

**1. SUBMISSION TO THE SCOTTISH GOVERNMENT ON
A MENTAL HEALTH STRATEGY FOR SCOTLAND: 2011-15 A CONSULTATION**

February 2012

The Scottish Human Rights Commission

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of our functions. The Commission is the national human rights institution (NHRI) for Scotland with a mandate to promote and protect human rights for everyone in Scotland. The Commission is one of three NHRIs in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission. In June 2010 the Commission was accredited with "A" status by the International Coordinating Committee of NHRIs and in May 2011 the Commission was elected to chair the European Group of NHRIs.

1.1 Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit evidence to the consultation on a Mental Health Strategy for Scotland: 2011-2015. In preparing this short submission the Commission has drawn on the emerging findings of a major research project to map the gaps and the good practices in the realisation of human rights in Scotland. This mapping research is the first of its kind in Scotland and will present a picture of where Scotland currently stands with regards to its international and domestic human rights obligations. The research findings will be used to launch a participatory process to develop Scotland's National Action Plan for Human Rights (SNAP). We take this opportunity to consider how the development of the new Mental Health Strategy can be aligned with the development of SNAP.

Legal Framework

In making its response, the Commission's draws particular attention to the following human rights standards:

- The European Convention of Human Rights and Fundamental Freedoms (ECHR)
- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The United Nations Convention on the Rights of Persons with Disabilities (CRPD)

- The Scotland Act 1998
- The Human Rights Act 1998

The following articles of ECHR are particularly relevant:

- Article 2 The right to life

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| - Article 3 | The prohibition of torture, inhuman or degrading treatment or Punishment |
| - Article 5 | Right to liberty and security |
| - Article 6 | The right to a fair trial and a fair hearing |
| - Article 8 | Right to private and family life, home and correspondence |

Outcome 6: Care and treatment is focused on the whole person and their capability for growth, self-management and recovery.

Question 15: What tools are needed to support service users, families, carers and staff to achieve mutually beneficial partnerships?

Question 16: How do we further embed and demonstrate the outcomes of person-centred and values-based approaches to providing care in mental health settings?

Outcome 11: The health and social care workforce has the skills and knowledge to undertake its duties effectively and displays appropriate attitudes and behaviours in their work with service users and carers.

Question 29: What are the other priorities for workforce development and planning over the next 4 years? What is needed to support this?

Outcome 14: The legal framework promotes and supports a rights based model in respect of the treatment, care and protection of individuals with mental illness, learning disability and personality disorders.

Question 35: How do we ensure that staff are supported so that care and treatment is delivered in line with legislative requirements?

Ensuring best practice in human rights throughout mental health law, policy and practice

In relation to each of the above questions, the Commission would like to explore with Scottish Government and other stakeholders how best to ensure a human rights based approach to mental health services throughout law, policy and practice. We propose to do this through a participatory process of development of Scotland's National Action Plan for Human Rights.

Scotland is recognised for having international best practice laws which link mental health, legal capacity and adult protection with human rights. The Adults With Incapacity (Scotland) Act 2000, the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007 all explicitly reference human rights principles. Principles such as participation, least restrictive alternative, and non-discrimination are drawn directly from human rights law. In addition, the effect of section 3 of the Human Rights Act 1998 is that all other primary and secondary legislation (including the three pieces of legislation listed here) should be read in a manner compatible with the ECHR. This duty applies throughout the lifetime of the legislation, and the ECHR is recognised to be a "living instrument", the interpretation of which depends on the prevailing standards of the time. There have been considerable developments in understanding of the ECHR rights in areas related to mental health since each of these laws was adopted.

As an example, the European Court of Human Rights is increasingly interpreting ECHR rights such as those contained in Article 6 (the right to a fair hearing in the determination of civil rights) and Article 8 (the right to respect for private and family life) through the lens of the UN Convention on the Rights of Persons with Disabilities (CRPD, binding on the UK since 2009). In a series of decisions on capacity and consent to decision making taken since the AWIA was adopted in 2000 the European Court of Human Rights has held that:

- "...the existence of a mental disorder, even a serious one cannot be the sole reason to justify full incapacitation." Any interference with legal capacity – such as a finding of full or partial incapacity or a guardianship order – is an interference with the right to private and family life and must be based on law, pursue a legitimate aim and be a proportionate means of achieving that aim;¹
- individuals have a right to a fair hearing (including right to participate in decisions and of access to a court to challenge decisions) in relation to a determination of their legal capacity;²
- blanket restrictions on a group of people to exercise capacity in a certain area simply due to the existence of a partial guardianship is disproportionate.³

A recent example of this is the European Court of Human Rights decision in *D.D. v Lithuania*.⁴ In that case the Court relied on a submission by the European Group of National Human Rights Institutions (which the Commission currently chairs) which referred to the Adults With Incapacity (Scotland) Act 2000 among a review of contemporary standards across Europe. The Court found that the loss of legal capacity of an individual while receiving mental health care and treatment in a social care home, her confinement and forced treatment violated her right to liberty and right to a fair hearing. In reaching this conclusion the court referred to the requirements of the UN Convention on the Rights of Persons with Disabilities,⁵ a standard which it is increasingly referring to in cases involving people with physical and mental disabilities.⁶

Similarly, there have been important developments in understanding of the positive obligations related to article 2 (right to life) and article 3 (prohibition of torture and ill-treatment). For example the House of Lords found in 2009 that hospitals have an operational duty to take reasonable steps to protect a mental health patient from suicide where that patient was detained under mental health legislation.⁷ In 2012 the Supreme Court extended that obligation to voluntary or "informal" patients.⁸

In this light it will be important to consider how best to ensure continued best practice in human rights through the lifetime of the proposed strategy.

¹ *Shtukaturov v Russia*, (application no. 44009/05), judgment of 27 March 2008.

² *Salontaji-Drobnjak v. Serbia*, (application no. 36500/05), judgment of 13 October 2009; *Stanev v Bulgaria*, (application no. judgment 17 January 2012; *DD v Lithuania*, (application No. 13469/06), judgment of 14 February 2012 (the last two cases concerned placement of people with mental disorders in social care homes).

³ *Alajos Kiss v Hungary*, (application no. 38832/06), decision of 20 May 2010.

⁴ *D.D. v Lithuania*, (application No. 13469/06), judgment of 14 February 2012.

⁵ The UK ratified the UN Convention on the Rights of Persons with Disabilities on 8 June 2009. The Scottish Human Rights Commission and the Equality and Human Rights Commission are the independent mechanisms in Scotland to promote, protect and monitor the implementation of the Convention. The Equality Unit is the Scottish Government focal point for the Convention.

⁶ See for example *Ruling on Legal Capacity Welcomed*, Scottish Human Rights Commission, 15 February 2012, <http://www.scottishhumanrights.com/news/latestnews/article/mentalcapacity2012>.

⁷ *Savage v South Essex Partnership NHS Foundation Trust* [2009] AC 6811.

⁸ *Rabone and another v Penine Care NHS Foundation Trust* [2012] UKSC 2, 8 February 2012.

Assuring, and not assuming, that practice is consistent with human rights can be advanced through the integration of a human rights based approach in strategy and policy, not only in law. It can also be advanced through training and capacity building with mental health workers and managers.

Scotland's National Dementia Strategy is one example of a human rights based strategy which is built around the PANEL framework of participation, accountability, non-discrimination, empowerment and legality which the Commission has promoted, including in supporting the drafting of the Charter of Rights for People with Dementia and their Carers in Scotland.⁹

In addition to rights based laws, strategies and policies, the Commission works to support public authorities to adopt a rights based approach in practice. During the course of its first Strategic Plan (2008-12) the Commission developed a significant programme of capacity building on a human rights based approach to social care for older people, *Care about Rights*. Written and audio-visual materials were developed in partnership with a range of public and private bodies and disseminated to every registered service for older people's care in Scotland. The training is estimated to have reached around 1,000 care workers.

"It is easy to become task oriented and risk averse... Care About Rights it is a tool to support delivery person centred care and to give staff the confidence ability to deliver it. It also makes people accountable and gives everyone (staff and the older people) a voice". (a quality manager with Southern Cross)

Care About Rights promotes a **FAIR** framework for the application of a human rights based practice:

Facts

What is the experience of the individual? Is the individual being heard and if not, do they require support to do so?

What are the important facts to understand?

Analysis of the right(s) at stake

What are the human rights at stake? Are they absolute rights which cannot be restricted? If they are qualified rights what is the justification for restricting the right? Is the restriction the minimum necessary to meet the aim?

Identification of shared responsibilities

What changes are necessary?

Who has responsibility for helping to make the necessary changes?

Review actions

Have the actions taken been recorded and reviewed and has the individual affected been involved?

The FAIR framework is useful as a tool for resolving conflicts, addressing competing priorities and ensuring the active and meaningful involvement of individuals, their families and carers in decisions that affect them.

⁹ www.dementiarights.org

Independent evaluation of *Care About Rights* programme indicates extremely positive impacts for awareness and understanding of human rights and projected improvements in person-centred service delivery.¹⁰

Among the benefits of Care About Rights for quality care outcomes identified in the independent evaluation are:

- **Increased technical knowledge and understating** of the legal underpinning for rights and why it is necessary. Care managers feels that staff enjoy this element of Care About Rights as it gives them better insight into rights and the legislation that underpins them. This knowledge is important in giving them the confidence to advocate on behalf of older people.
- **Empowerment:** Care managers noted that staff are working in a sector that is rife with people who think they are acting in the best interest of the older person - doctors, social workers, regulators and families. Care About Rights provides a framework for care staff to speak up for the older people. FAIR is key to this and although staff may have worked through a similar though process previously, FAIR provides a framework for discussion and a rationale for decision making. It gives care staff the confidence and ability to get their point across.
- **Confidence:** Linked to the point above, by providing a practical tool Care About Rights has instilled confidence in staff to challenge institutionalisation. Care managers feel it has given care workers a louder voice and the confidence to challenge medical staff when they feel it is necessary to uphold rights and support person centred care.
- **Increased staff morale and job satisfaction** as a result of being able to provide higher quality care.

Similarly, the independent evaluation of a human rights based approach at The State Hospital which the Commission undertook and published in 2009 demonstrates clear benefits for patients, staff and carers and improved outcomes for all.¹¹

In addition to training and capacity building, guidance can help clarify the importance to reconnect human rights and mental health in practice – so that those applying legislation related to mental health understand how to do so in a manner which takes human rights into account.

Integrated impact assessment may also provide a practical way of including human rights considerations in mental health policy setting. The development of Health Integrated Impact Assessment by NHS Health Scotland, supported by the Scottish Human Rights Commission among others, is a welcome initiative which could increasingly support the systematic integration of human rights considerations and best practice.¹²

Development of human rights indicators for measuring mental health performance can assist in monitoring practice and ensuring quality health outcomes. We hope to work with the Scottish Government and other partners to develop the recently published Human Rights Measurement Framework¹³ (developed in partnership with the Equality and Human Rights Commission) to assist in this regard

¹⁰ *Evaluation of Care About Rights, phase 2: report to the Scottish Human Rights Commission*, GEN, The University of Bedfordshire and Queen Margaret University, September 2011.

¹¹ *Human Rights in a Healthcare Setting: making it work, an evaluation of a human rights based approach at The State Hospital*; Scottish Human Rights Commission, 2009, <http://www.scottishhumanrights.com/application/resources/documents/HRHCSFINALVERSION.pdf>

¹² <http://www.healthscotland.com/equalities/eqia/definition.aspx>

¹³ <http://www.equalityhumanrights.com/human-rights/policy-and-research/human-rights-measurement-framework/>

Conclusion

The Commission is currently finalising a research project to map the gaps and good practices in human rights in Scotland. Upon the conclusion of this research we will convene a participatory process to develop Scotland's National Action Plan on Human Rights – a negotiated plan to address the gaps and replicate the good practices with specific, measurable, achievable, relevant and time-bound commitments and an independent monitoring process. We encourage the Scottish Government and others with an interest in mental health and human rights to engage with that process to identify the most appropriate steps to ensure that mental health practice is consistently human rights based. Among the mechanisms and tools available to pursue this aim are:

- capacity building and training on mental health and human rights in practice
- guidance on the linkages between mental health and human rights
- integrated impact assessment processes
- human rights indicators

We look forward to discussing further which of these measures would be the most effective.

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