

## **PE1787/D**

Scottish Government submission of 13 February 2023

### Introduction

1. Thank you for your email dated 16 January 2023, in which you asked for initial thoughts at Official level on the evidence presented to the Equalities, Human Rights and Civil Justice Committee (EHRCJC) by Sandra Docherty (the petitioner in the above-noted petition) on 13 December 2023.

2. We have carefully read the Official Report of Ms Docherty's evidence and note that this appears to fall into three broad strands:

- Information about Makaton, and the benefits it can bring to those who use it.
- Access to justice concerns, including in relation to police being unable to investigate crimes where a Makaton user is the victim.
- The benefits of making the legal system Makaton-enabled, and the reasons for doing so.

3. This reply sets out the Scottish Government's initial views on these three strands of evidence provided by Ms Docherty.

### Information about Makaton

4. We have noted with great interest Mr Docherty's evidence about Makaton, including its history, development, and usage. It is clear from her evidence that the language is capable of bringing considerable benefits to those who use it, and that these can go beyond the immediate benefit of being understood and into wider points such as enhanced involvement into education and other community settings.

### Access to justice

5. We note from Ms Docherty's evidence that she is concerned about the implications for access to justice for a person who communicates using Makaton, referring – for example – to the inability of police to proceed to investigate an offence where certain key information cannot be communicated by the victim.

6. The Scottish Government is committed to ensuring that everyone in Scotland benefits from a fair and effective justice system, with equity of access. Where a person with learning difficulties or disabilities that require communication or other forms of support in order to effectively engage with the justice system, they should be able to access that support. This applies to anyone, whether a victim, witness or accused person.

7. That commitment is demonstrated by a number of existing measures which enable communication support to be provided to those involved in the justice system. While we note that Ms Docherty's evidence focussed on the experiences of victims and witnesses in the criminal justice system, for the purposes of providing the Committee with the greatest possible context we have sought to provide information

about the justice system generally. However, the specific support which may be available to any particular person will necessarily be driven by their particular needs. *Equality, human rights and other relevant law*

8. The Equality Act 2010 (“the 2010 Act”) establishes a duty on public services to make reasonable adjustments. In the context of the justice system, that could mean providing extra support or information in different formats. The aim of these provisions is to ensure that individuals with a disability can have, to the extent that is reasonable, equal access to public services.

9. The courts in Scotland have an obligation under the Human Rights Act 1998 (“the 1998 Act”) to ensure that persons engaged in the justice system are able to communicate effectively. In practice, this can often mean that the courts must provide sign language interpreters where that is possible.

10. In essence, the 2010 Act and the 1998 Act jointly provided a statutory underpinning for ensuring that parties with communication support needs can access that support as part of engagement with the justice system.

11. The Committee may also wish to note the enhanced requirements for criminal cases under [The Right to Interpretation and Translation in Criminal Proceedings \(Scotland\) Regulations](#) (SSI 2014/95). These regulations provide that where persons are subject to police or criminal court proceedings, they are to be given such interpretation and translation assistance as is necessary including, where this is appropriate, interpretation into sign language.

12. In relation to victims in criminal proceedings, Section 3E of the Victims and Witnesses (Scotland) Act 2014 establishes that a victim has the right to understand and be understood. Please also see paragraph 15 below on the Victims’ Code for Scotland in relation to further work as regards this particular right.

### *Appropriate Adults*

13. Appropriate Adults (AAs) provide communication support to vulnerable victims, witnesses, suspects and accused persons, aged 16 and over, during police investigations. This was initially a non-statutory service established in 1991, which was then placed on a statutory footing by [section 42](#) of the Criminal Justice (Scotland) Act 2016. This provision requires the police to request support for vulnerable individuals in their custody where the police consider that the person has a condition which means they cannot understand what is happening, or cannot communicate effectively with police. Local authorities are responsible with providing AAs to police when requested to do so.

### *Letter of Rights*

14. The Scottish Government introduced a non-statutory Letter of Rights for Scotland in 2013, which was updated in 2018. The [Letter of Rights](#) sets out the rights that people in police custody have in straightforward language, and includes information about getting help with communication. The Scottish Government undertook a public consultation on the Letter of Rights in 2019, to capture lessons

learned and identify any areas that would benefit from improvement. Following this consultation, a [working group](#) (made up of two stakeholder sub-groups: the Accessibility Delivery Group and the Operational Delivery Group) was established to help deliver reforms to the Letter of Rights.

15. The working group agreed that a new easy read Letter and a children and young people's Letter be produced to replace the current standard and easy read Letters. Both Letters are to be provided as easy read, as standard. This will enable children and young people, as well as adults, to be aware of the appropriate support available to them. These Letters have been co-designed with relevant stakeholders and are currently awaiting publication.

#### *Victims' Code for Scotland*

16. This [Code](#) been jointly produced by Police Scotland, the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service, the Scottish Prison Service, the Parole Board for Scotland and the Scottish Government pursuant to section 3C of the Victims and Witnesses (Scotland) Act 2014. This sets out the rights that a victim has, which include a right to understand and be understood, and a right to interpretation and translation (see page 6 of the Code). We have also published an easy read version of this Code (see [page 5](#) for the information relating to the rights to understand and be understood, and to interpretation and translation).

#### *Scottish Learners with Disabilities (SOLD) Network*

17. [SOLD](#) is a national network which seeks to improve support for people with communication and understanding difficulties, and who are at risk of committing a crime, or being accused or convicted of a crime. [ARC Scotland](#) and [People First Scotland](#) deliver SOLD as a partnership, and this is funded by the Scottish Government.

18. SOLD's aims include enabling people with communication support needs to inform and contribute to all aspects of its work, and increasing knowledge and awareness of approaches to meet the support needs of people with communication support needs in the justice system.

#### *British Sign Language*

19. The Scottish Government is committed to promoting the use and understanding of British Sign Language (BSL) as a fully recognised language across the Scottish public sector. Our aim is to make Scotland the best place in the world for people who sign to live, work, visit and learn. This means that people whose primary language is BSL will be fully involved in all areas of daily and public life in Scotland.

20. Our BSL National Plan in place for 2017 to 2023 outlines 70 actions across ten ambitions. In October 2021, we published a progress report for the BSL National Plan 2017 to 2023 ([BSL Progress Report 2021](#)) highlighting the work completed on the 70 actions. In this report, we also identified areas where continued work was needed, and noted the impact of COVID-19 on progress.

21. We work closely and meet regularly with BSL organisations. We are developing a new BSL National plan due for publication later in 2023. In addition to the work being undertaken by the Scottish Government, Scottish national public bodies, local authorities, regional NHS boards, colleges and universities are required to publish their own BSL local Authority Plans. As such, individual bodies may commit themselves to other specific actions to promote BSL.

22. We are providing £1.1 million in funding, through the Equality and Human Rights Fund, to organisations to continue to support public bodies with implementing their BSL plans across Scotland. This includes frontline support for employment, a BSL Helpline, and a deafblind policy forum. Achievements to date include:

- The profile of the employment project has raised within their communities and they have seen members discuss positive destinations and show an interest in the project
- The BSL Helpline has supported 38 Deaf BSL users, with 6 case studies providing evidence of impact of the Helpline
- 12 Deafblind ambassadors are participating in the policy forum, and received Human Rights Building Blocks training. The forum have been involved in policy-making processes.

#### Benefits of making the legal system Makaton-enabled

23. We share Ms Docherty's view that everyone should benefit from a fair and effective justice system, where those who require communication support in order to meaningfully participate are able to access that support. More can potentially be done to make reasonable adjustments for people with communication support needs but a wider range of support is needed than Makaton alone appears capable of realistically providing.

24. We acknowledge that in some cases use of Makaton could be an appropriate means to deliver that support to some people. However, we consider that the existing equalities, human rights and other legislation does provide a framework for delivering that support in a flexible, effective, person-centred and rights-based way.

25. That framework is necessarily non-specific as to the particulars of communication support that can be provided. This makes the current regime flexible and capable of tailored response to the needs of a particular individual: specifying a particular means of communication for use throughout the justice system might run the risk of reducing at least some of the system's current flexibility. We expect that there would also be considerable cost implications to this.

26. That legislative framework is further enhanced by work taken forward by this Government – in close collaboration with justice partners – on initiatives like the Victims' Code, its easy read version and the Letter of Rights. These measures jointly create a robust system which works to ensure not only that communication support can be available, but that those entitled to that support are aware of their rights.

27. We have also noted the points made during the Committee's session on 13 December 2022 in relation to how Makaton can be understood differently by different people, and that it is – intentionally – quite basic. While we appreciate that there could be more fact-finding to be done about how the language can be used, these two points in particular struck us as potentially problematic in the context of embedding Makaton across the justice system. The first point suggests that in fact Makaton might confuse instead of clarify if people understand the language differently, and the limitations of the language may mean that other modes of communication might be more suited to effectively conveying some of the relative complexities of the justice system.

28. We have also noted from the absence of evidence about the numbers of Makaton users and the extent to which there might be demand for Makaton users in the justice system. Such evidence is potentially key to determining the benefits of introducing Makaton to the legal system. The Scottish Government is not aware of any evidence on these points, but the Committee may wish to consider approaching the Public Guardian in Scotland and the Mental Welfare Commission for Scotland to see if they are aware of any such information, or indeed in relation to this petition more generally.

#### Future work

29. The Committee may wish to note the Scottish Mental Health Law Review [final report](#), which was published in September 2022. Chapter 5 of the report covered support in legal and administrative proceedings, and recommendation 5.1 appears particularly relevant to Ms Docherty's petition:

*“The Scottish Government should introduce intermediaries. This should be subject to review and assessment of an expanded use of the Appropriate Adult scheme and independent advocacy*

- *The use of the existing Appropriate Adult Scheme should be expanded to increase the support for individuals throughout current justice processes.*
- *Work should be done to explore the possibility of using independent advocates to assist in providing support for individuals going through justice processes.*
- *Subject to the review of whether the expanded use of appropriate adults and independent advocates set out above proves sufficient to provide the necessary support, a scheme for the use of intermediaries should be introduced to provide support from start to finish in justice processes.”*

30. This recommendation links to prior work by the Scottish Government on the introduction of intermediaries. At the heart of that work was the Government's commitment to ensuring that the justice system is fair and effective through recognition that – notwithstanding the existing robust statutory framework which ensures that communication support can be made available – a standardised system may bring benefits to both individuals and the services within which that system operates. The recommendation above is an opportunity to further explore this.

31. However, recommendation 5.1 is one of 200 proposals for reform set out in the final report. Cross-government work is now underway to assess their implications and we will set out our response, including priority actions that will be taken forward, in due course. As part of this work, we are considering the 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.

32. This is a substantial task and we anticipate that the work to deliver reform will take time. Whilst we will aim to act as quickly as possible, we are committed to getting this right and to ensuring that any work we take forward can be successful.

33. We would be happy to keep this Committee updated on our response to recommendation 5.1 if that would be helpful.

### Conclusion

34. We hope that the information provided above will be of assistance to the Committee as it continues its work on Ms Docherty's petition. We would be very happy to provide further information to the Committee if that would be of assistance in this ongoing work.