

Minister for Mental Wellbeing and Social Care submission of 8 February 2023

PE1999/A: Fully implement the UN Convention on the Rights of Persons with Disabilities

Thank you for your letter seeking views on the content of Mr Watson's petition which calls on the Scottish Parliament to urge the Scottish Government to ensure the UN Convention on the Rights of Persons with Disabilities (UNCRC) is fully implemented in Scotland. Mr Watson goes on to say that "*it should not accept those recommendations in the Final Report of the Scottish Mental Health Law Review which are incompatible with the UNCRC. It should not accept that it is acceptable to use force, detention or covert medication in the treatment of patients with disabilities.*"

It may be helpful, in the first instance if I explained how our current legislation operates, including the various safeguards in place. Mental health is a priority for the Scottish Government, and we are looking at various legislative reforms which help reaffirm our commitment to ensuring that everyone who needs support can access services appropriate to their needs.

Mental Health Law

Scottish mental health and incapacity legislation is based on rights and principles which provides for rigorous safeguards in respect of an individual's human rights. Most people who use mental health services receive treatment without being subject to an order or certificate under current legislation. For some individuals however, compulsory treatment is used to provide the person with medical treatment to alleviate suffering and for the protection of both the person and others. Compulsory treatment is only allowed under mental health legislation in Scotland in very strict circumstances.

While detained in hospital, patients may have capacity to consent to treatment and the 2003 Act sets out safeguards around obtaining consent and the strict procedures around giving treatment where consent is not given or is refused. Treatment authorised by the Mental Health (Care and Treatment)(Scotland) Act 2003, or the Criminal Procedure (Scotland) Act 1995 may only be given in accordance with the range of safeguards set

out in part 16 of the 2003 Act. Safeguards include a right to independent advocacy and an efficient and independent Mental Health Tribunal which grants and reviews orders for compulsory treatment. The Mental Welfare Commission (the Commission) monitors the use of Scottish mental health law, including compulsory treatment. The Commission also has the power to intervene in particular cases if there is evidence of improper care, treatment or practices

Restrictive Practices

Compulsory measures can be used where a person's mental disorder makes them a risk to themselves or to others and where the person's ability to make decisions about treatment is significantly impaired. This means that sometimes rights need to be removed or restricted but where this is necessary then safeguards apply. Medication can be prescribed to treat an illness only if there is a clear underlying cause which would allow this treatment.

Before any restrictive practice is considered, we expect that other interventions are considered. These include enhanced nursing interventions and engagement, psychological or other behavioural treatments, care regimes, the person's activities, or even buildings or settings. The approach has to be dynamic and flexible and applied to the individual patient in a way that best manages their care and treatment, keeping them and others safe. This is in line with good practice.

The use of restrictive practices should only ever be as a last resort and there may be times where for example rapid tranquilisation is administered as an emergency, for the purpose of controlling or subduing disturbed/violent behaviour. It is essential, therefore, that the individual, and as far as possible, informal, and formal carers, know the reason for the prescription and be involved in discussion about progress, next stages of treatment and alternative strategies for managing any future similar situations.

Scottish Mental Health Law Review

The independent Scottish Mental Health Law Review, chaired by Lord John Scott KC, was tasked with reviewing our mental health and incapacity legislation in light of developments in international human rights, including the UN Convention on the Rights of Persons with Disabilities, and to consider where improvements could be made. The Review published its final report on 30 September 2022 and set out over

200 proposals for reform, separated into short, medium and long-term recommendations for changes to law, policy, and practice.

The Review recommends a human rights-based approach to the law with a greater focus on economic, social, and cultural rights. While acknowledging the tensions between UNCRPD and current mental health and incapacity law, the Review was not of the view that mental health and capacity law requires to be abolished entirely in order to comply with UNCRPD. The Review argues that the law should ensure that all the human rights of people with mental or intellectual disabilities are protected and fulfilled but recognises that there may still be times where there is a need for non-consensual intervention in a person's life. For those times they make recommendations, based on consideration of the person's ability to make an autonomous decision and, after this, a diagnosis and the impact and risks associated with that. The Review propose that there should be reforms to help drive reductions in the use of coercion, including restrictive practices, however, they recognise the need for it may remain in certain circumstances.

Given the range and complexity of the Review, we are taking time to carefully consider the recommendations within the report to ascertain how to better fulfil our obligation to promote and protect human rights within mental health settings and to ensure that rights and protections for those that need it most are upheld.

Cross-government work is now underway to assess their implications and we will set out our response to the Review, including priority actions that will be taken forward, in due course. As part of this work, we are considering the associated timescales for implementation and any recommendations that can be progressed in the short-term as part of our existing work to strengthen mental health and incapacity policy and law.

Human Rights Bill

In addition to the various workstreams which focus on improving human rights, the Scottish Government is taking forward a new Human Rights Bill, that will be introduced to Parliament in the 2021-26 Parliamentary session. The Bill will give effect to a wide range of internationally recognised human rights - belonging to everyone in Scotland, as far as possible within devolved competence, and strengthen domestic legal protections by making them enforceable in Scots law.

This will include incorporation, as far as possible within devolved competence, of the UN Convention on the Rights of Persons with Disabilities. This will place greater impetus on public bodies to remove barriers and support disabled people to fully participate in society, such as accessing information and services and living independently with dignity. This will support the necessary culture change and secure real transformational change for disabled people across Scotland.

Summary

The Scottish Government is making significant investment in the range of mental health supports available, which will see issues tackled earlier and where possible in the community, while ensuring speedier access to specialist care for those who need it.

Huge advances have taken place in relation to mental health. Treatment has advanced and social attitudes have changed which is why effective and up-to-date mental health legislation plays a vital role in ensuring that the rights of everyone are respected, protected, and fulfilled.

We continue to keep the changing context under review to ensure legislation is fit for purpose and the work set out in this letter are key pieces of work which will therefore play a key role in helping shape the future of mental health and incapacity legislation.

The Scottish Mental Health Law Review recommends that the future strategic direction of mental health and incapacity legislation should take a human rights based approach with a specific focus on economic, social, and cultural rights. However, they are not of the view that mental health and incapacity law requires to be abolished in order to comply with UNCRPD. They also recognise that there may still be times that there is a need for non-consensual intervention in a person's life.