

Disability rights in Scotland

Supplementary submission to
inform the CRPD List of
Issues on the UK

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Introduction

This submission has been produced by the Scottish Human Rights Commission (SHRC) and the Equality and Human Rights Commission (EHRC). Both organisations are part of the UK Independent Mechanism and are tasked under Article 33 of the UN Convention on the Rights of Persons with Disabilities (CRPD) to jointly promote, protect and monitor implementation of CRPD in Scotland. The SHRC and EHRC are accredited as A-status National Human Rights Institutions by the Global Alliance of National Human Rights Institutions.

UK constitutional arrangements – devolution of powers to Scotland

The UK Parliament has devolved various powers to the Scottish Parliament in areas such as education, health, housing, policing and justice. The UK Parliament maintains responsibility for areas that have not been devolved.

The Scotland Act 1998 provides that Scottish Ministers have no power to make subordinate legislation, or do any other act that is incompatible with the European Convention on Human Rights (ECHR) or with EU law.¹ The Scotland Act 1998 also provides that international obligations should be observed and implemented within devolved areas by both the Scottish Government and Parliament.² Scotland also has a separate legal system. Therefore, responsibility for implementing CRPD in Scotland lies with the UK and Scottish Governments.

How to read this document

This submission provides additional up-to-date information and suggested questions about disability rights in Scotland that are not contained in the main UK report, *Disability Rights in the UK*. We have indicated the CRPD articles relevant to the issues raised within each sub-heading. The issues identified in this submission fall within the devolved responsibilities of

¹ Section 57 (2) Scotland Act 1998.

² Para. 7(2), Schedule 5 Scotland Act 1998.

the Scottish Government. We consider these problems to be especially pressing for disabled people in Scotland and we recommend that the CRPD Committee considers this information in its preparation of the List of Issues in relation to the initial report of the UK.

We have also included in an annex draft recommendations of the measures the Scottish Government should take to promote and protect disabled people's rights. We will review these recommendations, at the same time as the recommendations in *Disability Rights in the UK*, ahead of the Committee's public examination of the UK. In doing so we will take into account the views of disabled people and information provided by the Scottish Government in response to the List of Issues.

Executive summary

Enhancing the status of CRPD in domestic law (Articles 3, 4)

The Scottish Government recently published its Delivery Plan for CRPD. We are pleased that disabled people and their organisations were involved in its development and will be involved in monitoring progress. However, it is not clear whether the Government gave due consideration to where Scotland currently falls short of the expectations of the Convention, areas of potential non-compliance and where progress needs to be made.

Equality and non-discrimination (Article 5)

Recently devolved powers have provided new opportunities to promote and protect disabled people's rights by allowing the Scottish Parliament to supplement the Equality Act 2010 in relation to Scottish public authorities. It is not clear how the Scottish Government will use this opportunity.

Accessibility (Article 9)

An Independent Housing Adaptations Working Group identified that adaptations are focusing on the highest and most urgent needs, rather than prevention. This may be leading to longer waiting times, increased costs to other parts of the health and care systems and a reduced quality of life and independence for disabled people. The recommendations from the Working Group have not been implemented.

Independent and adequate standard of living and social protection (Articles 19, 20, 26 and 28)

The UK Government has transferred responsibility for around a third of non-pension social security to the Scottish Parliament, including disability-related support and scope for introducing new benefits. The Scottish Government has explained that respect for the dignity of individuals will be at the heart of the new social security system in Scotland. It is

essential that the principles are given clear meaning and explicitly reflect social security as a human right.

There is still a substantial amount of work for local authorities to do to fully implement Self-Directed Support (SDS). While disabled people and their organisations support the introduction of SDS, they have also raised concerns that the reality on the ground falls a long way short of the positive intentions behind its introduction.

Employment (Article 27)

Local authorities appear to be failing in their duty to support people on community-based Compulsory Treatment Orders (CCTOs) to secure and sustain employment.

Education (Articles 24, 7)

Schools do not appear to be complying with the legal requirements to produce and review accessibility strategies.

Access to justice (Article 13, 12)

The Scottish Government has proposed a significant increase in court fees. We are concerned that this will have a disproportionate effect on disabled people and a negative impact on their ability to access justice and an effective legal remedy.

Many disabled people experience difficulties with the criminal justice system and they are more likely to report a lack of confidence that the Scottish criminal justice system provides equal access for all.

The justice system does not provide enough support and protection to vulnerable victims and witnesses, particularly people with learning disabilities. The Appropriate Adult scheme for support during police interviews is under-resourced and inconsistent, and there is still no formal system of support during the court process. There are concerns that people with learning disabilities are not getting the support of an Appropriate Adult when they need it.

Health and life (Articles 25, 10)

There are concerns about the Scottish Government's strategy for mental health services and calls for a root and branch review carried out by an independent body.

There are unmet needs in Intensive Psychiatric Care Units and the majority of health boards are failing to meet the 18 weeks waiting time target for access to psychological therapies.

People with learning disabilities or autism and those with complex needs experience delays in accessing appropriate community services and as a result are either in hospital longer than necessary or not receiving the specialist services they need.

People on community-based compulsory treatment orders are not receiving regular physical health reviews, despite data showing that people with poor mental health have an increased risk of physical illness and a much higher mortality rate.

Children and adolescents experiencing mental health problems are not consistently able to access timely support and therapeutic community-based services have not been sufficiently developed.

There are gaps in the arrangements for investigation of deaths in mental health settings.

Autonomy and integrity (Articles 12, 14, 15, 17)

There are concerns that people detained in hospitals, care homes and prisons are not always receiving treatment and care in accordance with legislative safeguards.

There is an ongoing shortage of Mental Health Officers (MHO). The MHO provides an essential safeguard under mental health and incapacity legislation.

There has been a significant increase in the number of guardianship applications since 2009/10. The number of new episodes of compulsory treatment is at its highest level since 2005.

There are gaps in the provision of advocacy and demand is increasing while funding has either been reduced or frozen. In mental health care, patient involvement in decisions about treatment and care planning remains low.

There is a need for a comprehensive review of the legislation that governs non-consensual care and treatment to reflect the CRPD requirements for a supported decision-making framework.

Disability rights in Scotland: Supplementary submission to inform the CRPD List of Issues on the UK

Enhancing the status of international human rights in domestic law (Articles 3, 4)

Implementation of CRPD

In December 2016, the Scottish Government published its plan to 2021 for delivery of CRPD in Scotland.³ The plan was informed by the experiences of disabled people and their organisations and disabled people will be involved in monitoring progress.

We support fully the Government's approach of involving disabled people in the development and monitoring of the plan. However, it is not clear whether the Government also gave due consideration to where Scotland currently falls short of the expectations of the CRPD, areas of non-compliance and where progress needs to be made.

We recommend that the CRPD Committee asks:

- 1. Please explain how the Scottish Government analysed Scotland's progress in implementing CRPD when developing the Delivery Plan, including identifying gaps in implementation or areas of potential non-compliance?**

Equality and non-discrimination

Equal opportunities (Articles 4, 5)

The Scotland Act 1998, as amended in 2016, allows the Scottish Parliament to introduce protections and requirements that supplement but do not modify the existing provisions of

³ Scottish Government (2016) A Fairer Scotland for Disabled People – Our Delivery Plan to 2021 for the UNCRPD, available [here](#) [accessed: 30 January 2017].

the Equality Act 2010 in relation to Scottish public authorities and the Scottish functions of cross-border public authorities.

We recommend that the CRPD Committee asks:

2. How will the Scottish Government use the new equal opportunities powers to promote and protect disabled people's rights under CRPD?

Accessibility (Articles 9)

Housing adaptations

Scottish data on housing and disability shows higher levels of social renting⁴ and overcrowding and a decrease in wheelchair adapted social housing.⁵ Around 5% of all households identify a need for adaptations.⁶

Disabled people are able to ask for assistance if adaptations are required. However, the assistance people receive depends on the tenure of their home and where they live, rather than need. In addition, assessment of need tends to focus on current, rather than anticipated need. An Independent Housing Adaptations Working Group identified that adaptations are often undertaken at points of crisis, focusing on the highest and most urgent needs, rather than prevention. This approach may be leading to longer waiting times, increased costs to other parts of the health and care systems and a reduced quality of life and independence for disabled people.⁷ The Working Group identified the need for fundamental changes. The recommended changes have not yet been implemented.

We recommend that the CRPD Committee asks:

3. What measures has the Scottish Government taken to address the issues affecting disabled people identified by the Independent Housing Adaptations Working Group?

⁴ Social renting is used to describe tenancies provided by local authorities and housing associations/registered social landlords.

⁵ Scottish Government (no date) 2,525 units in 2006 to 2,062 in 2015; SPICe Briefing (15 March 2016) Housing Adaptations (Major), available [here](#) [accessed: 30 January 2017].

⁶ Scottish Government (2016) Scotland's People Annual Report: Results from the 2015 Scottish Household survey, available [here](#) [accessed: 30 January 2017].

⁷ Scottish Government (2012) Adaptations Working Group – Final report – Adapting for Change, available [here](#) [accessed: 30 January 2017].

Independent and adequate standard of living and social protection (Articles 19, 20, 26 and 28)

Social security

The Scotland Act 1998, as amended in 2016, transferred responsibility for around a third of non-pension social security to the Scottish Parliament, including scope for introducing new benefits.⁸ The Government intends to introduce a Social Security Bill to the Scottish Parliament by June 2017.⁹ Therefore, the new social security arrangements are unlikely to be in place before 2018.

The Scottish Government has explained that respect for the dignity of individuals will be at the heart of the new social security system in Scotland. It is essential that the principles are given clear meaning and explicitly reflect social security as a human right.

We recommend that the CRPD Committee asks:

4. How is the Scottish Government:

- **taking into account the views, experiences and rights of disabled people in the development of the new social security system in Scotland?**
- **ensuring that the cumulative impact of proposed policies on disabled people is understood and used as a basis for policy development?**

Self-directed support

Self-directed support (SDS) allows people, their carers and their families to agree personal outcomes and make informed choices on their support and how it is delivered.¹⁰ The introduction of SDS has been supported by disabled people and their organisations. However, an audit of local authorities' progress in implementing SDS concluded that local authorities still have a substantial amount of work to do to fully implement SDS and recommended that they should work more closely with people who need support to develop their choices.¹¹

⁸ The benefits that are being devolved include benefits paid directly to disabled people such as disability living allowance (DLA) and personal independence payment (PIP). Universal credit remains reserved to the UK Government, but Scotland can change how it is provided, for example changing the frequency of payments or splitting payments between couples. The Scottish Parliament has the power to top up UK means-tested benefits and tax credits and create new benefits that relate to devolved areas such as health and social care.

⁹ Scottish Government (2016) Why are we consulting? Available [here](#) [accessed: 30 January 2017].

¹⁰ The support can range from services provided in the home, such as personal care, to help out of the home, such as support to go to college, to continue in employment or to enjoy leisure pursuits .for more information see Scottish Government Self Directed Support website 'What is Self-directed support?' Available [here](#) [accessed: 30 January 2017].

¹¹ Audit Scotland (2014) Self-directed support, p. 7, available [here](#) [accessed: 30 January 2017].

Disabled people have also raised concerns that the reality on the ground falls a long way short of the positive intentions behind the introduction of SDS.¹² They have pointed to ever-increasing anecdotal evidence that the introduction of SDS is being used to justify reducing care packages as local authority budgets continue to be squeezed.

We recommend that the CRPD Committee asks:

5. How is the Scottish Government monitoring the delivery of SDS to ensure that disabled people can:

- **exercise their equal right to live in the community?**
- **make choices equal to others to allow them to live and be included in their communities?**
- **receive the support necessary to live and be included in their communities?**

Employment (Article 27)

Employment support for people on Compulsory Treatment Orders

Under the Mental Health (Care and Treatment) (Scotland) Act 2003 local authorities have a duty to support people on community-based Compulsory Treatment Orders (CCTOs) to secure and sustain employment. However, as part of their visit and monitoring of 101 people on CCTOs (98 had a mental illness and two had a learning disability) the Mental Welfare Commission (MWC) found that no one was in full-time employment and only eight were in part-time work¹³.

We recommend that the CRPD Committee asks:

6. How does the Scottish Government ensure that local authorities in Scotland fulfil their duty to support people on community-based Compulsory Treatment Orders to secure and sustain employment?

¹² Inclusion Scotland (2015) Response to COSLA's UNCRPD Local Government Delivery Plan consultation, p. 15, available [here](#) [accessed: 30 January 2017].

¹³ MWC (2015) Visits to people on longer term community-based compulsory treatment orders, available [here](#) [accessed: 30 January 2017].

Education (Articles 24, 7)

Accessibility strategies

Local authority, independent and grant-aided schools are required to produce an accessibility strategy by the Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002. The strategy must cover how the school or local authority will increase disabled pupils' participation in the curriculum, improve the physical environment and improve communication with disabled pupils and children. A copy of the accessibility strategy must be available for inspection if someone requests it.

However, in a recent survey only 13 out of 61 local authorities and independent schools could provide a current accessibility strategy and only two of the 13 strategies reviewed were classed as good.¹⁴ The CRC Committee¹⁵ also raised concerns that many school buildings and facilities are not made fully accessible to disabled children..

We recommend that the CRPD Committee asks:

- 7. What measures has the Scottish Government taken to ensure schools produce and review their accessibility strategy and to improve the accessibility of school buildings and facilities?**

Access to justice (Article 13, 12)

Proposed increases in court fees

Individuals pursuing claims in the civil courts must pay court fees. Under the present system fees only partially meet the cost of providing civil court services. The Scottish Government has proposed a significant increase in court fees in an attempt to recover all of the cost of providing those services.¹⁶

Disabled people are more likely to be living in poverty than non-disabled people and face problems with equal access to public services, housing, transport and education. As a result, we are concerned that any significant rise in court fees will have a disproportionate effect on disabled people and a negative impact on their ability to access justice and an effective legal remedy.

¹⁴ Scottish Disability Equality Forum (2014) Excluded: How Scotland's schools are failing to plan for disabled pupils' needs, available [here](#) [accessed: 30 January 2017].

¹⁵ CRC Concluding Observations for UK, p. 13, available [here](#) [accessed: 30 January 2017].

¹⁶ Scottish Government (2016) Consultation on Scottish Court Fees, available [here](#)

We recommend that the CRPD Committee asks:

8. Can the Scottish Government provide evidence of the actual or likely impact on disabled people of increased court fees?

Confidence in the criminal justice system

Many disabled people experience difficulties with the criminal justice system and they are more likely to report a lack of confidence that the Scottish criminal justice system provides equal access for all.¹⁷

We recommend that the CRPD Committee asks:

9. What measures have been taken by the Scottish Government to improve disabled people's confidence in the Scottish criminal justice system?

Support and protection in the criminal justice system

The Scottish Government's Programme for Government for 2016-17 acknowledges that too often the justice system does not provide enough support and protection to vulnerable victims and witnesses, particularly people with learning disabilities.¹⁸

The Appropriate Adult scheme facilitates communication between the police and people with a mental health problem or learning disability who may be a witness, victim, suspect or accused of a crime. It is a vital safeguard for vulnerable suspects. The scheme is under-resourced and inconsistent, and (unlike England and Wales) there is still no formal system of support during the court process.

Concerns have been raised that people with learning disabilities are not getting the support of an Appropriate Adult when they need it¹⁹ and that there is a lack of understanding and under-utilisation of the scheme.²⁰ This has been attributed to police officers failing to recognise when someone has a learning disability. Police officers have indicated that they tend to rely on their own experience to make a subjective assessment about whether someone has a learning disability. There is also an over-reliance on healthcare professionals when assessing whether an Appropriate Adult is required.²¹ Other problems

¹⁷ Scottish Government (2014) Scottish Crime and Justice Survey 2012/13 data table ED2.2, available [here](#) [accessed: 30 January 2017].

¹⁸ Scottish Government (2016) A Plan for Scotland, The Government's Programme for Scotland 2016-17, p. 68, available [here](#) [accessed: 30 January 2017].

¹⁹ SCLD (2015) 'Journeys through the Criminal Justice System for Suspects, Accused and Offenders with learning disabilities', available [here](#) [accessed: 30 January 2017].

²⁰ SOLD Network, Challenges identified by the SOLD Network, available [here](#) [accessed: 30 January 2017].

²¹ HMIC Thematic Inspection of Police Custody Arrangements in Scotland (2014), p. 40, available [here](#) [accessed: 30 January 2017].

include a lack of awareness of issues concerning people with learning disabilities and a need for training within Police Scotland.²²

We recommend that the CRPD Committee asks:

10. How does the Scottish Government ensure that people with mental health problems and learning disabilities are equally protected by, and given access to, the justice system throughout the court process?

11. What measures has the Scottish Government taken to ensure that police officers recognise when an Appropriate Adult is required?

Health and life (Articles 25, 10)

Mental Health strategy

The Scottish Government consulted on a '10 year vision' for mental health in Scotland.²³ Responses from key stakeholders have highlighted the need for a significantly more ambitious transformational vision, criticising a lack of strategic vision, a lack of co-production in developing the strategy and a focus on services, rather than broader considerations of mental health.²⁴ There has also been criticism of a failure to evaluate the previous strategy and to follow up on numerous recommendations made under that strategy, leading to a series of outputs rather than any real change in outcomes.²⁵ These include a review of mental health services which provided views on future development and reflection on the successes and challenges of the mental health system based on the perspectives and experiences of service users, carers and professionals, and a report by the MWC and SHRC making recommendations for the Government to take forward in relation to human rights and mental health.²⁶

Calls from a broad range of stakeholders have been made for a root and branch review of the support offered to people with mental health issues, carried out by an independent Commission of enquiry.²⁷ SHRC has also called for a broad participatory process to ensure the vision for mental health is fully informed by people with lived experience, mainstreaming

²² SOLD Network, see note 20.

²³ A Mental Health Strategy for 2016-2026.

²⁴ Inter alia, The ALLIANCE (the national third sector intermediary for a range of health and social care organisations), Scottish Association for Mental Health, MWC. See also Mental Health in Scotland – a 10-year vision: analysis of responses to the public engagement exercise, available [here](#) [accessed: 30 January 2017].

²⁵ Inter alia, The ALLIANCE, Mental Welfare Commission, Royal College of Psychiatrists, available [here](#) [accessed: 30 January 2017].

²⁶ SHRC and MWC (Sept 2015) Human rights in mental health care in Scotland, available [here](#) [accessed: 30 January 2017].

²⁷ The Scottish Mental Health Partnership, available [here](#), and the Rights for Life Change Agenda, available [here](#) [accessed: 30 January 2017].

human rights throughout and with a specific focus on a move towards supported decision-making.²⁸

We recommend that the CRPD Committee asks:

12. How is the Scottish Government's strategy for mental health services taking into account the experiences of service users, carers and professionals to ensure mental health services meet the requirements of CRPD and human rights more broadly?

Mental health care

There are a 'range of unmet needs' in Intensive Psychiatric Care Units. These include a lack of activities, rehabilitation or a therapeutic environment; a 'one size fits all' approach to risk management and a lack of opportunities for meaningful involvement in the care process.²⁹

Despite the introduction of a waiting time target to ensure people can access psychological therapies within 18 weeks, the majority of Health Boards in Scotland are failing to meet this target.³⁰

We recommend that the CRPD Committee asks:

13. How does the Scottish Government ensure that psychiatric facilities in Scotland are of high quality and meet all patients' needs?

14. How will the Scottish Government ensure people can access psychological therapies within the 18 week target?

²⁸ SHRC (2016) A human rights based approach to the Mental Health Strategy, available [here](#) [accessed: 30 January 2017].

²⁹ Healthcare Improvement Scotland (2010) 'Intensive Psychiatric Care Units: overview report', available [here](#) [accessed: 30 January 2017].

³⁰ Five of the fourteen health boards met the target by December 2014 with 13% of people having to wait between three and six months to access services; 11% more than six months and 4% waited over a year. This compares to England where 61% of people access services within 28 days. See Scottish Association for Mental Health (SAMH) (2016) Talking it Out: Psychological Therapies in Scotland, available [here](#) [accessed: 30 January 2017].

Access to community services

In mental health care, those with a learning disability or autism experience delays in accessing appropriate community services and are accordingly likely to have longer stays in hospital than other mental health patients.³¹ The main reasons for delays are lack of funding, accommodation, or an appropriate care provider, or a combination of these issues.³²

The MWC has identified that mental health services need to respond better to those who do not fit current service approaches. Their visits and investigations repeatedly show worse services and poorer outcomes for people with complex needs or needs considered out of the ordinary, including people with autistic spectrum disorders, acquired brain injury, a personality disorder label, a dual diagnosis (e.g. learning disability plus mental illness), or women and young people needing secure care.

The MWC's investigation into the death of Ms MN, an individual with complex needs, recommended that the Scottish Government should audit the availability of specialist services for individuals with highly complex needs who are not appropriately accommodated in learning disability or mental health settings, and identify how gaps can be filled.³³ We are aware that the case of Ms MN is not an isolated incident.

We recommend that the CRPD Committee asks:

15. How does the Scottish Government ensure adequate community services for those with learning disability or autism?

16. When does the Scottish Government intend to meet the MWC recommendation and carry out an audit of specialist services for individuals with highly complex needs and ensure their needs are appropriately met?

³¹ The average (median) number of days since admission for patients with a Learning Disability was 759 days (around 2 years and one month). This compares with 129 days (around 4 months) for non-Learning Disability patients. The Mental Health & Learning Disability Inpatient Bed Census was carried out by the Scottish Government and NHS Boards as at midnight, 31 March 2016, available [here](#) [accessed: 30 January 2017].

³² MWC (2016) No through road: people with learning disabilities in hospital, available [here](#) [accessed: 30 January 2017].

³³ Investigation into the death of Ms MN, MWC, January 2016, Summary report, available [here](#) [accessed: 30 January 2017].

Access to physical health checks

People with poor mental health have an increased risk of physical illness, and a much higher mortality rate, dying on average more than 10 years earlier than the general population.³⁴ The MWC has raised serious concerns that many people on community-based Compulsory Treatment Orders (CCTOs) are not receiving regular physical health reviews.³⁵

We recommend that the CRPD Committee asks:

17. How is the Scottish Government ensuring that people on CCTOs have regular physical health reviews?

Child and Adolescent Mental Health Services

The Scottish Government set a standard for the NHS in Scotland to deliver a maximum wait of 18 weeks to start treatment from December 2014. At the end of March 2016, 84.2%³⁶ of patients met this standard.³⁷ This means around 700 children and young people did not receive timely support.³⁸ The most recent data shows that during the period July to August 2016, the number of patients meeting the standard had fallen with only 78.8% of patients being seen within 18 weeks.³⁹ There is also significant variance across Health Boards.⁴⁰

In focusing on access to medical services, however, government targets do not measure the outcome or effectiveness of interventions, nor do they capture non-medical avenues for support (e.g. in the community), early intervention or prevention. In relation to Scotland, the Committee on the Rights of the Child⁴¹ made a number of recommendations on child and adolescent mental health services.⁴²

³⁴ Scottish Government (2012) Mental Health Strategy for Scotland, available [here](#) [accessed: 30 January 2017].

³⁵ MWC (2015) Visits to people on longer term community-based compulsory treatment orders, available [here](#) [accessed: 30 January 2017].

³⁶ NHS Scotland (6 Dec 2016) Child and Adolescent Mental Health Services Waiting Times, available [here](#) [accessed: 30 January 2017].

³⁷ The target for all Health Boards is for 90% of patients to start treatment within 18 weeks.

³⁸ Scottish Parliament (2016) Mental Health Inquiry, available [here](#) [accessed: 30 January 2017].

³⁹ NHS National Services Scotland (6 Dec 2016) 'Child and Adolescent Mental Health Services, Waiting Times in NHS Scotland', available [here](#) [accessed: 30 January 2017].

⁴⁰ For example, the target was met in 100% of cases in NHS Borders, but only 37.6% in NHS Grampian and 51.1% in NHS Forth Valley, see [here](#) [accessed: 30 January 2017].

⁴¹ Committee on the Rights of the Child (July 2016) Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, available [here](#) [accessed: 30 January 2017].

⁴² The Committee recommended that the State Party [only recommendations relevant to Scotland have been included]: Rigorously invest in child and adolescent mental health services and develop strategies at the national and devolved levels, with clear time frames, targets, measureable indicators, effective monitoring mechanisms and sufficient human, technical and financial resources. Such strategy should include measures to ensure availability, accessibility, acceptability, quality and stability of such services, with particular attention

We recommend that the CRPD Committee asks:

18. How will the Scottish Government implement the recommendations of the Committee on the Rights of the Child and ensure that children and adolescents have timely access to mental health and community-based services?

Investigation of deaths in mental health settings

There remains a gap in the arrangements for investigation of deaths in mental health settings. A review of Fatal Accident Inquiry legislation recommended a mandatory fatal accident inquiry into the death of any person who is subject at the time of death to compulsory detention by a public authority.⁴³ Section 37 of the Mental Health (Scotland) Act 2015 requires the Scottish Government to carry out a review into the investigation of deaths of detained patients and inpatients. The review must take place by 24 December 2018.

We recommend that the CRPD Committee asks:

19. How does the Scottish Government intend to address the failure to ensure deaths in mental health settings are properly investigated?

Autonomy and integrity (Articles 12, 14, 15, 17)

Mental health safeguards

The MWC has identified common issues in their monitoring of hospitals, care homes and prisons relating to:

- certificates authorising involuntary physical healthcare not being appropriately completed⁴⁴
- care staff not having sufficient awareness of the powers of welfare guardians/attorney⁴⁵
- ensuring older people and those in adult acute care receive treatment in line with legislative requirements.⁴⁶

to children at greater risk, including children living in poverty, children in care and children in contact with the criminal justice system; Expedite the prohibition of placing children with mental health needs in adult psychiatric wards or police stations, while ensuring the provision of age-appropriate mental health services and facilities; Support and develop therapeutic community-based services for children with mental health conditions.

⁴³ Cullen (2009) Review of Fatal Accident Inquiry Legislation: The Report, available [here](#) [accessed: 30 January 2017].

⁴⁴ Under Part 5, Adults with Incapacity (Scotland) Act 2000.

⁴⁵ MWC (July 2015) Summary of recommendations and outcomes from our local visits 2014, available [here](#) [accessed: 30 January 2017].

⁴⁶ Treatment under Part 16 Mental Health (Care and Treatment)(Scotland) Act 2003.

There is an ongoing shortage of Mental Health Officers (MHOs) across Scotland. The overall shortfall is at its highest since data was first collected on this issue.⁴⁷ The MHO provides an essential safeguard under mental health and incapacity legislation and has a critical role in reviewing the proposal to detain an individual, considering alternatives and explaining an individual's rights to them. Only 56% of emergency detentions were carried out with MHOs consent.⁴⁸

We recommend that the CRPD Committee asks:

20. In relation to the mental and physical health of people detained in hospitals, care homes and prisons, how does the Scottish Government ensure treatment is provided in accordance with the legislative requirements?

21. How is the Scottish Government addressing the shortage of Mental Health Officers?

Substitute decision-making

Use of substitute decision-making mechanisms continues to rise under the two principal pieces of legislation – the Adults with Incapacity (Scotland) Act 2000 (AWIA) and the Mental Health (Care & Treatment)(Scotland) Act 2003. Monitoring work by the MWC⁴⁹ has identified a 99% increase in the number of new guardianship applications since 2009/10. Although the number of indefinite guardianship orders has been falling, almost 44% of the total orders in existence are on an indefinite basis.

The number of new episodes of compulsory treatment/measures has followed an upward trend and has risen to the highest level since 2005, when the current legislation was introduced.⁵⁰ Concerns have also been raised about the duration of detentions for people with learning disabilities compared to other groups detained under the 2003 Act and the use of psychotropic medication for people with autism.⁵¹

⁴⁷ Scottish Social Services Council (August 2016) Mental Health Officers (Scotland) Report 2015, available [here](#) [accessed: 30 January 2017].

⁴⁸ MWC (June 2016) 'Emergency Detention Certificates without Mental Health Officer consent', available [here](#). [accessed 30 January 2017]. An emergency detention certificate (EDC) can be issued by any registered medical practitioner and authorises detention in hospital for up to 72 hours, however, legislation requires that there should be consent from a MHO wherever practicable. S36(3) and (6) Mental Health (Care and Treatment)(Scotland) Act 2003.

⁴⁹ MWC (2016) Adults with Incapacity Act Monitoring Report 2015-16, available [here](#) [accessed: 30 January 2017].

⁵⁰ There were 5,008 episodes of new compulsory treatment in 2015-16. MWCS (2016) Mental Health Act Monitoring 2015-16, see note 40.

⁵¹ Scottish Government (2016) Review of learning disability and autism in the Mental Health (Scotland) Act 2003: Findings from a scoping exercise.

There remain gaps in the provision of advocacy for children and young people, for adults with physical disabilities, older people, carers, people from ethnic minority communities and those in prison settings.⁵² Demand for advocacy has gone up by 8%, whereas funding has either been reduced or frozen.

In mental health care, many of the mechanisms for ensuring patient involvement show poor levels of use. In their ward monitoring visits, the MWC continued to make a high number of recommendations about care planning, review and person-centred care, highlighting a need to ensure the individual's participation in planning and reviewing their own care.⁵³ The completion of social circumstances reports, which provide information to treating psychiatrists in relation to assessment, care planning and participation of family/carers and the broader social context of an individual, remains an area of concern.⁵⁴

We recommend that the CRPD Committee asks:

22. How is the Scottish Government addressing gaps in advocacy provision?

23. What is the Scottish Government doing to ensure patients are consistently involved in their treatment and care planning?

Deprivation of liberty

The Scottish Law Commission has made proposals to address the situation of people in hospitals or care settings who lack capacity to consent to their deprivation of liberty,⁵⁵ on which the Scottish Government has consulted. The proposals set out limited processes to authorise such deprivations of liberty on behalf of incapacitated individuals. They provide for a substituted decision-making process and do not explicitly engage with the implications of supported decision-making. A substantial majority of respondents to the consultation expressed the view that any changes to the law in this area should take place within the context of a wider revision of Adults with Incapacity legislation, as the current legislation is not working effectively. The Law Society of Scotland, the Mental Welfare Commission, the Public Guardian and SHRC,⁵⁶ among others, all recommended a comprehensive review of

⁵² A Map of Advocacy across Scotland 2013-2014 edition, The Scottish Independent Advocacy Alliance, available [here](#) [accessed: 30 January 2017].

⁵³ MWC (2015) Visits to people on longer term community-based compulsory treatment orders, available [here](#) [accessed: 30 January 2017].

⁵⁴ MWC (2015) Mental Health Act Monitoring Report 2014-15, available [here](#) [accessed: 30 January 2017].

⁵⁵ Scottish Law Commission (2014) Report on Adults with Incapacity, available [here](#) [accessed: 30 January 2017].

⁵⁶ Scottish Government published responses to the Scottish Law Commissions report on adults with incapacity, available [here](#) [accessed: 30 January 2017].

the three pieces of legislation which govern non-consensual care and treatment⁵⁷ in part, to reflect the requirements of the Convention.

We recommend that the CRPD Committee asks:

24. When will the Scottish Government carry out a comprehensive review of the legislation governing non-consensual care and treatment and how will it ensure new provisions reflect a supported decision-making framework?

⁵⁷ The Adults with Incapacity (Scotland) Act 2000, the Adult Support and Protection (Scotland) Act 2007 and the Mental Health (Care and Treatment)(Scotland) Act 2003.

Annex: Recommendations

The following draft recommendations are for the measures the Scottish Government should take to promote and protect disabled people's rights, in addition to relevant recommendations in *Disability Rights in the UK*. We will review these recommendations ahead of the CRPD Committee's public examination of the UK.

Enhancing the status of CRPD in domestic law (Articles 3, 4)

1. The Scottish Government should identify and address gaps in the implementation of the CRPD.

Equality and non-discrimination (Article 5)

2. The Scottish Government should use the new equal opportunities powers to promote and protect disabled people's rights under the Convention.

Accessibility (Article 9)

3. The Scottish Government should implement the changes to the systems for delivering housing adaptations recommended by the Independent Working Group.

Independent and adequate standard of living and social protection (Articles 19, 20, 26 and 28)

4. The Scottish Government should ensure that Scotland's new social security system:
 - delivers progressive realisation of CRPD rights
 - takes a participatory approach to the development of social security legislation and policy, underpinned by the standards and principles of the CRPD.

5. The Scottish Government should:

- identify whether the introduction of SDS is resulting in a better quality of life for individuals, including evidence on the impact of SDS on different groups of disabled people
- address gaps in the implementation of SDS to ensure real choice and support for independent living.

Employment (Article 27)

- 6.** The Scottish Government should support local authorities and integrated health and social care boards to discharge the duty to provide employment support services under ss26 and 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

Education (Articles 7, 24)

- 7.** The Scottish Government should proactively monitor compliance with the statutory accessibility requirements to ensure disabled pupils have access to school buildings, facilities and the curriculum.

Access to justice (Articles 12, 13)

- 8.** The Scottish Government should not significantly increase court fees.
- 9.** The Scottish Government should:
- ensure members of the Crown Office Procurator Fiscal Service have knowledge and experience of learning disability
 - develop and promote good practice guidance for staff involved in the assessment of vulnerable adults' capacity to be competent, reliable witnesses
 - monitor and report on when special measures are used to support disabled people, or not used, and identify the outcomes for disabled people.

10. The Scottish Government should:

- adopt an agreed police custody model to identify learning disability
- make training on learning disability mandatory for police officers and staff working in police custody arrangements.

Heath and life (Articles 25, 10)

11. The Scottish Government should establish a broad participatory process to develop a transformational vision for mental health across Scotland, underpinned by CRPD standards.

12. The Scottish Government should ensure psychiatric facilities provide an appropriate therapeutic environment.

13. The Scottish Government should ensure timely access to psychological therapies across all Health Boards.

14. The Scottish Government should ensure there are adequate community services for those with learning disabilities or autism.

15. The Scottish Government should carry out an audit of specialist services for individuals with highly complex needs to ensure their needs are appropriately met.

16. The Scottish Government should implement the Mental Welfare Commission (MWC) recommendation to ensure that mental health services facilitate patients having physical health checks at least every 15 months and access to relevant screening programmes.

17. The Scottish Government should implement the recommendations of the Committee on the Rights of the Child and ensure that children and adolescents have timely access to mental health and community-based services.

18. The Scottish Government should:

- carry out a review into the investigation of deaths of detained patients and inpatients
- ensure that deaths in mental health settings are investigated and implement any recommendations resulting from these investigations.

Autonomy and integrity (Articles 12, 14, 15, 17)

19. The Scottish Government should take action to ensure mental health treatment is provided in line with legislative requirements.

20. The Scottish Government should ensure sufficient Mental Health Officer (MHO) resource to safeguard those at risk of detention.

21. The Scottish Government should address the gaps in advocacy provision.

22. The Scottish Government should ensure patients are routinely involved in decision-making about their treatment and care planning.

23. The Scottish Government should:

- urgently carry out a comprehensive review of the legislation governing non-consensual care and treatment
- ensure new provisions reflect a supported decision-making framework.

Contacts

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