**Questionnaire: The right to liberty and security of persons with disabilities**

1. **Context**

For her report to the Human Rights Council, 40th session, the Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas Aguilar, intends to focus on the right to liberty and security of persons with disabilities.

The Special Rapporteur intends to undertake an innovative research on the various forms of deprivation of liberty experienced exclusively by persons with disabilities across the globe. In her report, she aims to examine the global challenges in relation to securing enjoyment of the right to liberty and security of person by persons with disabilities on an equal basis with others, identify disability-specific forms of deprivation of liberty and scrutinize them through the lens of human rights, as well as to present emerging trends and good practices related to securing implementation of this right.

The Special Rapporteur hopes to further develop the understanding of the scope of the right to liberty and security of the person in relation to persons with disabilities and to provide a clear guiding framework aimed at assisting governments in the implementation of rights as set under the article 9 of the International Covenant on Civil and Political Rights, article 37(b) of the Convention on the Rights of the Child, and article 14 of the Convention on the Rights of Persons with Disabilities.

The following questionnaire will assist the Special Rapporteur to identify instances in which persons may be deprived of their liberty for reasons tied to their actual or perceived disabilities and to better grasp the current situation when it comes to the enjoyment of the right to liberty and security by persons with disabilities.

1. **Questionnaire**
2. Please provide information in relation to the existence of legislation and policies that are intended to ensure and protect the right to liberty and security of persons with disabilities.

Scotland has a separate legal system from the rest of the United Kingdom and deprivation of liberty is dealt with under the devolved powers of the Scottish Parliament with entirely separate legislation from England and Wales or Northern Ireland.

The European Convention on Human Rights (ECHR) applies in Scotland by virtue of the Human Rights Act 1998 (HRA) and the Scotland Act 1998. The HRA requires all public authorities, such as hospitals, schools, local authorities, courts and the police to comply with those human rights. According to the HRA, all other legislation should also be interpreted and applied in a way that is consistent with the rights included in the Act. The Scotland Act 1998 established the Scottish Parliament and the Scottish Government. It ensures that neither the Scottish Parliament nor the Scottish Government can pass any law that is incompatible with the human rights contained in the Human Rights Act or the European Convention on Human Rights.

Article 5 ECHR protects the right to liberty. A legal gap in the protections required was identified by the European Court of Human Rights in *HL v United Kingdom* (2005) 40 EHRR 32 (the Bournewood case). The case concerned an individual who had been treated on an “informal” basis in a psychiatric hospital, against the wishes of his carers who had been deprived access to him. The European Court found that this constituted a breach of Article 5 as a person who was not considered capable of consenting to their detention, despite being compliant with their care, could not be treated as a voluntary patient. Such individuals were in fact deprived of their liberty and accordingly a lawful process was required in order to ensure the necessary safeguards of Article 5 were met. There has therefore been what is referred to as the “Bournewood gap” in legal protections since 2005.

In 2014, a further case at the Supreme Court of the United Kingdom, *Cheshire West and Chester Council v P* [2014] UKSC 19, clarified that there is a deprivation of liberty for the purposes of Article 5 where the person is under continuous supervision and control and is not free to leave and the person lacks capacity to consent to these arrangements. While both of these cases involved the law of England and Wales, the same issues arise under the law in Scotland.

The gaps identified by the Bournewood case and Cheshire West have yet to be addressed by legislative provisions in Scotland. The Scottish Law Commission has made proposals to address the situation of people in hospitals or care settings who lack capacity to consent to their deprivation of liberty,[[1]](#footnote-1) on which the Scottish Government has consulted. However, the proposals provide for a substituted decision-making process and do not explicitly engage with the implications of supported decision-making.

The proposals set out limited processes to authorise such deprivations of liberty on behalf of incapacitated individuals. The proposals look at persons within hospital settings and persons within a community setting and recommend a different approach for each setting. For hospital settings, an authorisation process is recommended whereby a medical practitioner would be able to put measures in place to prevent an adult with cognitive impairments, who is in hospital for the treatment of physical illness, leaving the hospital if certain conditions are satisfied. In community settings, which will mainly be residential care settings, the focus is on the authorisation of “significant restriction” in an individual’s day to day life. The proposals would result in changes to the Adults with Incapacity (Scotland) Act 2000[[2]](#footnote-2), which already makes provision for decisions to be made regarding the property, financial affairs and personal welfare of adults who are incapable by reason of mental disorder or inability to communicate.

A substantial majority of respondents to the consultation expressed the view that any changes to the law in this area should take place within the context of a wider revision of Adults with Incapacity legislation, as the current legislation is not working effectively. The Law Society of Scotland, the Mental Welfare Commission, the Public Guardian and SHRC,[[3]](#footnote-3) among others, all recommended a comprehensive review of the three pieces of legislation which govern non-consensual care and treatment[[4]](#footnote-4) in part, to reflect the requirements of the UN Convention on the Rights of Persons with Disabilities (the Convention).

The Centre for Mental Health & Capacity Law and the Mental Welfare Commission for Scotland recently published a report setting out the case for reform of Scotland’s Mental Health and Capacity Law.[[5]](#footnote-5) This report recognises that there remains widespread support for the principles of Scotland’s mental health and capacity law. However, it also recognises that “there is also concern that individuals may remain disempowered and unable effectively to assert their rights, and that balancing safeguards and rights to appropriate care have been undermined by resource constraints.[[6]](#footnote-6)”

The Scottish Government’s Mental Health Strategy 2017-2027[[7]](#footnote-7) makes a commitment to reform Adults with Incapacity legislation on the following basis:

*“Adults with Incapacity legislation should fully reflect the requirements of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), with particular emphasis on provision of supported decision making, addressing issues around deprivation of liberty and the interaction of AWI legislation with the legislation on mental health and adult support and protection.”*

More recently, the Scottish Government has begun initial conversations with key stakeholders about what the reforms could look like and has indicated that they are planning to launch a consultation in September / October about the proposed changes to AWI law and practice.

1. Please provide information on relevant legislation and policies related to:
   1. exercise of legal capacity;

The Adults with Incapacity (Scotland) Act 2000 makes provision for decisions to be made regarding the property, financial affairs and personal welfare of adults who are incapable by reason of mental disorder or inability to communicate.

Before interventions and non-consensual care and treatment may be considered under the 2000 Act, an individual must be assessed as being ‘incapable.’

The Adult Support and Protection (Scotland) Act 2007 allows local authorities to apply to the sheriff court for a range of protection orders to be made in relation to ‘adults at risk’, including assessment orders, removal orders and banning orders. Adults at risk are people age 16 or over who are unable to safeguard themselves, their property, rights or other interests; are at risk of harm and because they are affected by disability, mental disorder, illness or physical or mental infirmity are more vulnerable to being harmed than others who are not so affected.

It is understood that the majority of the interventions made under the 2007 Act have involved people with mental illness, dementia or learning disability[[8]](#footnote-8).

* 1. the rights of persons with disabilities in institutions including processes of deinstitutionalisation;

All measures authorising involuntary placement in institutions provide rights of appeal against those decisions, either to the Mental Health Tribunal for Scotland, in relation to mental health detention under the Mental Health (Care and Treatment)(Scotland) Act 2003, or to the Sheriff Court (local courts), in relation to the Adults with Incapacity (Scotland) Act 2000).

* 1. involuntary admission to mental health services or other institutions;

The Mental Health (Care and Treatment) (Scotland) Act 2003[[9]](#footnote-9) makes provision for involuntary detention in hospitals or in the community for people with a mental disorder (defined as mental illness, learning disability or personality disorder).

The Adults with Incapacity (Scotland) Act 2000 allows for substitute decision-makers (guardians, attorneys or interveners) to be appointed to make decisions on behalf of a person deemed incapable of making those decisions. Decisions regarding place of residence can be included within these powers and can be enforced by an order permitting a police constable to apprehend the adult and return them to their place of residence[[10]](#footnote-10).

* 1. criteria to be found not criminally responsible (insanity defence, *inimputabilidad*, etc.);.

The Criminal Procedure (Scotland) Act 1995[[11]](#footnote-11) establishes the following[[12]](#footnote-12):

*Criminal responsibility of persons with mental disorder*

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(1)A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct.

(2)But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.

* 1. unfitness to stand trial or unfitness to plead;

Section 53F of the Criminal Procedure (Scotland) Act 1995[[13]](#footnote-13) makes provision for when someone is unfit to stand trial.

(1) A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in a trial

(2) In determining whether a person is unfit for trial the court is to have regard to –

(a) The ability of the person to-

(i) Understand the nature of the charge

(ii) Understand the requirement to tender a plea to the charge and the effect of such a plea

(iii) Understand the purpose of, and follow the course of, the trial,

(iv) Understand the evidence that may be given against the person,

(v) Instruct and otherwise community with the person’s legal representative, and

(b) Any other factor which the court considers relevant.

* 1. security measures and diversion programmes

The Criminal Procedure (Scotland) Act 1995 makes provision for a number of alternative disposals in relation to “mentally disordered offenders”:

* Temporary Compulsion Order - A Temporary Compulsion Order (Section 53B) is used when the Court decides that a trial cannot start (or must stop) because of the accused’s mental disorder. The court orders them to stay in hospital for treatment.
* Compulsion Order - A Compulsion Order (Section 57) is used when an accused is convicted of an offence and the punishment is prison. The court can decide not to send them to prison and, instead, order that the individual must stay in hospital for treatment or have treatment in the community.
* Restriction Order - A restriction order is made by the court under Section 59 of the Criminal Procedure (Scotland) Act 1995 at the time of disposal and is added to a compulsion order. It is made by the court at the time of sentencing where the court considers that the person presents a serious risk to the public.
* Hospital Direction - A Hospital Direction (Section 59) would be used alongside a prison sentence. The court can decide an individual needs treatment for mental disorder.

1. Please provide the most recently available data, disaggregated by sex and age if possible, on the number of:
   1. persons under guardianship;

In the period 2015-16[[14]](#footnote-14)

* Total persons under guardianship = 10,735
* Total guardianship orders granted in 2015-16, disaggregated by age
  + 16-24 = 526
  + 25-44 = 356
  + 45-64 = 457
  + 65+ = 1318
  1. cases where the state or an organisation has been appointed guardian;

Guardianship orders appointing the local authority (state) granted in 2015-16[[15]](#footnote-15) = 678

* 1. institutions for persons with disabilities;

We are unaware of any published list of institutions for disabled people.

There are different types of accommodation for disabled people who need particular support, care or treatment. This accommodation is provided by the public, private and voluntary sectors and includes hospitals, residential homes and supported tenancies.

* 1. persons with disabilities placed in institutions;

We are unaware of any data published on disabled people placed in institutions.

The majority of people with learning disability and autism are now supported in the community, rather than in hospitals or other institutions. The Scottish Government started its final phase of learning disability hospital closures in 2000, when around 2,450 adults with learning disabilities were living in a hospital setting.[[16]](#footnote-16) By 2015, 188 adults with learning disabilities lived in National Health Service (NHS) facilities/ hospitals, 30 in independent hospitals and 12 in specialist rehabilitation units.[[17]](#footnote-17)

* 1. persons in institutions under guardianship;

We are unaware of any data published on people in institutions who are under guardianship. We have referred to published data on guardianship in response to other questions.

* 1. registers of the use of seclusion and restraints and its frequency;

There is no systematic collection of data of the use of physical restraint in care settings. The Scottish Patient Safety Programme – Mental Health has a programme dedicated to reducing harm from seclusion and restraint. Health boards participating in this programme collect data.

* 1. involuntary admissions to mental health services or other social care facilities;

In the period 2015-2016[[18]](#footnote-18):

* Total new episodes of compulsory treatment = 5,008
* Total extant episodes of compulsory treatment = 3,312
  1. existing inpatient mental health facilities;

We are unaware of any published list of inpatient mental health facilities.

* 1. beds for mental health inpatients in psychiatric hospitals and general hospitals;

At the 2016 census[[19]](#footnote-19)

* 4,254 available mental health, addiction and learning disability beds in Scotland
* The age breakdown of patients occupying mental health, learning disability and addiction inpatients beds is set out in the table below.

|  |  |
| --- | --- |
| * **Age group** | * **Patients (March 2016)** |
| * **Under 18** | * 55 |
| * **18-39** | * 806 |
| * **40-64** | * 1,267 |
| * **65+** | * 1,505 |
| * **All** | * **3,633** |

* The gender breakdown of patients occupying mental health, learning disability and addiction inpatients beds was 58% male, 42% female.
  1. average days a person spends under involuntary admission at mental health facilities;

The average (median) number of days since admission for:

Patients with a learning disability = 759 days (around 2 years and one month).

Non-learning disability patients = 129 days.[[20]](#footnote-20)

* 1. persons who have been declared unfit to stand trial or unfit to plead;

In the period 2015 – 16 = 19 people.[[21]](#footnote-21)

* 1. persons who have been found not to be criminally responsible;

In the period 2015-16:[[22]](#footnote-22):

Acquitted by reason of mental disorder and unfitness for trial = 28

* 1. institutions where persons who have been declared unfit to plead, stand trial or found to be not criminally responsible are placed and number of inmates;

There is one high secure psychiatric hospital (The State Hospital).

There are 140 high-secure beds for male patients requiring maximum secure care: 12 beds specifically for patients with a learning disability. All patients are male, with an average age of 42. The most common primary diagnosis is schizophrenia. The current average length of stay is 6.8 years, with individual lengths of stay ranging from two months to over 30 years. During 2015/16 there were 36 patient admissions and 39 discharges.

Female patients are sent to medium secure psychiatric facilities in Scotland or to a high security psychiatric unit in England.

In addition, there are three medium secure psychiatric facilities.

1. Please provide information on jurisprudence, complaints or investigations in relation to abuses and violence against persons with disabilities at home.

The Mental Welfare Commission (MWC) carries out investigations into an individual's care and treatment when they believe there are similar issues in other people's care and lessons to be learnt for services throughout Scotland. All of these investigations can be found here <http://www.mwcscot.org.uk/publications/investigation-reports/>

The MWC carried out an investigation into the death of Ms MN, who died in December 2012 after hanging herself in the care home to which she had recently been moved following a period of inpatient care. The investigation recommended that the Scottish Government should audit the availability of specialist services for individuals with highly complex needs who are not appropriately accommodated in learning disability or mental health settings, and identify how gaps can be filled.[[23]](#footnote-23)

1. Please provide any other relevant information (including information from surveys, censuses, administrative data, reports, studies, and case law) in relation to the right to liberty and security of persons with disabilities in your country. Please also refer to any innovative initiatives that have been taken at the local, regional or national level to promote and ensure the right to liberty and security of persons with disabilities and identify lessons learned from these.

In our submission to inform the UNCRPD Committee List of Issues on the UK[[24]](#footnote-24) we drew the Committee’s attention to:

* The ongoing shortfall of Mental Health Officers across Scotland, which is the highest since data was first collected on this issue. This is of concern because the MHO provides an essential safeguard under mental health and capacity legislation and has a critical role in reviewing the proposal to detain an individual, considering alternatives and explaining an individual’s rights to them.
* The recommendation that the Scottish Government review the three pieces of legislation which govern non-consensual care and treatment, in part to ensure they reflect the requirements of UNCRPD.

For the most recent review of the arguments for reform of Scotland’s capacity and mental health legislation, we recommend the Napier University and Mental Welfare Commission report[[25]](#footnote-25).

Thank you for your responses and contributions.

1. **Submission of responses**

Due to limited capacity for translation, we kindly request that you submit your answers, if possible, in **English, Spanish or French** and, no later than **30 May 2017.** Kindly identify links or provide copies of any laws, documents or cases, related to your answers. All responses will be posted in the official web page of the Rapporteur unless you indicate otherwise at:

<http://www.ohchr.org/EN/Issues/Disability/SRDisabilities>

Kindly be concise in your responses and them preferably via email to: [sr.disability@ohchr.org](mailto:sr.disability@ohchr.org), copying [registry@ohchr.org](mailto:registry@ohchr.org).

For any question, please contact the Special Rapporteur through Ms. Alina Grigoras, human rights officer at Special Procedures Branch- OHCHR: email: agrigoras@ohchr.org; phone: +41 22 917 92 89; or Ms. Cristina Michels, human rights officer at Special Procedures Branch- OHCHR: email: cmichels@ohchr.org, phone +41 22 928 9866.

1. Scottish Law Commission (2014) Report on Adults with Incapacity, available [here](http://www.scotlawcom.gov.uk/files/6414/1215/2710/Report_on_Adults_with_Incapacity_-_SLC_240.pdf) [↑](#footnote-ref-1)
2. <http://www.legislation.gov.uk/asp/2000/4/contents> [↑](#footnote-ref-2)
3. Scottish Government published responses to the Scottish Law Commissions report on adults with incapacity, available [here](https://consult.scotland.gov.uk/integration-partnerships/report-on-adults-with-incapacity/consultation/published_select_respondent) [↑](#footnote-ref-3)
4. The Adults with Incapacity (Scotland) Act 2000, the Adult Support and Protection (Scotland) Act 2007 and the Mental Health (Care and Treatment)(Scotland) Act 2003. [↑](#footnote-ref-4)
5. Napier University Centre for Mental Health & Capacity Law and MWC (May 2017) Scotland’s Mental Health and Capacity Law: the case for reform, available [here](http://www.mwcscot.org.uk/about-us/latest-news/call-for-reform-of-scotlands-mental-health-laws/) [↑](#footnote-ref-5)
6. Napier University and MWC (May 2017) see note 5 p3 [↑](#footnote-ref-6)
7. <http://www.gov.scot/Resource/0051/00516047.pdf> [↑](#footnote-ref-7)
8. Napier University and MWC (May 2017) see note 5 p11 [↑](#footnote-ref-8)
9. <http://www.legislation.gov.uk/asp/2003/13/contents> [↑](#footnote-ref-9)
10. Section 70 Adults with Incapacity (Scotland) Act 2000 [↑](#footnote-ref-10)
11. <http://www.legislation.gov.uk/ukpga/1995/46/contents> [↑](#footnote-ref-11)
12. Section 51A [↑](#footnote-ref-12)
13. Section 53F [↑](#footnote-ref-13)
14. <http://www.mwcscot.org.uk/media/342863/2016_awi_report_v3_07.09.2016_final_jw_27.09.16.pdf> [↑](#footnote-ref-14)
15. See footnote 11 [↑](#footnote-ref-15)
16. Scottish Government (2000) Same As You? A review of services for people with learning disabilities available [here](http://www.scotland.gov.uk/Resource/Doc/159140/0043285.pdf) [↑](#footnote-ref-16)
17. Scottish Commission for Learning Disabilities (2016) Learning disability statistics Scotland 2015 available [here](https://www.scld.org.uk/evidence-and-research/2015-report/) [↑](#footnote-ref-17)
18. <http://www.mwcscot.org.uk/media/342871/mental_health_act_monitoring_2015-16.pdf> [↑](#footnote-ref-18)
19. <http://www.gov.scot/Publications/2016/09/9885/4> [↑](#footnote-ref-19)
20. The Mental Health & Learning Disability Inpatient Bed Census, was carried out by the Scottish Government and NHS Boards as at midnight, 31 March 2016. <http://www.gov.scot/Resource/0050/00505394.pdf> [↑](#footnote-ref-20)
21. See footnote 13 [↑](#footnote-ref-21)
22. See footnote 13 [↑](#footnote-ref-22)
23. Investigation into the death of Ms MN, MWC, January 2016, Summary report available at <http://www.mwcscot.org.uk/media/244679/ms_mn_investigation_summary_report.pdf> [↑](#footnote-ref-23)
24. EHRC & SHRC (February 2017) Submission to the UN Committee on CRPD about disability rights in Scotland available [here](https://www.equalityhumanrights.com/en/advice-and-guidance/un-convention-rights-persons-disabilities-scotland) [↑](#footnote-ref-24)
25. Napier University and MWC (May 2017) Scotland’s Mental Health and Capacity Law: the Case for Reform available [here](http://www.mwcscot.org.uk/publications/corporate-reports/) [↑](#footnote-ref-25)