not the person’s responsibility. Those factors could include autistic impairments, intellectual impairments, and failures of public services to give support or education that the person needed to be able to adhere to the law.

It would be important for disposals to be made equivalent to disposals in general criminal law in terms of the **effect** of the punishment on the person. The place and duration of punishment should be no more restrictive for the person with disability than for any other person, in effect. In some cases, the place and duration of punishment might appear to be less restrictive for the person with disability than for other persons. This would be because of adjustments that balance out the greater impact of some restrictions on persons with disabilities. For example, the environment of a typical prison would have a more negative impact on autistic people or people with intellectual disability than on people in general.

It would always be made clear to offenders when part of the deprivation of liberty is a punishment for an offence, and how long that part is for. It could also be made clear what is support to stop offending and what is treatment for mental illness. It could be made clear whether the person has a choice about accepting these. Treatment and support to stop offending are discussed in the next sections.

Offenders who had restrictions on liberty as punishment would apply for release (parole) at the same time as for any person who committed the same offence. When the person’s punishment ended they would be released, with support as required. If the person required medical treatment for mental illness, they may continue or move to an order for that treatment. If there were decisions to be made about compulsory care and treatment for a person who would be released, these could be addressed by the Mental Health Tribunal.

What may need to happen next

We understand that the Scottish Sentencing Council may look at the sentencing of people with mental disability in future.

We suggest that it would be timely to review the aspects of criminal law that we refer to in section 8 at the earliest opportunity, for all offenders who are affected by these aspects of law. The current context includes the Scott review of mental health and incapacity law (link) and the context of the Barron review of forensic services (link). This is to avoid delay in law reform which would address some important human rights issues in this area.

A further review on this area of law, for all offenders with 'mental disorder', should happen very soon.

8.4 Fair access to support, care and treatment

What we recommend

We recommend duties on Scottish Ministers, the Scottish Prison Service, Health and Social Care Partnerships and NHS boards to ensure that wherever autistic offenders or offenders with intellectual disability are placed, each person is given access to the support, care and treatment that they need.

We recommend clarification in law that the right to independent living in the community applies to autistic offenders and offenders with intellectual disability, with limits to this right being on the same basis as for offenders in general

Why Scotland needs to do this

The European Court of Human Rights' judgement in Rooman v. Belgium clarifies that provision of appropriate support, care and treatment are essential for detention in an institution to comply with the European Convention on Human Rights.

The right to health appears in the Convention on the Rights of Persons with Disabilities. This 'right to the enjoyment of the highest attainable standard of health' applies equally to offenders and to other people with disabilities.

What this would mean for the law

In this model, the courts would make decisions in relation to responsibility and sentencing. If a person might need support, care or treatment for disability, decisions on this could be made by the Mental Health Tribunal for Scotland. Section 9 includes discussion on where responsibilities would lie for the provision of support, care and treatment.

What should happen in practice

In general, autistic offenders and offenders with intellectual disability should be in the community, or should return to the community, with no greater restrictions than other offenders would experience.

Many offenders will be detained and their right to independent living will be limited appropriately. It will be important for the professionals and services that are responsible for these offenders to act to prevent loss of independent living skills, and to ensure that new skills are promoted through habilitation.

Detention in any setting requires the state to provide an appropriate environment. The human rights model of disability applies to all autistic people and people with intellectual disability, including offenders. This model would require support to be provided to offenders with disability, to reduce any disability. For example, an autistic person or person with intellectual disability may have been disabled in the community by having inadequate support, which may have contributed to an offence. Social professional expertise will often be essential to address this disability.

Fair access to support, care and treatment is essential for compliance with all relevant human rights treaties.

8.5 Fair access to habilitation

What we recommend

‘Habilitation’ is a process of supporting disabled people to attain, keep or improve skills and functioning for daily living. Here, we are most interested in skills which support people to live well and to avoid offending. Section 9 has more discussion about habilitation.

We recommend duties in law to ensure access to habilitation, and to prevent indefinite detention of autistic offenders and offenders with intellectual disability in the context of failure to provide effective habilitation services in detention.

Why Scotland needs to do this

In the case of Rooman v Belgium, the European Court of Human Rights found that the authorities had not offered the person the interventions that he needed. He had no real hope of release because of this. The person was, in effect, detained indefinitely. We understand that governments are required to make available to offenders the supports that they need to become able to live safely in the community.

What this would mean for the law

We recommend duties in law on Scottish Ministers, the Scottish Prison Service, and Health and Social Care Partnerships to ensure that autistic offenders and offenders with intellectual disability are always offered individualised support to stop their offending behaviour.

We recommend that the law require that a person cannot continue to be detained by any part of the criminal justice system or forensic services at the end of a sentence as a result of failure to provide support whilst in detention, or if support to stop offending has not worked for that person. For some offenders, habilitation may then be provided in the community.

We recommend that autistic offenders and offenders with intellectual disability should be considered for community-based sentences on the same basis as for offenders in general.

What should happen in practice

Support to stop offending should include social supports, education programmes and psychological interventions, for example, to meet the needs of autistic offenders and offenders with intellectual disability.

For offenders with disabilities to be treated equally with other offenders, many will still have to be detained. We understand that some people may need a high level of support to be in the community safely after an offence. We also understand that there will be times when some offenders pose a very high level of risk to other people and cannot be in the community. However, we understand that interventions may only be effective for some autistic people and people with intellectual disability if they are delivered in the community, because of how autism and intellectual impairment can affect learning.

Fair access to habilitation is essential for compliance with relevant human rights treaties.

8.6 Public safety and victims' rights

What we recommend

Scottish Government should ensure that there is no disability discrimination in relation to Scotland's approach to pre-emptive detention, including post-sentence pre-emptive detention, and may wish to consider the human rights issues associated with pre-emptive detention in general.

For approaches to risk assessment and risk management, we recommend the following:

Approaches should be further developed and validated which incorporate the human rights of victims, of other affected persons, and of autistic offenders and offenders with intellectual disability.

Approaches should be further developed and validated which take full account of social and environmental factors for autistic offenders and offenders with intellectual disability, in addition to factors within the person.

In practice, approaches should fully involve the whole range of professionals, including social professionals, who can contribute to human rights-based assessment of risk.

Developments should ensure that risk assessment and risk management are non-discriminatory for autistic people and people with intellectual disability.

Why Scotland needs to do this

Pre-emptive detention can raise human rights issues in relation to the right to liberty and security.

There is a risk of discrimination against autistic offenders and offenders with disability, within approaches to risk assessment and risk management that have more focus on the individual and less focus on their context than other approaches that are used with offenders in general (link).

What this would mean for the law

We make no specific recommendations for changes in law. However, approaches to risk assessment and risk management should be consistent with other developments that are required for Scotland's compliance with its human rights duties, and the human rights model of disability should be reflected in these approaches in future.

What should happen in practice

Practitioners should make the judiciary and other decision-makers aware of strengths and weaknesses of the tools and approaches that are currently in use.

The human rights model acknowledges that individuals with disability experience impairments, and the model has a focus on the state's duties to remove the barriers that disable people. It does not appear that autistic offenders and offenders with intellectual disability always have the level of support that is required to stop offending or to return to the community (sections 8 and 9). There is a need for a stronger focus on social and environmental factors in Scotland's approach to rehabilitation of autistic offenders and offenders with intellectual disability, when assessing and managing risk (link).

What may need to happen next

Further research may be needed in this area, with a stronger focus on social and environmental factors in risk assessment and risk management for autistic people and people with intellectual disability.

It may be possible to increase the involvement of non-clinical professionals in risk assessment and risk management for autistic people and people with intellectual disability.

Developments in risk assessment and risk management which include more emphasis on victims' rights, the human rights of others, and social and environmental factors could contribute to public safety.

9 Where support, care and treatment happens for offenders

Autistic offenders and offenders with intellectual disability should be able to receive the support, care and treatment that they need, wherever they are.

We discuss habilitation in this section. Habilitation is a process of supporting disabled people to attain, keep or improve skills and functioning for daily living. Rehabilitation is a process of regaining skills, abilities, or knowledge that may have been lost or compromised as a result of disability, or due to a change in disability or circumstances. Both may be needed for autistic offenders and offenders with intellectual disability.

We have chosen to focus on habilitation in our use of language, as we believe that many of these offenders will never have had the support that they needed to develop the social or practical skills that they need for effective daily living. We think that habilitation is a good description of the process that will enable these offenders to overcome some aspects of their disability.

9.1 Habilitation in the community

What we recommend

We recommend that the law set a principle of equality and non-discrimination in disposals for persons with disabilities.

We recommend that offenders should return to the community under orders and supervision equivalent to that which offenders usually receive in the criminal justice system.

We recommend duties on Health and Social Care Partnerships to provide community-based habilitation services, and rights of access to these services for autistic offenders and offenders with intellectual disability.

We recommend a focus on developing very strong community-based habilitation approaches, led by professionals such as social workers and occupational therapists with input from health professionals or integrated teams, with consistent availability across Scotland. Not all areas have community-based forensic intellectual disability rehabilitation teams.

We recommend duties on Health and Social Care Partnerships to plan for and make community provision for offenders who should be returning to the community. This provision includes accommodation in the community for some offenders, and support for further habilitation in the community.

Why Scotland needs to do this

The Convention on the Rights of Persons with Disabilities requires Scottish Government to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes. This applies to all persons with disabilities, including offenders, and all programmes, including criminal justice programmes. Governments are to ensure and promote the full realisation of all human rights for all persons with disabilities without discrimination of any kind on the basis of disability (Article 4). For equality and non-discrimination, specific measures which are needed to accelerate or achieve real equality of persons with disabilities are not discriminatory (Article 5).

What this would mean for the law

There should be a presumption in law of placement in the community on the same basis as for other offenders.

The presumption would mean that when an autistic person or person with intellectual disability committed an offence, they would be considered for community-based disposal – with limits and supports - if a person without a disability would live in the community after the same offence.

What should happen in practice

We suggest that offenders would return to the community under the same orders and supervision that people usually receive in the criminal justice system. These offenders could also be offered treatment in the community if they needed it, in the same way as for autistic people and people with intellectual disability who are not offenders.

We suggest that habilitation in the community would be led by social professionals, supported by health professionals. In the context of health and social care integration, habilitation may be provided by an integrated team of professionals.

Some offenders could also be offered treatment in the community if they needed it, in the same way as for autistic people and people with intellectual disability who are not offenders.

Different Health and Social Care Partnerships may meet their duties to provide community-based habilitation services in different ways. Community-based habilitation services should be staffed with social, habilitation and clinical professionals who have experience and understanding of effective work with autistic offenders and offenders with intellectual disability.

Once established, community-based habilitation services might also be able to provide expertise that would be required for future developments in the prison service.

What may need to happen next

We understand that the Scottish Sentencing Council may set guidelines for sentencing that could apply to autistic offenders and offenders with intellectual disability. Sentencing guidelines could be very helpful in this context. Resources will also be needed.

Community-based habilitation services should be set up or developed for these offenders.

9.2 Habilitation units

What we recommend

We recommend a change in emphasis for current forensic wards from treatment to ‘habilitation units’ for offenders with intellectual disability and for autistic offenders.

Why Scotland needs to do this

There is an immediate need to provide environments and services that support the mental health and habilitation needs of autistic people and people with intellectual disability. The European Court of Human Rights clarified this in relation to people who are detained, in its recent judgment on Rooman v Belgium. The Joint Committee on Human Rights at the UK Parliament has concluded that inappropriate treatment and hospital environments for autistic people and intellectual disability can give rise to serious breaches of human rights (link).

What this would mean for the law

There would be a presumption that these offenders would move to the community at the end of these orders, with the support that they required in the community.

What should happen in practice

Decision-making processes

We recommend that judges would determine the punishment parts of sentences and would remit decisions to the Mental Health Tribunal for Scotland on support to stop offending, and on support care and treatment. Working within limits to liberty set by the court judgement, the Mental Health Tribunal would consider applications for authority to provide support to stop offending, and support, care or treatment. Applications would be made using human rights assessments (see 6.1).

Orders

Many autistic offenders and offenders with intellectual disability who are detained under orders will need care and treatment for mental illness or personality disorder. All will need support to stop offending. In section 8.4, we recommend that orders authorise support to stop offending (habilitation) for these offenders. This would be in addition to authorisation in orders that restricts liberty, and in authorisation for

support, care and treatment for mental illness or personality disorder. In practice, all support, care and treatment may usually be provided in one location.

Habilitation units

We recommend that existing low, medium and high secure forensic wards and units for people with intellectual disability should become habilitation units. Hospital services for autistic offenders are not currently separated in the way that services are separated for offenders with intellectual disability. The Barron review of forensic service provision has an opportunity to consider how these changes would happen (link).

Services would need to plan for transitions from high and medium security to low security within the duration of orders.

Roles for professionals

We recommend a similar model of professional decision making for offenders in habilitation units that we recommend for all autistic people and people with intellectual disability whose rights may be limited. This is described in section 6.3. That model includes a responsible officer, and a shift towards more leadership by social professionals. For people in low and medium levels of security, this would be a Chief Social Work Officer. For people detained under a high level of security, this would be the Chief Social Work Adviser at Scottish Government. Responsible officers would be responsible for tribunal orders. Their oversight of these individuals should serve to ensure appropriate environments and appropriate professional skill mixes.

For orders of shorter duration, we recommend that people could retain their care co-ordinator and lead clinician from the community. For orders of longer duration, the co-ordinator and clinician would be based at the habilitation unit. Co-ordinators based in these units or in any habilitation service would be habilitation co-ordinators. Human rights assessments would be needed for offenders in habilitation services, and would consider all relevant rights, including independent living (in relation to skills) for example.

Treatment for mental illness or personality disorder

If a person had mental illness or personality disorder for which treatment was available, the person could receive treatment in a habilitation unit. If adaptations were made in a forensic mental health ward, treatment could be given there.

We recommend a duty on Health and Social Care Partnerships to plan for people coming out of low security back into the community, so that transitions can be seamless. We recommend in 7.3 that Mental Health Tribunals should have the power to order that services be put in place. This would address current issues with delayed discharge from low secure facilities for some people. We understand that a form of limiting term was used in the past in Scotland, and that this was ended due to issues with access to appropriate resources. The powers and duties that we recommend should serve to ensure that resources are made available for these offenders.

What may need to happen next

The Barron review may decide to consider the practical implications of these recommendations.

Accommodation within the current forensic estate should be considered for habilitation of autistic offenders and offenders with intellectual disability.

9.3 Prison

What we recommend

We recommend that Scottish Government and the Scottish Prison Service should ensure that the effects of prison and other places of detention on autistic people and people with intellectual disability are no worse for than for other offenders.

We recommend a duty for health services to offer screening and diagnosis for autism and intellectual disability to all offenders, before a final decision is made on where the person will be for their order or sentence.

We recommend that the law should give rights of access to adjustments and supports in prison for autistic prisoners and prisoners with intellectual disability.

We recommend that Scottish Government supports the Scottish Prison Service to develop its estate, staff and NHS services to provide a disability-informed prison estate for autistic prisoners and prisoner with intellectual disability.

We recommend specific monitoring of how prison protects, promotes and fulfils the human rights of autistic people and people with intellectual disability. We recommend similar monitoring for the rest of the criminal justice system.

Why Scotland needs to do this

From a recent Scottish court judgment (link) which reflected the European Convention on Human Rights and the Convention on the Rights of Persons with Disabilities, we understand that ordinarily, the courts should assume that prison authorities will fulfil their own duties under the European Convention. We understand that the responsibility to provide appropriate services and facilities for autistic offenders and offenders with intellectual disability in prisons lies with Scottish Ministers and with the Governors of prisons. NHS boards have had a responsibility for health services in prisons since 2011.

The European Court of Human Rights' judgment in Rooman v Belgium was about an offender. That judgment references prison and may have implications for Scottish prisons. The support that prisons provide specifically for autism and for intellectual disability could determine

whether the detention of those autistic individuals or individuals with intellectual disability is an appropriate detention under the European Convention on Human Rights.

What this would mean for the law

We discuss a possible new law for autistic people and people with intellectual disability in section 1.4. In section 4, we recommend duties in law on NHS boards to provide similar access to support, care and treatment to autistic offenders and offenders with intellectual disability as for other autistic people and people with intellectual disability.

What should happen in practice

The adjustments and health and social care services that these offenders require should be made available to them in prison. Services may be provided in a range of ways, within current or future service delivery models.

Adjustments and services should be monitored by relevant commission(s) and inspectorate(s). This is discussed in section 7.3.

What may need to happen next

Planning could begin to meet the specific health, social care and habilitation needs of autistic offenders and offenders with intellectual disability who are in Scottish prisons.

Prisons must meet the human rights of autistic offenders and offenders with intellectual disability.

10 All of our recommendations

1.3 Autism and learning disability redefined

We recommend that in future, autism and learning disability should not be defined as forms of 'mental disorder' under the Mental Health (Care and Treatment) (Scotland) Act 2003 or in other mental health law.

We recommend that autism and learning disability should be defined in a new law. That law is discussed in section 1.4.

1.4 A law on support for people with intellectual disability and autistic people

We recommend the creation of a new law on support for people with intellectual disability and autistic people.

We recommend that changes in law and improvements in services are put in place before autism and intellectual disability are removed from the definition of mental disorder in Scotland's Mental Health Act. A date should be set for this.

Definitions of autism and intellectual disability should not be removed from Scotland's Mental Health Act now, with no other law in place. New law should also be created which aims to protect human rights on the same basis for everyone, to protect the rights of people who are at risk of serious adverse effects to their human rights.

1.5 Criminal law

We make a range of recommendations in sections 8 and 9 on the future of criminal law for autistic people and people with intellectual disability.

1.6 Law for mental health and for disability rights

We recommend that Scotland works towards law that removes discrimination in detention and compulsory treatment on the basis of disability.

We recommend reform of the law towards 'law for mental health'.

2.1 Disability

We recommend that Scotland's law should include the description of disability from the Convention on the Rights of Persons with Disabilities.

We recommend that autism and learning disability should be defined in a new law for autism and for intellectual disability.

If Scotland continues to have a definition of 'mental disorder' in law in future, we recommend that autism and learning disability should be excluded from the definition of mental disorder in law. This should be done in a way that continues protection for people's human rights, on the same basis as for people in general.

We recommend that Scotland's law for mental health should allow professionals to support autistic people and people with intellectual disability who are experiencing serious adverse effects on their human rights.

2.2 Human rights

We recommend that the law requires a human rights-based system for all decision making.

We recommend that law should directly use the language of human rights treaties that apply to Scotland in this area.

We recommend that a shared code of ethics is developed for mental health services for autistic people and people with intellectual disability.

2.3 Legal capacity

Our recommendations are about mental health law for autistic people and people with intellectual disability.

In Scots law, it is already impossible to challenge a person's ability to **hold** rights and duties in law (legal standing). We recommend that the law should continue to respect the legal standing of autistic people and people with intellectual disability in future.

In Scots law, it is possible to limit how a person **uses** the rights and duties that they have in law. We recommend that it should only be possible to limit the person's ability to exercise their rights and duties (legal agency) in the context of a human rights assessment which shows that it is necessary and proportionate for the state to limit the person's legal agency in that way.

3.1 Statement of rights, will and preferences

We recommend that a statement of rights, will and preferences should replace the advance statement in the Mental Health Act, for these groups of people.

We recommend a right to challenge any professional decision that does not respect a person's will and preferences, and which may not be proportionate for their human rights.

We recommend a right in law to notify the Mental Welfare Commission when any statement of rights, will and preferences is not complied with, in addition to duties on professionals to report this.

3.2 Independent advocacy

We recommend that independent advocacy be offered on an opt-out basis to autistic people and people with intellectual disability.

We recommend that non-instructed advocates are allocated to all persons who are not able to instruct an advocate due to the limits of their communication abilities.

We recommend duties on Scottish Government and local public services to provide resources for independent advocacy to meet the need.

We recommend that independent advocates should have powers to be able to support all people through the whole process of decision making and giving effect to those decisions.

3.3 Decision supporters

We make no recommendations about decision supporters, as the Scott review may look at this for Scottish Government.

3.4 Unpaid carers

We recommend that the rights of unpaid carers should be considered in human rights assessments. We discuss those in section 6.1.

We recommend that future developments in law should address the need for representation for autistic people and people with intellectual disability to be independent of representation for unpaid carers.

We recommend that carers should be allowed to take part in tribunals, in order to ensure their rights are considered.

In this review, we do not make any specific recommendations about the 'named person' role.

3.5 Information from professionals to support decision making

We recommend that Scotland set standards for accessible communication, for autistic people and people with intellectual disability.

3.6 Decisions about psychological interventions

We recommend that decisions about using psychological interventions should usually be made by autistic people and people with intellectual disability, using support for decision making.

When professionals may have to make decisions about the use of psychological interventions, to promote and protect human rights, these decisions should be made in the context of a human rights assessment.

3.7 Decisions about prescribing psychotropic medication

We recommend that Scottish Government gets to a position where it is confident, on an ongoing basis, that psychotropic medications are being used appropriately with these groups. We recommend a **clinical** review on current prescribing practice in psychotropic medications.

We recommend that anyone who is given psychotropic medication should have rights to other supports, to regular reviews of their mental and physical health, and to a plan to come off psychotropic medication. The plan should be offered when medication is first prescribed and at every review of health. The person could request a plan at any time.

We recommend that the law and practice should take an approach to psychotropic medication that is equivalent to the approach recommended for psychological interventions in section 3.6 above.

3.8 Decisions in crises

We make recommendations throughout this report that are relevant to times of crisis.

We recommend that Scottish Government considers a standard procedure for police of asking persons whether they have a disability, in situations where police find that they may need to intervene with an individual who is in crisis.

4.1 Rights to support, care and treatment

Scots law should provide rights of access to the support, care and treatment that autistic people and people with intellectual disability need. We recommend a separate law to give effect to positive rights for autistic people and people with intellectual disability. We discuss this in 1.4.

We recommend that the law should require universal design in new buildings and in service design, along with reasonable adjustments, for autistic people and people with intellectual disability.

We recommend that standards for accessibility for services are set and enforced, in the same way as for standards for accessible communication (discussed in section 3.5).

We recommend that standards for accessibility of buildings are set and enforced for autistic people and people with intellectual disability, in the same way as for people with physical disabilities.

4.2 Intellectual disability

We recommend that the law clarifies duties on NHS boards, Health and Social Care Partnerships and local authorities to provide reasonable adjustments to health and social care services which enable people with intellectual disability to make use of their rights, equitably.

This should include clarification of duties to give access to services, including screening and related services, to offenders in prison and in other settings.

4.3 Autism

We recommend the same changes in law for autistic people as the changes that we recommend in law for people with intellectual disability in section 4.2 above. Those recommendations are:

We recommend that the law clarifies duties on NHS boards, Health and Social Care Partnerships and local authorities to provide reasonable adjustments to health and social care services which enable people with intellectual disability to make use of their rights, equitably.

This should include clarification of duties to give access to services, including screening and related services, to offenders in prison and in other settings.

In addition, we recommend a duty in law on Scottish Government to ensure central provision of autism expertise, including lived experience, which enables local capacity building.

We recommend duties in law for Health and Social Care Partnerships to employ professionals who have specialist understanding of autism. It will be important to include autistic people and their organisations in the development and governance of local services.

4.4 Women

We recommend that human rights assessments should consider gender.

We recommend that decisions about support, care and treatment should consider gender.

We recommend that monitoring should include gender, including the interaction of gender with other characteristics.

4.5 Children

We recommend that the law should require children's rights to be considered in human rights assessments, in monitoring, and in decisions about support, care and treatment.

We recommend that Scots law should directly include the additional rights that autistic children and children with intellectual disability have under the United Nations Convention on the Rights of the Child.

We recommend a change in law to ensure that children can have access to independent support for decision making.

We recommend rights to support for parents, along with duties to provide that support to parents.

4.6 Offenders

We recommend duties in law on NHS boards, Health and Social Care Partnerships and local authorities to provide similar access to support, care and treatment to autistic offenders and offenders with intellectual disability as for other autistic people and people with intellectual disability.

4.7 Duties on public authorities

We recommend duties on NHS boards, Health and Social Care Partnerships and local authorities to provide services, environments and

professionals with specialist understanding, for autistic people and people with intellectual disability.

We recommend that planning duties should be set for Health and Social Care Partnerships and that these duties should be monitored against standards.

We recommend enforcement of compliance with the public sector equality duty under the Equality Act 2010.

5.1 Independent living

We recommend that Scots law should recognise the right to independent living of autistic people and people with intellectual disability.

We recommend that Scotland should invest in more community-based professionals and support.

5.2 Safe places

We recommend duties on Health and Social Care Partnerships to provide access to specially designed places other than hospital for pre-emergency situations.

We recommend that Health and Social Care Partnerships should have clear responsibilities to determine the quality of delivery and to ensure sound governance.

5.3 Community rehabilitation

We recommend duties on Health and Social Care Partnerships to provide community-based professionals with specialist understanding who work across all settings as required, including home and hospital.

We recommend duties on Health and Social Care Partnerships to provide community-based individual accommodation for longer-term crisis support, including crisis prevention.

5.4 Hospital admissions for mental illness or crisis

Below, we make recommendations on planning and admission, in the context of duties on NHS boards that we recommend in other sections.

We recommend universal design in new build hospitals, to ensure full accessibility for autistic people and people with intellectual disability. Adaptations will still be required for individuals within universal design.

We recommend a presumption against detention in mental health hospital for all non-mental health crisis admissions.

We recommend that for all hospital admissions, adequate adjustments must be made before admission.

6.1 Human rights assessments

We recommend that mental health law should introduce human rights assessments.

6.2 Authorising limits on human rights

We recommend that each form of support, care or treatment without consent should be considered and authorised separately: psychotropic medication, psychological interventions, and the environment including social support.

We recommend separate authorisation for different aspects of deprivation of liberty: detention, use of restraint, and seclusion.

6.3 Professional roles in decisions

We recommend a new model for professional roles in making decisions with and for autistic people and people with intellectual disability.

6.4 The role of psychologists in the Mental Health Act

We recommend changes to the role of clinical psychologists in mental health law.

7.1 Disabled Persons Organisations

We recommend that Scottish Government should ensure that organisations run by and for autistic people and people with intellectual disability have the resources that they need to carry out their core functions. The organisations should have enough resources to represent those groups of people well in all aspects of the implementation of the Convention on the Rights of Persons with Disabilities and other human rights conventions.

We recommend that Scottish Government ensures that these organisations can have influence in mental health law, policy and practice that affects autistic people and people with intellectual disability, at national and local levels.

We recommend that duties be placed in law for Scottish Government and for all relevant public bodies to support, work with, and demonstrate respect in decision making, in relation to these organisations.

7.2 How professional decisions are monitored

We recommend that a commission or inspectorate be given power to set human rights-based standards and enforce these in relation to mental health services, and a duty to report on the use of these powers. This may be the Mental Welfare Commission for Scotland.

We recommend that a new commission be established with authority to promote and protect the human rights of autistic people and people with intellectual disability across all settings.

7.3 How decisions are made and reviewed

We recommend new powers for the Mental Health Tribunal for Scotland.

We recommend that applications to the Mental Health Tribunal should include human rights assessments that make clear, separately, each of the rights that could be limited.

We recommend duties in law for the accessibility of the Mental Health Tribunal for Scotland.

7.4 Professional review

We recommend that an independent public body hosts an independent professional review service, on support, care and treatment for autistic people and people with intellectual disability whose rights are limited or may be limited.

We recommend rights in law for access to independent professional reviewers who understand autism, intellectual disability and human rights.

7.5 Dignity, accessibility, equality and non-discrimination

We recommend that the law require standards for dignity, accessibility, equality and non-discrimination, to apply to services for autistic people

and people with intellectual disability across public services and the justice system.

We recommend that standards should be based directly on the Convention on the Rights of Persons with Disabilities, the European Convention on Human Rights and other relevant conventions.

7.6 Monitoring limits on liberty (freedom)

We recommend that all use of detention, restraint or seclusion, and any other limits to liberty, should be monitored consistently for autistic people and people with intellectual disability across public services.

7.7 Monitoring compulsory treatment

We recommend that all compulsory use of support, care and treatment should be monitored consistently for autistic people and people with intellectual disability across public services.

8.1 Fair trials

We recommend giving suspects and accused persons a right of access to an ‘intermediary’ in law.

We recommend duties in law on criminal justice services to provide intermediaries.

We recommend that the law should retain the possibility of declaring that an autistic person or person with intellectual disability is unfit to stand trial, for those people who cannot fully take part in their own trial even with full communication support.

We recommend that the Mental Health Tribunal for Scotland has a role after sentencing, for all autistic offenders and offenders with intellectual disability.

8.2 Fairness in responsibility

We recommend that equivalent criminal defences to current ‘mental disorder’ offences should be made available for autistic people and people with intellectual disability in future, based on the concept of disability from the Convention on the Rights of Persons with Disabilities

We recommend that autistic offenders and offenders with intellectual disability who have criminal intent should receive disposals that reflect this criminal intent.

We recommend that, as at present, autistic offenders and offenders with intellectual disability who do not have criminal intent should not be held responsible for offences.

8.3 Fair punishment

We recommend further development in the use of ‘disability’ for mitigation (reduced consequences) in sentencing.

For offenders with criminal intent, we recommend that detention after an offence should be recognised as punishment, and that time limits should be put on orders for detention as punishment. We recommend that these limits should not be longer than the time limits that other offenders have on the punishments they receive.

We recommend that the law separates out punishment, support to stop offending, and support care and treatment for disability into different orders. In practice, all of these orders may run together, at the same and in the same place.

The law should require Scottish Government and public services, including the criminal justice system, to ensure that autistic offenders and offenders with intellectual disability are given all of the adjustments and services that they need.

8.4 Fair access to support, care and treatment

We recommend duties on Scottish Ministers, the Scottish Prison Service, Health and Social Care Partnerships and NHS boards to ensure that wherever autistic offenders or offenders with intellectual disability are placed, each person is given access to the support, care and treatment that they need.

We recommend clarification in law that the right to independent living in the community applies to autistic offenders and offenders with intellectual disability, with limits to this right being on the same basis as for offenders in general

8.5 Fair access to habilitation

We recommend duties in law to ensure access to habilitation, and to prevent indefinite detention of autistic offenders and offenders with

intellectual disability in the context of failure to provide effective habilitation services in detention.

8.6 Public safety and victims' rights

Scottish Government should ensure that there is no disability discrimination in relation to Scotland's approach to pre-emptive detention, including post-sentence pre-emptive detention, and may wish to consider the human rights issues associated with pre-emptive detention in general.

For approaches to risk assessment and risk management, we recommend the following:

Approaches should be further developed and validated which incorporate the human rights of victims, of other affected persons, and of autistic offenders and offenders with intellectual disability.

Approaches should be further developed and validated which take full account of social and environmental factors for autistic offenders and offenders with intellectual disability, in addition to factors within the person.

In practice, approaches should fully involve the whole range of professionals, including social professionals, who can contribute to human rights-based assessment of risk.

Developments should ensure that risk assessment and risk management are non-discriminatory for autistic people and people with intellectual disability.

9.1 Habilitation in the community

We recommend that the law set a principle of equality and non-discrimination in disposals for persons with disabilities.

We recommend that offenders should return to the community under orders and supervision equivalent to that which offenders usually receive in the criminal justice system.

We recommend duties on Health and Social Care Partnerships to provide community-based habilitation services, and rights of access to these services for autistic offenders and offenders with intellectual disability.

We recommend a focus on developing very strong community-based habilitation approaches, led by professionals such as social workers and occupational therapists with input from health professionals or integrated teams, with consistent availability across Scotland.

We recommend duties on Health and Social Care Partnerships to plan for and make community provision for offenders who should be returning to the community. This provision includes accommodation in the community for some offenders, and support for further habilitation in the community.

9.2 Habilitation units

We recommend a change in emphasis for current forensic wards from treatment to ‘habilitation units’ for offenders with intellectual disability and for autistic offenders.

9.3 Prison

We recommend that Scottish Government and the Scottish Prison Service should ensure that the effects of prison and other places of detention on autistic people and people with intellectual disability are no worse for than for other offenders.

We recommend a duty for health services to offer screening and diagnosis for autism and intellectual disability to all offenders, before a final decision is made on where the person will be for their order or sentence.

We recommend that the law should give rights of access to adjustments and supports in prison for autistic prisoners and prisoners with intellectual disability.

We recommend that Scottish Government supports the Scottish Prison Service to develop its estate, staff and NHS services to provide a disability-informed prison estate for autistic prisoners and prisoner with intellectual disability.

We recommend specific monitoring of how prison protects, promotes and fulfils the human rights of autistic people and people with intellectual disability. We recommend similar monitoring for the rest of the criminal justice system.

11 A list of words that we use in this report

These words all appear in this report. Here are explanations of what we mean by these words.

Absolute rights	Human rights which should never be limited. They are different from qualified rights, which can sometimes be limited. You can click here to read more.
Advance statement	When you write down how you would like to be treated if you become ill in the future.
Adverse	Bad, negative.
Appeal	When you ask a court or the tribunal to change their decision.
Autism	A lifelong condition that affects how people communicate, how people relate to other people, and how people experience the world around them.
Autistic person	For some people, a description of how they are different from other people. For some people, a person who has a particular form of disability.
Autistic People's Organisation	An organisation run by and for autistic people.
Best interests	What professionals or other people think is best for a person.
Capacity	See legal capacity, and mental capacity.
Clinical Psychologist	A professional who is an expert in psychology for mental health.
Compulsory treatment order	Means that you can be given treatment even if you do not want it. It might also mean that you have to stay in hospital.
Convention	An agreement in law between countries.

Convention on the Rights of Persons with Disabilities	An agreement between countries that are members of the United Nations. It says what the rights of people with disabilities are. It says what governments have to do for people with disabilities.
Council of Europe	An organisation for governments. These governments have agreed to the European Convention on human rights.
Criminal Justice	The system and services for people who have committed crimes.
Curator ad litem	A lawyer for people who could not tell a lawyer what to do for them. The curator ad litem tells other professionals what may be in the person's best interests.
Decision supporter	A person who helps a person with a disability to make their own decision. This could be a family member or a friend, not someone who is paid.
Detention	Being kept in hospital under the Mental Health Act. There are different types of detention, with different rules that keep you in hospital.
Direct discrimination	Discrimination that happens when a person is treated worse than another person because they have a characteristic that is protected by law, such as a disability
Disability	What a person experiences when they have impairments, and when there are barriers in society which affect them.
Disabled Persons Organisation	An organisation run by and for people with disability. The United Nations Committee on the Rights of Persons with Disabilities defines these in its General Comment 7. You can click here to read this.
Duties in law	Things that people, organisations or governments have to do.

Emergency detention certificate	Means that you can be kept in hospital and given treatment for no more than 3 days.
European Convention on Human Rights	An agreement between countries that are members of the Council of Europe.
Evidence	In this review, information that tells us something about how well the law promotes and protects human rights
Forensic	This is when mental disorder and criminal justice are looked at together.
Guardian	A partner, carer, relative or social worker approved by the court to make decisions for you if you are unable to decide for yourself.
Habilitation	A process of supporting disabled people to attain, keep or improve skills and functioning for daily living.
Human rights	The basic rights and freedoms that belong to every person in the world.
Human rights assessment	A way of making sure that people's human rights are protected and promoted
Human rights model of disability	A way of understanding disability that includes human rights, social and environmental factors that are outside of the person, and impairments within the person. You can read about this here (link).
Impairment	A limit on a person's ability to do something. The impairment is within the person.
Independent Advocate	Someone who helps you say what you think about detention, care and treatment. They are independent because they are not tied to other services.
Indirect discrimination	Discrimination that happens when a law or policy is applied in the same way to everyone but disadvantages a group of people who share a characteristic that is protected by law.

Intellectual disability	Also called learning disability. A lifelong condition that affects how people understand information, learn skills and live independently.
Law	The rules a government makes for the people who belong to a country.
Lawyer	A professional who is an expert in the law.
Learning disability	Also called intellectual disability. A lifelong condition that affects how people understand information, learn skills and live independently.
Legal aid	Help to pay for a solicitor if you cannot afford it. A solicitor should tell you how to apply for legal aid.
Legal capacity	The ability to have rights and duties (legal standing) and to use these rights and duties (legal agency).
Legal agency	Using (exercising) the rights and duties that a person has in law.
Legal standing	Holding (having) rights and duties in law.
Lived experience	Personal experience of autism, intellectual disability (learning disability), mental illness, or experience of caring for someone.
Local authority	A council.
Mental capacity	A person's decision-making skills. These vary according to the person and their situation.
Mental disorder	The words used in the Mental Health Act to mean mental illness, learning disability or personality disorder, or similar conditions.
Mental health	The way you think, feel and behave.
Mental Health Act	The Mental Health (Care and Treatment) (Scotland) Act 2003. This is Scotland's main law about detention and compulsory care and treatment for mental illness, personality

	disorder, learning disability, and other conditions that are ‘mental disorders’ The law says how you can be treated if you have a ‘mental disorder’. It also says what your rights are.
Mental Health Officer	A specially trained social worker who helps people who have a mental disorder. He/she should tell you about your rights and make sure you get the care you need.
Mental illness	A serious problem with mental health. The most common mental illnesses are depression and anxiety.
Mental Welfare Commission for Scotland	The organisation that looks after those who need help because of a mental disorder. They make sure that all treatment follows the law. People can speak to them at any time if they are unhappy about care and treatment.
Mental Health Tribunal for Scotland	The legal organisation that makes decisions about detention and compulsory treatment of people with mental disorder.
Named person	Someone you choose to look out for you if you have to have treatment. They help to make decisions about your care and treatment.
Negative rights	Rights that require duty holders not to act in ways that would harm the person who holds the right.
NHS Board	The group of people who run an NHS service.
Non-instructed advocacy	Independent advocacy for people who are unable to tell an independent advocate what to do.
Nurse	A professional who is an expert in support, care and treatment.

Objective medical expertise	The expertise that is required to be able to say that a person meets criteria for detention under the European Convention on Human Rights (link, paragraph 107)
Occupational Therapist	A professional who is an expert in support and skills for independent living.
Parole	When someone is released early from prison but is still checked up on.
Person with lived experience	An autistic person, a person with intellectual disability (learning disability), or an unpaid carer.
Positive rights	Rights that require action by duty holders, such as the government or public services.
Psychiatrist	A professional who is an expert in medicine for mental health.
Professional	A person who has special training, skills and knowledge. A professional is paid for what they do.
Proportionate	Means that the interference with a person's human rights is no more than is absolutely necessary to achieve one of the aims of human rights law. The impact of the limit on the person's rights must not be excessive. The more severe the interference with a person's rights, the more is required to justify that interference (link)
Public authorities	The organisations of professionals who run public services.
Public services	Services and places that are run by the government for the community.
Qualified rights	Human rights that can sometimes be limited. They are different from absolute rights, which should never be limited. You can read more about this here.

Ratify	To formally agree to something and make it valid (for example, when a government accepts a human rights agreement).
Reasonable adjustments	Relatively small changes that organisations make in their approach or provision to make sure that buildings and services are accessible to disabled people as well as to everybody else.
Reciprocity	This means that society owes some duty to provide appropriate services and support to those who have been required to accept treatment against their will.
Rehabilitation	A process of regaining skills, abilities, or knowledge that may have been lost or compromised as a result of disability, or due to a change in disability or circumstances.
Remit	A list of things that have to be thought about and reported on.
Responsible Medical Officer	A psychiatrist who has responsibility for orders from the Mental Health Tribunal for Scotland for a patient.
Restraint	Holding someone to stop them from moving, or to make them move another way. This might happen to stop a person from hurting their self, or to stop them from hurting other people, or to give the person medicine.
Seclusion	Being put in a room by yourself, away from other people. This might happen to stop a person from hurting other people.
Sheriff	A judge in the Sheriff Courts and sometimes in the Mental Health Tribunal for Scotland.
Scottish Government	The politicians who are chosen to make decisions for Scotland, and the civil servants who support them in their work. The decisions include health, social care, justice, education,

	housing, equal opportunities and many other decisions.
Scottish Parliament	The group of elected politicians who represent people from all parts of Scotland. The Scottish Parliament makes most of Scotland's laws.
Social Worker	A professional who is an expert in support for relationships and social problems.
Solicitor	In Scotland, a lawyer who represents you.
Short-term detention certificate	This means you can be kept in hospital and given compulsory treatment for up to 28 days.
Special regard	Making sure that you take a person's own views very seriously.
Speech and Language Therapist	A professional who is an expert in communication.
Treaty	An agreement in law between countries.
United Nations	An international organisation. Its members are the governments of the world's countries. It works to keep international peace and security, to support countries to develop, and to promote and protect human rights.
Universal design	Designing products, environments and services so that they can be used by all people as far as possible, without needing any adaptations or special design.
Unpaid carer	A person who cares for another person without being paid. This is usually someone who is related to the person, but it can be a friend or someone else.
Voluntary patient	Someone who agrees to have treatment for their 'mental disorder'.
Will and preferences	What a person wants.

The independent review of Learning Disability and Autism in the Mental Health Act