Inclusion Scotland

Mental Health (Scotland) Bill

1. Introduction

1.1 Inclusion Scotland is a network of disabled peoples' organisations and individual disabled people. Our main aim is to draw attention to the physical, social, economic, cultural and attitudinal barriers that affect disabled people's everyday lives and to encourage a wider understanding of those issues throughout Scotland.

1.2 It is essential that Mental Health legislation takes account of obligations under the United Nations Convention on the Rights of Disabled People (UNCRPD) and not just those under the European Convention of Human Rights (ECHR).


2.1 Inclusion Scotland has been consulting disabled people across Scotland about whether the Scottish and UK Governments are meeting their obligations to protect, promote and enhance the human rights of disabled people under the UNCRPD.

2.2 Our consultation has highlighted a number of issues of concern regarding the care and treatment of people with mental health problems that are relevant to this Bill, particularly in relation to compulsory detention and treatment orders, advance statements and named persons, which inform our responses below.

2.3 In an online survey of disabled people conducted by Inclusion Scotland this summer, 42% of those responding said their experience of mental health treatment had got worse the last 5 years, and only 15% said it had got better. 29% said that mental health treatment was rarely or never adequate to meet their needs, 14% said it was sometimes adequate and only 14% said it was mostly adequate. 42% said that other mental health services had got worse, with only 24% saying they had got better.

2.4 In a General Comment on Article 12 of the UNCRPD (Equal recognition before the law) published in April this year, the United Nations Committee on the Rights of Persons with Disabilities makes some important observations about State Parties’ obligations regarding people with cognitive or psychosocial disabilities being disproportionately affected by substitute decision-making regimes and denial of legal capacity.

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1 Information around Inclusion Scotland’s work on the UNCRDP. [http://www.inclusionscotland.org/](http://www.inclusionscotland.org/)

2.5 Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: legal capacity is removed from a person; a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.

2.6 It states that “States Parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity”. This would include supported decision making, and can include as peer support, advocacy (including self-advocacy support), or assistance with communication.

“States Parties’ obligation to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives. The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.

2.7 The UN Committee’s General Comment also makes significant observations relevant to compulsory detention and compulsory treatment:

“The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention.”; and

“Forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16).”

2.8 The Health and Sport Committee may wish to ask the Scottish Government how it intends to review existing mental health policy and practice in light of the UNCRPD General Comment.

3. Compulsory Detention Orders and Compulsory Treatment Orders

3.1 We welcome that the Policy Memorandum to the Bill recognises that, given that the provisions of the Mental Health (Care and Treatment) Act
2003 allow for compulsory treatment and detention, they have an effect on the human rights of the persons subject to such measures.

3.2 Given that recognition, it is essential that the changes proposed by this Bill are made only if there is overwhelming evidence that the present provisions are having a detrimental effect on the human rights of persons affected by them, including their health and well-being. Amendments should be judged on whether they enhance human rights, and not on administrative convenience.

3.3 Inclusion Scotland are therefore concerned about the following proposals:
- To increase the period of short term detention pending a determination of an application by the Tribunal from 5 days to 10 days.
- To extend the power of a registered nurse to detain a person for the purpose of an examination from two to three hours.
- To reduce the period when a person can appeal against a transfer to the state hospital from 12 weeks to 28 days.

3.4 The Committee should ask the Scottish Government what evidence it has to support these changes; how they enhance rights of persons affected; and how they are compatible with the Scottish Government’s obligations under the UNCRPD.

3.5 Where a person’s liberty is being restricted, it is vital that any period where they are being detained without independent review or examination is minimised, and that rights of appeal are maximised.

3.6 The use of compulsory treatment orders and compulsory detention orders (CTOs), by definition, restrict the rights and freedoms of the service users. They should be used only when absolutely necessary. They should also be regularly reviewed, including when requested by the service user.

3.7 The extent to which CTOs are used in Scotland should be monitored and benchmarked against practice elsewhere in the UK to ensure that the rights of service users are not being unduly restricted, and that mental health services are being provided in a way that best meets the mental health needs of service users.

4. Named Persons

4.1 Inclusion Scotland agrees with the policy memorandum that a person should only have a named person where they choose to have one. We also agree that the named person should consent to being the named person. Both these decisions should be based on informed choice and both the individual and the named persons should be fully aware of the rights and responsibilities of the named person.
4.2 We share the concerns of the SAMH, in their written evidence, that the Tribunal will retain the power to appoint a primary carer or nearest relative as named person by default unless the individual opts out. This would seem to be contrary to the policy memorandum.

4.3 We welcome that the Scottish Government has not included in the Bill the proposal that was in the draft Bill that would have removed the automatic right of the named person to be involved in tribunal and court hearings. We also agree with SAMH that the named person should be consulted by the Mental Health Officer (MHO) on the proposed care plan and notified if the person is taken to a place of safety, or any other significant change in treatment or detention.

5. **Advance Statements**

5.1 Inclusion Scotland support the proposal to establish a central register for advance statements. Advanced statements are an important safeguard for protecting human rights by allowing an individual to state what forms of treatment are acceptable to them if they are subject to a compulsory treatment order.

5.2 However, as advance statements will contain highly sensitive information about the person, it is important that there are safeguards built in to the register to protect the privacy of the individual, and ensure that advance statements are only accessible to those who need to know what is in them.

5.3 Disabled people have told Inclusion Scotland that, although pockets of good practice do exist, advance statements are not widely promoted by mental healthcare providers and many service users are unaware of them.

5.4 Inclusion Scotland therefore believes that there should be a statutory duty on Health Boards to promote advance statements.

6. **Advocacy**

6.1 Whilst the 2003 Act established a right to independent advocacy, provision varies across Scotland. Where it is available, it is often only when a condition has reached a critical stage. Early independent or peer advocacy support in planning and considering treatment options can help prevent a deterioration of mental health, and thus avoid the need for critical intervention, including compulsory treatment.

6.2 The Committee may wish to explore with the Scottish Government and Health Boards what is being done to improve the availability of advocacy services to meet the needs of service users and duties under the 2003 Act.
7. Learning Disability

7.1 People with learning disabilities and autistic spectrum disorders (ASD) are being included under the Mental Health (Care and Treatment) (Scotland) Act as having mental disorders, even where they have no mental health problems. This leads to inappropriate diagnosis and treatment.

7.2 Section 328 of the 2003 Act defines "mental disorder" as "any mental illness, personality disorder, or learning disability, however caused or manifested." Persons deemed to have a mental disorder can be subject to any of the provisions of the Act, including Compulsory Treatment Orders or Compulsory Detention Orders.

7.3 People with learning disabilities have told Inclusion Scotland of their concerns that they can be subject to “compulsory treatment” as a result of their learning disability alone. They are told what they can and cannot do, who they can and cannot meet and be compelled to undergo treatments because they “don't know what is good for them”.

7.4 Inclusion Scotland believes that including those with learning disabilities or ASD as having mental disorders is discriminatory and would urge the Committee to raise with the Scottish Government amending the 2003 Act to remove them from its scope.

8. Conclusion

8.1 Inclusion Scotland would like to see the provision of mental health services in Scotland improved to meet the standards described in the McManus Report. In particular we would like to see high quality preventative and reactive mental health treatment and services, and improved access to independent and peer advocacy, to meet unmet need and reduce the need for compulsory treatment.

Inclusion Scotland
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