

PE1741/E

Scottish Human Rights Commission of 31 October 2019

The Committee will be aware of the Independent Review of Learning Disability and Autism in the Mental Health Act. The Review concluded at Stage 1 that the Mental Health Act sometimes fails to protect people's rights. We agree with that conclusion.

The Review is currently consulting on proposals for changes to the Act to ensure that the law supports people's human rights. The proposals cover many of the issues raised by the Petition. They seek to change the legislation to a fundamentally different model which treats disabled people as equal citizens and provides support to remove the barriers they face which disable them (the social model of disability), as opposed to seeking to "treat" the individual (the medical model). They consider solutions to ensure compliance with the Convention on the Rights of Persons with Disabilities (CRPD) and the European Convention on Human Rights (ECHR), thereby protecting and promoting the human rights of people on the autism spectrum and people with learning disabilities. Crucially, they propose a range of mechanisms to ensure that people with learning disabilities and/or autism are supported to make decisions and that their rights, will and preferences are respected on the same basis as other people. These proposals are part of decisive move away from substitute decision making. We have responded to the consultation and, while we consider that there are still some issues to be worked out to ensure the proposals fully cohere, we believe that the Review makes promising practical proposals to deal with complex matters.

Alongside changes to the Mental Health Act, the Review proposes legislation to provide for positive rights, as opposed to those concerned with governing restrictions in the context of compulsory care and treatment, as the current Mental Health Act primarily does. This includes:

- Rights of access to specialist support, care and treatment;
- Rights to independent living;
- Standards on information to support decision making;
- Rights relating to the criminal justice system: specialist rehabilitation services, rehabilitation centres, rehabilitation in the community and adapted prison environments.

We broadly support these recommendations and believe a new law of this nature would better protect the human rights of people with learning disabilities and/or autism. We consider that many of these and the proposed changes to the Mental Health Act would equally improve human rights protection for a wider range of people, who currently fall within the ambit of the Mental Health Act, although that is a matter for the separate review of the Mental Health Act, being carried out by John Scott QC.

As regards human rights issues raised in the petition but which fall outwith the scope of the above proposals, the Committee will be aware of the recent recommendations of the First Minister's Advisory Group on Human Rights Leadership and the establishment this year of a Task Force to implement these recommendations. The recommendations seek to incorporate economic, social and cultural rights into Scots

law, such as the right to work and to just and favourable conditions of work, the right to social security, the right to an adequate standard of living and the right to health. If the Advisory Group's recommendations are taken forward as described, they would:

- in the first instance place duties on public authorities to have due regard to the incorporated rights;
- this would be followed by a duty to comply with the incorporated rights after the passage of a specified period of time; and
- provide individuals with the opportunity to hold public authorities accountable in court.

In addition, the Scottish Government has recently committed to incorporating the Convention on the Rights of the Child (CRC) into Scots law. This includes, but is not limited to, rights around education, the right of the child to participate in decisions which affect their life and support for disabled children and their families. In a recent response to the Scottish Government's consultation on incorporation of the CRC, the Commission recommended that:

- public authorities in Scotland should have both a duty to comply with the rights in the CRC, as well as a duty to have due regard to these rights in the carrying out of their functions. Both of these duties should take effect immediately;
- A provision enabling children and young people and others with sufficient interest to bring proceedings if and when a public authority has failed or will fail to comply with the duties imposed on it by the Act;
- A strike down power of the courts, if deemed within competence, failing which a declaration of incompatibility provision where a court finds that a provision of legislation made by the Scottish Parliament is incompatible with incorporated CRC rights, and provisions that any finding of incompatibility must be addressed by the Scottish Parliament.

The Commission is strongly of the view that disabled people, and in particular people with learning disabilities and people on the autism spectrum have an important role to play in shaping new legislation going forward, including legislation which implements the recommendations of the First Minister's Advisory Group and in relation to the potential future incorporation of the UN Convention on the Rights of Persons with Disabilities into Scots law. We suggest that the Scottish Parliament has a role in scrutinizing the future proposals to ensure that people with learning disabilities are meaningfully and appropriately included in these processes and their rights are protected and respected in practice.