

UNCRPD 29th Session:

Follow-up review of the Committee's inquiry into the UK

Scottish Human Rights Commission

28 August 2023

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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Thank you to the members of the Committee, the Country Rapporteurs and the Committee's secretariat for facilitating this follow up procedure.

The Scottish Human Rights Commission is pleased to present the following information in support of the Committee's review of progress on the 2016-17 inquiry into grave and systemic violations of the Convention in the United Kingdom.

The SHRC is the National Human Rights Institution for Scotland. The EHRC is the equality body for Scotland and retains human rights responsibility for reserved areas of policy in Scotland, including not only equality law, but employment law and much of UK welfare law, as relevant to this Inquiry. While I am pleased to speak to Scotland-specific issues on behalf of the SHRC, we have worked closely with the EHRC in preparation of the Scotland elements of the UKIM report and continue to do so, including opportunity to consider this statement.

The status of disabled people's rights in Scotland

Scotland has a broad range of legal responsibilities and a shared obligation to implement international human rights treaties under the Scotland Act 2016, which sets out the relationship between the UK and Scottish Government. Scotland has many competencies across which it must implement disabled people's rights, including education policy, health, justice, social care, some aspects of social security and transport, among many others.

The present Scottish Government has articulated a welcome, largely positive policy approach to advancing human rights which is broadly shared across the Scottish Parliament – with cross party support for new laws to incorporate international human rights law and opposition to the now dropped plans to repeal and replace the UK's Human Rights Act. This context is of course welcome. However, there is now much consensus that there a widespread implementation gap between the Scottish Government's position on human rights and practice.

For disabled people, this distinction between ambition and outcomes is extremely acute. In preparation of our elements of the UKIM report, the Commission commissioned a group of DPOs to independently review the progress in Scotland towards implementation of the 11 Inquiry recommendations. A copy of this supplementary report was also submitted to

the Committee. The DPOs concluded that disabled people have experienced an “unrelenting attack” on their human rights over the years leading up to and following the inquiry.

This position reflected the Commission’s analysis of the evidence. Our conclusion is that the Scottish Government, and other Scottish public bodies such as local authorities or the new social security agency, have not done enough to progress the protection of disabled people rights. Where there have been developments, they have not been ambitious enough or sufficiently resourced to withstand the socio-economic challenges that have occurred since 2016.

Scotland has significant powers and the stated political will to do more to fully realise and uphold disabled people’s rights. The promised incorporation of the Convention must deliver meaningful change and accountability. To this end, we have made standalone recommendations to the Committee, highlighting the extent and responsibility of Scottish Government to address the situation for disabled people.

I will now outline some of our specific findings.

Welfare reform and the right to social security

Recalling the Committee’s recommendation 114(b) (Rights-based welfare reform), the devolution of some social security powers represents the biggest relevant legal reform since 2016. Around 15% of total UK welfare spend in Scotland is now fully within the legislative competence of Scotland. This includes the full devolution of powers to replace some UK-wide benefits, such as PiP which is now replaced with Adult Disability Payment (ADP) in Scotland, to make changes to the administration of some UK-wide payments and power to create entirely new payments.

While the majority of social security remains reserved, the powers available reform the system in Scotland are significant, and especially in respect of disabled people given the full replacement of the PiP payment with Adult Disability Payment (ADP).

The founding legislation for Scottish social security adopts a human rights based approach with a reference to the right to social security in the legislation. However, this is not accompanied with a duty to comply, which would have strengthened the connection with international standards. There is

also, a lack of specific remedy for a breach of the right to social security which limits the opportunity for accountability for disabled people.

The Scottish Government has also focused on the 'safe and secure' transition of responsibility for the delivery of payments between the UK and new Scottish delivery agencies. There is a widespread view that this approach has impeded more radical redesign of payments and therefore minimised the opportunities to avoid or mitigate against the negative aspects of UK welfare reforms. For example, the same eligibility criteria have been transposed between PiP and the new ADP that fail to reflect a social and human rights model of disability or acknowledge the numerous barriers to mobility that are external to the impairment. DPOs report that outcomes of the assessment remain biased towards physical impairments due to the language of descriptors.

We also highlight issues with take up on new payments, which are inconsistent across all Scottish benefits. Figures are not yet available for ADP or the Child Disability Payment, but among longer running benefits delivered by Social Security Scotland, estimated take up rates range from 29% to 88%.

We have recommended that the Committee, in considering its recommendations to the UK note that recommendation 114(b) remains relevant for the whole of the UK but stress that Scottish Government has the responsibility to ensure the full scope of the right to social security for disabled people across devolved payments, and their administration. We therefore recommend that the Scottish Government do this by:

- Continuously reviewing the rollout of the devolved social security system, including carrying out cumulative impact assessments to ensure it reflects the human rights model of disability, the Public Sector Equality Duty, Scotland Specific Duties and the Fairer Scotland Socio-economic Duty.
- Taking steps to improve public awareness about the new benefits and make access to independent advocacy and advice widely available.
- Enhancing the legal status of the right to social security as part of the planned incorporation of ICESCR and CRPD.

We also share deep concern about the impact of the UK Government's welfare policies and proposals in the Health and Disability White Paper, as outlined in the EHRC's statement. The Scottish Government's own analysis estimates that they spend over £100 million a year mitigating the cost of UK wide welfare reform through programmes such as the Scottish Welfare Fund.

While investment in mitigation is clearly welcome, this spend could be allocated to other policies to support disabled people and low-income households.

Even with this investment in mitigation, research shows that the estimate costs of cuts to for disabled people or households with a disabled person is higher than the value of mitigation investments. The Scottish Government has not carried out a full cumulative impact assessment to enable us to better understand the combined picture of UK and Scottish reform programmes specific to Scotland. Given the ongoing cost-of-living crisis in the UK, attending to accessible and adequate social security at all levels of government is an urgent priority.

Social Care and Independent Living

Recalling the Committee's recommendation 114(c) (Legislation / Policy Change), the Commission highlights a number of issues with social care and support to realise the right to independent living for disabled people.

The Independent Living Fund (ILF) administered by the Scottish Government has been closed to new applicants since 2015. On transfer from the UK the ILF was supporting just over 3,000 disabled people in Scotland with high support needs (as of July 2015) and now supports just under 1,000 of that inherited population through a lifetime award. The Scottish Government has faced calls to reopen the ILF to new applicants, particularly in the face of the cost-of-living crisis and the difficulties in social care resourcing. It has said that it is "committed to re-opening this Fund on securing a sufficient long-term resource." The ILF has publicly said it is ready to administer the ILF to new people however, at this point in time, it has not reopened.

COVID-19 has exacerbated the ongoing crises in social care across Scotland, including: inadequate resourcing, high levels of vacancies and geographical variations in care costs.

During the pandemic, there were reports of reduction and / or removal of care packages resulting in people being left without essential care or offsetting care back to unpaid carers. This undermines the autonomy of services users. The full scale of the cessation or reduction of care packages is not known because several Health and Social Care Partnerships failed to provide data, and others provided it in a form that was not comparable. In Scotland's biggest city

Glasgow, where only people with 'critical' needs were receiving support, almost 2,000 people's care packages were affected.

Many people who have learning disabilities and autism in Scotland are being denied their rights to autonomy, choice and control over their place of residence and with whom they live. They are also being denied access to community-based services on an equal basis with others.

The Scottish Government is pursuing legislation to create a National Care Service based on state delivery of healthcare that would restructure social care provision under a national framework. This is currently on pause as the Scottish Government reviews the substance of the proposals. The Commission is concerned that commitment to human rights had not been embedded into the proposals, and there are widespread concerns about adequacy of resource.

Existing legislation aims to support disabled people who use social care to make decisions about how their social care budget is allocated through the Self-Directed Support programme established by the Social Care (Self-directed Support) (Scotland) Act 2013. Although this legislation strengthened the choice and control on offer to social care users, reviews and reports looking at the delivery of SDS since 2014 have revealed patchy and unequal access, as well as limited co-production, issues around workforce recruitment, training and awareness, lack of transparency in recording decisions, bureaucratic and unwieldy processes, unequal access to independent advocacy and budgetary pressures. This has meant that the extent to which individuals have been able to access the four SDS options equally and exercise real choice and control has been limited.

The Scottish Government must also deliver on its commitment to abolish social care charging to end the long-term hospital detention have a learning disability or who are autistic.

Poverty and income

As in the rest of the UK, poverty rates are higher for disabled people than the general population with 51% of households who live in poverty in Scotland including a disabled member.

Unemployment, underemployment and economic inactivity rates are also disproportionately high for disabled people. Scotland has the highest disability employment gap in the UK, as 18.5% in April 2021.

The Scottish Government made a commitment to reduce the barriers to employment for disabled people and halve the disabled employment gap as part of the Fairer Scotland for Disabled People Delivery Plan; however, DPOs have characterised the commitment to halve the disability employment gap by 2038 as unambitious. Additionally, data shows that just 32% of disabled people who engaged in Fair Start – Scotland’s national employability programme – between April 2018 and September 2022 actually started paid work.

While the law regarding employment is reserved to the UK, there is significantly more the Scottish Government can do with the powers available to it. Specifically, we recommend that the Scottish Government:

- Fully adopt and properly implement human rights budgeting to ensure sufficient resources are mobilised and appropriately spent to meet disabled people’s needs.
- Develop targeted employability support for disabled people and guidance for employers to ensure disabled employees are adequately supported.
- Develop a rights-based disability strategy, co-designed with disabled people.

The cost-of-living crisis is exacerbating income-related poverty and in turn disabled people’s broader access to basic essentials. A survey of disabled people in Scotland carried out in 2022 showed that over 75% of respondents reported that they were “going without or cutting back” on essentials like food, heating and energy, as well as medication and personal hygiene items.

Other issues

Recalling the Committee’s recommendation 114(f) (access to justice) and 114(i) (considering disabled people at risk), the Commission has recommended that the Scottish Government develop anti-hate and anti-prejudice campaigns to support the implementation of the Hate Crime Act as well ensure legal aid is available to meet reasonable adjustments required to engage with the justice system.

Disabled people and DPOs have also spoken frankly of the impacts that public rhetoric during the pandemic has had on their feelings of exclusion or being cast as expendable.

Participation and inclusion

The experience of the organisations we engaged with in preparation of our supplementary report affirms our analysis that too often consultation with DPOs and other expert stakeholders in Scotland is insufficient and under resourced. The Scottish Government is required to undertake equality impact assessments as part of all policy development processes under the Scotland.

Specific Public Sector Equality Duties. However, the essential processes intended to prevent damage to disabled people's rights are underfunded and display limited disability competency.

Significant examples were seen in the development of policy over the course of the pandemic, contributing to disabled people's reported sense of marginalisation in Scotland's approach to safe participation in public life.

Although new accessibility regulations came into force in 2018, there is no centralised function to ensure consistently accessibility of communications and availability of information disabled people need to engage with devolved authorities. Increasingly Scottish Government is pursuing increasing digital-by-default approaches, as outlined in the 2021 Updated Digital Strategy for Scotland. There is little evidence to date of the impact of these strategies for disabled people.

The Scottish Government also produces an equality and fairer budget statement as part of documents supporting the national budget process. This is a post-hoc rationalisation of prospective spending decisions and is not a cumulative analysis but does consider notable allocations by disability. Scotland remains well below what is considered to be acceptable by international best practice standards in terms of public participation in the budget.

The Scottish Government does not currently have a disability strategy following the end of the previous Fairer Scotland for Disabled People in 2021. We anticipate a revised strategy will be published in the short to medium term. This strategy must be co-designed with disabled people and rooted in the UNCRPD, ensuring coherence with the planned incorporation. The UK-wide Disability Strategy also has some applicability in Scotland, such as proposed changes to employment support or business support, and we refer to the EHRC's previous comments.

Measuring progress and outcomes

Finally, we note that the processes for measuring progress in Scotland are consistently undermined by a shortage of appropriate disaggregated data. While the Scottish Government is pursuing data improvement programmes through its Scotland's Equality Evidence Strategy 2023-2025, the programme of improvement is reflecting a longtime observation of domestic and international human rights monitoring processes. The Scottish Government has published an analysis of the National Performance Framework – partially aligned to the Sustainable Development Goals – from the perspective of disabled people. However, 'equality / inequality' is not a specific outcome but a broader 'value' of the National Performance Framework. The Commission has engaged with the Government on proposals for a human rights outcome, but this is not yet delivered, and proposals are primarily concentrated on civil and political rights.

In line with the incorporation agenda being consulted upon, the Commission has urged the Scottish Government to develop a system for implementation, reporting and follow up that allows human rights progress to be tracked and measured. This system should integrate the OHCHR indicators on the CRPD.

Concluding remarks

In closing, I reiterate that Scotland has number of key policy levers relevant to the inquiry with its primary or shared competence. In order for disabled people's rights to be realised in Scotland the findings of the Committee's must be integrated into development of devolved policy and services.

Ends.