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Response to the Independent Review of Learning Disability and Autism in the Mental Health Act

October 2019

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

# **Introduction**

We are pleased to respond to the Stage 3 consultation of the Independent Review of Learning Disability and Autism in the Mental Health Act. The Review concluded at Stage 1 that the Mental Health Act sometimes fails to protect people’s rights. We agree with that conclusion.

The proposals seek to change the legislation to a fundamentally different model which treats disabled people as equal citizens and provides support to remove the barriers they face which disable them (the social model of disability), as opposed to seeking to “treat” the individual (the medical model). They consider solutions to ensure compliance with the Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights, thereby protecting and promoting the human rights of autistic people and people with learning disability. Crucially, they propose a range of mechanisms to ensure that people with learning disabilities or autism are supported to make decisions and that their rights, will and preferences are respected on the same basis as other people. These proposals are part of a decisive move away from substitute decision making. While we consider that there are still some issues to be worked out to ensure the proposals fully cohere, we believe that the Review makes promising practical proposals to deal with complex matters.

Alongside changes to the Mental Health Act, the Review proposes legislation to provide for positive rights, as opposed to those concerned with governing restrictions in the context of compulsory care and treatment, as the current Mental Health Act primarily does. This includes:

* Rights of access to specialist support, care and treatment
* Rights to independent living
* Standards on information to support decision making
* Rights relating to the criminal justice system: specialist rehabilitation services, rehabilitation centres, rehabilitation in the community and adapted prison environments

We broadly support these recommendations and believe a new law of this nature would better protect the human rights of people with learning disabilities or autism. We consider that many of these and the proposed changes to the Mental Health Act would equally improve human rights protection for a wider range of people, who currently fall within the ambit of the Mental Health Act, although that is a matter for the separate review of the Mental Health Act, being carried out by John Scott QC.

We have participated in this review throughout its course, acting as a member of the Law and Policy Advisory Group and supporting the review’s human rights based approach. The issues raised and the human rights debate that surrounds them are complex and sometimes contentious. We must acknowledge how thoroughly and carefully the review team has engaged with the requirements of the human rights framework and used them to come up with concrete and, we believe, practical proposals for changes to law and practice to bring them to life.

The review has also led the way in engaging with all aspects of a human rights based approach embodied by the PANEL principles (Participation, Accountability, Non-discrimination and equality, Empowerment and Legality). In particular, people with lived experience of learning disability and autism have been involved in all parts of review and great efforts have been made to make these complicated ideas accessible to all.

This work will be extremely helpful for all stakeholders engaging with the other current reviews in mental health – the Mental Health Review led by John Scott QC and the Independent Review into the Delivery of Forensic Mental Health Services led by Derek Barron.

The review’s work will also be informative as we come to think about the further incorporation of economic, social and cultural rights, such as the right to the highest attainable standard of physical and mental health in the context of moving forward recommendations for a new Act of the Scottish Parliament.

**Survey Response**

**Section 2. How we understand autism, learning disability and mental health**

**2.1 Disability**

*What do you think about the ideas in this section?*

I have mixed feelings about the ideas.

*Why do you think that?*

We wholeheartedly support use of the social model of disability as outlined by the Convention on the Rights of Persons with Disabilities (CRPD) to define autism and learning disability. We do not consider that the medical model currently applied to the definition of ‘mental disorder’ under the 2003 Act fits with a modern, rights-based understanding of autism, learning disability or other disabilities. The social model enables the focus to be not just on the individual but also the circumstances around them which contribute to their disability e.g. their living situation, unmet care or support needs. Beginning with this understanding will provide a strong basis for the remainder of the proposals.

*Could these ideas be made better?* Yes

*How could these ideas be made better?*

We would question the need to define disability as temporary in relation to “experiencing stress, distress or serious limitations”. The Article 1 CRPD definition views disability as being caused by impairments interacting with various barriers. Legislation based on that model would seek to address the barriers, rather than the individual. We believe this is what the proposals seek to do throughout, however, the definition of disability proposed does seem to focus on the condition of the individual.

It would appear unnecessary to distinguish between times a person is experiencing “impairment” or “disability”. The proposals for positive rights (e.g. health checks, access to support, care and treatment) would apply throughout the course of the individual’s life, not only when experiencing ill health. There will remain a need to define a threshold for intervention where decisions may be made about detention, other limits to liberty and compulsory support, care or treatment, however this could be defined in terms of necessity to prevent “serious adverse effects” (Bach and Kerzner in *‘A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, Report to the Law Commission of Ontario’*) or “harm” (Australian Law Reform Commission, *‘Equality, Capacity and Disability in Commonwealth Laws’*), which could be incorporated in the consideration of “necessary and proportionate” in the proposed human rights assessments. This would be a disability-neutral threshold which could apply across legislation that deals with intervention (i.e. new mental health and incapacity laws)

**2.2. Human rights**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

Our work on human rights based approaches over the last ten years supports the theory that active, up-front consideration of human rights improves decision-making and supports reasoned, person-centred decisions that appropriately balance rights and risks. This is supported by a series of independent evaluations[[1]](#footnote-1).

It is important to build human rights-based structures and processes to result in the realisation of human rights outcomes. We support the explicit use of human rights language and commitments through e.g. a code of ethics. Equality and human rights impact assessments can provide an additional level of assurance for the mainstreaming of human rights. Education and training will be essential to enable professionals to understand and meaningfully engage with human rights.

*Could these ideas be made better?* Yes

*How could these ideas be made better?*

Good quality human rights training is essential to build meaningful understanding which supports a human rights culture in practice. Alongside training to support the ability of staff to carry out their duties, a human rights based approach requires the empowerment of individuals whom the decisions will affect. A programme of training or awareness-raising may therefore be necessary to support individuals with learning disability or autism and those who support them (carers, advocacy workers etc). The final element of a human rights based approach is accountability for decisions that impact upon people’s human rights. We will comment elsewhere in our response on proposals we believe could provide that accountability in practice.

**2.3 Legal capacity**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

Recognition of legal capacity and support to exercise it in practice are fundamental to the realisation of CRPD. While this is a significant shift and may be challenging to implement, setting out a clear requirement for these duties sets the scene for practical measures to implement supported decision-making across the law. This will need to be supported by a significantly evolved understanding of what it means to ensure supported decision-making, alongside mechanisms in the law to ensure that it can and will be provided.

*Could these ideas be made better?* n/a

*How could these ideas be made better?* n/a

**Section 3. Support for decision-making**

**3.1 Statement of rights, will and preferences**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

The primacy of the individual’s rights, will and preferences is at the heart of the right to legal capacity and CRPD more broadly. We believe that Advance Statements are a worthwhile mechanism for recording the individual’s wishes and thus supporting their autonomy but they are hampered by low use in practice which means both that most people do not have them and that they are not central to the decision-making process under the 2003 Act. Their restriction in law to matters concerning care and treatment does not take into account the importance of a whole range of other lifestyle matters which are of importance to the individual and may support their health. Accordingly, measures that place emphasis on finding out the individual’s will and preferences and placing them at the heart of the decision-making process would be a practical step in strengthening the right to legal capacity. Scrutiny and justification for decisions which conflict with expressed will and preference is important and can also drive consideration of the impact on the individuals’ rights into the heart of decision-making in practice. The scope for challenge by the individual and scrutiny by the MHTS or MWC provide appropriate and essential accountability mechanisms.

The consideration of ‘rights’, alongside will and preference, allows for a balance to be struck where other human rights would be jeopardised e.g. if a person’s right to life was at serious risk or if someone’s will and preference would interfere with the human rights of another person. However, framing this decision around human rights means that only relevant issues would be taken into account, there would be a move away from best interests decision-making and a proportionate means of balancing the issues would have to be justified. Again, a clear threshold for intervention, such as necessity to prevent serious adverse effects or harm would provide the parameters for the decision.

As regards the role of curator ad litem, it is striking that, if the curator agrees with the professionals that a proposal which goes against a person’s wishes is in their best interests, there is no one representing the individual’s will and preference and examining witnesses on that basis with equality of arms. We agree that the role would need to change to ensure the individual’s will and preference is always represented on an equal basis with the case to the contrary.

*Could these ideas be made better?* n/a

*How could these ideas be made better?* n/a

**3.2 Independent advocacy**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

Independent advocacy is a strong form of supported decision-making. If advocacy is working as intended (and as envisaged by the Millan Committee), helping the individual to express their wishes and uphold their rights, it can act as a preventative measure to avoid crisis situations arising. We therefore believe that duties to fund advocacy must recognise the need for advocacy at all times, not just in times of crisis.

The proposals around non-instructed advocacy are a practical means of realising the idea of “a best interpretation of the person’s will and preferences”, as required by CRPD and broadening our understanding of consent for those who are unable to express their will and preference verbally.

*Could these ideas be made better?* Yes

*How could these ideas be made better?*

This places a great deal of power and responsibility in the hands of the independent advocate who can essentially sign off consent in place of the individual for matters seriously affecting their human rights. There should therefore be independent scrutiny of these types of situations to provide a safeguard. Decisions based on non-instructed advocacy could therefore be subject to review by the MHTS.

**3.3. Decision supporters**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We support the creation of a role which gives clear authority to support the individual in making decisions and in having those decisions legally recognised. This is in line with CRPD General Comment No.1 which states *“Legal recognition of the support person(s) formally chosen by a person must be available and accessible, and the State has an obligation to facilitate the creation of support…This must include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting based on the will and preference of the person concerned”*

*Could these ideas be made better?* Yes

*How could these ideas be made better?*

We believe there is a need to consider a state service which provides decision supporters for people who do not have a person in their lives who would be able to act, as in Ireland’s Assisted Decision-Making (Capacity) Act 2015. This may be more of a professional role than the one suggested by the proposals.

**3.4 Unpaid carers**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We support recognition of both the role of carers in facilitating supported decision-making for the individual and in taking account of the impact of caring situations on their own human rights. We believe there are currently gaps in understanding of these aspects which could be addressed within the scope of the proposals. Supported decision-making encompasses a broad range of supports, including informal support arrangements, trusted support persons and assistance with communication, all of which may be facilitated by unpaid carers.

*Could these ideas be made better?*

Yes

*How could these ideas be made better?*

In addition to a need for separate, independent representation, carers may also need support to assist them to play their role in the various mechanisms proposed. Advocacy and training for carers could be provided for.

**3.5 Information from professionals to support decision making**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

Accessible information is a pre-condition of supported decision-making and a simple and practical step that can be taken towards its realisation. We agree that the Mental Welfare Commission is an appropriate body to set and oversee standards.

*Could these ideas be made better?*

Yes

*How could these ideas be made better?*

Accessible information may take many different forms for different people. It would be important to recognise this need for flexibility which embraces the spirit of supported decision-making, while also ensuring the parameters are clear enough that they will be met in practice. It would be helpful to clarify if the MWC were setting only minimum standards (with a requirement of compliance) or good practice guidelines. Good practice, while of assistance, would not necessarily lead to change in practice.

**3.6 Decisions about psychological interventions**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We believe that it is necessary to set out duties attributable to professionals as duty bearers in relation to decisions which affect a person’s human rights, to provide accountability for those decisions. In a social model, scrutiny would shift to testing the supports offered to a person, rather than testing the person and their impairments.

Separate authorisation is indicated by the European Court of Human Rights decision in *X v Finland*, which made clear that authority to detain and authority to provide non-consensual treatment require separate safeguards. We consider that principle is appropriately applied in the proposals.

The proposed criteria would enshrine key factors to be taken into account in an assessment of proportionality (e.g. least restriction). The requirement of a human rights assessment would ensure explicit engagement with these factors, underpinned by supported decision-making, and would allow scrutiny of the decision.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**3.7 Decisions about prescribing psychotropic medication**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

Overuse and inappropriate use of psychotropic medication of the type referred to in England could amount to a violation of a range of human rights, including the right to freedom from inhuman and degrading treatment (Art.3 ECHR) and the right to health (Art.12 ICESCR and Art.25 CRPD). Freedom from inhuman and degrading treatment is an absolute right meaning it must never be allowed to happen. Accordingly we support further priority action to understand and address the scale of the problem in Scotland.

In an individual case, these violations may be avoided where individuals are involved in decision-making as to the appropriate treatment for them and based on careful human rights assessments. The requirement for review and planning to come off medication are essential components to ensure ongoing proportionality. We also agree with the need to consider other supports, to move away from a medical model.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**3.8 Decisions in crises**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We will address the ideas in the relevant sections elsewhere

*Could these ideas be made better?* n/a

*How could these ideas be made better?*

n/a

**Section 4. Support, care and treatment**

**4.1 Rights to support, care and treatment**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

SHRC has long advocated for the incorporation of economic, social and cultural rights set out in UN Conventions such as ICESCR and CRPD. This is essential to provide accountability for such rights on a domestic level, which is currently weak. The right to health is one such right. A National Taskforce is underway (of which SHRC is a member) to advance recommendations for new legislation to protect economic, social and cultural rights. The proposals therefore fit well with the direction of travel and would be complementary to a new Act of the Scottish Parliament addressing the broader human rights framework.

*Could these ideas be made better?* n/a

*How could these ideas be made better?* n/a

**4.2 Learning disability**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

Each of these proposals are concrete ways to enshrine the necessary aspects (availability, accessibility, acceptability and quality) of the right to health in line with CRPD standards.

*Could these ideas be made better?* Yes

*How could these ideas be made better?*

Article 25(c) CRPD requires that these health services are provided as close as possible to people’s own communities, including in rural areas. We know that this is not always the case in relation to people with learning disability or autism and this may require to be stipulated in law.

**4.3 Autism**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

See comments on 4.2. In addition, the proposal for a national autism service does appear to be a concrete response to the judgment in *Rooman v Belgium*, which would help to ensure that the principle of reciprocity is realised in practice

*Could these ideas be made better?* n/a

*How could these ideas be made better?* n/a

**4.4. Women**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We support these proposals as a means of addressing the principle of non-discrimination and the provisions of Article 6 CRPD.

*Could these ideas be made better?* n/a

*How could these ideas be made better?* n/a

**4.5 Children**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We agree that it is important to build in the requirements of the UN Convention on the Rights of the Child, including participation in decision-making on an equal basis with children without disabilities. This will be particularly important as Scotland moves towards incorporation of those rights in domestic law.

*Could these ideas be made better?* n/a

*How could these ideas be made better?* n/a

**4.6 Offenders**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We agree that the provisions of CRPD, especially the right to health, apply regardless of whether the individual has committed an offence. Article 14 requires that those deprived of their liberty are treated on an equal basis with others deprived of their liberty, including by provision of reasonable accommodation. This supports the need to provide access to specialist support and services.

*Could these ideas be made better?* Yes

*How could these ideas be made better?*

Article 13 CRPD, Access to justice, requires that states promote appropriate training for (among others) policy and prison staff. A recommendation to that effect would be of assistance.

**4.7 Duties on public authorities**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

Duties to provide access to specialist service provision, accompanied by monitoring, would provide an accountability mechanism for the components of the right to health, which is currently absent.

We also support structures involving the Mental Welfare Commission to set standards, monitor and inspect services as a means of providing accountability. It is essential that disabled people and their organisations are involved in that monitoring, per Article 4(3) CRPD as expanded upon by General Comment no.7. The General Comment also requires the development of strong mechanisms and procedures ensuring effective sanctions for non-compliance with these obligations e.g. through monitoring by independent bodies who can hold them to account. This could be a component of the MWC’s role as proposed.

SHRC’s EQHRIA project found that integrated equality and human rights impact assessments have a number of benefits: achieving better outcomes for people, improving performance, demonstrating accessibility and accountability and ensuring compliance with the law. We support their use in this context.

*Could these ideas be made better?*

Yes

*How could these ideas be made better?*

Article 31(2) CRPD highlights the importance of disaggregated data. Monitoring should include disaggregation by other equality characteristics, such as sex, age and ethnicity.

**5. Where support, care and treatment happens**

**5.1 Independent living**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

The CRPD Committee made concluding observations in their 2017 review of the UK on the need to recognise the right to independent living and the enforceability of all its elements, and to allocate sufficient resources to ensure that support services are available, accessible, acceptable and adaptable sensitive to different living conditions for all persons with disabilities in urban and rural areas. The proposals directly address those recommendations. Incorporation of the right to independent living in Scots law also fits with our earlier comments about incorporation across the human rights framework.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**5.2 Safe places**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We support the idea of safe places, especially in local areas, to ensure they are equally accessible to all. We welcome recognition of the duties that may arise in order to protect the right to life (*Rabone v Pennine Care NHS Trust*)

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**5.3 Secure support centres**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

This idea embraces the spirit of CRPD in seeking to provide appropriately tailored support arising as a consequence of a person’s disability. We believe this is a promising idea to address those requirements along with the requirements identified in *Rooman v Belgium.* This is an area where CRPD and ECHR are aligned, in requiring appropriate treatment in situations where liberty is constrained*.* The proposal does, of course, still permit non-consensual treatment which comes into tension with Articles 12 & 14 CRPD. However, if the criteria for detention and compulsory treatment were disability-neutral (e.g. necessary to prevent “serious adverse effects” or “harm”, addressed in Section 1) this might be addressed. In addition, human rights assessments giving primacy to the individual’s rights, will and preferences would help to ensure a balance was struck which still upheld the requirements of CRPD.

A duty to plan for discharge engages with the question of the ongoing proportionality of detention and is therefore important. It would also mitigate concerns about re-institutionalisation of people with learning disabilities or autism.

As with other areas, we support the idea of these duties being backed up by standards.

*Could these ideas be made better?*

Yes

*How could these ideas be made better?*

We understand these proposals to be aimed at providing appropriate, tailored support in a way that is different to the medicalised model currently applied in some hospital units which treat people with learning disability or autism. However, it is important to clarify the way that these are different from existing Assessment and Treatment Units, which have been the subject of much criticism in terms of their regard for people’s human rights. It is essential to provide enough mechanisms to ensure that these do not become institutions for people with learning disabilities or autism and thus work against deinstitutionalisation.

**5.4 General hospitals and psychiatric hospitals**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

It is important to address the need for all services, including “mainstream” services, to be accessible to people with disabilities, in line with Articles 9 and 25 CRPD. This requires awareness-raising and training for appropriate professionals.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**6. How professionals make decisions**

**6.1 Human rights assessments**

*What do you think about the ideas in this section?*

I have mixed feelings about the ideas

*Why do you think that?*

SHRC has previously recommended implementation of the UN’s Special Rapporteur on the right to health five concrete actions (annual report of 2017)

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

We believe that the proposals follow those actions in seeking to shift decisively away from coercion and work towards the eradication of non-consensual treatment.

*Could these ideas be made better?*

Yes

*How could these ideas be made better?*

We generally support the conclusions of the Essex Autonomy Project and agree that they can be applied in relation to mental health law. We believe that a presumption about will and preferences could be better complemented by a rebuttable presumption that effect will be given to the person’s reasonably ascertainable will and preferences, which could afford primacy to the individual’s will and preferences above considerations such as ‘maximum benefit’ which can tend towards paternalism. We find this principle clearer and stronger than “special regard” which, as discussed by the Essex Autonomy Project, is subject to vagueness and criticism but can be more usefully operationalised by a rebuttable presumption with stringent criteria attached to the rebuttal.

As elsewhere, we support the idea of a human rights assessment which brings to the fore explicit consideration of the legitimate aim for restricting a person’s rights and the most proportionate means of doing so, and allows for scrutiny and accountability for that decision. As we commented in 3.6, in a social model, scrutiny would shift to testing the supports offered to a person, rather than testing the person and their impairments. It would therefore be important that the human rights assessment before the tribunal included the steps that the professionals have taken to support a person’s own decision-making. We believe this is the intention of these proposals. It would also need to address any alternatives available and why they are or are not suitable, to ensure that barriers causing the individual’s disability are addressed.

**6.2 Limits on human rights**

*What do you think about the ideas in this section?*

I have mixed views about the ideas

*Why do you think that?*

CRPD, alongside ECHR, recognises that there may be duties on the state to intervene to protect a person, from abuse or inhuman or degrading treatment, or risks to their life. Our understanding of the requirements of Article 12 CRPD are that any intervention which overrides a person’s will and preference can only be made on a non-discriminatory basis, not based on the person’s disability.

We think these criteria may have promise in striking the balance of human rights across CRPD and ECHR. They do seem to address the circumstances causing a person’s disability and thus accord with the social model. They may even allow for mental health legislation to be a supportive piece of legislation which seeks to provide access to appropriate services required as a consequence of disability and which are necessary to achieve the highest attainable standard of mental health. However, we still have questions about the use of disability as a starting criteria. The instruction from the CRPD Committee is to achieve disability-neutral criteria and not to have pieces of legislation that allow deprivation of liberty for only certain groups (those with autism and learning disability in this instance). It is questioned therefore how this fits with this approach. While we appreciate that this review deals only with people with learning disability and autism, we believe that consideration will need to be given between this review and the Scott review as to whether and how disability-neutral criteria for intervention can be designed.

We see promise in reframing the criteria of SIDMA (if support for decision-making is provided) and necessity (to take account of a fuller assessment of proportionality which addresses the barriers disabling a person). The idea of necessity, as framed, requires the identification of a legitimate aim, which may be another of the person’s rights or the rights of others, and proportionality would require consideration of all the options. As discussed at Section 1, we believe that necessity to prevent “serious adverse effects” or “harm” could be used to inform the assessment.

We very much support the idea of the tribunal’s decision setting out the positive reciprocal actions that professionals and public bodies have to take. This could transform the role of the tribunal into a much more supportive one, rather than one concerned with restrictions.

*Could these ideas be made better?* Yes

*How could these ideas be made better?*

As regards policing, we agree that a requirement to ask people whether they have a disability would assist, however, this should be complemented by training to assist officers to identify undiagnosed needs or ones the individual may not be able to communicate.

**6.3 Professional roles**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We do not have much comment on this section, however, we wish to emphasise the pivotal role of quality human rights training for all those involved, a task which should not be underestimated. The new concepts and understandings in these proposals do represent a paradigm shift which many people have been struggling to grasp since the General Comment in 2014. The legal structures proposed provided strong support for a shift in thinking but change will only come with significant shifts in attitude and approach from those who will administer the system in reality.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**6.4 The role of psychologists in relation to the Mental Health Act**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We share the view of the Joint Committee on Human Rights that clinical psychologists can be seen as professionals with ‘objective medical expertise’ for the purpose of Article 5 ECHR

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**7. How decisions are monitored**

**7.1 Disabled Persons Organisations**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

These proposals address General Comment No.7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention. In particular, paragraphs 61 – 66 lay out the state’s obligations to ensure sufficient funding and to have accountability mechanisms for non-compliance with duties of participation.

*Could these ideas be made better?* Yes

*How could these ideas be made better?*

There is a role for collective advocacy (in addition to the role of independent advocacy discussed elsewhere) as part of these proposals, which would require recognition of its role and adequate funding.

**7.2 How professional decisions are monitored**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

The Mental Welfare Commission would be an appropriate body to exercise greater powers of enforcement to back up the various new duties proposed on public authorities with a system of accountability, which is key to the realisation of human rights in practice. We believe that it is important for an independent body to have the power to intervene to address barriers that may be the cause of disability, such as inadequate support or housing, to avoid detention being used to address failures elsewhere.

Human rights-based standards contribute significantly to instituting a human rights culture. Precedents exist elsewhere in Scotland, namely the Health and Social Care Standards and HMIPS Standards for Inspecting and Monitoring Prisons in Scotland.

Second opinion professionals could provide a safeguard against undue influence and conflict of interest in relation to supported decision-making, as required by Article 12(4).

*Could these ideas be made better?*

Yes

*How could these ideas be made better?*

The ability of the MWC to intervene to address failures should be accompanied by or linked to enforcement powers. A system of recommendations may have some value but does not provide true accountability for situations which violate a person’s human rights

**7.3 How decisions are made and reviewed**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We believe a human rights-focussed role for the MHTS which focuses on testing the barriers and supports which disable or enable a person would create a much more CRPD appropriate model. We also believe that Tribunal should be empowered to have a more directive role, to require necessary supports and services that would render detention or other infringements on rights unnecessary.

We think making a link between MWC standards and Tribunal decision-making would be significant in driving those standards into the heart of care as it will make clear that they are not optional guidance.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**7.4 Professional review**

*What do you think about the ideas in this section?*

I have mixed feelings about the proposals

*Why do you think that?*

This seems to build on the availability of independent psychiatric reports currently widely used to consider challenges to detention. We are not sure that a separate service is needed to provide this or how this would be materially different to the current use of independent experts but that is not to say it does not have merit.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**7.5 Dignity, accessibility, equality and non-discrimination**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**7.6 Monitoring limits on liberty (freedom)**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We strongly believe that there is a need to introduce systematic monitoring of instances of restraint and seclusion, which is currently lacking. These are significant human rights issues and there is an obligation to work towards their reduction and eradication, currently hampered by a lack of data on the true picture. We also believe that they require separate scrutiny and safeguards in cases where they may, taking all factors into account, be a proportionate response.

We agree that this should also be disaggregated to identify particular groups affected e.g. age, race, gender.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**7.7. Monitoring compulsory treatment**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We agree that explicit and separate consideration of the impacts of various aspects of care, treatment and support from a human rights perspective would advance a human rights culture and the realisation of people’s human rights in practice. Shifts at the ECHR level, as seen in *X v Finland* and *Rooman v Belgium* indicate that greater scrutiny is needed of the impacts of particular aspects of care on the range of human rights engaged.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**8. Offenders**

**8.1 Fair trials**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We agree that more can be done to make the trial process accessible to people and that intermediaries may be of assistance, however, we also agree that it is crucial to ensure that Article 6 ECHR protections are upheld which allow for meaningful interaction between solicitor and accused in order to present a defence. Training for lawyers and judges may also contribute towards greater participation in the justice system.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**8.2 Fairness in responsibility**

*What do you think about the ideas in this section?*

I have mixed feelings about these ideas

*Why do you think that?*

It appears that what the proposals are trying to achieve, and what CRPD principles stipulate, is that people are treated the same where possible and differently when needed. This might mean that people would face the same responsibility but adapted consequences. The social model also points to a need to consider wider factors disabling an individual, which could be achieved by a plea in mitigation. The availability of appropriate disposals which follow on from that consideration are crucial to addressing these factors.

*Could these ideas be made better?*

Yes

*How could these ideas be made better?*

We are a little unclear whether disability as a mitigating factor is meant as a defence (akin to a plea of diminished responsibility) or as a plea in mitigation (for the purposes of sentencing). We think it may be both, which follows the reasoning set out, however a new defence is a more significant change to the criminal law. We would defer to experts in this area as to its viability.

**8.3 Fair punishment**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We think it is of assistance to separate out the purposes of punishment, support to stop offending and support, care and treatment, in order to ensure appropriate disposals tailored to disability.

We believe that equivalent time limits for punishment for offenders with autism or learning disability fulfil the basic principle of non-discrimination at which Articles 12 and 14 CRPD are aiming. Certainly disability should not lead to more restrictive settings or durations than for offenders who do not have a disability. Similarly, the management of risk for all offenders should be approached on an equal basis i.e. if it would not be justified to restrict a non-disabled offender after the end of their prison term, then it would not be justified for disabled offenders. We agree that mechanisms available for all offenders, e.g. Orders for Lifelong Restriction, could equally be applied here. We do believe that monitoring of their use for autistic people and people with learning disabilities will be necessary to ensure there is no indirect discrimination.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**8.4 Fair access to treatment**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

Based on fundamental CRPD principles, it is important that people with disabilities receive the adaptations they require. In the context of imprisonment, there is a requirement of reasonable accommodation (Article 14 CRPD). We also know that much of the prison estate in Scotland is not equipped to attend to the needs of prisoners with disabilities, which can lead to further violations of their rights e.g. limiting their access to purposeful activity and rehabilitation programmes. Specially designed facilities and significant adjustments to parts of the prison estate would assist both detainees and staff to uphold human rights.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**8.5 Fair access to rehabilitation**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

No additional comments

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**9. Where support, care and treatment happens for offenders**

**9.1 Rehabilitation in the community**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

The proposals address the human right to equality and non-discrimination both in principle and in practice. It is difficult to justify an alternative approach which sees disabled people treated more harshly than those without a disability. We consider that equal disposals would be capable of dealing with the punishment element of sentencing, while support and rehabilitation provide reasonable accommodation in line with Article 5 CRPD.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**9.2 Rehabilitation centres**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

See comments at 8.4 and 9.1

*Could these ideas be made better?*

*How could these ideas be made better?*

**9.3 Prison**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

See comments at 8.4. We consider that backing up the expectation of support, care and treatment with enforceable duties and rights of access would improve the realisation of rights in practice and help to address some of the barriers that currently exist.

The proposals are in line with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (2015), the most up to date rules which expand upon the 1955 Rules. In particular, the following Rules apply:

Rule 2.2

*“In order for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory.”*

Rule 5.2 2.

*“Prison administrations shall make all reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis.”*

Rule 109

*“1. Persons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.*

*2. If necessary, other prisoners with mental disabilities and/or health conditions can be observed and treated in specialized facilities under the supervision of qualified health-care professionals.*

*3. The health-care service shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.”*

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**10. What this means for the law**

**10.1 Autism and learning disability redefined**

*What do you think about the ideas in this section?*

I have mixed feelings about the ideas

*Why do you think that?*

We agree that legislation should change its definition and understanding of learning disability and autism to embrace the social model set out by CRPD. We think the proposals as a whole have much to recommend them for application in relation to all people currently subject to the Mental Health Act. We agree that it is important not to lose any of the rights currently provided under the Mental Health Act e.g. independent advocacy and Advance Statements, however, these are substantially built upon, if not superseded, by the new rights in the proposals.

*Could these ideas be made better?*

Yes

*How could these ideas be made better?*

For comments, see 10.2 and 2.1

**10.2 A law on support for intellectual impairment and autism**

*What do you think about the ideas in this section?*

I have mixed feelings about the ideas

*Why do you think that?*

It is difficult to comment on the proposals regarding amendment to the Mental Health Act vs a new law in light of the Independent Review of Mental Health and Incapacity in Scotland (the Scott Review). Should that review make proposals which significantly reframe the 2003 Act towards similar principles of a social model and supported decision-making, it appears to us that the current proposals would fit well within a reframed Act. We can see some difficulty in significantly amending the provisions of the Mental Health Act based on quite different principles to those guiding the Act as a whole. We also believe this raises the question of unequal treatment between those with learning disability and autism, who would have greater autonomy over their lives, and others subject to the Act. Conversely, having a separate piece of legislation which distinguishes on the basis of impairment and, in that context, may permit restrictions to legal capacity, may exacerbate the issues identified by the CRPD Committee e.g. deprivation of liberty on the basis of impairment. The challenge remains to design legislation which permits intervention on the same basis for all, without distinguishing as to impairment. We appreciate that the scope of this review does not encompass answering this broader challenge and there is much to be said for pushing ahead with the proposals to improve upon the current situation while these larger challenges are addressed.

In general, we think the proposals for new law to create positive rights addresses one of the key challenges in reforming mental health law on the basis of supported decision-making i.e. to transform it from law concerned with regulating and authorising restrictions on human rights, to law concerned with supporting individuals. Such a transformation would contribute to a reduction in stigma and discrimination and could reduce fear for those who come within its ambit.

The right to independent living may come within the proposals of the National Taskforce on Human Rights Leadership in its consideration of a new statutory framework to enhance human rights protection, however, it may be that some specifics of the right in application to people with learning disabilities or autism could be usefully built into specific duties in the new law. This would complement and enhance the general statutory framework.

*Could these ideas be made better?*

Yes

*How could these ideas be made better?*

Consideration in light of the findings of the Scott Review

**10.3 Criminal law**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

No further comments

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

**10.4 Commitments to positive rights and to ending detention on the basis of disability**

*What do you think about the ideas in this section?*

I like the ideas

*Why do you think that?*

We agree with the rationale set out here for positive steps towards ending compulsory detention and treatment on the basis of disability and we support the efforts of the proposals to ensure that limits are applied in the same way for people with disabilities as those without. We appreciate that this is contentious and complex territory and, in our view, the most important thing is to have a clear roadmap towards ending coercion. We believe that these proposals are a substantial contribution towards that end and would result in a genuine paradigm shift.

*Could these ideas be made better?*

n/a

*How could these ideas be made better?*

n/a

1. See for example, GEN, The University of Bedfordshire and Queen Margaret University, Evaluation of Care about Rights, Phase 2 report to the Scottish Human Rights Commission, October 2011; Scottish Human Rights Commission, Human Rights in a Healthcare Setting: making it work, an evaluation of a Human Rights Based Approach at The State Hospital, December 2009 [↑](#footnote-ref-1)