SHRC
Scottish
Human Rights
Commission

Scottish Mental Health Law Review: Consultation response

May 2022

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

www.scottishhumanrights.com

Introduction

In 2017, the Commission highlighted the following priorities for action in relation to mental health and incapacity reform[1]:

- "*Set out a road map for reform of the full legislative framework (the Mental Health (Care & Treatment)(Scotland) Act 2003, the Adults with Incapacity (Scotland) Act 2000 and the Adult Support and Protection (Scotland) Act 2007), with the participation of people with lived experience*
- *Ensure supported decision-making is at the heart of Adults with Incapacity reform already underway*
- *Coordinate the existing/proposed reviews in line with the Convention on the Rights of Persons with Disabilities (CRPD), with the aim of achieving supported decision-making.*
- *Devote resources to exploring supported decision-making in practice*
- *Implement the five actions proposed by the Special Rapporteur on the Right to Health."*[2]

We are pleased to see that the proposals of the Scottish Mental Health Law Review (the Review) seriously engage with and advance each of these priorities. It is evident throughout the proposals that the Review has identified the relevant human rights standards, considered what they require and sought to offer proposals which advance those requirements. This is fundamental to the application of a human rights based approach. As a consequence of this effort, we support the main thrust of the proposals, which we believe offer practical solutions to complex human rights questions. Accordingly we have not responded to every idea put forward, rather sought to address areas where we have something to add.

Alongside the Equality and Human Rights Commission, we are part of the UK Independent Mechanism that was established by the UK under Article 33(2) of the UN Convention on the Rights of Persons of Disabilities (CRPD) to promote, protect and monitor implementation of the Convention. We have therefore particularly considered how the proposals seek to further implement CRPD.

We have written extensively on the human rights framework that underpins mental health and incapacity law[3] which is also explained throughout the proposals. We have therefore not narrated the framework in this response. As previously, we acknowledge that there is some degree of tension between the obligations imposed by the European Convention on Human Rights (ECHR) and CRPD with regard to mental health and incapacity laws, and we do not attempt to provide a definitive answer to these in every case. Our comments reflect our interpretation of human rights standards at present. We previously called for collaborative work to resolve these issues which we believe the Review has now undertaken and we trust they will continue to do so.

The Commission continues to believe that it is possible to discern an international consensus among human rights bodies that we must make concerted efforts to move away from substitute decision-making and towards supported decision-making. We believe the work of the Review has tackled this challenge directly and provided a set of draft proposals that would set Scotland on a fundamentally new path in realising the human rights of people with mental health issues. The final goal must ultimately remain the removal of non-consensual treatment, however, we believe the proposals provide key elements of the roadmap towards that goal.

As the Consultation also identifies, these proposals sit alongside wider incorporation of a range of international human rights treaties, through a Human Rights Bill. Most importantly for the purposes of this consultation, this includes the entirety of CRPD along with a general right to health (contained both in CRPD and in the International Covenant on Economic, Social and Cultural Rights). The work of the Review is an important exercise in taking forward incorporation of the human rights which specifically apply in the area of mental health, in a detailed and considered manner. As the detail of wider incorporation is under development, it is not possible to say definitively where each specific duty should fall – whether a piece of mental health legislation or the wider Human Rights Bill – but it will be crucial to determine this as the work of incorporation continues.

Incorporation of CRPD into Scots law means that public authorities will be under a duty to comply with the requirements of CRPD. In our view, implementing these proposals would bring Scotland much closer to achieving compliance with the rights within CRPD relevant in the area of mental health, in particular, the rights to equal recognition before the law, liberty, health and independent living.

Chapter 2: What is the purpose of the law?

Purpose and principles

The Commission has, for many years, advocated the reform of mental health and capacity law towards supportive and enabling legislation, focused on delivering access to human rights, as opposed to governing restrictions on them. We therefore strongly support the proposals for a new purpose for mental health law, "to ensure that all the human rights of people with mental disorder are respected, protected and fulfilled". In achieving that, we agree that the legislation must extend beyond a focus on compulsory treatment and should take into account the full range of human rights set out in international human rights treaties, including economic, social and cultural rights. The proposals appropriately focus on CRPD as the primary source of standards in this area and we are broadly supportive of the analysis of its requirements, subject to any comment offered below. As such, we have not sought to repeat those requirements where we agree with the conclusion arrived at.

We are not of the view that mental health and incapacity law requires to be abolished in order to comply with CRPD, *provided* it is reformed as a supportive piece of legislation, and based on non-discriminatory grounds. General Comment No.1 of the Committee on the Rights of Persons with Disabilities, on the right to equal recognition before the law, requires that States "must immediately begin taking steps towards the realization of the rights provided for in Article 12. Those steps must be deliberate, well-planned and include consultation with and meaningful participation of people with disabilities and their organizations".[4] We consider that the proposals made here meet these requirements and represent a fundamental shift in the approach of mental health and

incapacity law. They present a clear roadmap for achieving the end goal of eradicating non-consensual practices.

As identified above, there is significant overlap with the wider exercise of incorporation of international human rights treaties in Scotland. As is evident from the range of issues covered in the proposals, mental health and incapacity law raises many specific human rights issues and we believe that a specific piece (or pieces) of legislation remains necessary. The provisions of that legislation must complement and cohere with the wider Human Rights Bill.

In terms of the new principles proposed, the Human Rights Bill may seek to explore the concept of ‘dignity’ as a founding principle to the delivery of human rights. The principles of both pieces of legislation should be developed in tandem to ensure cohesion. With regard to mental health law, dignity could be developed to encompass the protective aspects of CRPD, where, for example, positive action is required to prevent a person from suffering ill-treatment.

The key concepts of economic, social and cultural rights (progressive realisation, minimum core obligations, maximum available resources and non-retrogression) will all be developed in the Human Rights Bill. The proposals suggest a legal requirement for Scottish Government to establish core minimum obligations to people with mental disorder in relation to e.g. the right to the highest attainable standard of physical and mental health and the right to independent living. We believe these can complement the general obligations set out in the Human Rights Bill while offering specificity to the context of mental health.

The duties on public bodies and accountability for those duties are crucial. At this stage, we cannot say how these would overlap with similar duties set out in the Human Rights Bill, however a holistic accountability structure would be desirable.

We agree that the Mental Health Strategy has an important role to play in delivering the progressive realisation of human rights, however, the duty of progressive realisation should also be reflected in the statutory duties on public bodies. Article 2.1 of the International Covenant on Economic, Social and Cultural Rights obliges States to ensure that they

effectively use the maximum of their available resources to progressively achieve the full enjoyment of economic, social and cultural rights for all. This duty is of equal importance with that of ensuring the minimum core and would have application to the local activities of Health and Social Care Partnerships, as much as to national activities of the Scottish Government. For example, the choices of a Partnership in how to spend their budget should be taken within the parameters of these human rights requirements. This duty should therefore be equally subject to monitoring and accountability as a duty to deliver the minimum core.

Requirements which follow from particular human rights and system-wide changes including culture change

The proposals identify a series of human rights issues affecting people with mental health issues which may require specific duties or action. These reflect a range of CRPD obligations (Article 8 Awareness-raising, Article 9 Accessibility, Article 19 Living independently and being included in the community, Article 25 Health, Article 26 Habilitation and rehabilitation, Article 28 Adequate standard of living and social protection) which require concerted action and which we support. The proposals to strengthen sections of the 2003 Act are a practical way of building a broader understanding of human rights standards into existing duties. The plan for system-wide change is ambitious and implements the general obligations of Article 4 CRPD including, importantly, the obligation to closely consult with disabled people in the development and implementation of legislation, policies and decision-making practices.

We comment on the role of monitoring in Chapter 8, however it will be important to build in clear mechanisms by which action under the Mental Health Strategy and wider activity towards system-change will be informed by that monitoring. Clear attributable duties will be required to ensure accountability for acting on the human rights issues raised by monitoring.

Chapter 3: Supported decision-making

The realisation of supported decision-making is at the core of compliance with Article 12 CRPD. We agree that what is required is the

development of a comprehensive regime of supported decision-making, which should apply in all situations and, especially, where non-consensual interventions and treatment are being considered. In challenging situations, such as where the individual's will and preferences are not known, in a crisis, or where will and preference appear to conflict, supported decision-making becomes all the more important and requires additional efforts. This may result in a "best interpretation of will and preference" based on what is known of the individual and their wishes.

Range of support to be offered

General Comment No.1 requires that States "establish, recognize and provide persons with disabilities with access to a broad range of support in the exercise of their legal capacity…premised on respect for the rights, will and preferences of persons with disabilities"[5] and it is clearly envisaged that this would be made up a range of mechanisms which may be suited to different purposes. We agree therefore that this can be made up of developments in mechanisms already in existence, re-oriented towards the primacy of the individual's rights, will and preferences, in tandem with new mechanisms.

Across each of these mechanisms, it will be important to clarify their legal effect, in particular, the extent to which they are binding and the circumstances in which they can be overridden.

We support the following proposals for specific further provision for supported decision-making:

- Explicit legislative provision for advance directives: This must include clear, narrow limits on when an advance directive can be overridden;
- Statement of rights, will and preferences: We supported the Rome Review's recommendation for a statement of rights, will and preferences. We support measures that place emphasis on finding out the individual's will and preferences and put them at the heart of the decision-making process, as a practical step in strengthening the right to legal capacity. Scrutiny and justification

for decisions which conflict with expressed will and preference is important and can also drive consideration of the impact on the individual's rights into the heart of decision-making in practice. We will be interested to see proposals developed as to the circumstances in which these can be overridden, although we believe that they should be very specific and narrow. It will be essential that there is scope to challenge an overriding decision by the individual or interested parties. The Mental Health Tribunal or Mental Welfare Commission should have a role in scrutinising these decisions and we would like to understand better how this overlaps with scrutiny of the Autonomous Decision-Making (ADM) test;

- Decision-making supporter: We have commented further, in support of this role, in Chapter 10;
- Independent advocacy offered on an opt-out basis;
- Specialist support in legal and administrative proceedings, including reframing the role of curators and safeguarders: The ECHR case *AN v Lithuania*[6] found that the right to a fair trial was violated where, in capacity proceedings regarding an individual with mental health issues, there was no one at the hearing to put forward matters in support of the individual's claims. We believe this calls into question the current situation where, if a curator or safeguarder agrees with the professionals that a proposal which goes against a person's wishes is in their best interests, there is no one representing the individual's will and preference and examining witnesses on that basis, with equality of arms. We believe the individual's will and preference should always be represented on an equal basis with the case to the contrary;
- Non-instructed advocates: The provision of non-instructed advocacy would be a practical means of realising the idea of "a best interpretation of the person's will and preference", as required by CRPD and broadening our understanding of supported decision-making for those who are unable to express their will and preference verbally. However, consideration will be required as to the extent of any legal authority vested in a non-instructed advocate and routes to challenge their interpretation of will and preference;

- Use of the supported decision-making framework to identify and mitigate controlling influences;
- Development of a set of principles for support for decision-making.

What needs to happen practically to facilitate successful implementation of SDM?

The Consultation raises the question of whether a duty on public bodies should be created, to ensure that everyone who requires it has access to support for decision-making. As we have said before[7], we believe that supported decision-making needs to be explicitly built into processes, with duties attached and the scrutiny of the performance of those duties made more robust. One of the drawbacks of a wide ranging supported decision-making scheme is that delivery becomes rather diffuse, risking gaps in provision for those less able to access it. It must therefore be clear where accountability lies for ensuring that an appropriate level of supported decision-making has been provided. We believe that the intention to provide supported decision-making requires to be backed up by an attributable duty and to require evidence of its being performed.

We discuss the requirements of access to justice at Chapter 8 on accountability. The primary human rights duty is to provide an effective remedy[8], in recognition of the fact that rights can become meaningless if there are no consequences when they are breached. They also require that administrative remedies must be challengeable through a judicial procedure and that there must be clear consequences for authorities who do not comply with the reparations ordered by a competent tribunal. We believe that it will be important that a judicial body is able to assess whether the provision of supported decision-making has been adequate and to require action if not. We note that supported decision-making is intended to be part of the HRE process (addressed in Chapter 5 below) which provides opportunities for remedy and appeal. The judicial body should be provided with information on the steps that the professionals have taken to support a person's own decision-making. It would also need to address any alternatives available and why they are or are not suitable, to ensure that barriers causing the individual's disability are addressed.

Alongside development of existing models of supported decision-making discussed above, we also believe that ambitious thought is required to develop new models for the most challenging situations, if we are to arrive at the goal of removing non-consensual treatment and interventions. The CRPD Committee urged the State Party to step up efforts to foster research, data and good practices in the area of, and speed up the development of, supported decision-making regimes.[9] The establishment of a central body, such as a Centre for Excellence, has potential, if appropriately resourced and its outputs embedded in policy and practice.

Chapter 4: The roles and rights of carers

We support efforts to give further recognition to carers' rights and to the important role played by carers in supporting the realisation of the human rights of those they care for, especially as facilitators of supported decision-making.

In addition to awareness raising and training for professionals, carers may also need support to assist them to play their role in the various mechanisms proposed. Advocacy and training for carers could be provided for.

Chapter 5: Human rights enablement

Human rights enablement (HRE) framework

We support the inclusion of a framework which brings explicit and specific consideration of human rights to the forefront of care and support. The suite of HRE framework, supported decision-making and an autonomous decision-making test combine to ensure a focus on realising the human rights of the individual, not just in times of crisis and intervention, but in daily practice. While they address the key challenge of implementing Article 12 CRPD by focusing on the individual's will and preference, they also provide a framework for considering the full range of human rights that might be impacted in any given case. The process of HRE would allow for careful consideration of the legitimate aim for restricting a person's rights and the most proportionate means of doing

so, and allows for scrutiny and accountability for that decision. It also enables consideration of duties to take proactive action to fulfil economic, social and cultural rights.

It will be important to clarify the level of weight to be given to a person's autonomous decision. We consider that both "priority" and "special regard" are somewhat vague. We consider that a clear rebuttable presumption with stringent criteria attached to any rebuttal would more clearly ensure respect for the will and preference of the individual in line with Article 12 CRPD. We consider that the principle proposed by the Essex Autonomy Project[10] – that there should be a rebuttable presumption that effect should be given to the person's reasonably ascertainable will and preferences, subject to the constraints of possibility and non-criminality, rebuttable only if it is shown to be a proportional and necessary means of effectively protecting the full range of the person's rights, freedoms and interests – should be reflected in the amended principles. It would help to cement the foundation of the amended legislation in respect for legal capacity, while taking account of the permitted grounds for interference with Article 8 ECHR.

Carrying out a meaningful and informed HRE will require an in-depth understanding of a wide range of human rights, their content and requirements. The process of identifying relevant human rights, including economic, social and cultural rights, considering their requirements and balancing them up, as identified, cannot be prescribed as a tick-box exercise. Guidance and continuous training on applying human rights in practice will be necessary. Processes of challenge will also be important in assisting practitioners to learn any gaps or errors in their assessment. The FAIR framework[11] may be a useful starting point to lead practitioners through an assessment, as it is geared towards identifying responsibilities and reviewing action arising from the human rights assessment.

Scrutiny and challenge will also provide accountability for the process of assessment and the decisions made. For this reason, we believe there must be, identified at the outset, a professional with responsibility for ensuring proper coordination. As we have said elsewhere, all duties must be attributable to a specific individual. Mental Health Officers would

seem to be most suitable to this role and should already have some grounding in making human rights assessments. However, if a MHO is not involved, a broader category of persons could be prescribed which might include social workers and key medical professionals.

We appreciate that the circumstances in which a HRE is required will not be definitively set out, however, we agree that the events listed on p.73 should trigger an HRE or a review of an existing one.

Remedy and appeal

We agree with the proposals for an escalating process of appeal, culminating in review by a judicial body.

We also see merit in external bodies having the right to request review on behalf of individuals. The Mental Welfare Commission would be an appropriate body to deal with individual and possibly systemic cases.

As regards possible powers for the Scottish Human Rights Commission, as it stands under the Scottish Human Rights Act 2006 section 6(1), we do not have the power to ask the court (or Tribunal) to review whether it is reasonable that the rights of any group or individual are not being met. The Commission is of the view that the inclusion of the Commission within legislation would have to be reflected in the Scottish Commission for Human Rights Act 2006 which sets out the Commission's general mandate and specific legal powers. Consideration is being given to the Commission's powers as part of the work that is underway in relation to the Human Rights Bill. In the Commission's view, any consideration of the powers of the Commission ought to be undertaken in a holistic way, taking all relevant factors into account.

Chapter 6: Autonomous decision-making test

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

we believe the current capacity and SIDMA tests require to be replaced with a disability-neutral test.

The “controlling influences” of crisis or the impact of a person’s illness or condition take into account the permitted interferences with Article 5 ECHR on the basis of unsound mind and the *Winterwerp* criteria.[12] We consider that they provide a juncture between the requirements of Article 5 ECHR and CRPD. The role of diagnosis lies at this juncture. We believe that an appropriate role for diagnosis is in determining the nature of support and interventions that may be required, within a framework of supported decision-making. This shifts away from a discriminatory use of diagnosis to apply restrictions, towards one which takes account of a person’s disability with a view to facilitating the exercise of their human rights, in particular, the right to legal capacity.

The *Winterwerp* criteria[13] apply only to the test for lawful psychiatric detention, which requires a diagnosis of “true mental disorder”. For ECHR purposes, this would have to remain a component part of a deprivation of liberty specifically, but would not be required for the application of the autonomous decision-making (ADM) test to wider contexts. These might impact on other rights, such as the right to private and family life, to which the *Winterwerp* criteria do not apply. The test employs the essential ECHR components of proportionality, including that any departure from will and preferences must be for as short a period as possible, and that any restriction must be lawful, proportionate and non-discriminatory.

Across the test, we are pleased to see the emphasis on giving full effect to a person’s will and preference, at all times, even in crisis. This accords with General Comment No.1 which requires that, at all times, “accurate and accessible information is provided about service options and that non-medical approaches are made available”.[14] Similarly, we agree that the ADM test should not be applied until every support has been provided to maximise the person’s decision-making ability. We support the idea of a process of examining and constructing the person’s wishes leading, if necessary, to a best interpretation of will and preference. We believe this is what is envisaged by Article 12 CRPD in action. The weight accorded to will and preference needs to be clearly

defined. As above, we consider that a rebuttable presumption should be employed - that effect should be given to the person's reasonably ascertainable will and preferences, subject to the constraints of possibility and non-criminality, rebuttable only if it is shown to be a proportional and necessary means of effectively protecting the full range of the person's rights, freedoms and interests. As we have said previously[15], we believe that "harm", clearly defined, is an appropriate, disability-neutral threshold for intervention.

We believe that separate authorisation should be required for treatment and detention. *X v Finland*[16] made clear that authority to detain and authority to provide non-consensual treatment require separate safeguards.

It is not entirely clear who is responsible for granting authority or for keeping the authorisation under strict review in an urgent situation. Our assumption from the proposals is that orders for detention and treatment would remain available, adapted to fit with new tests and in a judicial forum. Similarly, judicial authorisation for interventions currently permitted by AWI legislation would be adapted. Where a deprivation of liberty is concerned, judicial authorisation should be obtained as soon as possible to comply with Article 5.

For situations that do not require judicial authorisation, such as treatment covered by section 47 certificates, we do consider that it is important to provide a discrete route of appeal against the ADM decision. Articles 12 and 13 CRPD require that individuals must have the opportunity to challenge an interference with their right to legal capacity[17] which is not confined only to the most serious interferences. Appeal should be:

- accessible, affordable, timely and effective[18]: We consider that an appeal should go directly to external review to facilitate these requirements. The Mental Welfare Commission may be an appropriate body to carry out such review provided they had the power to overturn the ADM decision and ensure the review was effective.

- We believe that judicial consideration should be an option. CRPD does not make a distinction on the seriousness of the interference and, if a matter is important enough to an individual that they wish to seek judicial consideration, it ought to be considered a serious interference with their autonomy.
- Equality of arms: this should include access to support, such as independent advocacy and legal representation as well as an independent second opinion, if required.

Chapter 7: Reduction of coercion

We are pleased to see consideration of the five actions proposed by the former UN Special Rapporteur on the Right to Health, Dainius Pūras, on which we have called for action. We believe a focus on these actions sets Scotland on a practical path towards eradicating coercion. We appreciate also the weight accorded to the views of people with lived experience on the sometimes necessary role of coercion, but requiring significant improvement in the experience of coercion. We support the ambition for Scotland to become a leader in taking a comprehensive approach to tackle coercion through a range of efforts and learning from best practice in alternative models across the world.

The process of developing improved practices should be tied to the process of monitoring and scrutiny so that areas for action identified can inform developments. We believe there is promise in providing powers to the Mental Welfare Commission, both to identify systemic areas for action and to require supports in individual cases to avoid the need for compulsion.

We believe that Part 16 treatment requires stronger safeguards including a right of challenge. Introducing authorisation for non-consensual treatment, separate from detention, which would require to be detailed and justified, would address the challenge of *X v Finland* and provide robust scrutiny by a judicial authority.

The Commission has also called for the extension of excessive security appeal provisions to low secure care and beyond and we are pleased that this is now being considered (here and in Chapter 8). For an

individual to be detained in conditions of excessive security engages the right to private and family life (Article 8 ECHR) and, potentially, even the right to freedom from inhuman or degrading treatment (Article 3 ECHR)[19]. Restrictions imposed by conditions of excessive security must therefore be justified. Restrictions must have a legal basis, pursue a legitimate aim, and be a proportionate means of achieving that aim. All patients have these rights and we do not see sufficient justification for denying this right of appeal to patients in low secure settings. Appeals of this nature would also provide an impetus to develop community-based services in the same way that the introduction of this right for people in the State Hospital has led to the development of the estate of medium secure provision.

We agree that requirements for services to record, reflect on and reduce coercive practices would contribute to its eradication. Within this, we believe that restraint and seclusion practices must be identified separately to other forms of coercion, in recognition of their seriousness. Restraint and seclusion are forms of coercion with a particularly serious impact on the individual's human rights, in particular, the right to freedom from inhuman and degrading treatment in terms of both ECHR (Article 3) and CRPD (Article 15). The UN Committee has made a concluding observation on the specific issues of restraint and seclusion in the UK. The Committee recommended that the State "Adopt appropriate measures to eradicate the use of restraint for reasons related to disability within all settings…as well as practices of segregation and isolation that may amount to torture or inhuman or degrading treatment".[20] This will require monitoring of the use of restraint and seclusion and specific safeguards around its use, so that it can be reduced to the absolute bare minimum possible to safeguard the full range of human rights of the individual.

Chapter 8: Accountability

As the proposals identify, accountability is a fundamental component of a system that respects, protects and fulfils human rights. Incorporation of human rights standards throughout legislation, policy and practice is essential to providing accountability for those standards. The proposals

consider a range of forms of accountability, all of which are essential components:

- Remedies and access to justice
- Advocacy, advice and support
- The scrutiny and regulatory landscape

This takes account of the importance of accountability throughout the course – from ensuring involvement of people affected in decision-making processes, through active monitoring of the impacts of decisions, to providing an effective remedy where rights are not being upheld.

Remedies and access to justice

The proposals identify that for remedies to be adequate, they must be accessible, affordable, timely and effective. Amongst other things, effectiveness requires that administrative remedies must be challengeable through a judicial procedure. In addition there must be clear consequences for authorities who do not comply with the reparations ordered by a competent tribunal. We have commented on proposals in other Chapters which improve the availability of a route of challenge to a judicial body and could introduce consequences for non-enforcement. This is an area which has been lacking in mental health legislation in some regards, particularly in the case of Recorded Matters. We therefore support proposals to strengthen the Mental Health Tribunal's powers to grant Recorded Matters to allow them to require action by authorities. The power to require the provision of care and support to avoid the need for compulsion could provide an enforceable right to voluntary treatment, where that has been unreasonably denied. This could guarantee the right of people with a mental illness to access services in the least restrictive environment, to be actively engaged in determining their treatment, and to be assisted in social reintegration. We would, however, like to see clarity on the consequences for non-enforcement of an order of the Tribunal.

Investigating deaths

The Commission responded in detail to the Mental Welfare Commission's recent consultation on investigating deaths occurring during compulsory care and treatment. Building on our work examining the adequacy of arrangements for investigation of deaths in the prison context we highlighted areas where the Mental Welfare Commission's proposals needed to be strengthened to help fulfil the procedural requirements of Article 2 ECHR.

We will not repeat that analysis here, however, building on the Deaths in Custody Review, the key recommendation was that "a separate, fully independent investigation should be undertaken into each death in […] custody".[21] The report considered the key features of an independent body, all essential to ensuring accountability. These include that "its functions and remit – including, for example the timescales for investigation, the parties that must be involved in an investigation, and related complaints/appeals processes – should be set out in statute and explicitly linked to human rights standards".

Complaints

The Commission considers that regulators, scrutiny bodies and ombudspersons play an essential role in addressing accountability gaps which has not yet been fully harnessed. This applies to the handling of complaints as well as the broader role of these bodies in monitoring and regulating the implementation of human rights. The Commission believes it will be necessary to build into their role, duties to implement their mandates in a manner that is consistent with and gives further effect to human rights. This could complement the proposals for an HRE which could be taken into account in the assessment of complaints. Complaints and access to justice are areas with significant crossover with the Human Rights Bill and the ideas outlined in the proposals should be developed in tandem with the proposals of the Human Rights Bill.

Collective complaints

The question of possible additional powers for the Scottish Human Rights Commission is addressed at Chapter 5 above.

The scrutiny and regulatory landscape

The role of regulators, scrutiny bodies and ombudspersons could be significantly enhanced by powers to provide consequences for non-enforcement. We support the proposals to extend the role of the Mental Welfare Commission in particular.

Chapter 9: Children and young people

Some of the areas raised in this chapter are within the expertise of the Children and Young People's Commissioner Scotland, particularly regarding the treatment of 16 & 17 year olds and the operation of capacity and supported decision-making for children. We offer comments primarily in relation to the implementation of CRPD and of wider human rights duties.

Principles

We agree that the current child welfare principle is broadly consistent with Article 3 UNCRC and also reflects Article 7(2) CRPD. The principle may need to be expanded to reflect respect for the evolving capacities of children in line with Article 12 UNCRC and Article 7(3) CRPD. Article 7(3) states:

> "States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right."

Incorporating this aspect highlights the respect for a child's will and preference as a balance against over-reliance on a best interests approach. Article 7(3) recognises that the evolving capacities of a

disabled children must be given as much weight as for a non-disabled child, and highlights the need for support to evolve and express them where needed.

Rights to support

Our comments in relation to a statutory duty to meet minimum core obligations in Chapter 2 apply equally to the proposal in relation to children with mental disorder. In the development of that minimum core, we believe that specific requirements for children will be evident. Specialist services for children, especially in-patient services, would be one such element, emerging from UNCRC, CRPD obligations and other principles of international law. For example, the Havana Rules 1990 (United Nations Rules for the Protection of Juveniles Deprived of their Liberty) stipulate:

> 28. The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.
>
> 29. In all detention facilities juveniles should be separated from adults, unless they are members of the same family. Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned.

We agree with the proposals to strengthen accountability and routes of challenge for the delivery of section 23 and to extend the duty beyond in-patient services. The development of specialist services is closely linked to a duty of progressive realisation and the use of maximum available

resources. The general duties discussed in Chapter 2 could support these new accountability duties.

Crisis services

The concerns outlined by practitioners about the use of mental health services to address gaps in the system raises a number of human rights issues, including regarding the right to health, liberty and equal recognition before the law. The proposals to develop child-centred alternatives to psychiatric care and provide additional safeguards for emergency detention of children are important. Emergency detention always indicates a need for early review, in order to comply with the requirements of Article 5.4 ECHR, however, we agree that this is especially important where it is known that its use is already subject to question.

Safeguards for treatment

We believe that specific attention requires to be given to the use of restraint and seclusion on children and young people, in line with the CRPD Committee's Concluding Observations in 2017 which require strategies "to identify and prevent the use of restraint for children and young persons with disabilities".[22] Consideration should be given to whether the particular situation of children and young people requires a ban on restraint and seclusion.

Chapter 10: Adults with Incapacity proposals

The Commission responded in detail to the Adults with Incapacity (Scotland) Act 2000 – Proposals for Reform in 2018.[23] We understand that responses to that consultation will be considered by the Review and, as requested, we will not repeat the detail of our positions. They remain our current positions. We summarised our view on the goals of incapacity reform from a human rights standpoint:

"Fundamentally, we believe the legislation must be framed as a supportive piece of legislation, which exists to provide support to individuals whose capacity may be limited, rather than to remove such capacity from them. This can, at times, require what might be considered

"100% support", based on the "best interpretation of will and preferences"[24] but it is crucial that it is always conceived as support, to move away from an acceptance that some bright line exists whereafter a person's legal capacity may be restricted by legislation.

It is fundamental to a shift towards supported decision-making that, in all instances, effort is directed towards enabling the individual to express their "will and preferences" and make a decision before any other type of intervention is considered. This must be supported by meaningful and robust obligations."

We consider that a reframing of the system to provide three tiers of supporting agent furthers these aims. Broadly speaking, we support the five proposals outlined at p.152.

Decision-making Supporter

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

Co-decision maker and Decision-Making Representative

In our 2018 response, we explained our view that a binary vesting of capacity (in either the individual or someone else) can and should be avoided. Rather, mechanisms should be created which allow an appointed person to sit alongside the individual to support them in the exercise of their capacity. We considered that there was a role for a co-decision making role with the following characteristics

- the individual could appoint such a person or someone with an interest could apply to be appointed
- no one could be appointed against the wishes of the individual
- the individual would be able to end the appointment[25]
- the appointed person would have a duty to ascertain the individual's will and preferences as far as possible
- the appointed person could not act against the wishes of the individual
- legal authority would be shared between the individual and the appointed person
- the appointed person could help the individual to make a decision and to implement it. For example, an individual might be able to decide where they wish to live or that they want to have care but may have more difficulty taking the necessary steps to enact that, where the appointed person could assist by e.g. signing tenancy agreements, dealing with social work, setting up direct debits.

The new proposals for a Decision-Making Representative may be an alternative way of avoiding a binary vesting of capacity. If the Decision-Making Representative is bound by the framework of Supported Decision-Making, ADM test and use of the HRE framework, their role is more clearly that of supporting the exercise of the individual's will and preference.

However, we consider that it remains important that the individual should not be appointed against the express wishes of the individual, and that the adult should be able to end the appointment, without which it represents a form of substitute decision-making.

As we said previously, we believe any appointment of this nature requires judicial oversight. In relation to other aspects of the application process, our 2018 response provides our views. In particular, we continue to believe there should be a requirement in all these cases that, in any contentious matter, the judicial authority must meet the adult to whom the application relates, including if this requires a visit to the adult.

We recognise the need for emergency applications which could be considered on the papers. It should be necessary, in that application, to demonstrate that concerted attempts have been made to enable the adult to exercise their legal capacity in relation to this decision insofar as

possible, with reference to the supported decision-making framework, ADM test and HRE framework.

Where questions of deprivation of liberty are concerned, Article 5(4) ECHR requires both “speedy review” of the lawfulness of detention and continuing review “at regular intervals”, particularly in circumstances where the grounds for detention are susceptible to change over time, such as mental health[26]. There should therefore be provision for speedy review as soon as possible after the emergency period.

Power of Attorney

General Comment No.1 supports both trusted support persons and advance planning measures[27] and we believe that Attorneys remain a worthwhile mechanism for facilitating this. We agree that their role needs to be clearly re-oriented around supporting the will and preference of the individual. Placing them within the framework of supported decision-making and HRE may assist, however, we do have concerns about the expectation on lay attorneys to be able to carry out such processes, even if more informal. Significant support and guidance would be necessary both before taking on the role and while performing it. In particular, we think understanding of the supported decision-making framework must be emphasised, as a way of conveying the core messages of General Comment No.1.

As regards potential deprivations of liberty, clear safeguards are required and we agree that the present uncertainty regarding the use of Powers of Attorney should be remedied. We consider that individuals should be able to make advance decisions in relation to arrangements which may amount to a deprivation of liberty, as an exercise of their legal capacity. A significant degree of specificity would require to be stipulated in order for such advance consent to be valid in potentially very distressing circumstances. It would also be essential that individuals truly understood what they were consenting to. This would require in-depth discussion with any person drawing up a Power of Attorney and the criteria should be designed in such a way as to ensure this takes place. A programme of education for solicitors practicing in

this area and for individuals considering Powers of Attorney would be advisable.

ECHR caselaw[28] highlights the need for sufficient safeguards against arbitrariness, including access to a judicial procedure capable of determining the lawfulness of the individual's detention, even where consent is provided by an authorised person, and periodic compulsory examination for the purpose of assessing whether an individual needs to remain in detention[29]. Regular review of a deprivation of liberty under the authority of an Attorney should therefore be an automatic requirement.

Part 5: Medical Treatment and Research

We consider that amendments to Part 5 are required to improve recognition of the adult's will and preferences and to regulate the use of force.

Force, detention and the relationship with the 2003 Act

The use of force or detention if "immediately necessary"[30] engages the right to private and family life (Article 8 ECHR) and, could, in severe circumstances engage the prohibition of inhuman and degrading treatment (Article 3 ECHR).

We believe therefore that additional safeguards are required. If force or detention are required, they should be subject to judicial consideration.

Access to Justice

In our 2018 response, we highlighted that any procedure must begin with specific steps to support the adult to make a decision and exercise their legal capacity. We believe that guidance on the support to be given to a person to exercise their capacity and reframing authority as that which reflects the best interpretation of will and preference are important steps. We consider that a process for dealing with a person's objection to treatment requires to be provided, amending section 50. At present, section 47 certificates can effectively exclude the adult's views if they are deemed to be incapable. We also consider that a short appeal period should be allowed to elapse before treatment can take place.

Chapter 11: Deprivation of liberty

In our 2018 response we expressed the view that if an adult expresses their wish to be in a place that involves significant restriction of liberty, this can provide valid consent for the purposes of Article 5 ECHR. Combining this with the requirements for supported decision-making in Articles 12 and 14 CRPD, we believe that consent can be construed broadly to encompass a best interpretation of will and preference. We also highlighted a series of steps[31] that we believed should be undertaken and recorded in order to maximise the exercise of the adult's capacity and respect their will and preference. It will be essential for a clear record of the process to be kept to enable the consent to be validated under scrutiny. In these circumstances, we accept that judicial oversight may not be required in every case. We agree that a standalone right of review for those de facto detained is an important safeguard in these circumstances, with a right for the Mental Welfare Commission to intervene in individual cases. Both the Mental Welfare Commission and nominated interested parties e.g. named persons, independent advocacy, could be designated with the ability to request review on behalf of an individual. We would anticipate that the tiered supporters available under reformed incapacity law would have a key role in this regard.

We have provided our views on authorisation of a deprivation of liberty by an Attorney in Chapter 10 above, which also apply to authorisation by other designated representatives.

As regards the remainder of cases, we favour a judicial process which provides the most robust scrutiny in light of the impact on the individual's human rights (not only Article 5 ECHR but also associated restrictions potentially impacting on Articles 3 and 8 ECHR). Article 5.4 requires that the individual is able to bring judicial proceedings "speedily" to challenge the lawfulness of their detention. The procedure followed must have a judicial character and afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question.[32] While this does not require automatic judicial review in every case, it is clearly favoured over administrative procedures.

Chapter 12: Mental disorder

We have set out above our view on the role of mental disorder as a component of Article 5 ECHR detention. We do not believe that the ECHR requires that a diagnosis of mental disorder be a component of other forms or support or intervention as envisioned across the proposals. We have also explained why we believe that CRPD requires disability-neutral criteria. Accordingly, we do not believe that new legislation should be confined to people with a diagnosed "mental disorder" or requires a specific gateway, and we consider that this is less contentious if the aims of the legislation are positive and supportive. The criteria identified for specific interventions elsewhere in the proposals appear to be adequate to address the human rights requirements involved in specific interventions including, in particular, detention.

Chapter 13: Fusion or alignment

We addressed the question of forum in our 2018 response on Adults with Incapacity and we repeat those views here:

"We do not have a particular view on whether the Sheriff Court or the Mental Health Tribunal is the appropriate forum for these matters and we can see advantages in both. We consider that current Sheriff Court practice would need to evolve significantly in order to meet the needs of those subject to the legislation, however, we think either this or the development of the Mental Health Tribunal could achieve the same ends.

The factors that we consider to be most important to achieve in either forum are:

- **Facilitating the meaningful involvement of the adult**, with sufficiently flexible approaches to do so: As we have highlighted above, we believe there should be a requirement in all these cases that the judicial authority must meet the adult to whom the application relates, including if this requires a visit to the adult. Article 13 CRPD requires that "procedural accommodations" are provided to facilitate the effective role of participants with disabilities

and we agree that the focus on flexible options for the participation of the adult are increasingly required. We understand that the procedural rules in Germany's courts require personal contact with the adult which, in practice, encourages the frequent participation of the adult.

- **Specialism**: To date, many of the most useful developments in caselaw have been seen in Sheriffdoms with dedicated AWI Sheriffs. Considerable guidance can also be found by interpreting decisions of the Court of Protection in England. We believe that the development of strong practice can be significantly advanced by the interpretation of the principles in caselaw regarding Scotland's own legislation.
- **Training**: Article 13 CRPD requires "appropriate training" in order to ensure effective access to justice and we agree that it will be essential for all judicial decision-makers to receive comprehensive training in relation to CRPD (in addition to the other matters identified)[33]. They will require to develop a robust understanding of supported decision-making given that it is, after all, a developing and sometimes untested field."

Similarly, we do not have a settled view on the question of fusion or alignment. We do agree that a human rights enablement approach lends itself to fusion legislation, providing a supportive structure for all those who require it, in a disability-neutral manner. We also consider that clarity and simplicity in the law would assist the empowerment of those who fall within its ambit.

---

[1] Consideration of Petition PE1667: Calling for a review of Scottish mental health and incapacity legislation, 5 December 2017 http://www.scottishhumanrights.com/media/1743/pe1667-re-mental-health-and-incapacity-legislation-december-2017-002.doc
[2] Explained on p.95 of the Consultation
[3] For example, see our response to the consultation on Adults with Incapacity (Scotland) Act 2000 https://www.scottishhumanrights.com/media/1762/awi-consultation-response-final.docx
[4] General Comment No.1 (2014) of the Committee on the Rights of Persons with Disabilities, at para.30
[5] Ibid at paragraph 50(b)
[6] [2016] ECHR 462

[7] See Section 3 of our Response to the Independent Review of Learning Disability and Autism in the Mental Health Act https://www.scottishhumanrights.com/media/1928/learning-disability-autism-review-stage-3-consultation-response-vfinal.docx
[8] Enshrined in Article 2.3 International Covenant on Civil and Political Rights, Article 13 European Convention on Human Rights, among other regional human rights treaties
[9] Concluding observations Treaty bodies Download (ohchr.org)
[10] '*Three Jurisdictions Report: Towards Compliance with CRPD Art.12 in Capacity/Incapacity Legislation across the UK'*, Essex Autonomy Project (2016)
[11] Using Your Rights – Making Rights Real
[12] *Winterwerp v the Netherlands* (6301/73) (1979) 2 EHRR 387
[13] ibid at para 39 "In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind' . The very nature of what has to be established before the competent national authority—that is, a true mental disorder—calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder."
[14] General Comment no.1 at para 42
[15] See Section 2 of our Response to the Independent Review of Learning Disability and Autism in the Mental Health Act https://www.scottishhumanrights.com/media/1928/learning-disability-autism-review-stage-3-consultation-response-vfinal.docx
[16] Application no (34806/04), [2012] 7 WLUK 45
[17] General Comment no.1 at paragraph 38
[18] For further detail see the Commission's paper on 'Adequate and Effective Remedies for Economic, Social and Cultural Rights' December 2020, at https://www.scottishhumanrights.com/media/2163/remedies-for-economic-social-and-cultural-rights.pdf
[19] with corresponding Articles 22 (respect for privacy), 15 (freedom from torture or cruel, inhuman or degrading treatment or punishment) and 17(protecting the integrity of the person) CRPD
[20] Concluding observations Treaty bodies Download (ohchr.org)
[21] Independent Review of the Response to Deaths in Prison Custody, November 2021, at p.75
[22] Concluding observations Treaty bodies Download (ohchr.org)
[23] At note 3 above
[24] General Comment No.1 at para.21
[25] General Comment No.1 at para. 29(g)
[26] *Herczegfalvy v Austria* (1992) A 244, 15 EHRR 437
[27] General Comment no.1 at paragraph 17
[28] *Červenka v. The Czech Republic,* Application no.62507/12 [2016], *KC v Poland*, Application no.31199/12 [2014]
[29] *KC v Poland*, ibid at para.70
[30] s.47(7)(a) Adults with Incapacity (Scotland) Act 2000
[31] At p.4 of our response
[32] *Stanev v. Bulgaria* [GC], (2012) 55 EHRR 22, no. 36760/06
[33] See also concluding observation in relation to Article 13: "The Committee recommends that the State party, in close collaboration with organizations of persons with disabilities: (a) Develop and implement capacity-building programmes among the judiciary and law enforcement personnel, including judges, prosecutors, police officers and prison staff, about the rights of persons with disabilities;"