Stage 3 of the review

Final consultation

All information in plain English

August 2019
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1. What Scotland needs to do

This section gives you some important background information about the review and about human rights challenges for Scotland. It also gives you a summary of all the ideas across all sections of this report.

There are no questions in this section.

If you are reading the full consultation document, there is a separate survey that you can fill in.

This is available separately.

If you are taking part online, there are questions in each online survey. There are also questions in the downloadable sections within each survey.

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1.1 About this review

A review of the law is when people look at the law and see if it needs to change. This review is about a law called the Mental Health (Care and Treatment) (Scotland) Act 2003. We will call this the Mental Health Act.

This review is looking at whether this law needs to change for people with learning disability and / or autistic people. We are finding out how well the law supports people’s human rights.

This review is independent. This means that no group of people can decide how the review will happen or what it will say, except the independent people who run the review. The review will finish in December 2019.

On our website there is more information about the review. There are videos and easy read information link.

The review’s remit

Scottish Government set the remit for this review. The remit is the list of things that we need 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 are looking at the role of psychology in the 2003 Act]

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)”

Our approach

It is very important that we include people with lived experience in this review. We have to do this to really understand things. Also, the United Nations tells us that we have to do this. In all aspects of this review, we are trying to give the same importance to what people with lived experience tell us and what professionals tell us. To make this possible, we are trying to make every part of the review accessible to all people.

This review has 3 stages. Before stage 1 began, we chose advisors for the review. We have the same number of advisors with lived experience as professional advisors. The advisors help us to make sure that the review is accessible to people and that the review can get the evidence that it needs. The advisors do not decide what the review should do. Only the review team makes decisions.
Stage 1: September 2018 - February 2019
We heard about people's experiences
We collected stories about people's experience of the Mental Health Act

Stage 2: March 2019 - July 2019
We thought about what needs to change and what needs to stay the same in the Mental Health Act.
We did this with people with lived experience and professionals

Stage 3: August 2019 - October 2019
We are telling everyone about the suggestions that came out of stage 2.
We are asking everyone what they think about what should stay the same and what should change in mental health law.

Reporting: November and December 2019
The review's executive group will agree and write the report and recommendations.
The Chair will make these recommendations to the Scottish Government
Stage 1

In stage 1 we asked about people’s experiences of the Mental Health Act and how the Act affects people’s human rights. We needed to find this out from people who had experience of the Mental Health Act. This included people with learning disability, autistic people, carers, and professionals. We called this “new evidence”.

We also needed to find how the Mental Health Act affects people’s human rights from what people had already written. We called these sources of information “reports”. These include articles in journals, news reports and other written reports. The reports were about mental health and rights in general, not just the Act.

Stage 1 told us that even when good care is provided, the Mental Health Act sometimes fails to protect people’s rights. We also heard that the Act sometimes makes it legal for public services to do things that have negative effects overall on people’s human rights. You can read more in our stage 1 report [link].

Stage 2

In stage 2, we asked organisations how the law could promote and protect human rights better in future. We met with organisation of autistic people and people with learning disability, and with carers organisations. We met with professional, third sector and public sector organisations. We met with human rights, judicial and monitoring organisations.

We also needed to understand what people have tried to do in the law and in practice, in this country and in other countries. We met or spoke with experts in the law and in services for autistic people and people with learning disability. These experts were in all of the countries in the United Kingdom and Ireland. We also spoke to experts in Australia, Canada, New Zealand and Switzerland.

After hearing all of that, we developed some ideas on what the law might do in future. We tested different ideas with groups of people with lived experience and professionals. After that, we made some changes to the ideas.

At the end of stage 2, we looked at all of the suggestions that organisations had made to us. This told us that we needed to have some more ideas for changes to the law. We then took all of these ideas and asked some legal experts to check that the ideas would work in law.

Stage 3

In stage 3, we are asking for your views on suggestions for the law in future. We need to know what you think of the suggestions in this document. At the end of stage 3, we will consider what you tell us about these suggestions.

Final report and recommendations

We will send a final report on this review to the Scottish Government in December 2019. That report will tell the Scottish Government what we did in this review and what we found. It will report on what people told us in stage 3. What people tell us will have an effect on what we write in the final report.

The final report will give recommendations to Scottish Government on how mental health law should be in future, for autistic people and people with learning disability.
1.2 The challenge for Scotland

Are people well served by the law?

An important part of this review’s remit is to consider:

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

At the end of stage 1, we found that autistic people and people with learning disability are not well served by the Mental Health (Care and Treatment) (Scotland) Act 2003. We do not think that this law is good enough at promoting and protecting the human rights of autistic people and people with learning disability.

Complying with the Convention on the Rights of Persons with Disabilities

We understand that when it was written, Scotland’s Mental Health Act was one of the best mental health laws in the world for human rights. After that, the United Nations decided that governments were not doing enough for the human rights of people with disabilities. The United Nations created the Convention on the Rights of Persons with Disabilities link. It is very important that Scotland complies in full with this Convention. 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 (paragraph 4).

All nations are challenged to comply with this Convention. We think that it will take a lot of time and effort to do this. However, as part of the United Kingdom, Scotland has already committed to comply with it. We understand that the question is not whether to comply with the Convention on the Rights of Persons with Disabilities, but how to comply with it.

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. This is also very important. As you will see in this document, we think that Scotland’s Mental Health Act may not fully comply with the European Convention on Human Rights. Since 2003, judgments of the European Court of Human Rights have developed our understanding of how the European Convention should be reflected in law. Some judgments have created challenges for many European nations.

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.
Equality and non-discrimination in how people experience their rights

The Convention on the Rights of Persons with Disabilities makes it clear that the rights of all people should be enjoyed on the same basis for everyone. Also, the rights of people with disabilities can be limited. However, a characteristic such as disability can never be used to justify a limit on human rights. Even detention and compulsory treatment could be justified. But autistic people and people with learning disability must not be detained or given compulsory care or treatment because of their disability.

Supported decision-making

In the Convention on the Rights of Persons with Disabilities, support for making decisions is very important. This includes support to give effect to those decisions in reality.

Supported decision-making is not just a way of supporting someone to make decisions in a shared way with other people. Each person with disability is entitled to make their own decision. Supported 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.

Proportionate decisions

When people’s human rights are limited, this must be done in a way that is proportionate. 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. For example, it is not proportionate to limit the rights of a person with disability on the basis that this might help the ‘greater good’ of other people in general.

Led by people with disabilities

Scotland has to fully involve autistic people and people with learning disability in the whole process of making Scots law comply with human rights standards. We have tried to do that in this review. The Convention on the Rights of Persons with Disabilities also requires Scotland to fully involve autistic people and people with learning disability in developing, implementing and monitoring the laws and policies that support Scotland’s commitment to this Convention.

The ‘paradigm shift’ in how we understand disability

We think that a lot of change 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.

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 legal capacity. We discuss this more in section 2.

Scotland’s opportunity
We suggest that Scotland has an opportunity to face these challenges, and to become a leader in implementing human rights in mental health law and in practical reality. This consultation document gives you our suggestions on how Scotland can do this for autistic people and people with learning disability, based on what we have heard from the people of Scotland and from around the world.

What we are asking of you
In this consultation, we are asking for your suggestions on our vision for this change. It is a big vision, and it would not be easy to implement. Our final report will deal with how we can work towards this vision.
1.3 The changes that we think need to happen

Here is a summary of the changes that we think need to happen in mental health law, for autistic people and for people with learning disability.

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

We suggest that Scotland needs to move to understanding autism and learning disability as disabilities, not as mental disorders.

We think that Scotland’s mental health services for autistic people and people with learning disability need to move to a human rights culture.

In Scots law, everyone is presumed to have legal capacity. We suggest that it should not be possible to challenge the legal capacity of autistic people or people with learning disability.

Section 3. Support for decision making

We suggest that Scotland should make change to comply in full with a key right in the Convention on the Rights of Persons with Disabilities, the right to equal recognition before the law.

To make it possible for autistic people and people with learning disability to have and use their legal capacity, Scotland would have to give strong support for decision making. We make a range of suggestions on how this support should be set up.

We also discuss how we think decisions should be made on psychological interventions, psychotropic medication, and at times of crisis.

Section 4. Support, care and treatment

We suggest that autistic people and people with learning disability should be given rights in law to have access to the support, care and treatment that they need.

We also make suggestions on how support, care and treatment could be provided for women, children and offenders, in ways that respect human rights.

We discuss some duties that would need to be placed on public authorities to make these rights real.

Section 5. Where support, care and treatment happens

We suggest that there should be a shift towards voluntary support and care that emphasises social support and care. We suggest a shift away from compulsory treatment in hospitals that emphasise medical treatment.

We suggest places where support, care and treatment should happen. This includes a new type of service which we call secure support centres.
Section 6. How professionals make decisions
We suggest that Scotland should make changes to move closer to compliance with the right to liberty and security. This is another key right in the Convention on the Rights of Persons with Disabilities.
We suggest that Scotland is not yet ready to end all detention on the basis of disability, or all compulsory treatment, in a safe way.
We suggest that human rights assessments should be the basis for all professional decision making for autistic people and people with learning disability.
We suggest new roles for a broad range of professionals.

Section 7. How decisions are monitored
We think that Scotland needs mental health law and services based on human rights. We think that autistic people and people with learning disability should be routinely involved in developing, implementing and monitoring the law and services.
We suggest that the Mental Welfare Commission for Scotland and the Mental Health Tribunal for Scotland should be more authority to protect the rights of autistic people and people with learning disability.
We make a range of suggestions on how human rights should be monitored.

Section 8. Offenders
We suggest changes to make the criminal justice system fairer for autistic people and people with learning disability.
We suggest that Scotland uses ‘intermediaries’ to support suspects and defendants who have communication impairment.
We suggest a change to how disability is understood in criminal law. This change could make it possible for person to be held responsible for an offence, but also to have adapted consequences that take account of the person's disability.
We suggest that punishment, treatment and support to stop offending should be clearly separated out in law for autistic offenders and offenders with learning disability.
We suggest that punishment should not be longer for these offenders than for any other offenders.

Section 9. Where support, care and treatment happens for offenders
We suggest that rehabilitation should usually happen in the community, for offences that would usually lead to community rehabilitation for anyone else.
We suggest that offenders should usually be given support, care or treatment in the community or in rehabilitation centres, not in hospitals.
We suggest that prison should only be used for autistic offenders or offenders with learning disability when it is specially designed or adapted to meet the person’s needs.

Section 10. What this means for the law

We suggest that autism and learning disability should no longer be defined as ‘mental disorders’ in Scotland’s Mental Health Act.

We suggest that Scotland develops a new law to give ‘positive rights’ for support, care and treatment to autistic people and people with learning disability.

We give a summary of the changes that we are suggesting for criminal law.

We suggest how Scotland might prepare to end detention on the basis of disability, and to end compulsory treatment, at some time in the future.
2. How we understand autism, learning disability and mental health

This part tells you about three things that you will need to know about, to understand the rest of this document.

We are suggesting that Scotland needs to understand autism and learning disability differently, to be able to promote, protect and fulfil people’s human rights, and to enable people to have the best mental health that they can have.

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2.1 Disability

What Scotland has to do to meet its human rights duties
Scotland needs to use a definition of disability that fits with the Convention on the Rights of Persons with Disabilities.

What we think Scotland needs to do
We spoke with experts in law, disability, public health and psychiatry.
We think that Scotland needs to define autism and learning disability as disabilities.
We think that Scotland needs to understand autism and learning disability as disabilities.

How we think Scotland could do this in law

Autism and learning disability as disabilities
We think that autism and learning disability need to be defined as disabilities, not as ‘mental disorders’.
We think that Scotland could use this definition of disability from the Convention:
‘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.’

New definitions in law
We think that definitions of autism and learning disability could be made in law, based on that definition.
Using the disability model, we could say that the autistic person has ‘autistic impairment’ at all times (and strengths also). We could say that any person who has a diagnosis of autism has autistic impairment.
We might say that when the autistic person is experiencing stress, distress or serious limitations, the person is experiencing ‘autistic disability’. The disability is in the interaction between the person’s autistic impairment, and attitudinal and environmental barriers. This ‘autistic disability’ would be temporary.
We think that the law could take a similar approach for people with learning disability. In future, we might say that the person has intellectual impairment at all times (and strengths also). We might say that when the intellectually impaired person is experiencing stress, distress or serious limitation, the person is experiencing ‘intellectual disability’. This ‘intellectual disability’ would be temporary.
Limits to human rights

We think that the definitions that we suggest above would be important when professionals were considering limits to a person’s rights. We discuss this in section 6.2 on ‘limits to human rights’.

How we think Scotland could do this in practice

A new understanding of autism and learning disability

We think that autism and learning disability need to be understood as disabilities, not as ‘mental disorders’. We think that this understanding should include the definitions that we described just before this page. In this understanding, a person always has autistic impairment or intellectual impairment. The person does not always have autistic disability or intellectual disability.

In our Mental Health Act, mental disorders are understood as medical disorders. Autism and learning disability are diagnosed by psychiatrists or clinical psychologists. However, there is no medical ‘cure’ or treatment for autism or learning disability. We think that understanding autism and learning disability as disabilities is more appropriate. We think that this be more effective for autistic people and people with learning disability who need support, care or treatment.

More information about human rights duties

Convention on the Rights of Persons with Disabilities

In the preamble (introduction) to the Convention, section e tells us that governments have agreed to this Convention ‘recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others’

Article 1 on the purpose of the Convention tells governments that ‘persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’
2.2 Human rights

What Scotland has to do to meet its human rights duties
Scotland needs to promote human rights across all areas of society. This includes all mental health services that support autistic people and people with learning disability.

What we think Scotland needs to do
We have discussed our suggestions with legal experts.
We heard from Police Scotland about how they have begun to introduce a human rights culture in their organisation.
We think that Scotland needs to introduce a human rights culture across all mental health services for autistic people and people with learning disability.
We think that a number of different approaches will be needed. This is to support mental health and learning disability services to move towards a human rights culture.

How we think Scotland could do this in law

Risk
We are aware that the culture in mental health and learning disability services can be risk averse. This culture can encourage professionals to make most decisions to reduce risks to health, safety or welfare. Sometimes, these decisions can put serious limits on human rights. This can give no benefit to some people, or even cause harm to them.
We think that the law can drive a change towards a human rights culture. We think that a human rights culture would enable professionals to support more people to take reasonable, positive risks.

Reasonable decisions
We suggest that a human rights based system for all decision making would enable professionals to understand and show how their decisions promote and protect human rights. Professionals could use this system to show that their decisions are reasonable, and that they are acting in ways that are compatible with human rights.

Human rights language
We suggest that Scotland should use the language of human rights treaties directly in Scots law. This includes the rights and language of the Convention on the Rights of Persons with Disabilities. These rights would need to be interpreted in ways that fit...
with both the Convention on the Rights of Persons with Disabilities, and the European Convention on Human Rights. We think that this is possible.

**Other changes**

We think that other things are needed to support the move to a human rights culture:

- Statement of rights, will and preference in section 3.1
- Human rights assessment in section 6.1
- Human rights-based standards in section 7.2
- Tribunal decisions based on human rights assessments in section 7.3

**How we think Scotland could do this in practice**

**Code of ethics**

Police Scotland has a code of ethics. It has a strong focus on human rights [link]. We think that mental health services for autistic people and people with learning disability may need a code of ethics.

**Equality and human rights**

Police Scotland also checks all of its ‘standard operating procedures’ for equality and human rights. These checks can be seen by the public [link]. We think that all policies and procedures need to be tested against human rights. They need to be tested for equality and non-discrimination.

**Human rights language in practice**

We suggest that human rights language should be used in practice. We think that this language can accessible to everyone. This language would need to be accurate about human rights. It would need to work for people with lived experience. This language could be used by all professionals.

**Education and training**

We think that a human rights culture would need some changes in education for professionals. We would also need some changes in training for people who are professionals now.
More information about human rights duties

Article 1 tells governments that ‘the purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.’

Article 4 is about general obligations. It tells governments to ‘take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes’

Article 8 on awareness-raising tells governments to ‘adopt immediate, effective and appropriate measures to

(a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

(b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

(c) To promote awareness of the capabilities and contributions of persons with disabilities.’

Article 25(d) on health tells governments to ‘require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care’
2.3 Legal capacity

What Scotland has to do to meet its human rights duties
Scotland needs to ensure that the rights, will and preferences of autistic people and people with learning disability are respected in all decisions that affect those people.

What we think Scotland needs to do
We think that Scotland needs to recognise the legal capacity of all autistic people and people with learning disability at all times. People with legal capacity can make their own decisions. They can make agreements with other people that are respected by the law.

We think that Scotland needs to give rights in law for support for decision making. This is also called 'support for the exercise of legal capacity'.

We think that Scotland needs to put safeguards (protections) in law. This is to ensure that people can get and use this support.

How we think Scotland could do this in law

People always have legal capacity
The Convention on the Rights of Persons with Disability requires our law to recognise the legal capacity of all persons with disabilities at all times. That Convention requires our law to include rights to support for people to make their own decisions. It also requires that people can get support to make these decisions real. This is called support to exercise (use) legal capacity.

Scotland already has a ‘presumption’ of legal capacity in law link. This means that the law gives legal capacity to everyone over 16 years of age, and sometimes to children below that age link. A person’s legal capacity can then be challenged, and the law makes it possible for a person’s legal capacity to be limited. A person’s legal capacity can be limited if a professional thinks that a person’s mental capacity is limited. Mental capacity for decision making is usually understood as the ability that people have to make decisions on their own.

Change criteria for limits on human rights
At present, a psychiatrist can say that an autistic person or person with learning disability has ‘significantly impaired decision making ability’. The person can then be detained and given compulsory treatment under the Mental Health Act, if they meet this criterion and other criteria. We suggest that these criteria should change in section 6.2 on ‘limits on human rights’.

Make legal capacity consistent in other laws
We suggest that all autistic people and people with learning disability should have legal capacity at all times. We suggest that it should no longer be possible in law to challenge the legal capacity of autistic people or people with learning disability. We
are suggesting this in the context of mental health services. However, we think that this could only work well if legal capacity could not be challenged in other contexts, such as guardianship. In guardianship, a person’s power to make decisions is taken away and is given to another person. Another review, the Scott review, may look at legal capacity in the context of guardianship.

How we think Scotland could do this in practice

Rights to support for decision making

These changes in law would have to come with strong rights to support for decision making (support for the exercise of legal capacity). This support would be needed for all of the decisions that a person could make, in the context of their mental health. In part 3, we say what support we think is needed, and how the law might need to change. The law would have to make sure that this support is offered to all autistic people and people with learning disability who may need mental health services. This support should ensure that all decisions are based on the person’s rights, will and preferences. It should ensure that all of the person’s rights are respected.

More information about human rights duties

Article 12 of the Convention on the Rights of Persons with Disabilities is about equal recognition before the law.

Article 12(1) says that governments ‘reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.’

Article 12(2) tells governments to ‘recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.’

Article 12(3) tells governments to ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’

Article 12(4) tells governments to ‘ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.’

Article 12(5) may be less relevant to mental health law, but we include it here for completeness: ‘Subject to the provisions of this article’ as described above, governments are told to ‘take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit’ and to ‘ensure that persons with disabilities are not arbitrarily deprived of their property.’
3. Support for decision making

Support for decision making is support that helps a person to form a view about what they want to happen. It often 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.

We have had to think about support for decision making in this review. It is an important part of what the Convention on the Rights of Disabilities requires in mental health law and in other law. Also, what we found in stage 1 told us that we needed to think about support for decision making.

We are aware that Scottish Government has begun other work on supported decision making, and that this work may continue in another review of Scotland’s Mental Health Act and related laws.

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3.1 Statement of rights, will and preferences

What Scotland has to do to meet its human rights duties
Scotland has to make sure that the rights, will and preferences of autistic people and people with learning disability are respected at all times.

What we think Scotland needs to do
In all decisions, the person’s rights, will and preferences must be respected by professionals.

We think that the advance statement in the Mental Health Act could be replaced by a statement of rights, will and preferences.

How we think Scotland could do this in law
We heard from legal experts about the Convention on the Rights of Persons with Disabilities, and how this 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.

We think that the law should require all decisions to respect the person’s rights, will and preferences. This means more than considering the person’s rights, will and preferences. It does not mean that the person’s will and preference will always determine what happens for them.

We think that there should be special regard for the rights, will and preferences of people with disability when decisions are being made, including decisions that could limit a person’s rights in any way. We discuss how the statement of rights, will and preferences could work as part of law to influence decision making, in section 6.1 on human rights assessments.

How we think Scotland could do this in practice
The statement of rights, will and preferences would work differently from the advance statement. Its validity would be 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.

What the statement could be about
The statement could 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 are a broad range of rights that are relevant to mental health link.
How the statement could be made

The statement would be expressed in any permanent way. This could be in writing, with pictures, or in a sound or video recording.

Expressing will and preferences informally

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.

The role of independent advocacy and curator ad litem

An independent advocate or decision supporter would offer the person support to produce a statement. Independent advocacy is discussed in section 3.2. Decision supporters are discussed in section 3.3.

In the curator ad litem role, a professional 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.

Disagreement about statements of rights, will and preferences

We would expect all professionals to act to put each person’s will and preferences into effect. It should become rare for professions not to do this. Any professional action that did not follow the person’s will and preference would have be justified. We think that every person whose rights may be limited should first have a human rights assessment. Human rights assessments are discussed in section 6.1. The professional would use this assessment, with the person’s expressed will and preferences, to consider what actions would most benefit the person’s human rights overall.

When someone changes their mind

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 could consider the statement, and the person’s new will and preferences, against the person’s human rights assessment. The professional would then decide to follow either the person’s previous will and preferences or their current will and preferences. They would base this decision on their view on which would give most benefit overall to the person’s human rights.

Decisions based on human rights

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 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.
Communicating decisions

Any professional decision to not follow a person’s statement of rights, will and preferences would put a limit on the person’s human rights. We think that a professional should always offer to discuss a decision with a person and their supporter before acting against the person’s will and preferences.

Challenging decisions

We think that each person would need a right to challenge any professional decision that may not be proportionate for their human rights. They could do this 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. We think the person would need a right to notify the Mental Welfare Commission when any statement of rights, will and preferences was not complied with, in addition to duties on professionals to report this. We discuss the Mental Welfare Commission in section 7.2.

We think that the person would also need a right to take human rights breaches to the Mental Health Tribunal, which we discuss in section 7.3. This could include when a professional did not agree with the person’s will and preferences for support, care and treatment. The person would need to show that the professional’s decision was not proportionate for the person’s rights overall. For example, the person might tell the tribunal that the professional’s decision had not brought any benefit to the person. Or the person might tell the tribunal that the professional’s decision did not fit with a human rights assessment that the tribunal had approved.

More information about human rights duties

Article 12 of the Convention on the Rights of Persons with Disabilities is about equal recognition before the law.

Article 12(3) tells governments to ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’

Article 12(4) tells governments to ‘ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.’
3.2 Independent advocacy

What Scotland has to do to meet its human rights duties
Scotland has to ensure that autistic people and people with learning disability have the support that they need to make their own decisions about their mental health, and to influence decisions that affect their mental health.

What we think Scotland needs to do
We think that Scotland needs to ensure that every autistic person and person with learning disability can have access to independent advocacy that meets their needs. This includes non-instructed advocacy for people who cannot tell an independent advocate what to do.

How we think Scotland could do this in law
What happens now
We understand that Scotland’s Mental Health Act already gives all autistic people and people with learning disability a right of access to independent advocacy. Independent advocates are directed by the person with disability, who is the advocacy partner. The independent advocate works to promote and protect the advocacy partner’s rights, will and preferences.

In stage 1, we heard that people value independent advocacy, but it is not always consistently available.

Recommendations and human rights requirements
We spoke with some authors of the Essex Autonomy Project’s Three Jurisdictions Report, about their recommendations on independent advocacy. The Convention on the Rights of Persons with Disabilities requires that the rights, will and preferences of autistic people and people with learning disability are respected in decision making. We think that this requires more commitment to independent advocacy.

Duties to fund advocacy
We suggest that the law should place duties on Scottish Government and public authorities to ensure funding for everyone who needs an independent advocate. The level of funding should ensure that each person has an advocate consistently for each decision making process for which the person requires support.

Increased powers for advocacy
We looked at the powers that independent advocates have in law in England, and discussed this with an expert on learning disability policy at NHS England.

We think that independent advocacy needs to have powers, to be able to support all people through the whole process of decision making. The advocate would have 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.

How we think Scotland could do this in practice

The offer of advocacy

Independent advocacy would be offered to all people on an opt-out basis. It would be offered because the person needs support for decision making, not because they have disability or mental disorder. If the advocate found that the person could not understand advocacy, then the advocate would work for that person automatically. This is called non-instructed advocacy. Non-instructed advocacy is for people with impairments in communication who cannot clearly express their own views. The advocate would give a best interpretation of the person's will and preferences.

Specialist support

All independent advocacy services, and independent advocates, would need to work to a high standard of communication with autistic people and people with learning disability. Autistic people and people with learning disability would need consistent support from all independent advocacy services, to work with the new approach that we suggest in this document. For independent advocacy services to support decision making in crises, services might be needed at all times.

The role of independent advocacy

Independent advocates understand that their role 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 learning disability, and relevant rights of other people.

Independent advocacy and the best interpretation of rights, will and preferences

We suggest that professionals would not have authority to give medical treatment to a person when the person did not want it, if the person was able to instruct their independent advocate. We suggest that there might be an exception for this in emergencies. For people who have non-instructed advocacy, professionals would consider the independent advocate’s best interpretation of the person’s will and preferences. If this said that the person may not want to receive the medical treatment, the Tribunal would respect the person’s will and preference as interpreted by the independent advocate.

Non-instructed advocacy

We think that non-instructed advocacy will be needed for professionals to be able to move from a ‘best interests’ approach, where professionals made a decision based on their view of what was best for the person. Professionals need to make decisions that are based on each person’s rights, will and preferences, and that are proportionate in relation to all of the person’s rights.
In non-instructed advocacy, the independent advocate gives a ‘best interpretation’ of the person’s will and preferences. They can give this in the context of the person’s human rights. Professional would use this information within their decision making.

We suggest that a person who has non-instructed advocacy could be said to be in agreement with decisions on support, care or treatment when all of these things happen –

The independent advocate decides that they have given all possible support to the person, to give effect to the person’s will and preferences

The independent advocate has given a best interpretation of the person’s will and preferences, in the context of the person’s human rights

The independent advocate does not believe that the person objects to support, care or treatment

The person’s human rights assessment concludes that support, care or treatment will give a significant benefit to the person’s human rights overall

After a decision is made, in the independent advocate’s opinion, the person’s behaviour does not show that they object to the support, care or treatment

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More information about human rights duties

Article 5 of the Convention on the Rights of Persons with Disabilities is about equality and non-discrimination.

Article 5(3) says that in order to promote equality and eliminate discrimination, governments must ‘take all appropriate steps to ensure that reasonable accommodation [reasonable adjustment] is provided.’

Article 5(4) says that ‘specific measures which are necessary to accelerate or achieve de facto [real] equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.’

Article 12 is about equal recognition before the law.

Article 12(3) tells governments to ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity [giving effect to their will and preference in real life].’

Article 12(4) tells governments to ‘ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.’
The Committee on the Rights of Persons with Disabilities discussed article 12 in its general comment 1:

‘21. Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the “best interpretation of will and preferences” must replace the “best interests” determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The “best interests” principle is not a safeguard which complies with article 12 in relation to adults. The “will and preferences” paradigm must replace the “best interests” paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.’
3.3 Decision supporters

A decision supporter could be any person who an autistic person or person with learning disability chooses, who helps them to form their own decisions and to put these decisions into effect. The person’s decision supporter would be someone with a personal relationship with the person with disability, not a professional.

We may not make any recommendations about decision supporters, as another independent review may look at this for Scottish Government. We discuss decision supporters here, so that we can consider how independent advocacy and statements of rights, will and preferences might fit with the role a decision supporter, whatever that role may look like in future.

What Scotland has to do to meet its human rights duties

Scotland has to ensure that autistic people and people with learning disability have the support that they need to make their own decisions about their mental health, and to influence decisions that affect their mental health.

What we think Scotland needs to do

We think that Scotland needs to ensure that every autistic person and person with learning disability can choose who supports them to make their own decisions.

How we think Scotland could do this in law

We spoke with the Mental Health Commission in the Republic of Ireland, which will run a decision support service that has been set up in law. We also read a proposal on supported decision making from People First Scotland link. We spoke with academics who are experts in supported decision making.

We understand that in Ireland, the law has been set up to allow people to chose other people to support their decision making in a range of different ways. The Mental Health Commission will be a regulator for supported decision making.

Another independent review may consider whether decision supporters need to be introduced in law in Scotland.

How we think Scotland could do this in practice

We think that Scotland could set up a decision support service that would work in practice. Another independent review may consider this.
More information about human rights duties

Article 12 is about equal recognition before the law.

Article 12(3) tells governments to ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’

Article 12(4) tells governments to ‘ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.’
3.4 Unpaid carers

The Mental Health Act has a role of ‘named person’. This is often a person’s unpaid carer. A named person has rights to be told about the person, rights to give their view about the person at tribunal hearings, and other rights. Unpaid carers only have rights to act as named persons if they are the parent of a child, or if an adult has asked them to act as a named person. This means that people with learning disability do not have a named person if professionals do not think that they are able to choose a named person.

The named person gives their own view about what would be in the person’s ‘best interests’, which means, what they think would be best for the person. The named person role is not to support the person’s own decisions.

We think that in future, many unpaid carers could be decision supporters. We may not make any specific recommendations about the ‘named person’ role in this review. It may be that some of our suggestions would have a particular effect on unpaid carers, and we discuss this here.

What Scotland has to do to meet its human rights duties

We think that Scotland needs to demonstrate respect for rights to privacy and to family life in all decisions that affect autistic people, people with learning disability, and unpaid carers.

What we think Scotland needs to do

We think that people in all roles need to make decisions based on the rights, will and preferences of the autistic person or person with learning disability. We think that all decision making based on ‘best interests’ needs to end.

We think that is important for the rights of autistic people and people with learning disability that professionals and public services recognise and value unpaid carers’ understanding of the person whom they care for.

We think that the rights of unpaid carers need to be considered in human rights assessments. We discuss those in section 6.1.

How we think Scotland could do this in law

Another independent review may consider the role of unpaid carers in law in Scotland.

How we think Scotland could do this in practice

The right to family life

We think that human rights assessments would need to consider the right to family life, for the autistic person and person with learning disability, and also for any family members including unpaid carers.
Carers and decision making

We think that unpaid carers need to be involved in decision making, where the person wants this to support the person’s own decision making, and also to support professionals in their decisions.

For example, an unpaid carer may have knowledge and understanding of a person’s communication needs or support needs. A person may want their unpaid carer to contribute to their statement of rights, will and preferences, or to their human rights assessment. We think that this information could be shared with professionals, if the person wanted this, if the person was a very young child, or if the person was receiving non-instructed advocacy. We would expect professionals to accept this information and use it in human rights assessments and care planning, for example. We are aware that the Carers (Scotland) Act 2016 gives rights to carers to be involved in hospital discharge, and to have their views and the care that they provide made part of care assessments.

Carers and non-instructed advocacy

We think that unpaid carers would have an important role in working with non-instructed advocates. Those advocates would need to understand each person’s communication, and their will and preference. 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.

We talk about the possibility of unpaid carers being decision supporters, in section 3.3. However, unpaid carers may also need to put forward their view on their own rights, including at tribunals. For example, an adult with disability may be living quite far from home to receive care and treatment. The adult with disability, or their unpaid carer, may feel that this is limiting their right to private and family life. Both the adult with disability and the unpaid carer may need to express their views on this at a tribunal. They may need separate, independent representation to protect their rights.

More information about human rights duties

Convention on the Rights of Persons with Disabilities:

Article 22 is about respect for privacy.

Article 22(1) tells governments that ‘no person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.’

Article 22(2) tells governments to ‘protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.’

European Convention on Human Rights:

Article 8 is the right to respect for private and family life.
Article 8(1) tells governments that 'everyone has the right to respect for his private and family life, his home and his correspondence.'

Article 8(2) tells governments that 'there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'
3.5 Information from professionals to support decision making

What Scotland has to do to meet its human rights duties
Scotland needs to ensure that all information that may be relevant to mental health is accessible to autistic people and people with learning disability.

What we think Scotland needs to do
We are aware that England has an accessible information standard for health and social care link. We discussed this with an expert on learning disability policy at NHS England.

We think that Scotland needs to set standards for accessible communication, for autistic people and people with learning disability.

How we think Scotland could do this in law
We think that these standards could be set by the Mental Welfare Commission for Scotland, using new powers that we suggest in section 7.2.

How we think Scotland could do this in practice
With more supported decision making, and with the other changes that we suggest in this consultation, there should be much less compulsory care and treatment for autistic people and people with learning disability. We would expect people to make their own decisions more often, including those people whose rights have been limited.

For supported decision making, it will be important that professionals give people accessible information about support, care and treatment options. This information will need to be offered to people at every time where they may need it, including all times where the person may need to make decisions.

More information about human rights duties
Convention on the Right of Persons with Disabilities:
Article 4(1)(h) tells governments to ‘provide accessible information to persons with disabilities about …assistance, support services and facilities’

Article 9(2)(a) tells governments to ‘develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public’

Article 9(2)(i) tells governments to take appropriate measures to ‘promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information’
Article 25(g) on health tells governments to ‘require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia [amongst other things], raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation [making and promotion] of ethical standards for public and private health care’
3.6 Decisions about psychological interventions

The Millan review led to the Mental Health Act that Scotland currently has. The Millan report recommended that this review of learning disability and autism should happen. Part of the remit for this review is to consider the role of psychology in relation to the Mental Health Act. We discuss the role of psychologists in section 6.4.

The Millan review’s report said this about psychological interventions and learning disability [link](page 31, paragraph 40):

‘Insofar as there are interventions directed at alleviating problems caused by a person’s learning disability, these will more commonly be psychologically based. The Act contains no specific safeguards in relation to such interventions. Furthermore, the evidence of the effectiveness of interventions which are authorised under mental health law is limited. Challenging behaviour may reflect inappropriate or inadequate services, and the answer should be to provide the right services, rather than place the client under greater constraints.’

We think that these comments are still relevant today. Based on another section of the Millan report, we take these comments to apply equally to autism and to learning disability ([link](page 37, recommendation 4.9)).

What Scotland has to do to meet its human rights duties

Scotland has to move away from all use of support, care and treatment without consent, including use of psychological interventions without consent.

Scotland has to move towards all support, care and treatment being led by the rights, will and preferences of autistic people and people with learning disability.

What we think Scotland needs to do

In stage 1, we met with and heard from people who had lived experience and professional experience of psychological interventions. In stage 2, we met with professionals who had experience of using psychological interventions.

We think that Scotland needs to become aware, and stay aware, of the effects of psychological interventions on autistic people and people with learning disability, as individuals and as groups of people.

How we think Scotland could do this in law

We think that the law should require professionals to make all reasonable efforts to tell an autistic person or person with learning disability about the possible benefits and harms of any support, care or treatment.

We discussed Northern Ireland’s new Mental Capacity Act with a legal expert there. That law deals with consent for treatment for mental health. The law says that professionals have to show that they have done everything possible to support the person to make their own decision. If they cannot show this, they are not protected from legal liability in decisions about treatment.
Duties on professionals
We suggest 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. We suggest that the law should make clear that this is part of what is necessary for professionals to be protected from legal liability in decisions about treatments.

Separate authorisation
We also suggest that the law should require separate authorisation for each form of medical treatment, including all psychological interventions, such as therapies or Positive Behavioural Support.

Criteria for use of psychological interventions
In section 3.7, we discuss what we think the law needs to set out what needs to happen before psychotropic medications can be used. We think that some of those suggestions should also apply to psychological interventions:

- An autistic person or a person with learning disability would not be given a psychological intervention if it could cause serious harm to that person.
- An autistic person or a person with learning disability would not be given a psychological intervention where experience or other evidence shows that the intervention may do serious harm to that person.
- The person would only be given a psychological intervention where this would clearly lead to significant benefit to the person, and there was no other possible way for the person to receive this benefit.

Psychological interventions and human rights assessments
A human rights assessment would be needed before the use of any psychological intervention without consent. The assessment would only allow for the psychological intervention to be used as part of a proportionate approach to protecting all of the person’s human rights.

How we think Scotland could do this in practice
We suggest that autism and learning disability should be understood as disabilities, not as health problems, in section 2.1.

We suggest that Scottish Government needs to be confident that psychological interventions are used appropriately with these groups of people in Scotland.

In section 7.3, we discuss the powers of the Mental Health Tribunal for Scotland. We suggest that the tribunal could separately consider and authorise each form of medical treatment, including all psychological interventions.

We understand that some psychological interventions can be used appropriately with autistic people and people with learning disabilities, if those interventions are adapted properly for the person’s needs, and that this requires professionals with the skills to do this. We understand that the evidence base for the effectiveness of psychological therapies for autistic people link and people with learning disability link link is growing, but is still limited.
We think that supported decision making is particularly important in this context. We suggest that the support for decision making that we discuss earlier in this section will be important for decisions about psychological interventions.

More information about human rights duties

Convention on the Rights of Persons with Disabilities:

Article 12(3) tells governments to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Article 15(2) tells governments to ‘take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.’

Article 17 is about protecting the integrity of the person. It states that ‘every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.’

Article 25(d) tells governments to ‘require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care’

Committee on Economic, Social and Cultural Rights, comment 14, 2000 [link]:

‘12. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

(a) Availability…
(b) Accessibility...
(c) Acceptability…
(d) Quality…’
3.7 Decisions about prescribing psychotropic medication

Part of this review’s remit is to consider ‘current prescribing practice in psychotropic medication.’ This review is considering the way in which decisions are made about psychotropic medication under Scotland’s Mental Health Act. This is not a clinical review, so we do not discuss which psychotropic medications may help or cause harm to autistic people or people with learning disability.

What Scotland has to do to meet its human rights duties

Scotland has to move away from compulsory use of psychotropic medication for autistic people and people with learning disability.

Scotland needs to move towards support, care and other treatments that are led by the person’s rights, will and preferences.

What we found in stage 1

We heard from experts in prescribing medication in stage 1 and 2, including psychiatrists and an expert on pharmacy for people with learning disability. In stage 1, some people with lived experience told us that psychotropic medication had been helpful, and some told it that it had been unhelpful.

In stage 1, we also looked at reports about the use of psychotropic medication for autistic people and people with learning disability. The reports told us the following information, which is repeated from our stage 1 report link (page 30):

‘We do not know how many autistic people or people with learning disability are receiving psychotropic medication. We do not really know what the effects of these medications are for these groups of people.

National practice guidance states that people who are given any psychotropic medication should have regular reviews, to make sure that the medicine helps and is used in the right way, and to check for side effects or interactions with other medications. This does not always happen.

Many people with learning disability who do not have psychosis are being given anti-psychotic medications. Many people are being given these medications for ‘problem behaviours’. However, these drugs should not be used for this, and they can have serious side-effects.

There is little support for using medication for behaviours that challenge services, when the person has no mental illness, but medication is used for this. There is some support for using interventions such as positive behavioural support.

It can be difficult to give a correct diagnosis of health needs for a person with learning disability.

Medicines may be used differently by people with learning disability who have mental illness.

Some autistic people believe that they respond to medication in different ways. They think that this needs more study and acknowledgement.
Some autistic people and their carers believe that psychotropic medication has very serious effects on them."

We understand that there is almost no evidence that psychotropic medication is helpful in supporting people with learning disability with behaviour, and that psychotropic medications can cause life-limiting physical health problems. We are aware that evidence for the effectiveness of psychotropic medications for autistic people is also limited.

What Scotland has done to address prescribing practice

Scotland has not undertaken a large scale review of prescribing practice of psychotropic medication such as England undertook as part of a major response to the Winterbourne View scandal. That review led to England’s Transforming Care programme. One of the reports, from Public Health England, estimated that up to 35,000 adults with a learning disability in England were being prescribed an antipsychotic, an antidepressant or both without a good medical reason for this.

The only similar work that we are aware of in Scotland is reported in a newsletter of the Scottish Learning Disability Observatory (SLDO). We spoke with SLDO in stage 2 of the review.

After the Winterbourne Medicines Review, NHS England launched a programme to address this problem. We spoke with NHS England’s leads for STOMP in stage 2 of the review. STOMP stands for stopping over medication of people with a learning disability, autism or both with psychotropic medicines. It is an English national project involving many different organisations which are helping to stop the over use of these medicines.

What we think Scotland needs to do

We think that Scotland needs to become aware, and stay aware, of the effects of psychotropic medications on autistic people and people with learning disability, as individuals and as groups of people.

We think that Scottish Government should commission work that effectively promotes the appropriate prescribing and use of psychotropic medications by doctors, nurses and other professionals, for autistic people and people with learning disability.

We think that Scottish Government should commission research to understand the health effects of current prescribing practice for autistic people and people with learning disability in Scotland.

How we think Scotland could do this in law

We think that the law should allow for regulations on medical treatments including psychotropic medications. These regulations could include the following:

Support for decision making

The person should be offered support for decision making. In the rest of section 3, we suggested support for decision making that includes a statement of rights, will
and preference, special regard (respect) for the person’s will and preferences, stronger independent advocacy, and rights to information from professionals.

**Medicine that provides significant benefit and does not harm**

The person would only be given psychotropic medication where this would clearly lead to very significant benefit to the person, and there was no other possible way for the person to receive this benefit.

An autistic person or a person with learning disability would not be given psychotropic medication where experience or other evidence shows that the medication may do serious harm to that person.

**Medicine and human rights assessments**

As for all support, care and treatment that might limit a person’s rights, a human rights assessment would be needed before compulsory treatment with psychotropic medication. The assessment would only allow for psychotropic medication to be given as part of a proportionate approach to protecting all of the person’s human rights.

**Preventing the need for medicine**

Before giving medication, the professional would first seek to understand the cause of the person’s symptoms, as far as possible. The professional would do this unless it was necessary to administer medication immediately, based on an assessment of human rights.

The person would not be given psychotropic medication unless they were also offered other supports. This would be to reduce any damage that the medication might do, and to make it possible for the person to stop taking the medication.

**Reviewing medicine and stopping medicine**

Any person who was taking psychotropic medication would have a right to regular reviews of their health. These would be reviews of mental health and physical health, by doctors or nurses who understand mental health and physical health in autistic people and people with learning disability.

Every person would have a right to a plan to come off of psychotropic medication. The person would be offered a plan when the medication was first prescribed, and at every review of health. The person could request this plan at any time.

**How we think Scotland could do this in practice**

We suggest that autism and learning disability should be understood as disabilities, not as health problems, as discussed in section 2.1. We understand that some autistic people and some people with learning disability will need psychotropic medications at times, but we think that Scottish Government needs to get to a position where it is confident that psychotropic medications are being used appropriately with these groups of people in Scotland.

**Public health**

We think that the small amount of research that has been done in Scotland on prescribing practices tells us that Scotland does have an issue with prescribing of
psychotropic medications for people with learning disability. It seems that nothing is known about prescribing patterns for psychotropic medications for autistic people in Scotland.

We think that Scottish Government should seek expert advice on how to determine the extent of any public health issue in this area.

**Monitoring**

We think that a public health observatory could monitor the prescribing of psychotropic medications for autistic people and people with learning disability in Scotland, including the benefits and disadvantages of this prescribing for these groups of people.

We think that the Mental Welfare Commission could monitor the authorisation of compulsory treatment with psychotropic medication for autistic people and people with learning disability.

We think that monitoring should include the extent of prescribing without the person’s consent, for children under parental consent, and for adults without their consent.

**Culture change**

We think that, as in England, an effective change programme will require national leadership.

We think that autistic people and people with learning disability should be involved in the training of professionals, including training on prescribing practice. We think that training must ensure that health professionals have enough knowledge and experience of these conditions to ensure that they are able to give benefit rather than cause harm to the person.

We think that these health professionals must have access to the support and resources that they need to fully support people, such as speech and language therapy or psychology.

We think that all of these services should be routinely monitored to check that persons are receiving services and feel that they are receiving benefit from these services.
More information about human rights duties

Convention on the Rights of Persons with Disabilities:

Article 10 is about the right to life. It tells governments to ‘reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.’

Article 12(3) tells governments to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Article 15(2) tells governments to ‘take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.’

Article 17 is about protecting the integrity of the person. It states that ‘every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.’

Article 25(d) tells governments to ‘require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care’

Committee on Economic, Social and Cultural Rights, comment 14, 2000 link link:

‘12.The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

(a) Availability…
(b) Accessibility...
(c) Acceptability…
(d) Quality…’
3.8 Decisions in crises

What Scotland has to do to meet its human rights duties
Scotland needs to respect the full range of the person’s human rights even in times of crisis.
Scotland needs to respect the person’s will and preferences even in times of crisis.

What we think Scotland needs to do
We make suggestions in other sections that are relevant to times of crisis. We have brought these together in this section.

How we think Scotland could do this in law
In sections 4.2 and 4.3, we suggest that the law may need to make it very clear that it is never acceptable to reject a person from support, care or treatment because they are autistic or because they have learning disability.
Although some people will come to emergency psychiatric services, we think that it will be important for most people that they do not stay in general psychiatric services.

In section 4.7, we suggest duties on public authorities that would include:
A duty to provide access to specialist health and social care professional services for autistic people and people with learning disability
A duty to provide access to specially designed health and social care environments for autistic people and people with learning disability
A presumption in law of placement in a specialist health and social care environment for autistic people and people with learning disability whose rights are limited learning disability and autism.

How we think Scotland could do this in practice
Safe places and secure support centres
We discuss safe places in section 5.2. These would be places that people can choose to go in a crisis, without being made to have treatment.
We discuss secure support centres in section 5.3. These would be places where people’s rights could be limited, after a human rights assessment. In a crisis, for example, a person could be detained at a secure support centre.
Safe places and secure support centres would be designed and staffed specifically for autistic people and people with learning disability. They would be set up to enable people to come out of crisis, by addressing the factors that had disabled the person, and by giving support, care and treatment if needed.

The police
With safe places and secure support centres, we would still expect some autistic people and people with learning disability to come to the attention of the police at a
time of crisis. In section 6.2, we suggest that the current police power to remove a person from a public place to a place of safety on suspicion of mental disorder could be made ‘disability neutral’. We also think that when police find that they may need to intervene with a person, a standard procedure of asking all people whether they have a disability could make it possible for police to understand the support needs that an autistic person or person with disability may have. We met with Police Scotland, who let us know that mental health professionals are available to work with the police in the community in only a few areas of Scotland.

**Emergency psychiatric services**

We would also expect some people to continue to come to emergency psychiatric services. For example, an autistic person or person with learning disability may come to health services in crisis, through accident and emergency at a general hospital. We discuss NHS England’s approach to accessible communication in section 3.5. This includes making all health and social care services aware of a person’s communication needs. We think that this is important for all health and social care services, including accident and emergency services.

**Rights, will and preferences**

Even at times of crisis, people’s rights, will and preferences should be respected. Failure to do this can escalate a crisis. For example, an autistic person may have a way of self-regulating that seems odd to professionals, but this is likely to be essential for the person to come out of crisis. We think that support for decision making should be taken at least as seriously by professionals at times of crisis as at any other time.

**Human rights and crisis**

Also at times of crisis, we think that professionals should continue to make decisions on the basis of human rights. In an emergency, this will be a more basic human rights assessment than the full human rights assessment that we discuss in section 6.1. We think that, even now, professionals need to be taking this approach. Professionals need to be able to demonstrate that they are complying with existing duties under the Human Rights Act 1998 to comply with the European Convention on Human Rights.

**Joint crisis planning**

Joint crisis planning may be one of very few effective ways of reducing hospital admissions for mental health crises link (pages 258 and 265). We discussed this with an expert based in London link. This work has not focussed on autistic people or people with learning disability, but it does show that respecting people’s will and preferences can be clinically important in preventing or reducing crises.

**More information about human rights duties**

All of the suggestions in this section come from other sections. Those sections give more information on the human rights duties that relate to each suggestion.
4. Support, care and treatment

This is a review of Scotland’s mental health law for autistic people and people with learning 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 part, we discuss how we think the law could change to make sure that autistic people and people with learning disability get the help that they need for their mental health, whatever that support, care or treatment may be.

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4.1 Rights to support, care and treatment

What Scotland has to do to meet its human rights duties

Scotland has to move away from mental health law that focuses on detention and compulsory treatment. Scotland has to move towards a law that gives people access to support, care and treatment that they choose to use.

What we think Scotland needs to do

We think that Scotland needs to give autistic people and people with learning disability clear rights of access to the support, care and treatment that they need.

How we think Scotland could do this in law

A separate law for positive rights

We think that a separate law may be needed that sets out ‘positive rights’ for autistic people and people with learning disability. Positive rights would give duties to public authorities to provide support, care or treatment to the rights holder. We think that most rights would need to be given to all autistic people and people with learning disability. A separate law might also amend (change) Scotland’s Mental Health Act.

The right to health

We think that changes in law should reflect the United Nations right to health. 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.

We think that the law could do the following things to help Scottish Government to meet its duties under the right to health:

Convention of Rights of Persons with Disabilities

We suggest that the wording of the Convention on the Rights of Persons with Disabilities should be brought into law, at least for autistic people and people with learning disability. There is more detail about this in 2.2. Doing this would put principles and rights in Scots mental health law including dignity, accessibility, equality and non-discrimination for these people with disabilities.

Monitoring rights

These rights would need to be monitored to make sure that they happen. We discuss how these rights could be monitored in 7.4.

Specialist services and environments

We think that there should be duties on public authorities to give people access to specialist health and social care services and environments. We discuss these duties in section 4.8. We discuss those environments in sections 5 and 9.

We think that autistic people and people with learning disability would need to have the right to use specialist health and social care services, wherever the person was.
**General services that are accessible**

We also think that a right is needed to support, care and treatment that meets the needs of the individual as an autistic person or person with learning disability. We think that if Scottish Government chooses to accept any or all of those suggestions, all of these positive rights could be brought together in a new law. We discuss that idea in part 10.

**How we think Scotland could do this in practice**

**Planning and resources**

We think the changes that we suggest would need planning and resource allocation.

**Effective engagement**

It seems to us this review’s governance and engagement processes have worked well for autistic people and people with learning disability. Scottish Government may wish to use some of these processes, and any law or service reform processes that have led to significant changes in culture and in outcomes.

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**More information about human rights duties**

Committee on Economic, Social and Cultural Rights, comment 14, 2000 [link](#): ‘12.The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

(a) Availability…

(b) Accessibility...

(c) Acceptability…

(d) Quality…’

The Convention on the Rights of Persons with Disabilities sets out the right to health in article 25. It tells governments to ‘recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability..’ and to ‘...take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.’

It tells governments to:

(a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as
appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

(c) Provide these health services as close as possible to people’s own communities, including in rural areas;

(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

(e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

(f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.
4.2 Learning disability

What Scotland has to do to meet its human rights duties
Scotland needs to provide all of the support and services that people with learning disability need to reach the highest standard of health that they can reach.
Support, care and treatment for health must be available, accessible, acceptable and of good quality.

What we think Scotland needs to do
We understand that people with learning disability in Scotland tend to experience much more mental and physical ill health than other people in Scotland.
We think that Scotland needs to provide access to the services that people with learning disability need.
We think that Scotland needs to provide screening, assessment and diagnosis services for people with learning disability.

How we think Scotland could do this in law
Right to health checks
We understand that in other parts of the UK, people with learning disability have access to regular health checks. We think that people with learning disability need a right to this in law.

Clarity about right to access to support
We think the law may need to make it very clear that it is never acceptable to reject people from support, care or treatment because they have learning disability.

Right to access to screening, assessment and diagnosis
We also think that a right in law is needed to give access to screening, assessment and diagnosis for learning disability. There should be duties on public authorities to provide access to these services.

Standards for accessibility in law
There should be standards for accessibility for these services. The standards would apply to these services and other services. Standards for accessible information are discussed in section 3.5. Other standards for accessibility could be set by the Mental Welfare Commission for Scotland, which is discussed in section 7.2.

Duties for public authorities to give access to specialist services
We suggest that there should be duties on public authorities to give access to specialist health and social care services and environments for people with learning disability. There is more about this in section 4.8.
How we think Scotland could do this in practice

Provide health checks

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

We understand that regular health checks would need to be agreed with General Practitioners (GPs) as part of the NHS contract with GPs in Scotland.

The health checks would be needed for mental health, and also for physical health. We think that GPs would need support from other services to give these checks accessibly. We think that GPs may also need access to training on how to identify possible learning disability, and on how to identity possible mental health issues in people with learning disability.

More information about human rights duties

In the Convention on the Rights of Persons with Disabilities, see article 9 on accessibility and article 25 on health.
4.3 Autism

What Scotland has to do to meet its human rights duties

Scotland needs to provide all of the support and services that autistic people need to reach the highest standard of health that they can reach.

Support, care and treatment for health must be available, accessible, acceptable and of good quality.

What we think Scotland needs to do

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 accept or understand their autism.

We understand that autistic people in Scotland tend to experience much more mental and physical ill health than other people in Scotland.

We think that Scotland needs to provide access to the services that autistic people need.

We also think that a right in law is needed to give access to screening, assessment and diagnosis for autism, with duties on public authorities to provide access to these services.

We think that Scotland needs to provide a national autism service.

How we think Scotland could do this in law

Right to health checks

We think that autistic people need a right in law to regular health checks.

Right to access to screening, assessment and diagnosis

We also think that a right in law is needed on access to screening, assessment and diagnosis for autism, with duties on public authorities to provide access to these services.

Clarity about right to access to support

We think the law may need to make it very clear that it is never acceptable to reject people from support, care or treatment because they are autistic.

Standards for accessibility for services

There should be standards for accessibility for these services. The standards would apply to these services and other services. Standards for accessible information are discussed in section 3.5. Other standards for accessibility could be set by the Mental Welfare Commission for Scotland, which is discussed in section 7.2.

Duties for public authorities to provide specialist services

We suggest that there should be duties on public authorities to give access to specialist health and social care services and environments for autistic people. There is more about this in section 4.8.
How we think Scotland could do this in practice

**Provide health checks**

From evidence provided by Scottish Learning Disability Observatory, we understand that the level of mental health and physical health issues for autistic people is exceptionally high compared to the rest of the population [link]. We understand that regular health checks would need to be agreed with General Practitioners (GPs) as part of the NHS contract with GPs in Scotland.

The health checks would be needed for mental health, and also for physical health. We think that GPs would need support from other services to give these checks accessibly. We think that GPs would also need access to training on how to identify possible autism, and on how to identity possible mental health issues in autistic people.

**Set up a national autism service**

We also think that a national autism service is needed, to make it possible for mental health services to develop to meet the needs of autistic people. This service would offer specialist advice to professionals. What we found in stage 1 told us that there is, in general, a low level of understanding of autism in Scotland’s mental health services [link] (pages 25 and 54).

The European Court of Human Rights has indicated that support, care and treatment must meet the individual needs of people who are detained for mental health reasons [link]. We can only see this being achieved for autistic people if there is a transformation in understanding of autism in mental health services. A national autism service would make it possible for professionals to ensure that support, care and treatment are appropriate. This service’s expertise would enable the Mental Health Tribunal, Mental Welfare Commission and all services to be confident that professional decisions are proportionate for each person’s human rights. We think that this service, or independent professionals, would also be needed to give second opinions on support, care and treatment (discussed in section 7.4 on ‘professional review’).

We think that a national autism service would be needed to advise across all services that support autistic people’s mental health in any way. We think that this service would need to include autistic people’s understanding of autism, and would need to include a broad range of professionals.

**More information about human rights duties**

In the Convention on the Rights of Persons with Disabilities, see article 9 on accessibility and article 25 on health.

European Convention on Human Rights:

Press release from the European Court of Human Rights: Court judgment concerning the psychiatric treatment provided to a person in compulsory confinement since 2004. Rooman v Belgium, 2019 [link] Article 5 (right to liberty and security), page 5.
4.4 Women

What Scotland has to do to meet its human rights duties
Scotland needs to address discrimination that autistic women and women with learning disability experience, both as women or girls, and as people with disability.

What we think Scotland needs to do
We heard about the experiences of many women and some girls in stage 1 of the review. In stage 2 we met with SWAN, an organisation of autistic women.
We think that human rights assessments need to consider gender.
We think that monitoring needs to consider gender.
We think that decisions about support, care and treatment need to consider gender.

How we think Scotland could do this in law
Human rights assessments that consider gender
We discuss how the law may need to change for human rights assessments in section 6.1.
Monitoring that considers gender
We discuss monitoring in 7.2, and decisions about support, care and treatment in 7.3.

How we think Scotland could do this in practice
Decisions that are gender informed
We think it is important that there is open discussion about any aspect of gender that an autistic person or person with learning disability wants to discuss, in relation to decision-making, support, care or treatment. We think professionals should consider any possible discrimination seriously in all decision-making.
For example, forced separation of children and parents will very often have strong negative effects on women. In Scotland, the process of removing a child from parents is considered carefully through child protection processes, the courts and the Children’s Hearings system. Detention of a parent under the Mental Health Act can effectively remove a parent from their child, and the child from their parent. However, we think that the current decision making process for detention of a parent under the Mental Health Act may not consider the rights of the parent or the child as carefully as a child protection process would.
Diagnosis that is gender informed
We also heard about particular difficulties in getting a diagnosis for autistic women. We think that our suggestions in section 4.3 about support, care and treatment for autism could address this.
More information about human rights duties

Articles 3 give some principles of the Convention as ‘non-discrimination’, ‘equality of opportunity’ and ‘equality between men and women’.

Article 5(1) on equality and non-discrimination tells governments to ‘recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.’

Article 6 of the Convention on the Rights of Persons with Disabilities is about women with disabilities.

Article 6(1) states that governments ‘recognise that women and girls with disabilities are subject to multiple discrimination’, and ‘in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.’

Article 6(2) states that governments shall ‘take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.’

Article 25 is about the right to health. It tells governments to ‘…take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation’.
4.5 Children

What Scotland has to do to meet its human rights duties
Scotland needs to address discrimination that autistic children and children with learning disability experience, both as children and as people with disability.

What we think Scotland needs to do
In stage 1, we heard from parents and professionals with experience of autistic children and children with learning disability. In stage 2, we met with the office of the Children and Young People’s Commissioner for Scotland, we met with Children’s Hearings Scotland, and we visited a secure accommodation centre for children and young people.

We think that children’s rights should be considered in human rights assessments, monitoring, and decisions about support, care and treatment.

We think that children need to be given specific rights in Scots law that reflect their additional rights under the United Nations Convention on the Rights of the Child.

How we think Scotland could do this in law

Incorporation of children’s rights into Scots Law and mental health law
We think that mental health law for autistic people and people with learning disability 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 the Convention on the Rights of Persons with Disabilities (CRPD) and the European Convention on Human Rights (ECHR).

Alternatively, if the United Nations Convention of the Rights of the Child is brought directly into Scots Law, we think that mental health law should make direct links to that Convention, in addition to the CRPD and ECHR.

Law that says planning needs to be based on rights
We suggest that for autistic children and children with learning disability, the law should require all children’s services planning to be based on children’s rights, and on other relevant rights from the CRPD and ECHR.

A right to a co-ordinated support plan
We suggest that all autistic children and children with learning disability who need services for their mental health should have a right to be offered a Co-ordinated Support Plan, which supports planning for their education. We think that 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.

Extension of corporate parenting duties
We think that corporate parenting duties should be extended in law to include any new service that is developed for autistic people or people with learning disability.
A right to support for parents
We suggest that parents of autistic children and children with learning 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.

Law that ensures children can participate in decision making
We suggest that professionals should be given clear responsibilities in law to ensure children’s participation in decision making. We suggest a presumption that children should be offered support and opportunities to influence decisions about their own lives, as described for all people in section 3 on support for decision making. This would include stronger rights of access to independent advocacy.

How we think Scotland could do this in practice
Access to support for decision making
We think that children will need access to the support for decision making that we discussed in part 2, including the statement of rights, will and preferences, and independent advocacy.

Reduction in restraint and seclusion
We think it is important to be clear in law, policy and practice that restraint and seclusion are not treatment, and that these can cause trauma for a child. We discuss this in section 7.6, about adults and about children. We think that in practice, all public authorities and professionals need to relate to autistic children and children with learning disability as equal citizens who have rights as children and rights as persons with disabilities. We understand that there is a need for schools to address practice in restraint and seclusion link. A shift in culture may be needed so that all schools consistently respect these children’s rights. We think that health and social care services need to develop approaches that reduce the use of restraint and seclusion with autistic people and people with learning disability. We think that it would be important to involve education services in this process, to share learning in both directions.

More information about human rights duties
Children have many additional rights under the United Nations Convention on the Rights of the child link.
4.6 Offenders

What Scotland has to do to meet its human rights duties

Scotland needs to provide all of the support and services that autistic people and people with learning disability need to reach the highest standard of health that they can reach. This includes autistic offenders and offenders with learning disability in the community, in prison and in all secure environments.

What we think Scotland needs to do

In stage 1, we visited autistic offenders and offenders with learning disability in forensic hospitals and in the community. In stage 2, we spoke with professionals and with academic experts.

We think that Scotland needs to provide the same standard of support, care and treatment to autistic offenders and offenders with learning disability as it does to other autistic people and people with learning disability.

How we think Scotland could do this in law

A right to the same standards of care

We think that Scots law could make clear that autistic offenders and offenders with learning disability have a right to the same standards of support, care and treatment as other autistic people and people with learning disability.

Duties on public authorities to provide services of equal standard

We also suggest that the law should place duties on all relevant public authorities to provide these services, to the same standards as for all autistic people and people with learning disability.

How we think Scotland could do this in practice

Standards apply equally to offenders

We think that when standards are set for support, care and treatment, it should be made clear that these standards apply equally to offenders.

Access to specialist support and services

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

More information about human rights duties

In the Convention on the Rights of Persons with Disabilities, article 25 on the right to health makes no distinction between offenders and non-offenders. This right applies equally to all persons with disabilities.
4.7 Duties on public authorities

What Scotland has to do to meet its human rights duties

Scotland needs to plan to meet its human rights duties towards autistic people and people with learning disability, across all mental health services and the justice system.

Scotland has to provide the services that autistic people and people with learning disability need and want.

Scotland needs to monitor how effective mental health services are in reducing inequalities and in promoting and protecting human rights, for autistic people and people with learning disability.

Scotland needs to involve autistic people and people with learning disability in all of this.

What we think Scotland needs to do

We met with the Equality and Human Rights Commission, and with professionals who plan services for autistic people and people with learning disability.

We think that there should be duties on some public authorities to provide specialist professionals, services and environments for autistic people and people with learning disability.

We think that Scotland needs to ensure that public authorities comply with the public sector equality duty under the Equality Act 2010.

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

How we think Scotland could do this in law

Duties for service provision and monitoring

We think that Scotland needs the following in law for NHS Boards, Health & Social Care Partnerships, and local authorities:

- A duty to provide access to specialist health and social care professional services for autistic people and people with learning disability
- A duty to provide access to specially designed health and social care environments for autistic people and people with learning disability
- A presumption in law of placement in a specialist health and social care environment for autistic people and people with learning disability whose rights are limited

Duty to involve people with disabilities

The law should say that people with disabilities should be involved in development, implementation and monitoring of services. We discuss this in section 7.1.
Duty to use Equality and Human Rights Impact Assessments in planning

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

Duty to plan for the future

We suggest that Health and Social Care Partnerships should have duties to plan for the future health and care needs of the autistic people and people with learning disability to whom they are responsible. This planning would project several years into the future. We suggest that this 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. We think that Health and Social Care Partnerships would need to have powers to require all relevant public authorities to provide them with information that they need for this planning.

How we think Scotland could do this in practice

Involve people with lived experience and Disabled Persons Organisations

We think that it will be important for public authorities to involve Disabled Persons Organisations, and autistic people and people with learning disability more generally, in the planning, development and governing of services and supports for autistic people and people with learning disability.

Services demonstrate meeting the duties of the Equality Act 2010

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 all mental health services with duties under the Equality Act 2010 should show publicly that they are meeting those duties.

We think that the Equality and Human Rights Commission could monitor compliance with the public sector equality duty. We give more detail on duties under the Equality Act 2010 below, in ‘More information about human rights duties’. We discuss equality in sections 4.1, 4.4, 4.5 and 7.4 of this consultation document.

Standards for policies, services and environments

In section 7.2, we suggest that the Mental Welfare Commission for Scotland could be given powers to set standards. We suggest that the Commission could set standards for services and environments that Health and Social Care Partnerships must have in place for autistic people and people with learning disability. Standards could include how these services and environments should be developed, including a requirement to involve people with lived experience. Standards could also include areas that policies must address, and direction on how policies should be reviewed. Health and Social Care Partnerships would be required to give their policies to the Commission. The Commission could inspect those services and environments.
More information about human rights duties

Service provision and monitoring

Convention on the Rights of Persons with Disabilities:

Article 25 is the right to health.

Article 31 is about statistics and data collection.

Article 31 (1) tells governments to ‘collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention….’

Article 31 (2) requires that ‘the information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties’ (governments’) obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.’

Article 31 (3) tells governments to ‘assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.’

Article 33 (3) is about national implementation and monitoring. It requires that ‘civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.’

European Convention on Human Rights:

Press release from the European Court of Human Rights: Court judgment concerning the psychiatric treatment provided to a person in compulsory confinement since 2004. Rooman v Belgium, 2019 link Article 5 (right to liberty and security), page 5.

Planning

Equality Act 2010: the public sector equality duty

All public authorities must take a proactive and organised approach to tackling ‘institutional discrimination’ and must focus on organisational change. For example, public authorities must advance equality of opportunity between people who share a relevant protected characteristic and those who do not.

Public authorities have to have due regard to the need to:

- Remove or minimise disadvantage suffered by people due to their protected characteristics
- Take steps to meet the needs of people with certain protected characteristics where these are different from the needs of other people
- Encourage people with certain protected characteristics to participate in public life or in other activities where their participation is disproportionally low.
This requires meeting different needs includes (among other things) taking steps to take account of disabled people’s disabilities. Meeting the general equality duty may involve treating some people more favourably than others.

The public authority must consciously think about the need to do the things set out in the general equality duty as an integral part of the decision-making process and should give evidence of a structured attempt to focus on the details of equality issues. It should also consider the need to comply with the general equality duty when a policy is being implemented, and review its decisions.

As good practice, public authorities keep records of how they met the needs of the general equality duty in making decisions. The general equality duty also applies to all of the decisions made in the course of exercising public functions (including in individual cases). There must be arrangements to integrate it properly into the day-to-day activities of those bodies to which the general equality duty applies.

‘Listed authorities’

The Mental Welfare Commission for Scotland, the Mental Health Tribunal for Scotland (as part of the Scottish Courts and Tribunal Service) and NHS boards are ‘listed authorities’ in the Equality Act 2010. This means that they have the general duties described above, but also specific duties that apply under the public sector equality duty in the Equality Act 2010. The public sector equality duty covers disability and 8 other ‘protected characteristics’.

Listed authorities must consider equality in all their functions, including decision-making, in the design of internal and external policies and in the delivery of services, and must keep these issues under review.

Specific duties for listed authorities include:

- Regular reporting on mainstreaming the equality duty
- Publish equality outcomes and report progress which it considers will enable it to better perform the general equality duty.
- Update those outcomes regularly and report on progress on those outcomes regularly
- Involve people who share a relevant protected characteristic and anyone who appears to the authority to represent the interests of those people.
- Assess the impact of applying a proposed new or revised policy or practice, against the needs of the general equality duty
- Gather and use employee information to better perform the general equality duty.

Listed authorities should use public performance reporting systems (or create new ones) to publish reports on mainstreaming the equality duty, equality outcomes, and reports on progress made to achieve these outcomes.
5. Where support, care and treatment happens

We think that autistic people and people with learning disability should be able to get the support, care and treatment that they need, wherever they are.

In this part, we discuss the places where people may need to be to receive support, care or treatment. We also discuss rights and duties that may be needed to give people access to those places.

In part 9, we discuss the places where offenders may need to be to get support, care and treatment.

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5.1 Independent living

What Scotland has to do to meet its human rights duties
Scotland has to make it possible for all autistic people and people with learning disability to choose where they live and who they live with.

What we think Scotland needs to do
In stage 1, we met some people in hospital who wanted to live in the community. In stage 2, we met an expert on autistic people and people with learning disability who live far away from home.
We think that Scotland needs to give autistic people and people with learning disability a right to independent living in law.
We think that Scotland will need more investment in community-based professionals and support and link (page 9). This is needed so that people can live in the community, or can move back to the community.

How we think Scotland could do this in law
We suggest that Scots law could include a right to independent living that matches the right in the Convention on the Rights of Persons with Disabilities.
We suggest that Scots law could include duties on Scottish Government and local authorities to ensure enough resources to support this right.

How we think Scotland could do this in practice
Housing
We think that there may need to be more housing set up in different ways that can meet the needs of autistic people and people with learning disability. For example, local authorities might provide of specialist flats or houses in groups. In Scotland, we heard about this in Moray. We visited and example of this in Midlothian. This housing was set up to prevent people from being detained in hospital.
Community living
We think that the right to independent living would be for living in the community, not for living in care homes and nursing homes.
More information about human rights duties

Convention on the Rights of Persons with Disabilities

Article 19 is about living independently and being included in the community.

Article 19(1)(a) tells governments to ensure that ‘persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.’

Article 19(1)(b) requires that ‘persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.’

Article 19(1)(c) requires that ‘community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.’
5.2 Safe places

What Scotland has to do to meet its human rights duties

Scotland has to make it possible for people to seek and get the support, care and treatment that they need in a crisis. People should not have to be detained or forced to accept treatment just so that they can get support, care or treatment.

What we think Scotland needs to do

We heard from some people in stage 1 about what made them feel safe or unsafe. Some people told us what helps them be well, and what makes their health worse.

We think that Scotland needs to make places where people can choose to go for support, care and treatment in a crisis.

People would not be taken to those places to be detained or treated against their will. These places would be designed to meet the needs of autistic people and people with learning disability.

How we think Scotland could do this in law

Duty to have safe places

We think that a duty could be given to Health and Social Care Partnerships to make safe places available for autistic people and people with learning disability.

How we think Scotland could do this in practice

Local safe places

We think that safe places would need to be available in local areas. To be possible in local areas, safe places for autistic people and people with learning disability might have to be a part of other services.

Suicide

People would not have their rights limited when they came to a safe place. However, a judgment of the UK Supreme Court is relevant link. Professionals would have to detain a person if they thought that the person was leaving the safe place to commit suicide.
More information about human rights duties

Convention on the Rights of Persons with Disabilities

Article 14 is about liberty and security of person. It tells governments to ensure that people ‘are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.’

Article 16 is about freedom from exploitation, violence and abuse. It tells governments to ‘take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.’

Article 25 tells governments to ‘recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.’ Governments are to ‘take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.’
5.3 Secure support centres

What Scotland has to do to meet its human rights duties
Scotland needs to stop using hospitals to detain and treat autistic people and people with learning disability.

What we think Scotland needs to do
We heard about people’s experiences of hospitals in stage 1. We visited a specialist hospital for autism and learning disability in England in stage 2. We visit other places where support, care and treatment are given.

We suggest that Scotland should move from a medical model to the disability model, in section 2.1. This shift in our understanding of autism and learning disability should also change how we offer support, care and treatment. We think that this needs to lead to the end of detention and compulsory support, care and treatment in hospitals for autistic people and people with learning disability. We think the law requires this change for most autistic people and people with learning disability who are in hospital at this time. A recent judgment from the European Court of Human Rights supports our view link.

We think that Scotland needs to have specialist, secure support centres for autistic people and people with learning disability. This is for people who need to be detained. It is also for people who need to be detained and given compulsory support, care or treatment.

We think that autistic people and people within learning disability could have access to these centres, with or without mental illness or personality disorder.

How we think Scotland could do this in law
Duty to have secure support centres
We think that the law could include duties on Health and Social Care Partnerships. The duty would be to have access to secure support facilities. These would be designed specifically for autistic people and people with learning disability.

Standards
We think that standards would need to be set. The standards would say how services should be designed and adapted. They would say how services should be given to autistic people and people with learning disability.

National autism service
We think that a national autism service would need to be set up in law. This is discussed in section 4.3. That service could be needed to help to set up secure support centres.
**Duty to plan for discharge**

We think that a duty in law would be needed. The duty is for public authorities to plan for discharge before anyone is admitted to a secure support centre in a planned way. The duty is also to plan for discharge immediately after a person is admitted in an emergency.

**How we think Scotland could do this in practice**

**Social service leadership and community links**

We think that secure support centres would need to have very strong links with the community. We think that they would need to be led by social work or social care professionals, nurses or occupational therapists. The should be input from all health professionals who are needed.

These centres could be similar in some ways to secure care for children and young people. Those centres are managed by social care professionals, with input from health professionals. The centres could be run by Health & Social Care Partnerships. They could be commissioned by Health & Social Care Partnerships within the third sector or the independent sector.

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**More information about human rights duties**

**Convention on the Rights of Persons with Disabilities**

Article 4 of the Convention on the Rights of Persons with Disabilities tells governments to ‘undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.’

Article 14 tells governments to ensure that ‘the existence of a disability shall in no case justify a deprivation of liberty.’

Article 25 tells governments to ‘recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.’ Governments are to ‘take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.’

**European Convention on Human Rights**

Press release - European Court of Human Rights, Rooman v Belgium, 2019 [link]

‘…the assessment of whether a specific facility was “appropriate” had to include an examination of the specific conditions of detention prevailing in it, and particularly of the treatment provided to individuals suffering from psychological disorders. Thus, it was possible that an institution which was a priori inappropriate, such as a prison structure, could nevertheless be considered satisfactory if it provided adequate care, and conversely, that a specialised psychiatric institution which, by definition, ought to be appropriate could prove incapable of providing the necessary treatment. It followed that appropriate and individualised treatment was an essential part of the notion of “appropriate institution”.’
5.4 General hospitals and psychiatric hospitals

What Scotland has to do to meet its human rights duties
Scotland has to make sure that support, care and treatment meet the needs of each person.

What we think Scotland needs to do
We think Scotland needs to ensure that autistic people and people with learning disability always have access to specialist support and environments. This must meet each person’s needs.
We think that Scotland should make general hospitals accessible for autistic people and people with learning disability.
We think that Scotland should only offer psychiatric hospitals to a person if the hospital is adjusted to meet the specific needs of that person.

How we think Scotland could do this in law
Rights to support, care and treatment
We think that Scotland would need to put general rights and duties for support, care and treatment in law. We discuss these in sections 4.1, 4.2, 4.3 and 4.7.

Duty to offer screening and diagnosis
We suggest in sections 4.2 and 4.3 that a duty in law is needed. The duty is to offer screening and diagnosis services for autism and learning disability. This is needed to ensure that autistic people and people with learning disability are not misdiagnosed and mistreated.

How we think Scotland could do this in practice
Emergency mental health services
We think that Scotland will continue to need to make emergency mental health services available to autistic people and people with learning disability.
However, we think that these services must develop a strong understanding of autism and learning disability. This is to avoid doing harm. This understanding is essential for supporting autistic people and people with learning disability in crisis.
We think that emergency mental health services must be able to identify that a person may be autistic or may have learning disability. This includes accident and emergency services in general hospitals.
We think that emergency mental health services should be able to refer the person to specialist services such as safe places and secure support centres.
Specialist services

We think that autistic people and people with learning disability in crisis should be offered a safe place or given secure support services. There may be some autistic people or people with learning disability who prefer to use general mental health services, with adaptations, and based on informed choice.

More information about human rights duties

European Convention on Human Rights

European Court of Human Rights, Rooman v Belgium, 2019.

See 5.3 and link or link
6. How professionals make decisions

We think that 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 right to limit a person’s liberty (freedom) to protect a person’s right to life when the person could commit suicide.

We think that 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. We need monitoring and judicial authority (tribunal and court) to deal with professional decisions that are not proportionate.

In this part, we suggest a new approach to making proportionate decisions based on human rights. We call this ‘human rights assessment’. We suggest that Scotland is not yet ready to meet a key human rights requirement of ending all detention and compulsory treatment on the basis of disability. 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 in this part. We think that Scotland needs to understand autism and learning disability as disabilities, not as mental disorders, as discussed in section 2.1. We also suggested in section 2.2 that mental health services for autistic people and people with learning disability need to shift towards a human rights culture. We talk about the professions that provide support, care or treatment to autistic people and people with learning disability. We think that social work and social care may be best placed to lead changes in culture.

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6.1 Human rights assessments

What Scotland has to do to meet its human rights duties
Scotland has to protect people’s right to exercise their legal capacity (the right for people to make their own decisions a reality). This right has to be protected in law. Scotland’s law has to make sure that the person’s rights, will and preferences are all respected.

Scotland has to stop making decision for people based on their ‘best interests’. Instead, decision should be made that respect the person’s rights will and preferences.

What we think Scotland needs to do
We think that Scotland needs to put some new concepts in law:
- Statements of rights, will and preferences. These are discussed in section 3.1
- A ‘presumption’ in law that the person’s will and preferences should happen

Human rights assessments
We think that Scotland needs to develop ways of doing human rights assessments.
We think that human rights assessments need to become part of all decision making by professionals.

What Scotland needs to do in law
You may find it helpful to read section 2.3 on legal capacity before reading this section.

The right to equal recognition before the law
We think that Scotland needs to create mental health law for autistic people and people with learning disability that fits with the Convention on the Rights of Persons with Disability.

The United Nations has a Committee on the Rights of Persons with Disabilities. This Committee has said what the right to legal capacity means, in its General Comment 1. We need to take this seriously. We understand that Scotland, as part of the UK, has a duty to make its law fit with the Convention. We understand that comments and observations from United Nations committees are very important, but are not ‘legally binding’. This means that we need to take them seriously but we do not always have to follow them (page 54). This is also important, because different United Nations committees and officials have given different views on whether detention on the basis of disability and compulsory treatment are ever allowed under United Nations treaties.
A group of UK legal experts suggested a way to comply with the Convention in a report called the Essex Autonomy Project Three Jurisdictions Report link (page 37). The report is about article 12 of the Convention. This is about ‘equal recognition before the law’. Article 12 is about making sure that people with disability can make their own decisions and that people have support to do this if they need it. Article 12 tells governments to make sure that the law respects the decisions of all people with disability, so that those decision can have effects in reality.

These experts gave an explanation of the rights and duties that article 12 gives. They think that this explanation is closer to what the Convention actually means. They wrote about this for incapacity law. We have spoken with some of the legal experts. We understand that their suggestions could also work for mental health law.

A presumption in law about will and preferences
The legal experts wrote that even when people are given all the support that they need to make their own decisions, some people may still not be able to make their own decisions at times. They think that for those people, the law has to make it possible for another person to make that decision. Also, the law should say how those decisions have to be made. And for those people, the law should say how the person’s rights, will and preferences should be protected link (page 37).

Different people will support autistic people and people with learning disability to make decisions. Sometimes, those people will have to make a decision for a person. All of these people would have to work to make happen what the person with disability wants to happen. The legal experts suggest that there should be a presumption in law that the person’s will and preferences should happen. The law would presume that these people should work to make the person’s will and preferences a reality.

Special regard for will and preferences
The legal experts also wrote that all decisions should respect the person’s rights, will and preferences. This means more than ‘considering’ the person’s rights, will and preferences. It does not mean that the person’s will and preference will always determine what happens for them. That would be impossible link (page 40).

We think that there could be special regard for the will and preferences of people with disability when decisions are being made. We discuss the statement of rights will and preferences in section 3.1. People could use that statement, and independent advocacy, or other support for decision making. These supports would help professionals to make sure that they give special regard to the person’s rights, will and preferences.

Proportionate decisions about human rights
All of the person’s rights are important. Scottish Government and public services have a responsibility to protect all of the person’s rights. Sometimes, public services might have to do something against the person’s will and preferences, so that they can protect all of the person’s rights. 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. This includes the person’s rights under the Convention on the Rights of Persons with Disability link (page 98).

We think that there could be a proportionality test. This tests would help to make sure that there is special regard for the person’s rights, will and preferences. The test 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 people’s human rights would only be allowed if there would be very significant benefits to the person’s human rights overall. We suggest that this test of whether a decision is proportionate for a person’s human rights could be called a ‘human rights assessment’.

**How we think Scotland could do this in practice**

**The presumption about will and preferences**

In practice, the presumption in law could mean that any professional supporting an autistic person or person with learning disability should give effect to ‘the reasonably ascertainable will and preferences of that person’, if the person’s will and preferences are possible, and not criminal.

**Special regard for will and preferences**

Professionals would have to give special regard to the will and preferences of autistic people and people with learning disability. Each person may have to be offered support for this, as discussed in part 2. Special regard could also mean that professionals would make decisions by weighing up possible benefits and limits to the person’s rights. In making their decision, the professional would consider what might happen if the professional supported the person to make their will and preference a reality.

After the person had used any support for decision making, and professionals know the person’s will and preference, the role of all professionals would be to try to make the person’s will and preferences a reality. This would only change if what the person wants is criminal, clearly impossible, or it would have a disproportionate negative effect on their person’s human rights overall.

We talk about the ‘best interpretation’ of a person’s will and preference in section 3.2 on independent advocacy. A best interpretation is needed when it is very difficult to understand what a person’s will and preferences are. We suggest that those people need non-instructed independent advocacy.

For those people, the best interpretation of the will of the person should lead the decision making process for professionals. However, we think that that professionals who are making decisions should not be the people to decide what the best interpretation of the person’s will and preferences is. That could lead professionals to make decisions based on judgements about ‘best interests’, instead of decisions that aim to make the person’s will and preferences a reality.
Human rights assessment

The proportionality test could be called a ‘human rights assessment’. The assessment would be based on all of the person’s relevant human rights. This would include the right to health, the right to liberty and many other rights. The human rights framework for this review includes many of the rights that a human rights assessment might have to consider. The review’s human rights framework is here link.

In an emergency, there may be an immediate and grave risk to life, health or safety. A professional who made a decision in an emergency would have to think about the person’s human rights at the time of the emergency. But it would not be possible to do a full human rights assessment at the time of an emergency.

We think that professionals need to use human rights as the basis for all decision making. We suggest that professionals should think through the main human rights that are relevant to each decision. They should discuss these in a way that makes sense to each person. We think that all professionals should consider all relevant human rights before they make any decision that may limit a person’s rights.

By using human rights as the basis for all decision making, professionals could show that their decisions meet the professional’s duty to comply with the Human Rights Act 1998. The UK’s Human Rights Act brings the European Convention on Human Rights directly into our law link. Section 6(1) of this Act says that ‘it is unlawful for a public authority to act in a way which is incompatible with a Convention right.’ It is not clear to us that Scottish public authorities can show that their decision making is proportionate, for the autistic people and people with learning disability who they support and treat. Human rights assessments might help public authorities to show the proportionality in their decisions.

Full human rights assessments

We suggest that Mental Health Officers could do a full human rights assessment when decisions may be made about detention, other limits on liberty, and compulsory support, care or treatment. Mental Health Officers are specialist social workers. There might need to be extra training and special experience for the Mental Health Officer. This would be a new assessment. Also, the Mental Health Officer may have little experience of working with autistic people or people with learning disability.

We suggest that a Mental Health Officer could do a full human rights assessment within a few days after an emergency admission, to meet timescales that would be set in law. At all times that are not emergencies, a human rights assessment could be required before any decision to limit any of the person’s human rights.

For example, a social or health professional might think that a person with disability needs to have their liberty (freedom) limited for a time because the person is continuing to put their life at risk. A Mental Health Officer could do a human rights assessment, based on the person’s view and on the person’s statement of rights will and preferences if they have one. The assessment might include information from unpaid carers and information from professionals. We discuss unpaid carers in section 3.4. The person, their independent advocate, and their lawyer would be able to get a copy of the human rights assessment. If the person had a decision
supporter, they could get a copy. The decision supporter might be the person’s unpaid carer, for example.

The Mental Health Officer could then ask the Mental Health Tribunal to ask for a hearing. The tribunal hearing would give a decision on whether professionals can limit the person’s liberty. At the hearing, the tribunal members could use the human rights assessment to help them to make their decision. The tribunal members could decide whether the professionals can limit the person’s liberty in this way. Part of their decision-making would be about whether it is proportionate to limit the person’s liberty.

The Tribunal could invite any professional who contributed to the human rights assessment to come to the tribunal. They could invite professionals to clarify their contribution in advance of the tribunal.

If a human rights assessment was approved by the tribunal members, then all professionals would have to follow the human rights assessment. The person’s care plan would have to fit with this human rights assessment.

More information about human rights duties

Convention on the Rights of Persons with Disabilities

Article 12 is about equal recognition before the law.

Article 12(4) tells governments to ‘ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.’

The Committee on the Rights of Persons with Disabilities gives its interpretation of Article 12 of the Convention in its General Comment 1 link

Essex Autonomy Project Three Jurisdictions Report

In this review, we are working with another interpretation of article 12 link.

6.5 The limits of support. Page 37:

“..the exercise of legal capacity may not always be possible, even when all possible supports are provided. In such circumstances, the law must provide for someone else to take the decisions that the affected individual is unable to take, while establishing the methodology to be employed … and the safeguards to protect persons who find themselves in that vulnerable position”

7.2 Respect for rights, will and preferences. Page 40:

The legal experts suggest that Scotland should write into law a ‘rebuttable presumption approach’. This would mean that ‘wherever an individual is authorised or obligated to construct a decision with or on behalf of a person whose decision-
making is impaired or absent, that individual should operate with the rebuttable presumption that the reasonably ascertainable will and preferences of that person should be given effect in the matter (subject to the obvious constraints of possibility and non-criminality)'

H.3 A schema for special regard. Page 98:

The legal experts describe how special regard could work in law, with a 'special regard schema'. This would be:

a) Where special regard is to be afforded to a particular matter, there exists a legal presumption with regard to that matter;

b) The presumption is not absolute, but can be rebutted in particular circumstances;

c) The circumstances which might suffice for such a rebuttal are specified by indicative example, rather than by exhaustive enumeration [meaning that examples are given, instead of a complete list of all possible circumstances];

d) 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.
6.2 Limits on human rights

What Scotland has to do to meet its human rights duties

Scotland need to not detain autistic people and people with learning disability on the basis of disability.

What we think Scotland needs to do

Human rights standards

The Committee on the Rights of Persons with Disabilities states very clearly that people with a disability should never be detained on the basis of disability link. The convention does say that the existence of a disability shall in no case justify a deprivation of liberty. However, there is disagreement on this within the United Nations link. Also, the European Convention on Human Rights allows for the detention of people on the basis of disability ('unsound mind') when other criteria are also met link (page 24).

We think that that mental health law in Scotland would need to change significantly for Scotland to comply with its human rights duties on the right to liberty, for autistic people and people with learning disability. The Convention on the Rights of Persons with Disabilities is a higher-level treaty than the European Convention on Human Rights. We might expect the decisions of the European Court of Human Rights to move closer towards the Convention on the Rights of Persons with Disabilities over time. We think that Scotland could make some changes to the law to start to move towards complying with article 14 of the Convention on the Rights of Persons with Disabilities.

We think that Scotland can become a much more equal society for our autistic citizens and for citizens with learning disability, in this generation. We think that our mental health law can and must move much closer to what the Convention on the Rights of Persons with Disabilities requires of Scotland. We understand that it is discriminatory in that Convention to limit a person’s right to make their own decisions or their right to freedom on the basis of their disability. We think that Scotland needs to take major steps to support decision making by autistic people and people with learning disability in relation to their own mental health. We think that Scotland needs to increase the freedom of these groups of people when they are experiencing poor mental health.

Change soon and change later

We think that a very large part of the disability that autistic people and people with learning disability experience is due to their needs not being adequately supported by public services, and by society in general. In this consultation, we discuss how people can be disabled by what mental health law allows and does not allow. However, we also think that the best intentions and the most advanced adaptations may still not be able to eliminate the effects of some mental impairments link (page 115).
We do not think that current services for autistic people [link] or people with learning disability [link] are usually able to meet the mental health needs of these groups of people. We think that the law may need to change to address this. However, we think that if the law never allowed professionals to restrict liberty or to give compulsory treatment to autistic people or people with learning disability, this could lead to more lives lost to suicide [link]. We also think that more people could be brought within the criminal justice system inappropriately [link] (see ‘statement’).

So, we think that major change is needed at this time, to reduce the use of compulsory treatment and limits on liberty for these groups of people. We also think that major change needs to happen to give Scotland a whole system that always considers each person’s human rights. Scotland’s professionals and public services need to make proportionate decisions that protect all of each person’s human rights. We think that all of these changes need to happen and that this will take some time. After these changes, Scotland may be able to end limits on liberty on the basis of disability, for autistic people and for people with learning disability.

How we think Scotland could do this in law

Police power to remove a person to a place of safety
We think 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 Scotland’s Mental Health Act [link]) could be made ‘disability neutral’ [link]. This could reduce disability discrimination in restrictions in liberty and to help to set a direction for future developments in the law, towards how the Convention on the Rights of Persons with Disabilities says the law should develop. We think that it could be more equitable to move this power from mental health law to law for public health or public safety.

Compulsory treatment that follows detention
Under Scotland’s Mental Health Act, detention often comes with compulsory treatment. We think that the law could be set up to guide practice away from compulsory use of psychotropic medication, for autistic people and people with learning disability who are detained. We discuss this in section 3.7. Under the European Convention on Human Rights, authority for a person to be detained does not automatically give professionals authority to give compulsory treatment to that person [link].

Limits on liberty are not treatment
We think it is important to be clear in law and in practice that being detained, restrained or otherwise restricted is not treatment. These things may have to happen at times to protect human rights, but they are not treatment and they can cause harm. We think it is important to make clear distinctions between what is support, care or treatment and what is a restriction on liberty. We discuss this in section 7.6.
Presumption of harm from detention and from compulsion in treatment

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 think that a presumption in law is needed 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 benefit is very likely to happen. We think that the risk of harm to a person’s rights gives another practical reason for giving special regard to the person’s own will and preferences. We think that the person’s own perspective is needed for us to know how the person’s rights are affected by support, care, treatment, and limits on rights.

Criteria for detention and compulsory treatment

We suggest that the criteria for detention and compulsory care and treatment may need to change from the criteria in the Mental Health Act, for autistic people and people with learning disability.

Criteria: now

To help us discuss this, here are the five criteria that must be met before a Compulsory Treatment Order can be made under Scotland’s Mental Health Act. This is from section 57(3) of Scotland’s Mental Health Act link:

(a) the patient has a mental disorder;
(b) medical treatment which would be likely to—
   (i) prevent the mental disorder worsening; or
   (ii) alleviate any of the symptoms, or effects, of the disorder, is available for the patient;
(c) if the patient were not provided with such medical treatment there would be a significant risk—
   (i) to the health, safety or welfare of the patient; or
   (ii) to the safety of any other person;
(d) because of the mental disorder the patient’s ability to make decisions about the provision of such medical treatment is significantly impaired; and
(e) the making of a compulsory treatment order is necessary.
Criteria: future

We think that the following criteria are needed instead:

<table>
<thead>
<tr>
<th>Now</th>
<th>Future</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Mental disorder</td>
<td>Disability. The person has autistic impairment and/or intellectual impairment. Also, the person is experiencing autistic disability and/or learning disability (discussed in section 2.1).</td>
</tr>
<tr>
<td>(b) Medical treatment for mental disorder</td>
<td>Support, care and treatment is available to reduce the person’s disability. Support may include a therapeutic environment.</td>
</tr>
<tr>
<td>(c) Significant risk</td>
<td>Not a separate criterion. Considered within ‘necessary and proportionate’.</td>
</tr>
<tr>
<td>(d) Significantly impaired decision making ability</td>
<td>Support for decision making has been offered and provided.</td>
</tr>
<tr>
<td>(e) Necessary</td>
<td>The measures sought are necessary and proportionate.</td>
</tr>
</tbody>
</table>

More information about the criteria for detention

In the next pages, we discuss each of these criteria in turn.

Mental disorder: now

(a) that the patient has a mental disorder

Scotland’s Mental Health Act makes it possible for a person to be detained or given compulsory treatment due to learning disability or autism. We understand that this can happen even if the person is not suffering with extreme stress or distress, or mental illness. We do not think that this complies with the European Convention on Human Rights. A judgment of the European Court of Human Rights tells us that these criteria should be used when detention of an autistic person or person with learning disability is being considered link (page 24):

- the individual must be reliably shown, by objective medical expertise, to be of unsound mind, unless emergency detention is required;
- the individual’s mental disorder must be of a kind to warrant compulsory confinement. The deprivation of liberty must be shown to have been necessary in the circumstances;
- the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.
Autism and learning disability are lifelong conditions. Autism and learning disability ‘persist throughout any period of detention’. However, these criteria imply that it is possible to have a mental disorder that is not ‘of a kind to warrant compulsory confinement’. Using these conditions to justify detention and compulsory treatment across a person’s life is clearly prohibited by the Convention on the Rights of Persons with Disabilities. Detention and compulsory treatment across the lifetime would certainly be against Scotland’s well-established policy that people should not live in hospital wards. We think that the European Convention on Human Rights does not intend this either, in the absence of extreme stress or distress.

The Scottish Mental Health Act seems to legitimise the long term detention of autistic people and people with learning disability who have no mental illness and are not experiencing extreme stress or distress. It appears to us that the current law is sometimes used to detain individuals because of a lack of support and accommodation in the community link. We cannot see how this could comply with any human rights standards.

The English Mental Health Act was revised in 2007 to address this problem in relation to learning disability. Now, people with learning disability cannot be detained or treated under that Act unless the person’s learning disability is "associated with abnormally aggressive or seriously irresponsible conduct" by the person with learning disability link. We discuss this below in relation to risk.

**Mental disorder: future**

We think that ‘mental disorder’ as a concept does not fit with the Convention on the Rights of Persons with Disabilities. We discuss that in section 2.1, which is based on a concept (idea) of disability.

We think that Scots law could state that a diagnosis of autism and/or learning disability does not automatically mean that the person is ‘of unsound mind’.

If an autistic person or a person with learning disability may have their rights limited through detention, it is important to be clear whether the person is experiencing ‘unsound mind’. We have said that we think that being autistic or having learning disability may not be enough to justify detention in terms of the European Convention on Human Rights. In the disability model, we could say that the autistic person has ‘autistic impairment’ at all times. We might say that when the autistic person is experiencing stress or distress to the extent that the person is of ‘unsound mind’, the person is experiencing ‘autistic disability’. The disability is in the interaction between the person’s autistic impairment, and attitudinal, environmental or other barriers link. This ‘autistic disability’ would be temporary. We suggest that autistic disability would be what demonstrates ‘unsound mind’, not autistic impairment on its own.

We think that the law could take a similar approach for people with learning disability. In future, we might say that the person has intellectual impairment at all times. We might say that when the intellectually impaired person is experiencing stress or distress to the extent that the person is of ‘unsound mind’, the person is experiencing ‘intellectual disability’.

A new criterion in law for these groups of people might be in two parts. The first part would be that the person has autistic impairment and/or intellectual impairment. This would be demonstrated by a diagnosis from someone with ‘objective medical
expertise’ such as a psychiatrist or clinical psychologist. The second part would be that the person was also experiencing autistic disability and/or intellectual disability. A psychiatrist or clinical psychologist would confirm that by showing the connection between the person’s autistic impairment and/or intellectual impairment, and their extreme stress or distress.

In section 10.1, we discuss how we think autism and learning disability could be defined in law in future.

Medical treatment for mental disorder: now

(b) medical treatment which would be likely to—

(i) prevent the mental disorder worsening; or

(ii) alleviate any of the symptoms, or effects, of the disorder,

is available for the patient;

Medical treatment cannot ‘cure’ autistic impairment or intellectual impairment. We do not think that medical treatment can prevent these impairments from ‘worsening’. We understand that, in the disability model, disability might be alleviated by medical treatment. Alternatively, medical treatment might not alleviate symptoms or effects of disability. Medical treatment might further disable a person if the treatment was inappropriate.

In the disability model, symptoms and effects are not just caused by the person’s impairments. The symptoms and effects come from the interaction between the person’s impairment, and attitudinal and environmental barriers.

Effective support, care and treatment can all alleviate disability. For example, changing a person’s environment to make it suited to their impairments and strengths can sometimes be effective. Sometimes structure in routines, good communication, psychological therapy or medication can alleviate disability. However, we think it would be inconsistent with human rights to authorise any form of placement, support, care or treatment for an autistic person or person with learning disability without their consent where the support, care or treatment would not be likely to alleviate their autistic disability or intellectual disability. We discuss that in section 6.1.

Medical treatment for mental disorder: future

This criterion could be replaced by a new criterion. The criterion would be that support, care or treatment which would be likely to prevent the person’s disability from worsening, or which could alleviate the person’s disability, can be made available for the person.

We think that each form of support, care or treatment without consent should be considered and authorised separately: psychotropic medication, psychological interventions, and each other form of support, care or treatment. This would enable the tribunal to consider each form of intervention carefully. It would make it possible for the person to request or object to forms of support, care or treatment, or to object to specific interventions. We discuss this in sections 3.6 and 7.7.

We note that some people may need support, but no care or treatment. Some people may only need to be in a supportive environment that is well adapted to them
as an individual. Detention may be needed at times, but detention is not support, care or treatment. Also, restraint and seclusion are not support, care or treatment.

**Significant risk: now**

(c) if the patient were not provided with such medical treatment there would be a **significant risk**—

(i) to the health, safety or welfare of the patient; or

(ii) to the safety of any other person;

Risk to self or others is sometimes called ‘dangerousness’. We think that risk to self or others might not need to be considered as a separate criterion if human rights assessments were used. Human rights assessments could make it possible for all rights to be considered, for all persons, including risk to all rights.

We do not think that a person is dangerous ‘because’ of their autistic impairments or intellectual impairments. Following the disability model, we think that these impairments interact with barriers, and that this can cause risk to the person or to other people. So, for example, we think that risk can be caused by poor supports, by the person’s impairments, by the person’s attitudes (if the person has criminal intent, for example), or by other people’s attitudes. ‘Dangerousness’ may be caused by a combination of these factors or other factors.

**Significant risk: future**

We think that considering risk to rights within human rights assessments would be a better approach than adding a ‘qualifier’ in the way that ‘abnormally aggressive or seriously irresponsible conduct’ with learning disability was added to the English Mental Health Act. We think that there are problems with dangerousness as a concept, including the stigma (discrimination) that it encourages. We have not seen evidence that autism or learning disability generally cause people to be more dangerousness to other people. Also, some people could be excluded from treatment who cannot directly consent to treatment, if there was a requirement that the person had to pose a risk to other people link.

**Significantly impaired decision making ability: now**

(d) because of the mental disorder the patient’s ability to make decisions about the provision of such medical treatment is significantly impaired

The code of practice for Scotland’s Mental Health Act explains this concept link (page 16, paragraph 22):

‘This concept is separate to that of “incapacity” as defined under the Adults with Incapacity (Scotland) Act 2000. However, when assessing a person’s decision-making ability, it is likely that similar factors will be considered to those taken into account when assessing incapacity. Such factors could involve consideration of the extent to which the person’s mental disorder might adversely affect their ability to believe, understand and retain information concerning their care and treatment, to make decisions based on that information, and to communicate those decisions to others.’
Significantly impaired decision making ability: future

The Convention on the Rights of Persons with Disabilities requires our law to recognise legal capacity and give access to support for decision making for all autistic people and people with learning disability. We discuss legal capacity in section 2.3, support for decision making in part 3, and how the law could be set up to include will and preferences in decision making in section 6.1 on human rights assessments.

In section 2.3, we say that the law in Scotland already recognises all adults as having legal capacity. We also suggest that all of these are needed in law: rights to support for decision making, a presumption in law that a person’s will and preferences should be given effect, and special regard of the person’s will and preferences.

Together, all of these changes could enable autistic people and people with learning disability to make their own decisions and to give effect to their decisions more often that happens at present, in relation to their mental health. Also, when professionals feel that a decision has to be made for a person to protect their rights, those decision would have to be made with special regard for the person’s will and preferences.

Professional decision making needs to clearly move away from decisions made for people in their ‘best interests’. There should be less decision making for people, and more decision making by people with the support that they choose. When professionals have to make decisions, these decisions must be clearly led by the person’s will and preferences, and must clearly respect all of the person’s rights.

With these changes in place, we think that there might no longer be a need for the criterion of ‘significantly impaired decision making’. However, it would be important to ensure that a person could easily challenge any decisions made for them by other people when those decisions may not respect the person’s rights, will or preferences.

Necessary: now

(e) the making of a compulsory treatment order is necessary.

The European Court of Human Rights explains what is required for detention of persons of ‘unsound mind’ under Article 5 (1) of the European Convention on Human Rights to be lawful: The requirement of lawfulness is not satisfied merely by compliance with the relevant domestic law; domestic law must itself be in conformity with the Convention, including the general principles expressed or implied in it...

The general principles implied by the Convention to which the Article 5 (1) case-law refers are the principle of the rule of law and, connected to the latter, that of legal certainty, the principle of proportionality and the principle of protection against arbitrariness which is, moreover, the very aim of Article 5 …[emphasis added].’

Proportionality is very important when professionals are acting to limit someone’s rights. It is not clear to us how proportionality is shown when Scotland’s Mental Health Act is used to limit the rights of autistic people or people with learning disability.
Necessary: future

Scotland’s current Mental Health Act was pioneering in its use of principles. These are given at the start of the Act in sections 1 to 3. The work of the Millan Committee’s work led to the creation of our current Mental Health Act. The committee’s report, New Directions, gave a list of principles link (page 18). The principle of reciprocity was defined in this way link (page 19):

‘Where society imposes an obligation on an individual to comply with a programme of treatment and care, it should impose a parallel obligation on the health and social care authorities to provide safe and appropriate services, including ongoing care following discharge from compulsion.’

The report said: ‘This principle received strong support, including that of key agencies such as the Law Society of Scotland, the Royal College of Psychiatrists and the Scottish Association for Mental Health. It is potentially the principle with the most significant consequences for services, since it implies that those subject to compulsion should have, unlike others, a legal right to receive appropriate treatment.’

We agree that reciprocity could be a significant principle for the mental health of autistic people and people with learning disability. However, this principle does not appear in the Mental Health Act in these words. The word ‘reciprocity’ does not appear in the Act at all.

Human rights assessments would consider what is proportionate for professionals to decide and do for a person. They would consider this in terms of all of the person’s human rights. Human rights assessments could be important in making sure that professional decisions lead to reciprocity for the person.

We think that other changes could be needed to ensure that decisions are proportionate and reciprocal for any autistic person or person with learning disability affected by mental health law. It will be very important to ensure that those decisions have effect. We discuss this in section 7.3 on how decisions are made and reviewed, in relation to mental health tribunals.

We suggest that it would not be lawful to restrict someone’s liberty on the basis of disability when a tribunal finds that this would not be proportionate. For example, the tribunal might find that the person is disabled by environmental factors, and that if these were addressed, this would significantly reduce a risk of harm to the person’s health. The tribunal might instead decide to instruct public bodies to change the person’s environment.

We suggest a new criterion of ‘necessary and proportionate’, in two parts. We think that ‘necessary’ may need to be more clear defined. We think that the meaning could be ‘necessary to protect, promote and fulfil all of the person’s human rights’. In some instances, this would include ‘necessary to protect the human rights of other people’.

We suggest that ‘proportionate’ should mainly be tested through human rights assessments. The rights of others would need to be part of this test. We think that those rights should each be clearly identified and should be considered individually. This approach would help Scotland to move away from the idea that people can be generally ‘dangerous’ because of a disability. This approach could support professionals to avoid putting disproportionate limits on people’s rights the basis of risk to other people.
How we think Scotland could do this in practice

Police powers and duties

Police sometimes have to act to help an autistic person of learning disability who is stressed or distressed. We suggest a change to the standard procedure for police. This would be to ask all people whether they have a disability. This could make it possible for police to understand the support needs of an autistic person or person with learning disability, and the support needs of other people with disability. When the police restrict a person’s liberty, this would enable them to make reasonable adjustments for the person. It could help to avoid escalating difficult situations, and might help to avoid discrimination on the basis of the disability.

Decisions about limits on human rights in practice

Decisions about limits on human rights could also be made differently in emergency and non-emergency situations. For example, limits on liberty might be considered when there is a serious risk to the person’s human rights, or to the human rights of another person. For example, there might be a risk of serious physical harm.

Support for decision making should made available to all autistic people and people with learning disability who need it, to comply with the Convention on the Rights of Persons with Disabilities (article 12). We discuss that in part 3. A person might express their own will and preferences, or their will and preferences might be expressed through a supporter. All supports would have to be offered to minimise the person’s disability before professionals could seek authority to limit the person’s liberty.

In an emergency, professionals would consider the person’s human rights, and the human rights of other people. The professional would do a full human rights assessment a short time after any decision to limit the person’s human rights.

At other times, a Mental Health Officer professional would do a human rights assessment. This might show that some limit on the person’s liberty could be necessary and proportionate. This assessment might then lead to short term limits on the person’s liberty, or to an application to a tribunal for authority for longer term limits on the person’s liberty.

To avoid discrimination, we think that non-emergency decisions about public protection may need be made in the same way for people with and without disabilities, using a similar method of assessing risk. There is a possibility that risk assessments would be used in a discriminatory way in practice. Autistic people and people with learning disability might be being considered to pose more of a risk to other people because of their diagnosis, without evidence for this assumption. This may need to be monitored.

Any restrictions on liberty would be set out in the human rights assessment that was approved by the tribunal. The tribunal’s decision would also set out the positive (reciprocal) actions that professionals and public bodies have to take. These would be needed so that the overall effect on the person’s human rights is positive. Care plans would need to fit with the human rights assessment. In practice, this could mean that all professionals would need to think about how to act proportionately in
relation to the person’s human rights, in all decisions. Section 2.2 on human rights culture is relevant to this.

**Criteria for limits on human rights in practice**

If these criteria were changed for autistic people and people with learning disability, they might be used in much the same way as now. The Mental Health Tribunal for Scotland would still use the criteria to decide whether professionals should be given authority to detain a person, or to give the person treatment that they do not want or may not want.

We think that these new criteria would make it possible for the tribunal to work with other changes that we have suggested. Some of the criteria could bring changes in practice into the tribunal’s decision-making process. These changes include human rights assessments, changes in support for decision making, and a change in how legal capacity is understood. Other criteria could make it possible for the tribunal to work with the concept of disability instead of the concept of mental disorder, and to demonstrate that the tribunal’s decision making is proportionate.

We have suggested removing the separate criterion for risk to self or others. In practice, risk would be considered within human rights assessments. Over time, this might have the effect of reducing the stigma and other discrimination that can come from associating autism and learning disability with risk to others.

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<td><strong>Convention on the Rights of Persons with Disabilities</strong></td>
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<td>Article 14(1) of the tells governments ‘that the existence of a disability shall in no case justify a deprivation of liberty’.</td>
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<td><strong>European Convention on Human Rights</strong></td>
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<td>In contrast, Article 5 of the, the right to liberty and security, tells governments to make sure that:</td>
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<td>1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:</td>
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<td>2. …(e) the lawful detention of .. persons of unsound mind..</td>
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<tr>
<td>Case law from the European Court of Human Rights shows that persons of ‘unsound mind’ can mean autistic persons or persons with learning disability <a href="#">link</a>.</td>
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6.3 Professional roles

In this section, we discuss how professionals might work together to support people to lead their own support, care and treatment. We suggest new roles for the professionals who already support autistic people and people with learning disability.

**New professional roles**

Care managers would have responsibility for co-ordinating the person’s support, care and treatment. Care managers would be social workers, occupational therapists or nurses.

Mental Health Officers would carry out human rights assessments.

Psychiatrists and clinical psychologists would give opinions on whether the person meets the European Court of Human Rights’ criteria for detention or for compulsory treatment.

Chief Officers of Health and Social Care Partnerships, or Chief Social Work Officers, would be responsible officers. They would have final responsibility for orders made by the Mental Health Tribunal for Scotland.

Any other professional whose skills were needed could contribute directly to autistic people and people with learning disability.

We think that these changes in roles would need to be put in law. This should help to lead a shift from treating autism and learning disability within a medical model, to collaborative working that supports people to realise their rights, will and preferences. This is the most important outcome that this change should achieve.

**Care managers**

We suggest that social workers, occupational therapists and nurses could act as care managers for autistic people and people with learning disability. Care managers would have responsibility for co-ordinating the person’s support, care and treatment. We think that the care manager would usually be a member of a community team.

At first, care managers may or may not have expertise in autism or learning disability. It would be the care manager’s responsibility to ensure that expertise in autism or learning disability is available to the person. If the care manager did not have this expertise, it would need to come through the person’s support team of professionals.

It might be most important for the person to have a consistent care manager. Or, the person might prefer to have whichever care manager is most relevant to their support needs at a particular time.

**Expertise in autism or learning disability**

This expertise would come from –

The care manager, or any relevant professional who the Health and Social Care Partnership identifies as having expertise in autism or learning disability

A specialist learning disability professional, such as a nurse, psychologist, or psychiatrist
External expertise in autism. This might come from the national autism service that we discuss in section 4.3.

**Education**

We think that by a certain date, all Scottish social work, nursing and occupational therapy education would need to include learning on autism and learning disability. This education would -

Be guided by people with lived experience of these conditions

Give students placements to work with autistic people and people with learning disability

Give practical understanding of how to work with autistic people and people with learning disability

Give an overview of all forms of support, care and treatment for these groups of people

We think that, by a later date, all new care managers would need to have had this education. We think that existing professionals would need have training from a university that provides this education.

**Care manager responsibilities**

The care manager would –

Be open to understanding the person’s will and preferences at any time, as the person chooses to communicate it

Co-ordinate care planning with the person and for the person

Ensure that care planning fits with the person’s human rights assessment

Co-ordinate information about the person’s support, care and treatment needs

Ask for input from other professionals

Be aware of the person’s current needs and their relevant history

Care managers may need to stay aware of whether the person’s support and care arrangements are stable, and stay aware of the person’s physical and mental health. Significant changes, for better or worse, would indicate that a review of the person’s human rights may be needed. A review could show that the limits on the person’s rights might need to be reduced, or that new limits may be needed. This review would be done with the person, their independent advocate and their decision supporter, if the person wanted this.
Mental Health Officers

A Mental Health Officer is a social worker who has special training and experience in working with people who have a mental illness, learning disability, dementia or related conditions.

Human rights assessment

If the care manager thought that they might need to restrict a person’s liberty or other rights, an application would need to be made to the Mental Health Tribunal for Scotland. The care manager would ask the Mental Health Officer to do a human rights assessment, which we discuss in section 6.1. The Mental Health Officer would receive reports from the care manager, a psychiatrist or clinical psychologist, and any other reports that they asked to receive from professionals. These reports should give the Mental Health Officer a full picture of the person’s rights, will and preference. The reports that the Mental Health Officer needs might change, depending on the rights that might be limited (the ‘measures being sought’).

The Mental Health Officer would then make the application to the tribunal, with the human rights assessment as the main part of the application. The Mental Health Officer would tell the responsible officer that they had applied to the tribunal.

When any limit on a person’s rights was being considered, the care manager would make clear to a Mental Health Officer what the purpose of that limit would be. This would be needed for the Mental Health Officer’s human rights assessment. The lawful purpose of these limits would be to alleviate the person’s mental health condition, or their autistic disability or intellectual disability. We discuss this in section 6.2, about compliance with the European Convention on Human Rights. For people who pose a risk to other people’s human rights, the lawful purpose of limits on liberty would be to bring about a reduction in, or control over, the risk to other people’s human rights link (page 25 paragraph 117).

The Mental Health Officer would need to be employed in a way that made them independent of the Health and Social Care Partnership and the Social Work department. This would be to avoid conflict of interest.
Psychiatrists and clinical psychologists

Disability criterion

When a Mental Health Officer considered limits on a person’s liberty, or compulsory treatment, an opinion would be needed from a psychiatrist or clinical psychologist on whether the person met part of the European Court of Human Rights’ criteria for detention for compulsory care and treatment. They would check whether the person was experiencing ‘unsound mind’. This would be considered in the context of a new ‘disability’ criterion, as described in section 2.2 and 6.2 (about autistic disability or intellectual disability).

Treatment

Psychiatrists and clinical psychologists would also provide treatment to the person. Medical treatments would mainly be psychotropic medication and psychological interventions.

If an application was made to the Tribunal to use psychotropic medication without the person’s consent, a psychiatrist’s report would be needed to say that this was necessary.

If an application was made to the Tribunal to use psychological therapy or other psychological interventions, a clinical psychologist’s report would be needed to say that this was necessary. For example, an application might be made use behaviour modification methods that the person has not consented to.

The psychiatrist, the clinical psychologist or both would contribute to the Mental Health Officer’s human rights assessment. All treatment would need to be consistent with the human rights assessment that the Tribunal approved.

Public safety

We think that the relationship between psychiatrists and clinical psychologists, and autistic people or people with learning disability, should be therapeutic only. We think that psychiatrists and clinical psychologists should not provide assessments of risk from autistic offenders or offenders with learning disability towards other people when this could lead to pre-emptive detention. Pre-emptive detention includes detention before an offence is committed, and detention after an offence which continues for longer than a typical detention. Pre-emptive detention of persons with disabilities on public safety grounds would be contrary to some of Scotland’s human rights duties.

We understand that no risk assessment tools have been designed and validated with Scottish or UK populations for use with autistic people or people with learning disability. We suggest that any assessment of risk from autistic offenders and offenders with learning disability should be carried out by the same professionals who would assess risk for other offenders. For example, non-clinical professionals might assess risk to in the context of multi-agency public protection arrangements (MAPPA). We also suggest that risk assessors and risk assessment tools should make no assumptions about risk from autistic offenders and offenders with learning disability based on disability. We do not think that it should be the clinician’s role to form judgements about risks of offending or reoffending. We assume that there would still be a role for clinicians in multi-agency public protection.
Responsible officers

Social professions and paradigm shift

We think that a shift towards support, care and treatment for autism and learning disability, will require more leadership from social work and social care. We think that the responsible officer needs to have an overview of all of the resources that are available to keep people well, wherever they may be living.

We think that this will be needed to shift the ‘paradigm’ of our understanding, towards a system that is based on human rights and the disability model. We think that this shift will lead to collaborative working that supports people to realise all of their rights, will and preferences.

Responsibility for orders

We suggest that Chief Officers of Health and Social Care Partnerships, or Chief Social Work Officers, would be the responsible officers with final responsibility for orders from the Mental Health Tribunal for Scotland.

The responsible officer could go to the tribunal, or they could ask a representative to go to the tribunal for them (other than the person’s care manager). The responsible officer’s decisions on orders would be based on reports from the care manager, plus any other reports that they chose to ask for. Orders could end when the responsible officer, and a psychiatrist or clinical psychologist, agreed that the order should end. If there was disagreement, this could be referred to the tribunal.

Chief Officers of Health and Social Care Partnerships

We understand that the Chief Officers of Health and Social Care Partnerships lead the implementation of the strategic plan in their area. The Chief Officers aim to integrate and transform health and social care services for the local communities. They do this through their strategic role within their integration joint board and through their operational role within their NHS board and local authority. All Health and Social Care Partnerships are responsible for adult social care, adult primary health care and unscheduled adult hospital care. Some are also responsible for children’s services, homelessness and criminal justice social work.

Chief Social Work Officers

We understand that the Chief Social Work Officer is often, but not always, the most senior social work manager for a local authority. As it is an operational role, this role may sit a level below that of the highest level strategic manager with specific responsibility for social work. However, this is always a very senior role within social work. We also understand that Chief Social Work Officers currently have final responsibility for complex decisions for individuals. This includes decisions about whether individual children and young people should be in secure accommodation. This accommodation is for children and young people who present a very high level of risk to themselves or to other people. A very high proportion of these children and young people have support for serious mental health issues.
Roles in decisions about support, care and treatment

- Directing support: Person with disability
- Monitoring support: Independent advocate or Decision supporter, Care manager
- Providing support: Unpaid carer, Other professionals

When the person has no limits on their rights:

- Care manager
- Social worker, Occupational therapist or Nurse

When limits on rights are being considered / when compulsory treatment is being considered. Also:

- Mental Health Officer
- Psychiatrist or Clinical psychologist

When rights are being limited / when compulsory treatment is being given. Also:

- Responsible officer
- Psychiatrist or Clinical psychologist
6.4 The role of psychologists in relation to the Mental Health Act

Clinical psychologists
In this section, we discuss possible future roles for clinical psychologists, for autistic people and people with learning disability.

Part of the review’s remit is to consider the role of psychology in relation to the Mental Health Act, for autistic people and people with learning disability. This includes the role of clinical psychologists.

Differences between Scotland and England
A review of English and Welsh mental health law led to the Mental Health Act 2007. This law opened up two main roles to a range of professions. To understand these changes, we read about the model for these roles in England and Wales. We discussed the roles with experts. We made a visit to a specialist hospital.

In Scotland, two doctors and a social worker make applications to the Mental Health Tribunal for Scotland. One of the doctors, a psychiatrist, is the person’s Responsible Medical Officer. A social worker is the Mental Health Officer.

The Approved Clinician / Responsible Clinician model
In Scotland, only a psychiatrist can be a Responsible Medical Officer. The equivalent role of Responsible Clinician in England and Wales is open to psychiatrists, clinical psychologists, nurses and social workers. We heard that less than 1% of Responsible Clinicians are not psychiatrists.

A Responsible Clinician has overall responsibility for the care and treatment of a person who is being assessed and treated under the Mental Health Act in England and Wales. This professional will have an extra qualification as an Approved Clinician. The professional is a Responsible Clinician when they have responsibility for patients.

Objective medical expertise
‘Non-medical’ Approved Clinicians have had training and assessment to show that they have ‘objective medical expertise’. This allows them to give an opinion that a person is of ‘unsound mind’ and that the person needs to be detained and given compulsory care and treatment. Case law from the European Court of Human Rights requires this opinion, as discussed in 6.2. We understand that since this change happened in law, there has not been a legal challenge to Responsible Clinicians who have this authority but are not psychiatrists. However, the Joint Committee on Human Rights at the Westminster Parliament challenged the idea of giving authority to nurses and social workers as Approved Clinicians link (page 12 paragraph 26).

We saw some evidence from a senior clinical psychologist who was a Responsible Clinician. He had achieved impressive outcomes for a group of patients with learning disability for whom he had responsibility at Northgate Hospital in the North of England. The British Psychological Society gave us this evidence. We arranged our
own visit to Northgate to find out more about the Approved Clinician / Responsible Clinician model. Northgate has specialist services for autistic people and people with learning disability. We met psychiatrists, clinical psychologists and nurses who are Approved Clinicians.

Published evidence

We looked for published evidence on what people with disabilities think about the Approved Clinician model, but there was no evidence available. There is some published research on this model written from the perspective of professionals link link. We could not find any published research on the effectiveness of this model for people with disabilities.

The Approved Mental Health Practitioner model

In Scotland, only social workers can be Mental Health Officers. The equivalent of the Mental Health Officer role in England and Wales was changed to the Approved Mental Health Practitioner. We spoke with university lecturers in Wales who train Approved Mental Health Practitioners.

England and Wales moved to having social workers, nurses, occupational therapists and clinical psychologists as Approved Mental Health Practitioners. Although clinical psychologists can become Approved Mental Health Practitioners, we understand that none have chosen to do this.

This model has been more successful than the Approved Clinician model. Around 5% of Approved Mental Health Practitioners are professionals other than social workers, but less than 1% of Approved Clinicians are professionals other than psychiatrists. However, we are not suggesting that Scotland should adopt the Approved Mental Health Practitioner. This is because we think that social workers may be the best professionals to lead on human rights assessments as Mental Health Officers.

The model that we discuss in professional roles (section 6.3)

We are suggesting a new model of responsibility for professionals in Scotland, for autistic people and people with learning disability. Within this model, we think that there may not be a need for the Approved Clinician role.

When the Approved Clinician model was being proposed in the Westminster parliament, the Joint Committee on Human Rights agreed that clinical psychologists could be seen as professionals with ‘objective medical expertise’ based on case law from the European Court of Human Rights link (page 10, item 1.8). In Scotland, clinical psychologists already have roles identified in law in relation to offenders with mental disorder link link. We understand that those psychologists do not have additional qualifications for those roles, only their professional training as clinical psychologists.

We feel that 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 learning disability. At our visit to Northgate, we were impressed with how co-
operative the Responsible Clinicians appeared to be as a professional group. We feel that the sort of collaborative culture that we saw at Northgate is needed within every service that supports the mental health of autistic people and people with learning disabilities in Scotland.

Also, we think that it is important to prioritise professional training in autism, learning disability and human rights. The training for professionals to become Approved Clinicians has a strong focus on the medical model, not the disability model. We think that it is very important to ensure that care managers have a very good understanding of autism and learning disability, so that services can fulfil their human rights. We also think it is very important that all professionals develop a much better understanding of human rights.
7. How decisions are monitored

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

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

We suggest that the Mental Welfare Commission for Scotland and the Mental Health Tribunal for Scotland should be given increased authority to protect the rights of autistic people and people with learning disability.

We make a range of suggestions on how human rights should be monitored.

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7.1 Disabled Persons Organisations

What Scotland has to do to meet its human rights duties
Scotland needs to involve autistic people, people with learning disability and their own organisations in monitoring the Convention on the Rights of Persons with Disabilities in Scotland.

What we think Scotland needs to do
We think Scotland needs to ensure that organisations run by and for autistic people and people with learning disability have the resources that they need. The organisations should have enough resources to represent those groups of people well.

We also think Scotland needs to ensure that these organisations can have influence in mental health law, policy and practice that affects autistic people and people with learning disability.

How we think Scotland could do this in law
A duty could be placed on Scottish Government to ensure that Disabled Persons Organisations exist for autistic people and people with learning disability There could be a duty on Scottish Government and public authorities to closely consult with and actively involve persons with disabilities, including through their representative organisations.

How we think Scotland could do this in practice
For all of the suggestions that we have made in this document, we think it is important for Disabled Persons Organisations to be established and to be given opportunities to influence future developments.

We invite autistic people and people with learning disability to tell us how they think people should be involved, as individuals and through organisations.

More information on our human rights duties
Convention on the Rights of Persons with Disabilities

Article 4(3) tells governments to ‘closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.’ Governments should do this when they are developing and implementing laws and policies to implement the Convention, and in other decision-making processes about issues that relate to persons with disabilities.
Article 33 tells governments to monitor how the Convention is implemented (what effect it has).

Article 33(3) says that ‘civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.’

Disabled persons organisations have been defined by the Committee on the Rights of Persons with Disabilities in its General Comment 7 [link].
7.2 How professional decisions are monitored

What Scotland has to do to meet its human rights duties

Scotland needs to monitor whether the rights of autistic people and people with learning disability are promoted, protected and fulfilled, for the human rights conventions that apply to Scotland.

What we think Scotland needs to do

In stage 1, we hear about some experiences of how mental health services are monitored. In stage 2, we met with the Mental Welfare Commission for Scotland. We also received information after this meeting.

The Mental Welfare Commission for Scotland currently carries out the duties that the United Nations Convention Against Torture requires in Scotland. We think that the powers and duties of the Mental Welfare Commission for Scotland would need to change. This is to ensure that Scotland also meets all of its duties under the European Convention on Human Rights and the Convention on the Rights of Persons with Disabilities.

How we think Scotland could do this in law

We suggest that the law should give the Mental Welfare Commission new powers. The powers would be to do the things that we describe below.

How we think Scotland could do this in practice

Commissions in other countries

We spoke with experts from the Care Quality Commission for England, and from the Mental Health Commission for the Republic of Ireland. We think that the Mental Welfare Commission for Scotland would need some of the powers that those bodies have, to be able to ensure that Scotland meets its human rights duties under a range of human rights conventions.

New powers and duties

The Mental Welfare Commission would continue to monitor detention, compulsory care and treatment, and other limits on rights. We suggest that the Commission could have the authority to set, change and enforce human rights-based standards for mental health services for autistic people and people with learning disability. The Commission could act to ensure that each person’s human rights are promoted, protected and fulfilled. The Commission could also inspect and grade services. It could enforce change and close services as a last resort.

The Commission could have authority to intervene in any matter that seems to contribute to a person’s disability, and which may lead to limits on the person’s
rights. This would include health issues, but this could also include inadequate support and failure to provide housing, for example.

Information
The Commission could be told whether each person is offered independent advocacy, a statement of rights will and preferences, or a decision supporter. When the Commission receives information from the Mental Health Tribunal for Scotland about decisions that the tribunal has made, it could receive a copy of each person’s human rights assessment.

Second opinion professionals
As one way to protect people’s human rights, experts in autism, learning disability and human rights might be available through the Commission or in another way that is independent. When a person’s rights are being limited and the person is receiving support, care or treatment, this professional could give a second opinion on whether the support, care or treatment is appropriate. They could give an opinion on whether the limits to the person’s rights are proportionate in practice. This professional would visits the places where people would have their rights limited. The professional could check the person’s will and preferences and a human rights assessment from the person’s care manager or from the tribunal. If professional found that a proposed approach did not fit with these, then they would not authorise that approach.

More information on our human rights duties

Optional Protocol to the Convention against Torture
The United Kingdom has accepted the United Nations Convention Against Torture link. The UK has also accepted an optional protocol to this convention which requires government to ‘establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment’ link.

Convention on the Rights of Persons with Disabilities
Article 15 is about freedom from torture or cruel, inhuman or degrading treatment or punishment

Article 15(1) states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...

Article 15(2) tells governments to ‘take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.’

Article 33 tells governments to monitor how the Convention is implemented (what effect it has)

European Convention on Human Rights
Article 3 of this convention is on the prohibition of torture. It states that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment.’
7.3 How decisions are made and reviewed

What Scotland has to do to meet its human rights duties

Scotland needs to make sure that autistic people and people with learning disability have a fair, accessible hearing, if they may have their rights limited by detention or compulsory support, care or treatment.

Scotland needs to make decisions that have a balanced effect on the human rights of autistic people and people with learning disability.

What we think Scotland needs to do

Scotland has a mental health tribunal system. In stage 1, we spoke with people who had experience of mental health tribunals. In stage 2, we met with the Mental Health Tribunal for Scotland. We also received information after this meeting. We spoke with the leaders of two other tribunal systems in Scotland. We heard from academics and practitioners in Australia on mental health tribunal systems.

We think that the powers and duties of the Mental Health Tribunal for Scotland may need to change to meet the needs of autistic people and people with learning disability. We think this is needed to ensure that Scotland meets all of its duties under the European Convention on Human Rights and the Convention on the Rights of Persons with Disabilities.

We think that the tribunal system may need to become more accessible. This is so that autistic people and people with learning disability are able to take part in full in their own hearings.

How we think Scotland could do this in law

We suggest that the law could change to give the Mental Health Tribunal for Scotland new powers and duties. The powers would be to do things that we describe below.

We understand that the Equality Act 2010 might have to be amended to give the Mental Health Tribunal some of these new powers. We also understand that this would be possible in law.

How we think Scotland could do this in practice

Accessibility

We think that the Tribunal should send out papers in an accessible format to the person, the person’s lawyer, and their independent advocate or other decision supporter. We think this should happen at least two weeks before Tribunal hearings.

Tribunal members, and the person’s lawyer, would need to understand how to work well with autistic people or people with learning disability. This may take training,
tribunal members who understand autism or learning disability. At the tribunal, spoken language should also be accessible to the autistic person or person with learning disability.

We think that the Tribunal should give its decision at the hearing in a way that is accessible for the person. We think that the Tribunal could explain its decision to the person on paper after the hearing, in an accessible way. This could show how the decision should promote and protect the person’s human rights. It should explain whether and how the person could challenge the decision.

Decisions

In making its decisions, the tribunal would use the person’s statement of rights, will and preferences, discussed in section 3.1, or the person’s will and preferences, however the person chose to express these. The tribunal would also use the human rights assessment for the person, discussed in section 6.1.

We suggest that the tribunal could make some decisions without a hearing, for example, on challenges to decisions to refuse services.

The tribunal could check whether the professionals and services are promoting, protecting and fulfilling the person’s human rights. The tribunal could refer to standards set by the Mental Welfare Commission.

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 make any decision on this, except about compensation. Appeals could be made to an appeal tribunal or a court, if there are new grounds to challenge a decision.

Remit and powers

The tribunal’s remit could include accessibility in services, including primary care services such as GPs. A person could make use of rights to equality and non-discrimination that they have under the Equality Act 2010, if they also meet the definition of disability under that Act. The tribunal could authorise treatment for offenders, or could require that treatment is offered to offenders. It could require a public authority to offer a person support and accommodation, or a safe place, for example.

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 want to take away someone’s home or their support when they are detained. The tribunal could make an order to stop this. This would protect the person’s right to independent living. It could prevent long-term limits on the person’s liberty due to them having no home.

Review

We suggest that after a tribunal decision, the person, their representative or the Mental Welfare Commission could ask for a review. They could ask for this 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 rights, instead of overall benefit to the person’s rights.
More information on our human rights duties

Convention on the Rights of Persons with Disability

Article 13 tells governments to ‘ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants…in all legal proceedings, including at … preliminary stages.’

European Convention on Human Rights

Article 6(1) gives the right to a fair hearing. It tells governments that ‘in the determination of his civil rights…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

Tribunals (or other mental health courts) are part of the procedure for detention and authorisation or compulsory care and treatment, that ensures that there is ‘fair and proper procedure’ that gives the person ‘protection against arbitrary deprivation of liberty’ link, page 25 paragraph 119.
7.4 Professional review

What Scotland has to do to meet its human rights duties

Scotland has to ensure that the support, care and treatment that autistic people and people with learning disability receive meets each person’s individual needs.

What we think Scotland needs to do

We think that Scotland needs to set up a second opinion professional service on the support, care and treatment that autistic people and people with learning disability receive, for people whose rights are limited.

How we think Scotland could do this in law

Rights to a second professional opinion

We suggest that autistic people and people with learning disability need rights in law, for any person whose rights have been limited.

We suggest a right to a second professional opinion on the support, care or treatment that the person is are receiving, or that they have not received.

We also suggest a right to review by tribunal at any time when a second opinion professional finds that the human rights assessment is not being complied with.

The second opinion could be requested at any time when there is evidence that the services or environment provided may not be adequate for the person’s individual needs.

The second opinion professional’s role

The second opinion professional would consider the person’s support, care and treatment against the human rights assessment that the tribunal approved. They could also consider the support, care and treatment against standards set by the Mental Welfare Commission for Scotland, discussed in section 7.2. They would report to the person and their representatives.

How we think Scotland could do this in practice

We think that second opinion professionals would have to be highly experienced in working with autistic people or people with learning disability. Those professionals would also have, or would need to develop, a good understanding of human rights.

We think that a second opinion professional service could be set up in a number of ways. It would be most important that the professionals could act independently of all other services.
More information about human rights duties

**Convention on the Rights of Persons with Disabilities**

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Article 15(1) states that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…’

Article 15(2) tells governments to ‘take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.’

Article 17 is about protecting the integrity of the person. It states that ‘every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.’

**European Convention on Human Rights**

Article 3 of this convention is on the prohibition of torture. It states that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

Rooman v Belgium, European Court of Human Rights, 2019. Press release [link](#)

‘…the assessment of whether a specific facility was “appropriate” had to include an examination of the specific conditions of detention prevailing in it, and particularly of the treatment provided to individuals suffering from psychological disorders. Thus, it was possible that an institution which was a priori inappropriate, such as a prison structure, could nevertheless be considered satisfactory if it provided adequate care, and conversely, that a specialised psychiatric institution which, by definition, ought to be appropriate could prove incapable of providing the necessary treatment. It followed that appropriate and individualised treatment was an essential part of the notion of “appropriate institution”.

"
What Scotland has to do to meet its human rights duties

Scotland has to ensure that the rights of autistic people and people with learning disability are met, including rights to dignity, accessibility, equality and non-discrimination.

What we think Scotland needs to do

In stage 1, we heard about people’s experiences of dignity, accessibility, equality and non-discrimination. In stage 2, we met with Equality and Human Rights Commission.

We think that Scotland needs to set standards for dignity, accessibility, equality and non-discrimination.

We think these standards should be based directly on the Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights.

We think that Scotland needs to monitor these standards in ways that are meaningful for autistic people and people with learning disability.

We think that the Mental Welfare Commission and the Mental Health Tribunal should comply with these standards and ensure that these standards are met across Scotland.

How we think Scotland could do this in law

List of suggestions in other sections

Our suggestions for law for this are all made in other sections:

Bring rights from the Convention on the Rights of Persons with Disabilities directly into Scots law. We suggest that those right can be interpreted in ways that fit with the European Convention on Human Rights. Section 2.2.

Give new powers and duties to the Mental Welfare Commission for Scotland, including making human rights-based standards and monitoring these standards. Section 7.2.

Give new powers and duties to the Mental Health Tribunal for Scotland, including powers to require public bodies to take any action (except payment of compensation). Section 7.3.

Statements of rights, will and preference. Section 3.1.

Human rights assessments. Section 6.1.
How we think Scotland could do this in practice
For autistic people and people with learning disability as groups

We suggest that the Mental Welfare Commission (the Commission) could monitor all rights, including dignity, accessibility, equality and non-discrimination, for these groups of people. We suggest that the Commission would do this as part of visiting and inspections, and would report on this each year.

In section 7.2, we suggest that the Commission could have new powers to require services to meet the human rights-based standards that it sets. For example, the Commission might find that a service is generally not accessible for autistic people or people with learning disability. The Commission might require the service to become accessible for those groups of people.

The Commission would set human-rights based standards for all relevant services. This would include standards on dignity, accessibility, equality and non-discrimination. For example, standards on accessibility in communication could be developed with people with lived experience. Those standards might also be developed with the most relevant professional groups such as Speech and Language Therapists and Independent Advocates. Standards would reflect interpretations of these human rights from human rights treaty bodies, courts, and legal experts.

We suggest that for autistic people and people with learning disability, the Equality and Human Rights Commission could scrutinise the accessibility of the Mental Welfare Commission for Scotland and the Mental Health Tribunal for Scotland. It might do this through an ongoing review process. Also, the Equality and Human Rights Commission could monitor accessibility of all public authorities for these groups of people at the level of the public sector equality duty.

For individual people

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

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.

For individual people, we think that if a service did not make itself accessible or equal to the standards set by the Commission, the Commission could address this using new powers. If the service did not improve for a person, then we suggest that the person or the Commission could take this to the Mental Health Tribunal for Scotland.

With the new powers that we suggest in section 7.3, the Tribunal could direct services to become more accessible for individual autistic people and people with learning disability, or to stop actions that are discriminatory.
More information on our human rights duties

Dignity

Convention on the Rights of Persons with Disabilities

Article 1 says that the purpose of the Convention is to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.’

Article 3(a) gives a principle of the Convention as ‘respect for inherent dignity...of persons’

Article 8(1)(a) on awareness raising tells governments to act immediately to ‘foster respect for the rights and dignity of persons with disabilities’.

Article 25(d) on the right to health tells governments to ‘require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia [amongst other things], raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation [making and promotion] of ethical standards for public and private health care’

Accessibility

Convention on the Rights of Persons with Disabilities

Article 3(f) gives a principle of the Convention as ‘Accessibility’

Article 9(1) on accessibility tells governments to ‘…take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, access to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas...’

Article 9(2) tells governments to ‘develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public’, and gives other direction on what to do to make public and private buildings, facilities and services accessible.

Equality and non-discrimination

Article 2 defines ‘discrimination on the basis of disability’ as ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation [meaning, reasonable adjustments].’

Article 3 give some principles of the Convention as ‘non-discrimination’, ‘equality of opportunity’ and ‘equality between men and women’.

Article 4 gives a general obligation on governments to ‘ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with
disabilities without discrimination of any kind on the basis of disability.’ The article gives more information on what must be done to achieve this.

Article 5(1) on equality and non-discrimination tells governments to ‘recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.’

Article 5(2) tells governments to ‘prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.’

Article 5(3) tells governments to ‘take all appropriate steps to ensure that reasonable accommodation is provided [meaning, reasonable adjustments], in order to promote equality and eliminate discrimination’

Article 5(4) tells governments that ‘specific measures which are necessary to accelerate or achieve de facto [real] equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.’

Article 6 is about equality for women and girls with disabilities. We discuss this in section 4.4 on gender.

Article 7 is about equality for children with disabilities. We discuss this in section 4.5 on children.

Article 25 is about health. It tells governments to ‘recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability’.

Article 28 on the right to an adequate standard of living and social protection tells governments to ‘recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions.’ It tells governments to ‘take appropriate steps to safeguard and promote the realisation of this right without discrimination on the basis of disability.’

**European Convention on Human Rights**

Article 14 of the convention tells governments that ‘the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’
7.6 Monitoring limits on liberty (freedom)

What Scotland has to do to meet its human rights duties
Scotland should not limit the liberty of autistic people or people with learning disability on the basis of their disability.

What we think Scotland needs to do
We discuss limits on liberty in section 6.2.
We think that Scotland needs to monitor restraint, seclusion, detention and other limits on liberty very carefully.
We think that Scotland needs to use monitoring information to prevent disproportionate limits to liberty for autistic people and people with learning disability.
We think that Scotland needs to monitor this for individuals and for groups of people.

How we think Scotland could do this in law
Other suggestions
We think that the changes in law that we suggest for Disabled Persons Organisations, the Mental Welfare Commission and the Mental Health Tribunal would be needed to make this work.
Target: limits to liberty are not based on disability
We also think that the law should include a target of no limits on the liberty of autistic people or people with learning disability on the basis of their disability, and a requirement to monitor all limits to liberty.

How we think Scotland could do this in practice
Shift in culture
We think that there needs to be a shift in culture. We think that there will always be a rare need for restraint, seclusion and detention, in emergencies. We think that at this time, the use of restraint, seclusion and detention for situations other than emergencies could not safely be stopped in public services.
However, we think that the use of restraint, seclusion and detention beyond emergencies is often a sign that public services are not supporting people well enough with their disabilities.
We think that there needs to be a shift in attitude away from accepting the use of restraint, seclusion and detention outwith emergencies. This shift would come as part of a general change in how we understand and support autistic people and people with learning disability. Using the disability model, discussed in section 2.1, we see autistic people and people with learning disability as people with impairments. People can be disabled by the interaction between their impairments,
and attitudes and environments. Restraint, seclusion and detention can be part of what disables a person.

**Monitoring**

We think that all use of restraint or seclusion, and all other limits to liberty, should be monitored consistently for autistic people and people with learning disability across public services. The Mental Welfare Commission would set national, human-rights based standards for restraint, seclusion, and other limits to liberty in mental health services. The Commission could enforce these standards through inspections, monitoring and reporting.

**Tribunal decisions**

The Mental Health Tribunal’s decisions would be based on human rights assessments and on standards set by the Mental Welfare Commission. The tribunal would decide which interventions were allowed or not allowed, and would give this information in its decisions on human rights assessments. Interventions might include restraint, seclusion and other limits on liberty. The person’s care plan would fit with the human rights assessment.

**Monitoring across sectors**

We are aware of a proposal for statutory guidance for restraint and seclusion specifically for schools. This guidance would have definitions based on human rights. It would help to ensure appropriate responses, and would ensure consistency in recording restraint and seclusion [link](page 15). We see that this is necessary in mental health services and in schools, and possibly also in other settings such as social care and criminal justice. Ultimately, we see a need for national monitoring of restraint and seclusion of autistic people and people with learning disability in all settings. We suggest that standards are developed in a way that allows data to be brought together from all sectors.

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**More information on our human rights duties**

**Convention on the Rights of Persons with Disabilities**

Article 17 is about protecting the integrity of the person. It tells governments that ‘every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.’

Article 31 on statistics and data collection tells governments to ‘collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention…’
What Scotland has to do to meet its human rights duties

Scotland needs to only give support, care or treatment to autistic people or people with learning disability when this fits with their rights, will and preferences.

What we think Scotland needs to do

We think that Scotland needs to use monitoring information to prevent disproportionate use of support, care and treatment without consent for autistic people and people with learning disability.

We think that Scotland needs to monitor this for individuals and for groups of people.

How we think Scotland could do this in law

Consider each right

We think that applications to the Mental Health Tribunal should include human rights assessments that make clear, separately, each of the rights that could be limited. The tribunal could approve limits on some, all or none of these rights. We think that this approach would be needed to comply with the European Convention on Human Rights and the Human Rights Act 1998, section 6.

Consider each item of support, care or treatment

We think that the law should require each form of support, care or treatment to be considered and authorised separately. Psychotropic medication, psychological interventions, and other forms of support, care and treatment could be considered. This would enable the tribunal to consider each form of intervention carefully. It would make it possible for the person to request specific forms of support, care or treatment, or to object to specific interventions.

How we think Scotland could do this in practice

Support for decision making

We think that there needs to be a shift to a human rights culture. This would include with stronger support for decision making, as part of a general change in how we understand and support autistic people and people with learning disability.

We think that all professional decisions about support, care and treatment need to be based on the person’s rights, will and preferences. This is need for Scotland to comply with the Convention on the Rights of Persons with Disabilities.

Monitoring

We understand that there is no specific monitoring for autistic people at this time. We think that all use of support, care and treatment for mental health should be monitored for autistic people and people with learning disability. This is needed to ensure compliance with people’s rights, will and preferences. We think that the Mental Welfare Commission could monitor and report on this.
Standards

The Mental Welfare Commission could set standards for the use of support, care and treatment, supported decision making, independent advocacy. It could set standards for decisions about compulsory treatment including medication and psychological interventions. The Commission could enforce these standards through inspections, monitoring and reporting.

The Mental Health Tribunal’s decisions would be based on the person’s statement of rights, will and preferences, or their will and preferences expressed in any other way. The tribunal would decide which interventions were allowed or not allowed. The tribunal would give this information in its decisions on human rights assessments. Those assessments would include information on any support, care and treatment that was allowed or not allowed.

More information on our human rights duties

Convention on the Rights of Persons with Disabilities

Article 17 is about protecting the integrity of the person. It tells governments that ‘every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.’

Article 25 on health tells governments to recognise that ‘persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.’

Article 25(e) tells governments to ‘require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia [amongst other things], raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation [making and promotion] of ethical standards for public and private health care’

Article 31 on statistics and data collection tells governments to ‘collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention…’

European Convention on Human Rights

Article 8 is on the right to respect for private and family life. It says:

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

This right was breached in the case of X v Finland, European Court of Human Rights, through the compulsory medication link. The breach happened because the law in Finland allowed compulsory treatment to happen when a person’s detention was approves. There were no separate safeguards in law for compulsory medication in those circumstances.
8. Offenders

This review was asked to look at ‘the criminal justice system and the interaction with the Act’ for autistic people and people with learning disability.

In stage 1, we met autistic offenders and offenders with learning disability. In stage 2, we heard from experts in criminal justice from Scotland, England, Northern Ireland and Australia.

In this part, we suggest changes to make the criminal justice system fairer for autistic people and people with learning disability.

We suggest that Scotland uses ‘intermediaries’ to support suspects and defendants who have communication impairments.

We suggest a change to how disability is understood in criminal law. This change could make it possible for person to be held responsible for an offence, but also to have adapted consequences that take account of the person’s disability.

We suggest that punishment, support to stop offending, and support care and treatment should be clearly separated out in law for autistic offenders and offenders with learning disability.

We suggest that punishment should be for no longer for these offenders than for any other offenders.

We think that the law could make clear that offenders have the same rights of access to care and treatment as autistic people and people with learning disability who are not offenders.

We think that autistic offenders and offenders with learning disability all need to be offered individualised support to stop their offending behaviour.

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8.1 Fair trials

What Scotland has to do to meet its human rights duties

Give equal recognition before the law to autistic people and people with learning disability. We discuss this in section 2.3.

Make sure that autistic people and people with learning disability have effective access to justice on an equal basis with other people.

Do not detain people on the basis of disability.

What we think Scotland needs to do

We think Scotland needs to make sure that the criminal justice system is accessible for autistic people and people with learning 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.

How we think Scotland could do this in law

We think that giving defendants a right to an ‘intermediary’ in law would make a big difference in making the trial process more accessible. We think that this could 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.

We think that additional safeguards would be needed in law. This is to ensure that support and adjustments happen for each person who needs them.

The Committee on the Rights of Persons with Disabilities has said that there should be no ‘declarations of unfitness to stand trial’. This would mean that every person would be held able to stand trial. It might be possible to give every person a legal representative who has responsibility for interpreting the will and preferences of the individual to the best of that person’s ability. That representative would give their interpretation of the person’s will and preferences to the court and the relevant professionals involved in the trial process link (page 218).

However, it is not clear to us that it would be possible or legally sound for legal representatives to interpret the will and preferences of an individual in the context of criminal proceedings. It may be that a legal representative could test the Crown (prosecution) case thoroughly for the person.

Also, we understand that, even with all support and other reasonable adjustments, some people might still not be able to stand trial. It is not enough for a person to express their will and preferences to take part meaningfully in a trial. The person must also be able to understand the charges, tell their lawyer what to do, follow the process, and give evidence in their own defence.

We think that Scotland can do a lot more to make it possible for people to take part in criminal proceedings against them. But we also think that we may need to keep the possibility of declaring that a person is unfit to stand trial, for those people who cannot fully take part in their own trial. We think that this may be needed to comply with the European Convention on Human Rights.
We think that if a judge is considering the possibility that a person may not be able to stand trial, it will be important to know that the person has been offered all the support that they need and all other reasonable adjustments. If the judge thinks the person has been given all the support and adjustments they need, then the judge will need to decide if the person should be required to take part or not. The judge may decide that the person is not able to stand trial, even with those supports. This decision would be based on balancing the person’s rights and considering whether it is proportionate to make the person take part in a trial. The rights to be taken into account would include rights to a fair hearing, rights to legal capacity and other rights. This process for decision on whether the person will be required to take part in the trial might require a change in law, in statute.

**How we think Scotland could do this in practice**

**Intermediaries for suspects and defendants**

Northern Ireland has a ‘registered intermediaries’ scheme. In this scheme, professionals like speech and language therapists or social workers work with people who have been charged with a crime and who need support for their communication [link](#). Registered intermediaries work for the criminal justice system. They ensure that it is accessible and that the proceedings are fair. We spoke with the Northern Ireland Executive about this system. We think that this could work well for autistic offenders and offenders with disability in Scotland.

In Scotland, we think that intermediaries could be made available for autistic people and people with learning disability who come into the criminal justice system as suspects or defendants. To avoid discrimination, the intermediary system would need to be for everyone who is charged with a crime or who is prosecuted for a crime, and who needs support with their communication. Access to the intermediary would not depend on having a diagnosis.

**How intermediaries work in Northern Ireland**

Before the police interview the person, the intermediary meets with the person. The intermediary finds out what the person’s communication abilities and support needs are. The intermediary gives the police a report, which helps the police to make the interview accessible for the person. The intermediary is at the interview to support communication. The intermediary writes a report for court about the person’s communication needs. They meet with the judge and lawyers before the trial (a ‘ground rules hearing’). These professionals all discuss the intermediary’s report and agree what should happen to support the person’s communication.

When the person is asked questions in court, the intermediary tells the court if the person has difficulty understanding the questions. They advise the court on how to ask the questions in an alternative way. The intermediary works for the court and does not take sides. They do nothing else in court. They do not give any views of their own.

**Lawyers and judges**

We also think that lawyers and judges may 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
learning 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.

More information about our human rights duties

**Convention on the Rights of Persons with Disabilities**

Article 12(2) tells governments to ‘recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’.

Article 12(3) tells governments to take ‘appropriate measures’ to help persons with disabilities exercise their legal capacity.

Article 12(4) tells governments to ‘ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law’.

Article 13 tells governments to ‘ensure effective access to justice for persons with disabilities on an equal basis with others…in order to facilitate their roles as direct and indirect participants…in all legal proceedings’.

Article 13(1) tells governments to provide accessibility measures ‘including through the provision of procedural and age-appropriate accommodations’ and training for those working in the judiciary.

Article 14(1) tells governments ‘that the existence of a disability shall in no case justify a deprivation of liberty’

The Committee on the Rights of Persons with Disability has said that ‘declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems, and the detention of persons based on those declarations, are contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant. The Committee has also called for States parties [governments] to remove those declarations from the criminal justice system’ [link](paragraph 16).

**European Convention on Human Rights**

The guidance on article 14 from the Committee on the Rights of Persons with Disabilities may be in tension with how the European Court of Human Rights has interpreted Article 6 of the European Convention on Human Rights. Safeguards for a fair trial are considered in case law by the European Court of Human Rights and are very important.

Article 6(1) of the European Convention on Human Rights says that:

‘…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…’

Article 6(3) says that:

‘Everyone charged with a criminal offence has the following minimum rights:'
(a) to be informed promptly, in a language which he understands and in
detail, of the nature and cause of the accusation against him;
(b) to have adequate time and the facilities for the preparation of his
defence…
(e) to have the free assistance of an interpreter if he cannot understand or
speak the language used in court.’
8.2 Fairness in responsibility

What Scotland has to do to meet its human rights duties
Scotland needs to give equal recognition before the law to autistic people and people with learning disability. This includes making it possible for people to be held criminally responsible.

What we think Scotland needs to do
Scotland may need to remove criminal defences that make it possible for a person with disability to be held not responsible for an offence because of disability.

How we think Scotland could do this in law
Capacity to follow the law
We think that legal capacity for personal decisions and legal capacity to comply with the law are not the same thing. To comply with the law, a person has to act responsibly in social contexts. We think that, in general, this may take more ability than when a person makes a decision and acts based on their own will and preferences. We think that it is important to think about these things so that we can understand how to treat autistic people and people with learning disability on an equal basis with others.

It is important for equality that autistic people and people with learning disability can be held responsible for criminal actions. However, it may be very difficult for some autistic people or people with learning 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.

Disability as a mitigating factor
We heard a suggestion that disability could be raised as part of a plea in mitigation. We think that this approach could both allow for responsibility and 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. Also, it could make it possible to 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 follow the law.

Disposals
We think that it would be important for this change to come with changes in the disposals that are available to autistic offenders and offenders with learning disability. We discuss rehabilitation in the community in 9.1 and rehabilitation centres in 9.2. It would be very important for the human rights of these offenders that
changes in the law about responsibility did not lead to inappropriate placement in prison, for example. We discuss prison in 9.3.

**Definition of disability**

We think that the definition of disability in the Convention on the Rights of Persons with Disabilities could be useful in putting this defence into law link (line 5):

‘…disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others’

The disability may be the result of the person’s impairment and a lack of appropriate support. For example a person with learning disability who was not given sex education may not know what lawful sexual behaviour is. Or, the disability may be all because of an impairment that the person has. 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.

**How we think Scotland could do this in practice**

**Prosecution**

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.

Within the sentencing process, a person’s disability might be considered at the first stage of the sentencing process, when culpability is being assessed. Also, or instead, disability might be considered as a mitigating factor.

**Disability as a mitigating factor**

When an autistic person or person with learning disability was charged with an offence and prosecuted, they could ask their lawyer to raise their disability as a mitigating factor. This could be because the person did not understand what they did, or did not understand why it was wrong, or could not avoid committing the offence, for example.

The judge or jury would decide whether to accept this defence. If the person was found guilty and the defence was accepted, the person would be held responsible for the crime with disability as a mitigating factor. The consequences for the person might include a requirement to accept support to stop offending. There might also be punishment for the person, which we discuss in the next section.

If a court found that the person had offended but the person was not at all responsible for the offence, the person would not be punished. The person could be offered support to stop offending.

If a person might need support, care or treatment for disability, decisions on this might be made by the Mental Health Tribunal for Scotland.
More information about our human rights duties

Convention on the Rights of Persons with Disabilities

Article 12(2) tells governments to 'recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.

The Committee on the Rights of Persons with Disabilities has written that 'legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency)' - emphasis added link (paragraph 13). So, the disabled person has duties to follow the law, which means that there would be negative consequences for a person with disabilities who breaks the law. This could include all persons with disabilities who could not understand the law.

As stated above, the Committee on the Rights of Persons with Disability has said that 'declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems, and the detention of persons based on those declarations, are contrary to article 14 of the Conventions since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant. The Committee has also called for States parties (governments) to remove those declarations from the criminal justice system.' link (paragraph 16)
8.3 Fair punishment

What Scotland has to do to meet its human rights duties
Scotland would have to end detention of autistic people and people with learning disability on the basis of disability. This includes offenders.

What we think Scotland needs to do
We think that Scotland needs ensure that it is dealing with autistic offenders and offenders with learning disability no less favourably than other offenders.

We think that Scotland needs ensure that it providing all of the services and making all of the adjustments that autistic offenders and offenders with learning disability need.

We think that it may be important to separate out in law what can happen for autistic offenders and offenders with learning disability. In practice, all of these things may be given or offered in one place. But we suggest that punishment, support to stop offending, and support care and treatment for disability should be separated out in orders and in offers of support, care or treatment.

For all autistic offenders and offenders with learning disability, we think that Scotland could set time limits for punishments. We think that these limits should be no longer than the time limits that other offenders have on the punishments that they receive.

We think that some autistic offenders and offenders with learning disability could be damaged by being sent to a typical prison. But we do think that it could be more equitable for offenders whose offence would usually include a prison sentence to be detained in appropriate parts of the prison service. Those would need to be developed. In part 9, we discuss alternatives including rehabilitation centres.

We understand that some autistic offenders and offenders with learning disability may need treatment for mental illness. We think that when medical treatment is needed, this could be given in a rehabilitation centre. We discuss that in 9.2.

We think that offenders could be offered support or required to accept support to stop offending. We also discuss this in section 8.4 on fair access to rehabilitation.

How we think Scotland could do this in law
Moving towards ‘disability neutral’ law
The Committee on the Rights of Persons with Disabilities states very clearly that people with a disability should never be detained on the basis of disability. The Convention says that ‘the existence of a disability shall in no case justify a deprivation of liberty’. However, there is disagreement on this within the United Nations link. Also, the European Convention on Human Rights allows for the detention of people on the basis of disability (‘unsound mind’) when other criteria are also met.
The Convention on the Rights of Persons with Disabilities is a higher-level treaty than the European Convention on Human Rights. So, we might expect the decisions of the European Court of Human Rights to move closer to compliance with the Convention on the Rights of Persons with Disabilities over time. We think that Scotland could make changes to the law to be more compliant with Article 14 of the Convention on the Rights of Persons with Disabilities.

In other sections (3.8 and 6.2) we suggest that the current police power to remove a person from a public place to a place of safety on suspicion of mental disorder could be made ‘disability neutral’ link. We think that this would begin to reduce disability discrimination in restrictions on liberty. We think it would also help to set the right direction for future developments in the law, towards ending restrictions based on disability in future.

**Limiting terms**

We are aware that it is possible for an autistic offender or offender with learning disability to spend much more time in the forensic hospital system than another person would spend in prison after a similar offence.

We think that limiting terms would help Scotland to comply with its human rights duties. The limiting term is the best estimate of the sentence the court would make as the outcome of a full trial of criminal proceedings for an offence similar to the offence being considered. Under a limiting term, the person is entitled to leave any facility in which they were detained as an offender when the term ends. Some states in Australia limit terms for offenders with mental disorder link (page 21).

We also think that sentences could be reviewed for all autistic offenders and offenders with learning disability for parole after the same time limits as for other offenders.

We think that it would be equitable for restrictions on autistic offenders and offenders with learning disability, such as detention or limits on what the person can do in the community, to end at the end of punishment. We think that the exception to this could be situations where longer restrictions can be applied to other offenders in the same way. An example of this might be the Order for Lifelong Restriction, which is applied to the most serious and high risk offenders in Scotland. It is used with a very small number of autistic offenders and offenders with learning disability.

**Separate orders**

The Mental Health Act modified the Criminal Procedure (Scotland) Act 1995. It created orders that can be made for offenders with ‘mental disorder’. These include Compulsion Orders and Restriction Orders. We think that the law could change to separate out punishment and support to stop offending in orders for autistic offenders and offenders with learning disability. We think that the law could deal with support, care and treatment separately for disability. We suggest that law could take the same approach to support, care and treatment of offenders as for any autistic person or person with learning disability. We discuss that in part 4.
How we think Scotland could do this in practice

Being clear on what punishment is

We think that it could always be made clear to these offenders when part of the deprivation of liberty is a punishment for an offence, and how long that 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.

Risk assessments

We think it may be important to make sure that when risk assessments are made that could lead to restrictions on a person, no assumptions are made that the person is dangerous just because the person is autistic or has an intellectual impairment. We understand that there is no clear link between autism, intellectual impairment and ‘dangerousness’. We understand that dangerousness as a concept is problematic. We also understand that there is often not a strong scientific basis for predictions made through risk assessments (page 782). Risk assessment tools and practices, and decisions based on risk assessments, may need to be monitored to prevent any discrimination on the basis of disability.

Parole

We suggest that those offenders with disability could apply for release (parole) at the same time as for any person who committed the same offence. When the person’s sentence ended they would be released. If there were issues about support, care and treatment for a person who would be released, these might be addressed by the Mental Health Tribunal.

Continuing risk

A very small number of all offenders, including a very small number of autistic people and people with learning disability, would put the public at serious risk if they were completely free. These people’s offences are sexual offences, violent offences or offences that put life at risk. It is possible for those offenders to receive an Order for Lifelong Restriction. It would be very important for the Order for Lifelong Restriction to be used proportionately for the very few people autistic offenders and offenders with learning disability who commit these offences. These orders should not be used more for these groups than for other people. We note that there are broader human rights issues for any offender with pre-emptive detention after the end of a sentence.

Effects of disposals

After trials, courts make decisions on ‘disposals’ for each person that determine where a person will be for their punishment. We think that it may 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 that some restrictions on persons with disabilities. For example, we think that the environment of typical prison would have a more negative impact on autistic people or people with learning disability than on people in general.
More information about our human rights duties

Constitution on the Rights of Persons with Disabilities

Article 14(1) tells governments 'that the existence of a disability shall in no case justify a deprivation of liberty'

European Convention on Human Rights

However, Article 5 of the European Convention on Human Rights, the right to liberty and security, tells governments to make sure that:

3. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

  ...(e) the lawful detention of ... persons of unsound mind...

Case law from the European Court of Human Rights has shown that persons of 'unsound mind' can mean persons with mental illness, autistic persons or persons with learning disability.
8.4 Fair access to treatment

What Scotland has to do to meet its human rights duties
Make sure that autistic offenders and offenders with learning disability have access to the support, care and treatment that they need, to have the best health that they can have.

What we think Scotland needs to do
We understand that wherever autistic offenders or offenders with learning disability might be placed – in a place of detention or in the community – that person must be given access to the support, care and treatment that they need.

How we think Scotland could do this in law

Rights to support, care and treatment
We think that the law could make clear that offenders have the same rights of access to support, care and treatment as autistic people and people with learning disability who are not offenders. We discuss this in part 4.

Presumption that detention will not be in hospital
There are autistic people and people with learning disability in prison, some of whom will not have a diagnosis. We understand that there is a need to protect autistic people and people with learning disability in prison from discrimination from other prisoners and from inappropriate environments that disable people. However, we also see that the placement of autistic people and people with learning disability in hospital wards can be discriminatory. People who commit offences are generally sent to prison or are given sentences in the community. They are not sent to hospital. We think that the law could presume that autistic offenders and offenders with learning disability will be sent to rehabilitation centres or special prison facilities that are set up to meet their needs, instead of hospitals. The law might also have to be set up to ensure that those offenders have access to the support, care, treatment and environments they need.

Independent living
We discuss the right to independent living in section 5.1. Of course, there will be offenders who should not live independently for a time, as part of their punishment. There will also be offenders who pose such a high level of risk that they could not safely be in the community at times. However, we think that it would be useful for the law to clarify that the right to independent living applies to autistic offenders and offenders with learning disability, with effect at the end of detention.
How we think Scotland could do this in practice

Access to similar services as non-offenders

In part 4, we say what we think may need to change in law for autistic people and people with learning disability to have access to the support, care and treatment that they need. Autistic offenders and offenders with learning disability could have access to the same services, provided to them where they are. The fact that the NHS now provides healthcare services to Scottish prisoners may help with this.

Understanding autism and learning disability

We think that when autistic offenders and offenders with learning disability are detained in forensic wards, a model of ‘mental disorder’ is being used to understand and treat autism and learning disability. However, autism or learning disability cannot be treated. The disability that autistic people or people with intellectually impairments experience can often be reduced or removed through support, care and treatment with the right approaches and environments.

Where people are detained

We think that it could be more equitable for autistic offenders and offenders with learning disability to not be detained in hospitals. We suggest that these offenders should be detained in appropriately-designed rehabilitation centres or prisons. The prison service might use specially designed facilities and/or parts of existing prisons with significant adjustments.

Rehabilitation centres would be a new model for detention. Setting these up these centres could be an opportunity to create appropriate environments for autistic offenders and offenders with learning disability. In New Zealand, some offenders with learning disability are detained in the ‘disability sector’. This is different from hospital or prison. Scotland already has a model of secure care for offenders which includes a high level of access to treatments for mental health. That model is secure accommodation for children and young people. That model is governed by social work and social care services. We say more about where offenders are detained in part 9.

Sometimes, a person’s disability may be so specific or may become so severe that the person cannot be supported in a rehabilitation centre or an adapted prison. A court or tribunal might require a person go to a hospital. That hospital would be required to adapt to meet the person’s needs, as an autistic person or a person with learning disability, before the person was admitted. The person would return to the rehabilitation centre or to the prison after they had recovered. If a person or a professional thought that there was a need to transfer from a rehabilitation centre or a prison to a hospital, we suggest that this decision this could be made by tribunal. The person would have rights to challenge this.

We discuss rights to support, care and treatment in part 4. We discuss duties that could be placed on public authorities to provide specialist services in section 4.8.
More information about our human rights duties

Convention on the Rights of Persons with Disabilities

Article 25 of the Convention on the Rights of Persons with Disabilities tells governments to ‘recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.’

The United Nations Committee on Economic Social and Cultural rights commented on the right to health. Its comments are relevant to the right to health (article 25) of the Convention on the Rights of Persons with Disabilities link. The Committee’s comments tell governments that ‘the right to health must be understood as ‘a right to the enjoyment of a variety of facilities, goods services and conditions necessary for the realisation of the highest attainable standard of health’. The comment also says that ‘health care and public health facilities must be ‘available, accessible, acceptable and of good quality’.

European Convention on Human Rights

The European Convention on Human Rights does not give a right to health, but a recent judgment from the European Court of Human Rights (Rooman v Belgium) clarified the case law principles about the right to liberty and security. The judgment clarified the meaning of the obligation on governments and public services to provide treatment to people who are detained. This judgment tells us that whether a particular place of detention and treatment (institution) is “appropriate” depends on the specific conditions of detention there. This particularly depends on the treatment given to people who are “suffering from psychological disorders.”

Article 5 of the European Convention on Human Rights allows for the detention of some people with disabilities (of ‘unsound mind’) in an appropriate institution. The Rooman judgment tells governments that an institution which might at first seem inappropriate for a person, such as a prison, could actually be appropriate if it provides adequate care. It is also possible that a specialised psychiatric institution, which at first would seem to be appropriate, could be unable to provide the treatment that a person needs. This means that appropriate and individualised treatment for each person is essential. Whether an institution is an “appropriate institution” for a person depends on whether it gives appropriate and individualised treatment for that specific person.

Rooman vs Belgium press release: Court judgment concerning the psychiatric treatment provided to a person in compulsory confinement since 2004, European Court of Human Rights 2019 link
8.5 Fair access to rehabilitation

**What Scotland has to do to meet its human rights duties**
Give access to programmes and other support that is needed to be able to stop offending, for autistic people and people with learning disability.

**What we think Scotland needs to do**
We think that autistic offenders and offenders with learning disability all need to be offered individualised support to stop their offending behaviour. We understand that this may need to include social supports, education programmes and psychological interventions, for example.

**How we think Scotland could do this in law**

*Giving support to stop offending*
We think that the law could make clear that offenders have rights of access to individualised support to stop their offending behaviour.
Courts could have the power to require a person to accept support to stop their offending.

*Release at end of sentence*
We think that the law could state that a person cannot continue to be detained by any part of the criminal justice system at the end of a sentence, if they have not been given support to stop offending, or if the support has not worked for them.

**How we think Scotland could do this in practice**
We think that it would be more equitable for autistic offenders or offenders with learning disability not to be sent to forensic wards, units or hospitals. We discuss this in part 9.

*Equal access to community-based sentences*
We suggest that all autistic offenders and offenders with learning disability could be considered for community based sentences on the same basis as for all offenders. Some offenders would still have to be detained, as punishment and/or because of the level of risk to the public, on the same basis as for all offenders. We discuss possible places of detention in part 9.

For offenders with disabilities to be treated equality with other offenders, many will still need to be detained. However, we understand that interventions may only be effective for some autistic people and people with learning disability if they are delivered in the community, because of how autism and intellectual impairment can affect learning. 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.

More information about our human rights duties

Convention on the Rights of Persons with Disabilities

Article 25 tells governments to 'take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.'

Article 26 tells governments to 'organise, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services'.

European Convention on Human Rights

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

We think that autistic offenders and offenders with learning disability should be able to receive the support, care and treatment that they need, wherever they are.

In this part, we discuss the places where offenders may need to be to receive support to stop offending, and support, care and treatment.

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9.1 Rehabilitation in the community

What Scotland has to do to meet its human rights duties
Scotland should support each autistic offender and offender with learning disability to live in the community, if a person without a disability would be allowed to live in the community after the same offence.

What we think Scotland needs to do
The Convention on the Rights of Persons with Disability says that ‘the existence of a disability shall in no case justify a deprivation of liberty’.
We understand that when an autistic person or person with learning disability commits an offence, they should live in the community – with limits and support - if a person without a disability would live in the community after the same offence.
We understand that a person with disability should not be kept in detention or have their liberty restricted after an offence, if a person without a disability would not have their liberty restricted after that offence.

How we think Scotland could do this in law
Principles of equality and non-discrimination in disposals
We suggest that the law could set a principle of equality and non-discrimination in disposals for persons with disabilities.
We also suggest that the law clearly allows for offenders with disabilities to be treated more favourably where this is needed to address the effects of their disability.

How we think Scotland could do this in practice
Fair sentencing
Sentencing guidance would be needed to show what the usual disposals would be for each offence, for people without a disability.
In practice, autistic offenders and offenders with learning disability may need to be treated more favourably to reduce their disability, and to make disposals equitable.

Same orders as for other people
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 learning disability who are not offenders.

Socially-led rehabilitation
We suggest that rehabilitation in the community would be led by social professionals, supported by health professionals.
More information about human right duties

Article 4 of the Convention on the Rights of Persons with Disabilities gives general obligations to governments. It tells governments to ‘undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.’

Article 4(1)(c) tells governments to ‘take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes’.

Article 5(4) on equality and non-discrimination tells governments that ‘specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.’

Article 14 tells governments to ensure that ‘the existence of a disability shall in no case justify a deprivation of liberty’. We understand this to mean that a person with disability should not be detained for offence for which a person without disability would not be detained.

Article 26 is about voluntary habilitation and rehabilitation, so it may not be directly about rehabilitation of offenders. However, this right does seem to give some principles that would need to apply to any rehabilitation service for autistic people and people with disability. It could be most relevant when health, education, employment or social services are part of rehabilitation services and programmes.
9.2 Rehabilitation centres

What Scotland has to do to meet its human rights duties
Scotland should provide places of detention for autistic offenders and offenders with learning disability that reduce the effects of their disability.

Scotland should detain some autistic offenders and offenders with learning disability in rehabilitation centres for punishment, for offences that would lead to prison for offenders who do not have a disability.

What we think Scotland needs to do
We discussed New Zealand’s approach to rehabilitation of offenders with learning disability with a legal expert there. We visited a secure care centre in Scotland that supports some young offenders, some autistic people, and many young people with mental health issues.

We think that Scotland needs to set up rehabilitation centres for autistic offenders and offenders with learning disability.

We suggest that these centres would be led by social professionals, supported by health professionals. Rehabilitation centres would not be hospitals but treatment could be given there.

How we think Scotland could do this in law
Duty to provide access to rehabilitation centres
We think that a duty could be given to Health and Social Care Partnerships to make rehabilitation centres available for autistic offenders and offenders with learning disability.

How we think Scotland could do this in practice
Limited times at rehabilitation centres
Offenders would go to rehabilitation centres to have support for rehabilitation, for offences that would lead to a prison sentence for offenders without a disability.

These offenders would be made to stay at the rehabilitation centre for a fixed period of time as a punishment. They may also need treatment for mental illness. That treatment could be given at the rehabilitation centre.
More information about human right duties

Convention on the Rights of Persons with Disabilities

Article 26 of the convention on habilitation and rehabilitation may be relevant, as discussed above in section 9.1 on ‘rehabilitation in the community’.

Article 25 tells governments to ‘recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability’. It tells governments to ‘take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation’.

Article 25(d) of that Convention tells governments to ‘require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia [amongst other things], raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation [making and promotion] of ethical standards for public and private health care’

European Convention on Human Rights


‘…the assessment of whether a specific facility was “appropriate” had to include an examination of the specific conditions of detention prevailing in it, and particularly of the treatment provided to individuals suffering from psychological disorders. Thus, it was possible that an institution which was a priori [in general] inappropriate, such as a prison structure, could nevertheless be considered satisfactory if it provided adequate care, and conversely, that a specialised psychiatric institution which, by definition, ought to be appropriate could prove incapable of providing the necessary treatment. It followed that appropriate and individualised treatment was an essential part of the notion of “appropriate institution”.’
9.3 Prison

What Scotland has to do to meet its human rights duties
Scotland should only send autistic people and people with learning disability to
prison if the prison environment has been adjusted to minimise the person’s
disability.
Scotland should make sure that the effects of prison on autistic people and people
with learning disability are no worse for than for other offenders.
Scotland should only send autistic people and people with learning disability to
prison if a person without a disability would be sent to prison for the same offence.

What we think Scotland needs to do
We met with the Scottish Prison Service. We met with Healthcare Improvement
Scotland about health care in prisons. We also spoke with past and present Chief
Inspectors of Prisons in Scotland.
We think that prison environments would have to be designed and adjusted to
reduce the disability that autistic offenders and offenders with learning disability
experience.
We think that support, care and treatment services should be offered to autistic
people and people with learning disability who go to prison.

How we think Scotland could do this in law
Duties and rights
We think that a duty could be given to health boards and the Scottish Prison Service
to provide the services that we describe above.
We think that the law could give rights of access to adjustments and supports for
autistic offenders and offenders with learning disability.

How we think Scotland could do this in practice
Screening and diagnosis
We think that health services should offer screening and diagnosis for autism and
learning disability to all offenders. We think that this should be offered before a final
decision is made on whether the person will go to the community, a rehabilitation
centre or to prison.

Making use of other developments
We think that development in prisons would need to make use of other
developments in services for autistic people and people with learning disability,
including the national autism service that we discuss in section 4.3.
### Making prison environments appropriate

We think that health services and the prison service would need to work together to develop prisons, parts of prisons, and health and social care services.

We heard from the Scottish Prison Services about the trauma-informed model of prison that they are developing for women. This let us see that Scotland could possibly develop a disability-informed model of prison for autistic people and people with learning disability. However, we are aware that the prison service is not currently well adapted to support people with disabilities.

### Supporting people across the whole criminal justice system

We see a need for a process of designing rehabilitation support services and rehabilitation centres for autistic people and people with learning disability. This process could be an opportunity for Scotland’s criminal justice system to develop its understanding of how to support people across the whole system.

We think that it is important to monitor how the criminal justice system protects, promotes and fulfils the human rights of autistic people and people with learning disability.

### More information on human rights duties

#### Convention the Rights of Persons with Disabilities

Article 14(2) of the Convention is about liberty and security of person. It tells governments to ‘ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation [reasonable adjustments].’

Article 25(b) on health tells governments to ‘provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimise and prevent further disabilities, including among children and older persons.’

Article 31 on statistics and data collection tells governments to ‘collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.’


22(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.
**World Health Organisation**


1. There must be a clear acceptance that penal institutions are seldom, if ever, able to treat and care for seriously and acutely mentally ill prisoners. Such prisoners should be diverted whenever possible to appropriate mental health services before reaching the prison gate. Those already in prison should be transferred to specialist psychiatric care as soon as possible. For those awaiting transfer, those where diversion is not possible or those with minor mental health problems, adequate psychiatric facilities and support should be made available to address their immediate needs.

**European Convention on Human Rights**


‘…the assessment of whether a specific facility was “appropriate” had to include an examination of the specific conditions of detention prevailing in it, and particularly of the treatment provided to individuals suffering from psychological disorders. Thus, it was possible that an institution which was a priori [in general] inappropriate, such as a prison structure, could nevertheless be considered satisfactory if it provided adequate care, and conversely, that a specialised psychiatric institution which, by definition, ought to be appropriate could prove incapable of providing the necessary treatment. It followed that appropriate and individualised treatment was an essential part of the notion of “appropriate institution”.’
10. What this means for the law

In this final part, we discuss how changes could be made in law to move closer to meeting Scotland’s human rights duties. We also suggest how Scotland could prepare for full compliance with human rights duties in future.

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10.1 Autism and learning disability redefined

One part of this review’s remit is to consider ‘the definition of mental disorder under the 2003 Act in relation to learning disabilities and autism’.

Based on what we found in stage 1, we concluded that autistic people and people with learning disability are not well served overall by the Mental Health (Care and Treatment) (Scotland) Act 2003.

We discuss definitions of autism and learning disability in 2.1 on ‘disability’ and in 6.2 on ‘limits on human rights’. The Convention on the Rights of Persons with Disabilities does not allow rights to be limited on the basis of disability. We think that the model of disability from the United Nations Convention on the Rights of Persons with Disabilities should be the basis for our definitions of autism and learning disability. We think that this would help Scotland to reach a long-term goal of no longer limiting the rights of these groups of people on the basis of disability.

We think that a person with a diagnosis of autism could be said to have ‘autistic impairment’ – and strengths – and could be said to have ‘autistic disability’ on a temporary basis when the person is experiencing extreme stress or distress. We think that a person with a diagnosis of learning disability could be said to have ‘intellectual impairment’ – and strengths – and could be said to have ‘intellectual disability’ on a temporary basis when the person is experiencing extreme stress or distress.

We suggest that all autistic people and people with learning disability who need mental health services would be supported under a new law which we discuss in the next section. This would include autistic people and people with learning disability who do not have mental illness or personality disorder; those people who also have mental illness; and those people who also have personality disorder.

We suggest that autism and learning disability should no longer be considered as forms of ‘mental disorder’ under the Mental Health (Care and Treatment) (Scotland) Act 2003. We include all autistic people and people with learning disability in this suggestion, including those people who also have mental illness or personality disorder. We are suggesting this approach to ensure consistency in the support, care and treatment of autistic people and people with learning disability. We see a need for a clearly separate law for autistic people and people with learning disability. We think that it would be confusing and arbitrary in practice to have autistic people and people with learning disability subject to one law when diagnosed with mental illness or personality disorder, and another when not diagnosed with those conditions. Also, we think that the suggestions that we make in this consultation should apply to all autistic people and people with learning disability.

We think that our suggested changes would need to be in place before autism and learning disability were removed from the definition of mental disorder in Scotland’s Mental Health Act. We are not suggesting that autistic people and people with learning disability should lose rights that they currently have in other laws. That would be against the Convention on the Rights of Persons with Disabilities (article 4(4)). Further 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. We are not suggesting that autism and learning disability should simply be removed from the Mental Health Act now, with no other law in place. In the next sections, we discuss what law we think needs to be in place.
10.2 A law on support for intellectual impairment and autism

We suggest that Scotland needs a new law for support, care and treatment for autistic people (people with autistic impairments) and people with intellectual impairments.

Scotland is one of a few countries that uses the term ‘learning disability’. The term can be confused with ‘learning difficulties’, which usually means conditions such as dyslexia. The Convention on the Rights of Persons with Disabilities uses the term ‘intellectual impairments’. International research that is based on the medical model tends to use the term ‘intellectual disability’.

In our discussions before we began stage 1 of the review, we found that there may be no terms that every person is happy with. In practice, we think that it is most important to use the terms that each person wants to apply to themselves. Based on what we have heard and read, we suggest these terms for law: ‘autistic person’ and ‘person with intellectual impairment’. We also suggest that the law and practice guidance should allow individuals to use their preferred terms to describe their own condition. We think that professionals should be required to use those terms in practice with each person.

We are suggesting one new law for autistic people and people with intellectual impairments. Autism and intellectual impairment are very different. We are not suggesting that we need one new law because of the proportion of autistic people who have intellectual impairments, although having one law could be helpful for those people.

We are not suggesting that current learning disability services should simply adapt to take in autistic people also within existing resources.

We are suggesting a law that applies to all people with autistic impairments and intellectual impairments to give benefits to those people. We are also suggesting that this law could amend the Mental Health Act. These amendments would make it possible to limit rights only when people are experiencing autistic disability or intellectual disability, and when limiting rights is shown to be a proportionate decision that respects the person’s rights, will and preferences.

It is important that the rights that we suggest are made available to all autistic people and people with learning disability.

Another reason for our suggestion of a new, separate law for autism and learning disability is that, when the time is right in future, Scots law which enables detention and compulsory care and treatment on the basis of disability could possibly be ended. That would leave positive rights in another law for autistic people and people with learning disability.
For positive rights, and for the duties that go with those rights, we think that the following changes could best be made a new law:

Define autism and intellectual impairment with the disability model
Introduce a human rights culture across all services
Give clear rights of access to specialist support, care and treatment
Rights to independent living. These would be rights to choose where you live and who you live with, and rights to the support that you need
Require standards on information from professionals to support decision making
Establish a national autism service
Create a duty to provide the same standard of support, care and treatment to autistic offenders and offenders with intellectual impairment as to other autistic people and people with learning disability
Rights to safe places
Give duties to public authorities
Establish rights for Disabled Persons Organisations, and duties on public authorities to involve autistic people and people with intellectual impairments

The same law could make amendments to the Mental Health Act on:
Decisions about psychological interventions and psychotropic medications
Statement of rights, will and preferences
Human rights assessments
Independent advocacy
Establishing secure support centres, and limiting the use of hospitals
Professional roles, including roles in relation to limits on rights
How professional decisions are to be made, reviewed and monitored
How detention and compulsory support, care and treatment are to be reviewed and monitored

We have also suggested changes that we think need to be made in law for autistic people and people with learning disability. These changes could be made in the new law that we suggest. These changes might instead be made in laws for everyone, but we think that these changes should not be delayed.

Rights to independent living might possibly be best placed in a separate law, as this right would be relevant to many people other than autistic people and people with intellectual impairment.
We are aware that the Scott review may consider legal capacity and support for decision making. In this document, we discussed some concepts in relation to decision supporters and unpaid carers. Those concepts may need to be developed more, and they may be relevant to the Scott review.

We note that some of our suggested changes could change the scope of mental health law for autistic people and people with learning disability. We are aware that the Scott review may consider the interaction between mental health law, incapacity law and adult protection law in Scotland. Some of our suggestions may be relevant to all of those laws. For example, we suggest in 7.3 that the Mental Health Tribunal should have power to make any order to protect a person’s human rights. We also suggest in section 6.1 that all professional decisions should be made on the basis of all of the person’s relevant human rights. Taken together, these suggestions could give the tribunal more scope to make judgments across health and social care.

In the section about limits on human rights (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’. This could reduce disability discrimination in restrictions in liberty. It could also help to set a direction for future developments in the law, towards how the Convention on the Rights of Persons with Disabilities says the law should develop. We think that it could be more equitable to move this power from mental health law to law for public health or public safety.

Some of the suggestions that we make may have effects on other groups of people in the criminal justice system if they were implemented. These are discussed in the next section.
### 10.3 Criminal law

For equality in restrictions on liberty, we think that autistic offenders and offenders with intellectual impairment should receive the same disposals as anyone else would receive under criminal law, or should be treated better where this is needed to minimise the effects of their disability.

In other sections, we suggest a range of rights to specialist support, care and treatment services for autistic people and people with intellectual impairment. We suggest a new law to support those rights in section 10.2.

For autistic offenders and offenders with intellectual impairment, we suggested that specialist rehabilitation services (8.5) and rehabilitation centres (9.2) might need to be established. We think that rights and duties for those services and centre could be included in the new law that we suggest in 10.2, along with rights of access for offenders to the same level of support, care and treatment as for non-offenders (section 8.4). Rights to rehabilitation in the community (9.1) and to adapted prison environments (9.3) might also be included in a new law.

Some of the suggestions that we make for offenders may have effects on other groups of people in the criminal justice system if they were implemented:

- Intermediaries to support communication
- Fairness in responsibility (disability as a mitigating factor)
- Fair punishment (detention as clearly defined, time-limited punishment)

The other, broader review of the Mental Health Act might choose to consider whether these suggestion are also relevant to people with mental illness and other conditions, and how these suggestions might best work in law.
10.4 Commitments to positive rights and to ending detention on the basis of disability

Although the United Nations’ position is not consistent on this link, some parts of the United Nations have clearly stated that all detention on the basis of disability should end, and that laws which allow this should be repealed link.

We have not suggested that detention and compulsory treatment on the basis of disability should end at this time for autistic people and people with learning disability. With the current level of development of mental health and criminal justice services in Scotland, we think that if the law did not allow professionals to restrict liberty or to give compulsory treatment to autistic people or people with learning disability on the basis of disability, this could lead to more lives lost to suicide. We also think that more people could be brought within the criminal justice system inappropriately. The Convention on the Rights of Persons with Disabilities does allow for rights to be limited, but it requires us to limit rights in the same way for persons with disabilities as for everyone else. All of the suggestions that we make in this consultation are aiming towards that goal.

So, we think that any commitment from Scottish Government to work towards the key human rights requirement of ending detention on the basis of disability would have to be tied to a clear commitment to resource the services that people need, to duties on public authorities to provide these services, and to rights of access to these services for autistic people and people with intellectual impairment.

When those services are established, we expect that people will not need to be compelled to use them.