



Law Society
of Scotland

Rights of People with Disabilities in Scotland

Submission to the United Nations Committee on the
Rights of Persons with Disabilities 7th Pre-Sessional
Working Group by the Mental Health and Disability
Sub-Committee of The Law Society of Scotland

24 February 2017



1. Introduction

1.1 The Mental Health and Disability Sub-Committee

The rights, will and preferences of people in Scotland with intellectual disabilities are central to the role of the Mental Health and Disability Sub-Committee (“the MHDC”) of the Law Society of Scotland (“the Society”). The MHDC has a unique expertise in relevant rights, law and practice as well as an exceptional understanding of the collective will of people with such disabilities and an unrivalled breadth of experience in dealing with day-to-day issues where individual rights will and preferences are uncertain, disputed or in apparent conflict. This expertise, understanding and experience is invaluable in contributing towards the statutory objectives and mission of the Society.

1.2 Activities

The MHDC has played a leading and proactive role in the development of the law and practice in Scotland which is now encompassed within the three principal statutes: the Adults with Incapacity (Scotland) Act 2000 (“AWI”), the Mental Health (Care and Treatment) (Scotland) Act 2003 (“MHA”) and the Adult Support and Protection (Scotland) Act 2007 (“ASP”). As well as this leading role, the MHDC is constantly alert to the need to address situations of disadvantage, or threatened disadvantage, to people with intellectual disabilities compared to others. The committee proactively addresses such situations frequently. It also responds on behalf of the Society to a wide range of Government and other consultations. It has promoted relevant training and professional development, and the setting of professional standards. Membership of the MHDC includes authors or joint authors of most of the main texts on relevant topics, and providers of education and training not only to lawyers but to relevant non-governmental organisations and others. The MHDC liaises closely with the Society’s Professional Practice Committee, Equalities Law Sub-Committee and Access to Justice Committee; always from the viewpoint of people who are vulnerable or have intellectual disabilities.

The MHDC has always advocated for the need for substantial reform where necessary and, in 1991, this resulted in the Committee hosting the initial seminar which launched the consultation process for what would become the AWI. Invitees included appropriate representatives from all major relevant organisations of and for people with intellectual disabilities. The MHDC was then highly involved in developing the draft legislation which was published by the Scottish Law Commission (“SLC”) in 1995. When reform stalled at that point, the MHDC played a leading role in the “Campaign for Justice” participated in by over 70 organisations of and/or for people with intellectual disabilities, including 30 national organisations. The campaign resulted in the AWI being passed; it was the first major piece of legislation of the then new Scottish Parliament in 2000.

In 1995, the MHDC were joint organisers of a national conference entitled “Consensus for Change?” which, in due course, led to the creation of the MHA. The MHDC also advocated the need for more general protection of people who are vulnerable and at risk, as now embodied in the ASP. In particular, the MHDC

was responsible for the concept that vulnerable people should not always be removed from situations of risk but rather that the causes of risk should be removed from them thus allowing individuals to remain their own homes where possible.

As narrated in the Executive Summary below, while the AWI, MHA and ASP were all regarded as world-leading at the time, aspects of application in practice have been regressive and the MHDC is now playing a leading role in promoting coordinated reform of all three, and related improvements in practice.

1.3 Statutory role and mission

The Society has a statutory duty to work in the public interest, a duty which the Society is strongly committed to achieving through its work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. The Society seeks to influence the creation of a fairer and more just society through its active engagement with the Scottish and United Kingdom (“UK”) Governments, Parliaments, wider stakeholders and our membership. The statutory role and mission of the Society is highly relevant to people with intellectual disabilities.

The Society is also the professional body for over 11,000 Scottish solicitors. With its overarching objective of leading legal excellence, it strives to excel and to be a world-class professional body, understanding and serving the needs of the public and its members. It sets and upholds standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

1.4 Role of persons with intellectual disabilities

A fundamental objective of the MHDC both in drafting this submission and in its work generally is, and always has been, to attempt to reflect the realities and aspirations of people with the whole diverse range of intellectual disabilities throughout Scotland. Every member of the MHDC has been selected for their ability to contribute in one way or another towards that common purpose. The membership of the committee has never been limited to lawyers, and recruitment for membership has always been carried out on a fully inclusive basis. The current membership includes practising solicitors with daily experience of engaging with people with intellectual disabilities and those closest to them; lawyers working in organisations of and for people with intellectual disabilities; lawyers working in relevant public authorities; academic lawyers specialising in the field; psychiatrists and/or psychiatric nurses working in the field among others. The diversity of backgrounds frequently produces lively and productive debate.

2. Executive Summary

The MHDC welcomes the opportunity to consider and respond to the Committee on the Rights of Persons with Disabilities in relation to the review of the UK’s UN Convention on the Rights of Persons with Disabilities (“CRPD”) compliance.

The committee is of the view that Scottish legislation is, in some places, non-compliant with the CRPD. We are, however, also of the view that the remedy to this non-compliance lies in amending the black letter law and changing the practical application of the law. Our response below discusses the issues that have arisen since the introduction of the AWI, MHA and ASP and makes several recommendations for how these issues may be addressed so as to further the UK's compliance with the CRPD.

Of particular concern to us, is the tendency for decisions under Scottish law to embrace a "best interests" methodology which, perhaps, demonstrates a lack of education, training and/or awareness of the "constructing decisions" methodology and the CRPD more generally. We are, however, encouraged by the Scottish Government's willingness to engage with us and to reform the law in this area, including, in order to achieve further compliance with the CRPD.

3. The task for Scots law

The MHDC participated fully in the Essex Autonomy Three Jurisdictions Project¹ and half of the core research group were also members of the MHDC. Various consultation and roundtable events took place in Scotland, including direct engagement with people with relevant disabilities. The MHDC supports the view that Scottish legislation is non-compliant with the CRPD, but that the non-compliance can be remedied. Of greater concern is that practice has in some respects drifted away from the original intentions of the current legislation, in ways less compatible with the CRPD. Early in 2016, the Scottish Government initiated a consultation on an SLC Report about compliance with Article 5 of the European Convention on Human Rights ("ECHR"). The lead Scottish Government official maintained close contact with the MHDC including attending a meeting with the MHDC in February 2016. During that meeting, the MHDC suggested that the Government should review the relevant areas of law and practice, to include achieving compliance with the CRPD.

The MHDC are encouraged that the Scottish Government has been receptive to our work and has demonstrated a commitment to improving compliance with the CRPD. For example, the Scottish Government publication *A Fairer Scotland for Disabled People – Our Delivery Plan to 2021 for the United Nations Convention on the Rights of Persons with Disabilities*² indirectly refers to the CRPD requirements in terms of support for persons with intellectual disability in paragraphs 12 (parity of esteem) and 14 (support for the exercise of legal capacity, namely promoting independent advocacy and advance statements) and directly in paragraph 15 where it states:

¹ See final report <http://autonomy.essex.ac.uk/eap-three-jurisdictions-report>

² Scottish Government, *A Fairer Scotland for Disabled People - Our Delivery Plan to 2021 for the United Nations Convention on the Rights of Persons with Disabilities* (December 2016). Available online at: <http://www.gov.scot/Resource/0051/00510948.pdf> (accessed 9 December 2016).

“We will work with disabled people and the organisations that represent them to develop changes to the Adults with Incapacity Act, in relation to the deprivation of liberty, and to assess compliance with UNCRPD by 2018.”

Moreover, it also states:

“We will continue to work with the Law Society of Scotland to encourage the promotion of specialism in disability discrimination law and will promote awareness of such activity.”³

The Scottish Parliament has endorsed the Delivery Plan and, amongst other things, has also resolved:

“...that the Scottish Government should be firmly committed to implementing the UN Convention on the Rights of Persons with Disabilities in full so that disabled people in Scotland can realise all of their human rights...”⁴

The MHDC also welcome the willingness shown by the Scottish Government to engage with the MHDC regarding the scope of the recently conducted review of the AWI and their encouragement to address all three relevant Acts in the process of consultation upon the Act.⁵

4. Background

The UK’s constitutional arrangements relating to international law are such that, unlike rights under the ECHR, the CRPD rights are not directly binding under national law.⁶ That being said, the CRPD is nevertheless highly influential. As a state party to the treaty, the UK is bound under international law to comply with the CRPD and, furthermore, devolved legislation and the actions of the Scottish Ministers can be prevented by the UK Government if such legislation or action contravenes CRPD rights.⁷ We note that the European Court of Human Rights should interpret ECHR rights with reference to the CRPD as it is a higher source of international law and, that similarly, the domestic courts in the UK are increasingly using the CRPD for the same purposes.⁸ However, the Scottish courts have made very limited references to the CRPD to date and, we are of the view that this reflects a worrying lack of familiarity with and application of the CRPD in circumstances where it is highly relevant.

³ Para 83.

⁴ Scottish Parliament, *Minutes of Proceedings*, Parliamentary year 1, No 53, Session 5, Thursday 8 December 2016, para 4.

⁵ *Consultation on the Scottish Law Commission Report on Adults with Incapacity*, December 2015. The Adults with Incapacity (Scotland) Act 2000, the Mental Health and Treatment Act 2003 and the Adult Support and Protection Act 2007.

⁶ Enabling national legislation is required for rights identified in international human rights treaties to have legal effect in the UK. For example, ECHR rights have legal effect in Scotland via sections 29(2) (d) and 57(2) of the Scotland Act 1998 and sections 2, 3 and 6 of the Human Rights Act 1998. These provisions require Scottish devolved legislation and its implementation, the actions of the Scottish Ministers and of public bodies to be ECHR compatible.

⁷ Sections 35 and 58 of the Scotland Act 1998.

⁸ See, for instance, *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15

In January 2016 we responded to the Scottish Government consultation on its draft CRPD delivery plan for 2016 to 2020.⁹ We also responded to the Scottish Government consultation on the SLC's report on adults with incapacity in March 2016.¹⁰ Both of these responses make frequent reference to the CRPD. The latter consultation also invited recommendations for amendment and improvement of the AWI and related legislation as well; therefore our response also referred to the MHA and ASP.

As mentioned above, the MHDC members Adrian Ward, Alison Hempsey, Alex Ruck Keene and Professor Jill Stavert also formed one half of the authors of the Essex Autonomy Project Three Jurisdictions Report which considered the compatibility of capacity and incapacity legislation across the UK with Article 12 of the CRPD.¹¹ The work of this 2015/2016 report was formally published in June 2016 and considerably informed the approach we adopted in the consultation responses referred to above.¹² Although both consultation responses preceded the final report, we stated in them that the recommendations in the report should be fully taken into account by the Scottish Government in future and, when seeking to amend incapacity, mental health and adult support and protection legislation in Scotland. The report ultimately concluded that the AWI is incompatible with Article 12 CRPD but that this is remediable. The recommendations from the report are set out below.

Under the leadership of Professor Stavert, Edinburgh Napier University has conducted extensive research into the impact upon and implications for Scottish law of the CPRD and has, together with the Mental Welfare Commission for Scotland, hosted seminars on the topic. Members of the MHDC have been substantially involved in this work, which also informs the content of this submission.

5. Article 12 CRPD (equal recognition before the law) and its application to

⁹ Law Society of Scotland Consultation Response *United Nations Convention on the Rights of Persons with Disabilities (CRPD): The Scottish Government's Draft Delivery Plan 2016-2020*, January 2016, Response 727192194. Available online at: https://consult.scotland.gov.uk/equality-unit/rights-of-persons-with-disabilities/consultation/view_respondent?uuld=727192194 (accessed 9 December 2016). This was the submission referred to under heading 3 above.

¹⁰ Law Society of Scotland *response to Scottish Government Consultation on the Scottish Law Commission Report on Adults with Incapacity* (March 2016). Available online at: <https://www.lawscot.org.uk/media/745234/mhd-consultation-on-the-slc-report-on-awi-final-.pdf> (accessed 9 December 2016).

¹¹ Adrian Ward is Convenor of the MHDC and a consultant with TC Young Solicitors;

Alison Hempsey is a Partner with TC Young Solicitors;

Alex Ruck Keene is a Barrister with 39 Essex Chambers, Honourary Research Lecturer at the University of Manchester, Wellcome Trust Research Fellow at the Dickson Poon School of Law, Kings College London and a member of the Law Society of England and Wales Mental Health and Disability Committee; and

Professor Jill Stavert is Professor of Law and Director of the Centre for Mental Health and Incapacity Law Rights and Policy at Edinburgh Napier University.

¹² W Martin *et al*, *Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK*, June 2016. Available online at: <http://autonomy.essex.ac.uk/eap-three-jurisdictions-report> (accessed 9 December 2016).

Scottish legislation

The principles that underpin the AWI, MHA and ASP seek to ensure that the individual's autonomy is preserved and that their present and past wishes and feelings are given effect in so far as it is reasonably and practically possible in all decisions made concerning them, including in the implementation of interventions. An intervention must also provide a benefit that cannot be otherwise achieved. The legislation also identifies various forms of support that enable an individual's wishes and feelings to be made known, such as powers of attorney, advance statements and independent advocacy, and albeit, in non-specific terms in the legislation itself, assistance with communication.¹³

In terms of specifically addressing Article 12 CRPD issues and its application to the AWI we note that General Comment No 1 is clear that all substitute decision-making must be replaced with supported decision-making.¹⁴ However, we suggest that the meaning of "supported decision-making" in relation to people whose intellectual disabilities render them incapable of acting and deciding, with any amount of support, has to be derived from a wider reading of the General Comment, and in particular, with reference to "best interpretation of will and preferences" in para 21 of the General Comment. It is further suggested that the issue is not whether the involvement of someone else is required to facilitate legally valid acts and decisions for persons with some degree of such incapability, and hence to meet the core requirement of Article 12, which is to support the exercise of legal capacity, but the method employed. The choice of method is thus between "substitute decision-making on the basis of best interests" (which the General Comment states must be abolished) or supported decision-making based upon a best interpretation of the will and preferences of the individual. It should be noted that a "best interest" approach was rejected for the purpose of the AWI, the principles and provisions of which were designed to lead to a "constructing decisions" methodology.¹⁵ We would respectfully suggest that the "constructing decisions" methodology best describes the more developed approach now advocated by the UN Committee as being the only approach compliant with the CRPD.

We are concerned that there appears to be a current trend in practice and judicial decisions in Scotland away from a "constructing decisions" methodology towards, either expressly or in practice, a paternalistic "best interests" approach (as that term is used in the General Comment). The journey in England and Wales has been in the opposite direction even though it uses the term "best interests" in the Mental Capacity Act 2005.¹⁶ We consider that a paternalistic "best interests" approach to decision-making for

¹³ For information the role that statutorily recognised and other support for decision-making can play in reinforcing principles that underpin Scottish legislation please see Mental Welfare Commission for Scotland, *Supported decision-Making: A Good Practice Guide* (2016) available online at: http://www.mwcscot.org.uk/media/348023/mwc_sdm_draft_gp_guide_10_post_board_jw_final.pdf

¹⁴ General Comments No. 1, paras 7 and 27

¹⁵ Scottish Law Commission, *Incapable Adults*, Report No. 151 (1995), para 2.50. Such term being described in A Ward, *Adult Incapacity*, W Green (2003).

¹⁶ See A Ward, "Abolition of Guardianship? 'Best interests' versus 'best interpretation'", 2015 SLT (News) 150; A Ruck Keene and A Ward, "With and Without 'Best Interests': the Mental Capacity Act 2005, the Adults with Incapacity (Scotland) Act 2000 and constructing decisions" (2016) 22

adults with impairments of capacity, irrespective of how it is presented (for example if couched in terms of giving precedence to the “benefit principle” in section 1(2) of the AWI), remains unacceptable.

6. Recommendations: AWI

We acknowledge that respect for all rights and the will and preferences of everyone, regardless of disabilities, must lie at the centre of all legal regimes which must reflect the CRPD.¹⁷ In terms of the necessary amendments to the AWI, we therefore recommend a strengthening of supported decision-making and of the “constructing decisions” methodology which already represents best practice under the AWI, together with robust provisions to prevent “best interests” decision-making. We are concerned by the fact that, as set out above, interpretation and application of the AWI has proceeded in the opposite direction to that of CRPD compliance. This calls both for legislative change and for resourcing to enable specialist training and education, for professionals and for members of the public, to embed the principles of the CPRD into daily life.

In terms of specific legislative changes, we consider that these should include the following:

- a. The AWI requirement regarding the provision of support should be extended to specifically include support for the exercise of legal capacity, not simply support for communication.¹⁸
- b. The requirements to give all reasonable assistance in communicating in the AWI should (a) become a robust obligation upon specified persons, and; (b) be extended to an obligation upon specified persons to provide all support necessary to enable an adult to exercise such capacity as may – with such support – be within the adult’s capabilities.
- c. An explicit 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 such presumption being rebuttable only if stringent criteria are satisfied.
- d. It should statutorily be declared that the starting-point for decision-making should be an attributable requirement to ascertain the adult’s past and present ‘wishes and feelings’, as the primary element in achieving respect for the adult’s ‘rights, will and preferences’.

International Journal of Mental Health and Capacity Law 17-37, available online at: <http://www.northumbriajournals.co.uk/index.php/IJMHMCL/issue/view/61>.

¹⁷ See also *Three Jurisdictions Report*, recommendation 1.

¹⁸ Section 1(6) AWI.

- e. In the AWI and in relevant court rules there should be a clear requirement to facilitate the personal participation of the adult, to supplement this where necessary, to record how this has been done, and in the absence of participation to record the reasons and to record the steps nevertheless taken to ascertain the ‘will and preferences’ of the adult.

We note that this has been recently introduced in Scotland in a practice direction adopted by the Sheriffdom of Lothian and Borders¹⁹ and commend this as an example of the CRPD good practice. Such practice direction requires that all applications under the AWI made to its courts must include:

“averments as to the present and past wishes and feelings of the adult so far as they can be ascertained. If it is not possible to ascertain them, the writ must include averments as to (1) why this is not possible and (2) as to the steps taken, if any, (including any assistance and/or support provided) with a view to ascertaining them;”²⁰

- f. In the AWI and in the relevant court rules there should also be a clear requirement to appoint a person specifically to represent the subject of the proceedings by way of advancing arguments on their behalf as to their desired outcome where that is ascertainable. This is to be distinguished from any person appointed to secure the interests of the person in the proceedings (whether a safeguarder or otherwise), or any person appointed to assist the court in discharging its inquisitorial functions; it may in some cases be necessary to appoint both such a person and a representative as described in the preceding sentence.²¹
- g. That powers of attorney are recognised as important forms of support for the exercise of legal capacity.
- h. The express inclusion of the concepts of ‘assisting’ and ‘acting with’ the granter in Powers of Attorney documentation.
- i. The removal of obstacles, such as unnecessary difficulties and delays relating to support provided by attorneys, guardians or appointees under intervention orders and Access to Funds arrangements, for persons with intellectual disabilities, as such obstacle are discriminatory.

¹⁹ Sheriffdom of Lothian and Borders Practice Note No 1 of 2016: Applications under the Adults with Incapacity (Scotland) Act 2000. Available online at

[https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/sheriff-court-practice-notes-\(civil\)](https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/sheriff-court-practice-notes-(civil)) (accessed 13 December 2016).

²⁰ In other words, clear statements. Ibid, paras (g) and (k).

²¹ See, by analogy with the position in England and Wales under the different legal framework of the Mental Capacity Act 2005, the arguments outlined as regards the requirements of representation in relation to the CRPD in Ruck Keene, A., Bartlett, P. and Allen, N. (2016) *Litigation Friends or Foes? Representation of ‘P’ before the Court of Protection*, *Medical Law Review* 24(3), pp. 333-359. See, in addition, the forthcoming report entitled “Participation of P in Welfare Proceedings in the Court of Protection” produced by Lucy Series, Phil Fennell and Julie Doughty at Cardiff School of Law and Politics as part of a project on the Court of Protection’s welfare jurisdiction, funded by the Nuffield Foundation, as the most detailed exposition of the relevant principles within the CRPD, principles equally applicable by analogy to proceedings under the AWI.

- j. The further development of definitions of the concepts of undue influence and conflicts of interest with a view to providing robust safeguards for the exercise of legal capacity.
- k. We acknowledge the important role played by advance directives and independent advocacy in supporting the exercise of legal capacity and note the attempts to reinforce the increase and use of these under the recent Mental Health (Scotland) Act 2015 and the Mental Welfare Commission for Scotland's initiative to promote the use of advance statements.²² However, at the same time despite an annual increase in the need for independent advocacy it is significantly under-resourced in Scotland. We consider that the Scottish Government must ensure adequate funding to providers of independent advocacy.
- l. More broadly, we note that Department of Work and Pensions appointeeships, management of damages payments, and other similar appointments are currently not CRPD-compliant and therefore consider that the requirements set out above should apply to all situations where someone acts, manages or decides on behalf of an adult. We also suggest that this is extended to private 'third party measures', where trustees are in effect exercising management functions in respect of funds allocated to, or which they have discretion to allocate to, a person with some degree of relevant disability (or under arrangements predicated upon such relevant disability).
- m. Principal mental capacity and adult incapacity legislation should be structured to ensure that provisions and procedures necessary to ensure CRPD compliance apply throughout the entire Scottish legal system.

We note that supported decision-making and co-decision-making arrangements seem to be virtually unknown in Scotland, despite the Public Guardian having approved for registration a form of power of attorney including clauses providing for both. Again, whilst this is a matter which may call for law reform, it is as much a matter for education, publicity and training.

7. CRPD more generally and its application to Scottish legislation

In addition to the recommendations mentioned above additional CRPD issues that need to be addressed in Scotland include the following:

7.1 AWI

²² Mental Welfare Commission for Scotland website, Advance Statements, <http://www.mwscot.org.uk/get-help/getting-treatment/advance-statements/>

There is an apparent incompatibility between Article 5 ECHR, which in Article 5(1) (e) permits “lawful detention” of “persons of unsound mind” and Articles 12 and 14 of the CRPD. This needs to be taken into account when seeking to address situations covered by the AWI where persons may be unable (according to the test applied by the AWI) to consent to a deprivation of liberty. This is particularly important in the Scottish and United Kingdom context given the very wide definition of deprivation of liberty (for purposes of Article 5 ECHR) given by the Supreme Court in the Cheshire West case.²³ In consequence of this decision, arrangements for the delivery of complex care to those with disabilities are very likely to amount to a deprivation of liberty, even where there is no element of coercion or any reason to consider that the person concerned is anything other than content and actively seeking to manifest their agreement to the arrangements. We are concerned that steps are taken to allow a person’s legal capacity to agree to arrangements for their care and treatment are properly recognised even where such agreement does not amount to capacious consent as currently understood under the AWI.

There is a need to remove all requirements for legal aid contributions, including any contributions by third parties such as parents, for AWI proceedings. Given that such proceedings are necessary by reason of disability and the need to overcome detriment and disadvantage to impose such a contribution is fundamentally discriminatory and thus contrary to the equality and non-discrimination and access to justice requirements of Articles 5 and 13 of the CRPD.

There is a need for effective and specialist mediation in AWI matters (including with adequate resourcing and training) so as to enable matters relating to support for legal capacity to be resolved, wherever possible, outside the court forum and with commensurately fewer demands upon the individuals requiring that support.

The unification of those court bodies addressing matters connected to intellectual disability (i.e. those with jurisdiction over the AWI, MHA and the ASP) into one specialist tribunal, so that it is possible for as many matters as possible connected to the support for legal capacity in this context to be addressed by one specialist body.

The need to remove obstacles to the effective cross-border recognition and implementation of measures (including private mandates) relating to those with intellectual disabilities.

7.2 MHA

We acknowledge that interventions under the MHA depend on a diagnosis of mental disorder which may be inherently discriminatory in the context of Articles 12, 14, 15 and 17 of the CRPD. However, notwithstanding this, questions remain about whether the delivery of care and support services for persons with a mental disorder, as required by the MHA, gives effect to positive rights such as living independently,

²³ P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor [2014] UKSC 19.

rehabilitation and work and employment.²⁴ In particular, concerns have been raised that some local authorities may be failing to fully understand and carry out these duties. Moreover, we note that a lack of funding, accommodation and/or appropriate care providers is resulting in persons with learning disabilities or autism are more likely to experience delays in accessing appropriate community services and thus remain in hospital for longer periods relative to other mental health patients²⁵. There is consequently a need to ensure the adequacy of such community services. Further, mental health services are not always able to adequately address the less usual and complex needs of certain persons with mental disorders. This needs to be addressed and gaps in provision appropriately met.²⁶

7.3 ASP

So far as applicable, the changes proposed for the AWI in section 6 above should also be made to the ASP. This applies, in particular, to item c, that there should be an explicit 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 such presumption being rebuttable only if stringent criteria are satisfied.

7.4 Social Care

In the social care context, there are services that are failing to deliver social care that is needed and are being charged for in a fashion which adversely and discriminately affects persons with disabilities (Article 19 CRPD). Further, whilst the aims of self-directed support ("SDS") contained in the Social Care (Self-directed Support)(Scotland) Act 2013 were laudable, the way in which they are being implemented means that reality does not match its original aspirations (again, engaging Article 19 CRPD). Disproportionately few people with disabilities access SDS because of the substantial responsibilities that are attached to the process which are onerous and not proportionate.

7.5 Health Care

The continuation of substantial health inequalities and, in particular, in the provision of mental health care (including mental health services for children and adolescents), which give rise to equality and discrimination issues (Article 5 CRPD), the right to health (Article 25 CRPD) and children (Article 7 CRPD).

7.6 Equalities and Disabilities Ombudsman

²⁴ Sections 25-27 MHA.

²⁵ Please see *No Through Road: People with Learning Disabilities in Hospital* a visit and monitoring report by The Mental Welfare Commission for Scotland dated February 2016 available at http://www.mwscot.org.uk/media/296413/no_through_road.pdf

²⁶ Please see The Mental Welfare Commission for Scotland's investigation: The Death of Ms MN available here: http://www.mwscot.org.uk/media/244671/ms_mn_investigation_full_report.pdf

The concept of an ombudsman to assist service users, and to advise those in the public and private sectors with relevant duties, is now well established in UK practice. There is, however, a gap in Scotland in the area of equalities and disabilities issues. An ombudsman service to cover those areas in Scotland should be established. This however should not in any way detract from the key role of the Mental Welfare Commission. Work will be required to clarify respective roles and the inter-relationship between them.

7.7 *Parens patriae* jurisdiction

The Court of Session in Scotland retains a general protective jurisdiction known as the *parens patriae* jurisdiction. It can be used to protect people within the jurisdiction of the court in circumstances where protection appears to be needed, and is not otherwise provided by law²⁷. This jurisdiction could be seen as equating to constitutional obligations upon states which have a written constitution to protect their citizens. In the context of CRPD, we have noted the decision dated 26 July 2016 and published 25 August 2016 by the First Senate of the German Federal Constitutional Court that the constitutional duty to protect citizens required authorisation of treatment of a woman against her consent where that was not otherwise provided for in legislation.²⁸ We have noted that the Federal Constitutional Court considered that this contravened neither the CRPD nor the recommendations in General Comment No 1. The practice of states is relevant to the interpretation of international instruments such as the CRPD and, we would expect Scottish courts to give careful consideration to the CRPD and related jurisprudence in any case where it is proposed that measures be imposed that are contrary to a person's evident will and preferences. Subject to that proviso, we are of the view that the failsafe *parens patriae* jurisdiction should be retained in relation to adults with intellectual disabilities.

²⁷ A recent application in relation to a child was *Cumbria County Council, Petitioner* [2016] CSIH 92, where a child placed cross-border into Scotland from England fell into a gap in relevant legislation.

²⁸ Please see "A Major Step Forward in CRPD Compliance by the German Federal Constitution Court?" in Mental Capacity Law Newsletter November 2016: Issue 70 pp 22-32 available here. <http://www.39essex.com/content/wp-content/uploads/2016/11/MC-Newsletter-November-2016-Compendium-Screen-Friendly-1.pdf>. This includes a link to the original decision (in German).

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