

Forensic Mental Health Review: Human Rights Briefing

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1. Executive Summary

- 1.1. The interim report (“the report”) by the Independent Review into the delivery of Forensic Mental Health Services is immensely valuable as it reflects a variety of experiences within the system, particularly from people with lived experience, rather than simply providing factual data. The report identifies a wide range of complex issues, such as deprivation of liberty and right to private and family life. It also highlights the particular challenges for groups such as women, disabled people, children and young people and older people, who face the biggest barriers to realising their rights
- 1.2. Many of these issues can also be framed as rights issues. Human rights are internationally recognised standards with which we must comply. The Human Rights Act 1998 incorporates the rights contained in the European Convention of Human Rights (ECHR) into our laws and requires all public authorities to act in a way that complies with the ECHR. The UK and devolved Governments also have legal obligations under a number of international human rights treaties. In this respect, forensic mental health services are directly linked to the highest attainable standard of physical and mental health, contained in Article 12 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), as well as a range of rights contained in the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”).
- 1.3. There is an imperative to ensure that in both law and practice, public authorities are respecting, protecting and fulfilling people’s rights. For this reason, we have looked at the issues raised in the report through a human rights lens.¹ We have set out key themes of deprivation of liberty, private and family life, health and disability and the corresponding issues raised in the report. We have then provided a brief analysis of each key human rights standard. For each theme, we have listed the recommendations we think would be necessary to ensure rights are upheld within the forensic mental health system. This is intended to support the review team to pinpoint the issues that go to the heart of human dignity, in

order to measure compliance with human rights standards and make recommendations which will have a positive impact on people's rights and freedoms.

2. Human Rights Framework

Issues relating to deprivation of liberty

- 2.1. The report noted that people are placed in secure settings which are at inappropriate levels of security because of a lack of beds at an appropriate level, resulting in people waiting months or years for places in lower security to become available.² Additionally, people are not being discharged into the community due to a lack of suitable accommodation or support packages and also because there is no right of appeal for conditions of low security.³ This means people are being detained with restrictions to their freedom, privacy and choice, which can be disproportionate to what they actually require.⁴
- 2.2. The report details people's experiences of medication, including that people received medication which had no positive changes for them and that medication was withheld when it was needed.⁵ Experiences also noted a denial of medication while in custody.⁶ In terms of psychological interventions, people observed that those who do not or cannot engage with these interventions are 'left to float around', as alternatives are limited.⁷ The report also highlights the consensus that having people in an inappropriate security level limits their access to appropriate care and treatment.
- 2.3. Concerns were raised in the report regarding Compulsion Order and Restriction Orders (COROs), that these have unlimited duration, although they are subject to annual review.⁸ A CORO may have different measures attached to it, but these can include detention at a specified hospital and the administration of medical treatment.
- 2.4. The report noted use of restraint was a difficult issue for all respondents and that several family members reported instances

where they felt that their relatives had been restrained inappropriately or excessively. It also noted that people found the experience terrifying.⁹

- 2.5. Care and treatment were seen to be compromised by delays in referring people from lower conditions of security to conditions of higher security.¹⁰ In particular, there were reports of women who courts identified as requiring assessment in hospital but who had to return to prison to await a hospital place because no beds were available.¹¹ The report noted the concerns raised by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in its report on an ad hoc visit to Scotland in 2018. The CPT found that women in need of urgent care and treatment in a high secure forensic psychiatric facility were held in segregation in prison. The CPT expressed serious concerns that a number of women should not have been in a prison environment, let alone segregated for extended periods in solitary confinement.¹² Women in need of high secure care may also inappropriately remain in medium secure units and are more likely to be placed in services which do not best meet their care needs or aid their recovery.¹³ The report also noted that delays in discharges particularly affect people with more complex needs, including learning disabilities.¹⁴
- 2.6. The report also noted that due to significant issues in arranging mental health assessments, people have to spend additional time in custody awaiting initial assessment, in excess of statutory requirements.¹⁵
- 2.7. The report showed that people questioned the appropriateness of forensic mental health services for people with acquired brain injuries, cognitive executive dysfunction, diagnoses of personality disorder and older people.¹⁶ It was argued that people with acquired brain injuries require specialist neurological input rather than forensic mental health services, while those with personality disorders may be best treated in the community using specialist psychological therapies.¹⁷ The review was told that it can be difficult to rehabilitate people with forensic histories back into the

community if they have or develop progressive neurological disease, as their conditions are not treatable.¹⁸

- 2.8. Staff shortages were also linked to greater restrictions on people's freedoms because escorted leave is reduced as a result. Additionally, some people lost authorised leave when transferring from medium secure units.¹⁹

Article 3 ECHR – Freedom from torture or inhuman or degrading treatment or punishment

- 2.9. Article 3 of the ECHR confirms that no one shall be subjected to torture, or to inhuman or degrading treatment or punishment. For this right to be engaged, ill-treatment must reach a minimum threshold of severity.²⁰ The assessment of whether this has been reached depends on the circumstances of the case. Public authorities are required to detain a person in conditions which are compatible with respect for human dignity. The European Court of Human Rights has confirmed that “the detention of a person who is ill in inappropriate physical and medical conditions may in principle amount to treatment contrary to Article 3”.²¹ The obligation on public authorities is therefore to provide appropriate medical care and treatment to any person with a mental disorder who is in conditions of detention.

Article 5 ECHR – Right to liberty and security

- 2.10. Article 5 prohibits an individual from being deprived of his or her liberty, except under certain circumstances. This includes where a person has a mental health condition which makes detention necessary.²² Additionally, decisions authorising a person's involuntary detention should be subject to procedural safeguards.
- 2.11. As with Article 3, suitable therapy is also a requirement for the deprivation of liberty to be lawful.²³ This therapy must, as far as possible, be provided with the purpose of curing or alleviating the person's mental health condition and to prepare them for eventual release.²⁴

2.12. It is therefore a requirement of human rights law that a person should only be deprived of their liberty where this is necessary, and where the facility itself and the treatment provided are appropriate to the person's needs. Bearing in mind the severity of a deprivation of liberty, it is a fundamental principle of human rights law that a person should only be detained in conditions of security which are required by their individual circumstances.

Convention on the Rights of Persons with Disabilities (CRPD)

2.13. The CRPD protects the rights of people with mental illness (including dementia), learning disabilities and other related conditions. Conceptually, the CRPD endorses the social model of disability, which recognises that instead of treating disabilities, it is necessary to remove systemic barriers and attitudes which prevent the full participation of disabled people in society. As expressed in the Milan report on the Review of the Mental Health (Scotland) Act, "Challenging behaviour may reflect inappropriate or inadequate services, and the answer should be to provide the right services, rather than place the client under greater constraints".²⁵

2.14. In relation to deprivation of liberty, Article 14 of the CRPD requires that people are not deprived of their liberty unlawfully or arbitrarily, that any deprivation of liberty is in conformity with the law and that the existence of a disability shall in no case justify a deprivation of liberty. It is a fundamental principle of the CRPD that disabled people should not be discriminated against. The Independent Review of Learning Disability and Autism in the Mental Health Act (IRMHA) stated that "a person's disability should not lead to more restrictive settings or durations than for offenders who do not have a disability."²⁶

2.15. Article 12 of the CRPD states that people with disabilities have the right to exercise their legal capacity on an equal basis with others in all aspects of life. It is therefore vital that people with disabilities

are consulted on all decisions which affect them, including those about treatment.

Recommendations

- It is of critical importance that the system has enough beds to allow people to stay in a facility with the appropriate security level for them.
- People in need of forensic mental health services should not be placed in prison. High secure forensic mental health services should be made available for women within Scotland.
- Where appropriate treatment cannot be provided in a facility, it is necessary that the person be transferred to a more appropriate setting. No one should be transferred to prison due to a lack of available beds.
- Any deprivation of liberty must be accompanied by appropriate therapy with the purpose of alleviating a person's mental health condition.
- People should have the right to appeal conditions of low security in order to allow them a pathway back into the community.
- Disabled people with disabilities should be treated equally. They should not be subject to longer periods in detention. The IRMHA recommends setting time limits on sentences.²⁷
- In addition to regular review, COROs should be subject to time limits
- People should not be deprived of their liberty solely on the basis of administrative or practical difficulties.

Issues relating to privacy and family life

2.16. The report relates that a lack of beds means people are placed out of area, far away from their support networks. In addition, financial support for visiting out of area services is only available at the level of the State Hospital.²⁸

- 2.17. The report notes there are no high secure beds for women in Scotland. In addition, there are insufficient medium and low secure settings for women. High and medium secure provision for men with learning disabilities are nearly always full. Many people are moved out of area due to a lack of services within their area, especially women.²⁹
- 2.18. The report highlights concerns about privacy and personal space within wards, including the importance of access to own bedrooms, privately located phones and retention of belongings.³⁰

Article 8 ECHR – Right to respect for private and family life, home and correspondence

- 2.19. Article 8 of the ECHR guarantees the right to respect for private and family life, home and correspondence. The scope of this right covers a range of different areas such as the right to maintain contact with close family and the protection of personal data. The right is not absolute, which means that a public authority may interfere with the right in accordance with the law and where necessary for certain specified aims. These aims include where it is in the interests of public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³¹ This interference must also be proportionate to the specified aim.
- 2.20. The European Court of Human Rights considers the individual circumstances of each case, weighing up the proportionality of the public authority's actions. On one occasion it decided that an authority's refusal to meaningfully consider transferring a person closer to his parents' home was a violation of Article 8.³²
- 2.21. The right to a private life also includes the rights to privacy and confidentiality, in terms of protection of personal data and the right to respect for correspondence, including telephone calls.³³

Recommendations

- Family contact should be facilitated, including via technology, increasing in-area placements and providing financial assistance in a way which allows all persons deprived of their liberty to develop a family life.
- People's right to confidentiality, privacy and personal space should be maintained in facilities.

Issues relating to the right to health

- 2.22. The report concluded that resourcing issues affect the availability and quality of provision of services in some areas, and that people felt that the system is under-resourced.³⁴
- 2.23. The report highlighted inequalities in access to care and treatment, including different thresholds for access to services in each area and the unavailability of community forensic mental health services in all parts of the country.³⁵
- 2.24. The report noted that current arrangements for women's forensic care in Scotland are inadequate. It noted the lack of high secure provision for women within Scotland is seen as unacceptable. It also highlighted that high secure care was unavailable to women on remand, as they are not allowed to be transferred outside Scotland. There is a shortage of medium and low secure beds for women. There are a lack of agreed pathways for women to access low secure, rehabilitation and discharge into the community. The report states that there is a broad consensus that this gender inequality is a human rights concern.³⁶
- 2.25. There is a lack of access to general forensic mental health services for children and young people. There are specific concerns about the unmet mental health needs of young people in secure care. There is a lack of low secure inpatient care and medium secure care, resulting in young people being placed in

adult Intensive Psychiatric Care Units or in specialist provision in England.³⁷

2.26. Forensic units are not currently set up for an ageing population, and there is a lack of expertise in recognising and dealing with issues associated with old age such as dementia, frailty and hearing loss. Older adults can remain inappropriately placed in secure settings due to a lack of alternative provision.³⁸

2.27. The report highlighted that placing people with diverse needs and levels of acuity in the same ward can have adverse consequences on their mental well-being. It also identified a lack of suitable support packages in the community, and as a result, people deemed ready for discharge were unable to leave, leading to further mental health issues.³⁹

2.28. It was acknowledged that people in the forensic mental health system, particularly women and people with learning disabilities, experience poorer physical health and earlier morbidity than people in the general population.⁴⁰

International Covenant on Economic, Social and Cultural Rights (ICESCR) – Right to highest attainable standard of physical and mental health

2.29. Article 12 of the ICESCR provides the right to the enjoyment of the highest attainable standard of physical and mental health. The obligation is for governments to take steps to the maximum of their available resources, to progressively realise the right to health. As a minimum, people, particularly vulnerable or marginalised groups, should have the right to access health services on a non-discriminatory basis. It also means putting in place available, accessible, acceptable and quality health services.

2.30. This means there must be sufficient forensic services **available**. Services must be **accessible** to everyone without discrimination, particularly vulnerable or marginalised groups, which includes the provision of accessible information. Services must be **acceptable**

to the person, respecting issues of confidentiality and being sensitive to culture, communities and gender. Lastly, services must be scientifically and medically appropriate and of **good quality**.

Recommendations

- Services should be adequately resourced and available for all, regardless of where a person lives or what their current level of security is. Services should also be, accessible, acceptable and of good quality. Services should be non-discriminatory and address the barriers faced by certain groups in accessing services.

Issues relating to people with disabilities

2.31. The report highlights that there are similar capacity issues for people with learning disabilities across high and medium secure facilities.⁴¹ There is also a lack of community accommodation and support packages.⁴² In particular, there are significant gaps for women with learning disabilities.

2.32. People expressed concern that people with learning disabilities spend longer in hospital. It can be harder for them to demonstrate their risk has lowered and many experience severe delays while awaiting accommodation in the community.⁴³ The IRMHA noted that delays in discharge for people with learning disabilities may amount to a breach of their human rights.⁴⁴ People also raised concerns that the threshold for people with a learning disability being sent to hospital for offences is lower than that for the general population.⁴⁵

2.33. There is a known lack of specific provision pathways for people with autism as services are geared towards mental illness or learning disability. There is also a lack of expertise about autism across the system.

2.34. The report relates how some people feel they have not been listened to, that reports had not been discussed with them and

they had not been informed of key developments in their care.⁴⁶ The report also noted that processes around disclosure of abuse for people with learning disabilities can be delayed by professionals as they consider the 'validity of the claim'.⁴⁷

2.35. The report highlighted that the communication needs of the forensic population may be significantly underestimated, making the system inaccessible to those with communication difficulties.⁴⁸

Convention on the Rights of Persons with Disabilities (CRPD)

2.36. As noted above, the CRPD protects the rights of people with mental illness (including dementia), learning disabilities and other related conditions. The CRPD provides a useful framework, protecting a range of rights, including rights to exercise legal capacity,⁴⁹ to personal liberty and security,⁵⁰ to rehabilitation,⁵¹ to independent living and to access all aspects of community life.⁵²

2.37. Article 5(2) prohibits all forms of discrimination on the basis of disability and guarantees to persons with disabilities equal and effective legal protection against discrimination on all grounds. It is therefore vital that people with disabilities are consulted and informed about decisions which affect them.

Recommendations

- Disabled people should be treated equally. They should not be subject to longer periods in detention. They should not face delays when disclosing complaints as a result of their disability.
- Services should be offered in a non-discriminatory manner, ensuring the removal of barriers for those with communication difficulties.

3. A Human Rights Based Approach to recommendations

- 3.1. In order to complement the review team's Human Rights Based Approach (HRBA) to the review process, the Commission recommends the review also takes a HRBA to recommendations, using the PANEL principles (participation, accountability, non-discrimination, empowerment and legality).⁵³
- 3.2. In terms of participation, we think it would be helpful if the review recommends further participation of people with lived experience after the review is concluded, to share their views on the review's final recommendations.
- 3.3. On the issue of accountability, we note that there are concerns around the barriers to using complaints systems.⁵⁴ It is a key principle of human rights law that people have access to an effective remedy where their rights are not respected. We recommend that the review considers how to improve access to justice, including through complaints systems, as this is fundamental to protect against abuses of people's rights. In addition, we suggest where duty bearers are named in the review's recommendations (e.g. professionals, public authorities, Scottish Government, third party providers), consideration is given to the existing and/or new processes required to hold decision-makers and services providers accountable for the delivery of high quality, rights-based services.
- 3.4. To ensure equality and non-discrimination, the recommendations should be tailored to address inequalities faced by certain groups.
- 3.5. In terms of empowerment, the review identified for example that while people were informed of their rights, they were not provided with enough information about how to exercise them.⁵⁵ People also thought that support is needed to help people with learning disabilities understand court proceedings.⁵⁶ We therefore recommend the review consider how to empower people to use their rights, for example through better communication materials or increased resourcing of advocacy services.
- 3.6. Lastly, the review may need to consider whether any changes are required in legislation, such as the need to put accountability

mechanisms in law, for example by extending the right of appeal to people in low security.

4. Conclusion

- 4.1. For reasons of space we have not set out an exhaustive list of all the articles in international law which may be engaged by the review. We have however set out a range of the most relevant human rights standards, in order to provide a benchmark for the review. We hope that this will be used by the review to frame issues as rights issues, with the aim of bringing about the substantial and co-ordinated change that is needed.

¹ We note there are many examples given in the report which detail areas of best practice where rights are upheld. For reasons of space we have focused on those issues which contributors to the report have highlighted as requiring improvement.

² Section 3 of the interim report, see: <https://www.gov.scot/publications/independent-forensic-mental-health-review-interim-report/pages/12/>.

³ Section 10.1.

⁴ Section 2.1.2.

⁵ Section 5.1.2

⁶ Section 8.1.

⁷ Section 5.1.3.

⁸ Section 10.1. See also s.133 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

⁹ Section 6.5.

¹⁰ Section 3.1.2.

¹¹ Section 3.1.3. .

¹² Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 17 to 25 October 2018, see para. 95: <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-publishes-report-on-the-united-kingdom-focusing-on-police-and-prisons-in-scotland>

¹³ Section 7.1.1 and 7.1.3.

¹⁴ Section 3.2.2.

¹⁵ Section 8.2.1.

¹⁶ Section 9.

¹⁷ Section 9.1 and 9.2.

¹⁸ Section 9.3.1.

¹⁹ Section 3 and 3.3.1.

²⁰ *Ireland v UK* (1979-80) 2 EHRR 25, para 162.

²¹ *Rooman v Belgium*, ECHR 18 Jul 2017, para. 144

²² Article 5(1)(e) of the ECHR.

²³ N.20, *Rooman v Belgium*.

²⁴ This therapy must also be "individualised therapy, based on the specific features of the compulsory confinement, such as the conditions of the detention regime, the treatment proposed or the duration of the detention". See n.20, *Rooman v Belgium*, para 205.

²⁵ Millan report, see: https://www.mhtscotland.gov.uk/mhts/files/Millan_Report_New_Directions.pdf.

²⁶ IRMHA report, p.134, see:

<https://webarchive.nrscotland.gov.uk/20200313213229/https://www.irmha.scot/wp-content/uploads/2020/01/IRMHA-Final-report-18-12-19-2.pdf>.

²⁷ N.25, IRMHA report.

²⁸ Section 2.1.3

²⁹ Section 2.1.2

³⁰ Section 6 and 6.2.1.

³¹ Article 8(2) of the ECHR.

³² *Rodzevillo v Ukraine*, 38771/05 (Judgment (Merits and Just Satisfaction) : Court (Fifth Section)) [2016] ECHR 74 (14 January 2016), para 85.

³³ *Margareta and Roger Andersson v Sweden*, 14 EHRR 615, 1991.

³⁴ Section 2.1.1.

³⁵ Section 2.2.1 and 3.1.3.

³⁶ Section 7.1.

³⁷ Section 7.4.

³⁸ Section 7.5.

³⁹ Section 3.1.1, 3.2.2 and 2.2.2.

⁴⁰ Section 5 and 5.2.

⁴¹ Section 7.2.1.

⁴² Section 7.2.2.

⁴³ Section 7.2.1.

⁴⁴ N.25, IRMHA report.

⁴⁵ Section 7.2.3.

⁴⁶ Section 5.3 and 5.3.1.

⁴⁷ Section 5.3.3.

⁴⁸ Section 5.3.2.

⁴⁹ Article 12 CRPD.

⁵⁰ Article 14 CRPD.

⁵¹ Article 26 CRPD.

⁵² Article 19 CRPD.

⁵³ For further information on what a Human Rights Based Approach is, see our website here:

<https://www.scottishhumanrights.com/projects-and-programmes/human-rights-based-approach/>.

⁵⁴ Section 5.3.3.

⁵⁵ Section 5.3.1 and 10.

⁵⁶ Section 7.2.3.