

Getting it Right? Human Rights in Scotland

Foreword

This publication presents the findings of a three year project in which the Scottish Human Rights Commission (SHRC) has reviewed research on the realisation of internationally recognised human rights in Scotland. This is not intended to be a comprehensive 'state of human rights in Scotland' report, but a prompt for discussion in the development of Scotland's National Action Plan for Human Rights.

The report suggests that while Scotland has made notable progress, it can do better. It has a relatively strong legal and institutional framework for human rights, some examples of positive strategy and policy direction, but the actual outcomes for people often remain inconsistent.

Scotland therefore needs a more systematic approach to assure and not assume the realisation of human rights in practice. Strong human rights based legal and policy frameworks must be translated into more consistent, positive outcomes to which individuals are entitled.

The United Nations recommends the adoption of a National Action Plan for Human Rights. National Action Plans are evidence based, developed in an inclusive way and independently monitored. They are concrete plans to fill 'gaps', build on good practice and help countries look outwards and move forward. Experience from Nordic and Commonwealth countries, amongst others, shows the potential of this approach to deliver real and sustainable improvements in the realisation of rights for all, particularly the most marginalised.

SHRC is facilitating an open and inclusive process of development and monitoring of Scotland's National Action Plan for Human Rights. This will include a National InterAction (a facilitated negotiation of commitments) on International Human Rights Day, 10 December 2012, and various other opportunities for involvement until March 2013. Preliminary engagement by SHRC with civic society, central and local government and political parties has found support in principle and gives us confidence that agreement on the National Action Plan can be reached in 2013.

We invite you to join SHRC in ensuring that Scotland's National Action Plan for Human Rights leads to significant and sustainable improvements in the way that Scotland assures the realisation of all human rights by everyone.

Professor Alan Miller, Chair
Professor Kay Hampton, Commissioner
Shelagh McCall, Commissioner
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October 2012

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Disclaimer: This report summarises the findings of published research and the use of participants who provided views and testimony. The Commission takes no responsibility for the views of others which it has reported.

Executive Summary

Introduction

The Scottish Human Rights Commission (SHRC) seeks to empower people to know and claim their rights, and to increase the ability and accountability of public and private bodies to deliver on human rights in Scotland. In support of these goals SHRC promotes the evidence based and inclusive development of Scotland's National Action Plan for Human Rights - a road map to the further realisation of all human rights in practice in Scotland. This paper presents a summary of some of the key gaps and good practices which have emerged from a scoping project undertaken by SHRC. This is not intended to be a comprehensive 'state of human rights in Scotland' report, but a prompt for discussion in the development of Scotland's National Action Plan for Human Rights. With this in mind, individuals and organisations are encouraged to consider their views in response to two key questions:

1. Based on the evidence presented in the report Getting it right? Human rights in Scotland, or your own experience, what do you consider to be the most urgent human rights issues which should be addressed in Scotland's National Action Plan for Human Rights?
2. What specific and achievable actions do you consider would best address the concerns you identify in your response to question 1?

This report summarises the findings of a scoping project based on a literature review of social research, three legal literature reviews on references to specific international human rights treaties in relation to Scots law, as well as SHRC's own experience since 2008. SHRC also convened a series of small focus groups and in-depth interviews with a range of communities, groups and individuals in Scottish society. In line with the SHRC's statutory mandate, particular attention was given to hearing from those who tend to be marginalised and whose voices are less often heard in mainstream debates surrounding human rights. In taking this approach SHRC sought to put a 'human face' on the issues uncovered in the scoping.

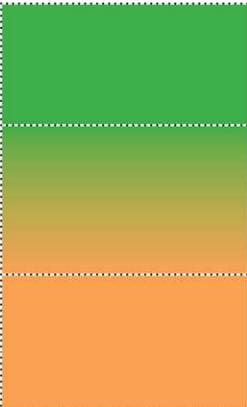
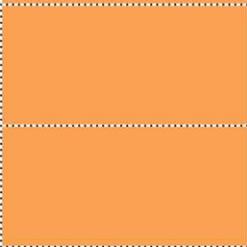
This report does not comprehensively cover every human rights issue in Scotland. Rather, the Commission has chosen to present some of what appears to be the key human rights gaps and good practices that emerged from the scoping project.

Key Messages

There is some cause for optimism but certainly not for complacency as inconsistencies were noted in several areas, as is exemplified in Table 1 (below). It was found that in terms of structural steps, that is the operation of law and institutions, references to human rights were frequent and explicit in the Scottish context. However, regarding process steps, that is the enactment of policies and

strategies, very few are currently rights based in nature although there was some potential identified. Outcomes, it was found, contained the greatest risk to the realisation of human rights in Scotland - that is where human rights can actually make a difference to the day to day lives of people in the country. SHRC argues that it is this last area that requires urgent attention, especially when viewed through the lens of the eight thematic areas identified later in this Executive Summary.

Table 1: Overview of findings on human rights structures, processes and outcomes

Steps to make human rights real	What does the scoping project overview suggest?	Progress <ul style="list-style-type: none"> • largely on track • partially on track • largely off track
Structural steps <i>(laws and institutions)</i>	A range of human rights based laws. National Human Rights Institution with 'A' status Other institutions increasingly taking a rights based approach	
Process steps <i>(strategies and policies)</i>	Some rights based strategies and policies in some thematic areas but no overarching human rights action plan	
Outcomes <i>(practice, results for people affected)</i>	Reports of divergent practice even in areas with human rights based laws and strategies.	

Structural steps:

Structural steps are the legal and institutional measures to protect human rights. They include the ratification of human rights treaties, domestic laws to incorporate those international obligations and establishing institutions to ensure accountability for putting human rights into practice. The Human Rights Act 1998 (HRA) incorporated the European Convention on Human Rights (ECHR) and together with the Scotland Act 1998 it forms a foundation for the legal protection of civil and political rights in Scotland.

Process steps:

The full realisation of human rights requires the adoption of effective measures or processes such as the development of appropriate strategies and policies, and the allocation of adequate resources. Awareness and capacity building can also be an important vehicle to put human rights into practice, as can practical approaches such as impact assessment. A human rights based approach has been explicitly integrated in some strategies and policies in particular areas in Scotland, the National Dementia Strategy is a clear example.

Outcomes:

Assessing human rights outcomes requires evaluating the extent to which the lived experience of the population matches up to the requirements of international human rights law. A key tool to do this is human rights indicators. Under a joint project of SHRC with the Equality and Human Rights Commission (EHRC), the London School of Economics and the British Institute for Human Rights produced an initial Human Rights Measurement Framework for England, Scotland and Wales. The scoping indicates that human rights outcomes appear to vary greatly, even in areas where laws and policies explicitly suggests that practice should be rights based. There are also however an increasing number of good practice examples in Scotland of organisations seeking to introduce a human rights based approach to their work.

Although the scoping project notes a few examples of putting rights into practice, it suggests inconsistency in a number of areas, even where laws and policies are largely rights based. Indeed, in general terms, it is noted that the influence of human rights is felt most strongly on our laws and institutions and its influence decreases the closer to real life we look. The result is unacceptable outcomes for some individuals, particularly the most marginalised.

Based on these findings, SHRC considers that Scotland needs to better promote the influence of human rights laws in areas that matter most to people e.g. where we actually lead our lives - in our homes, neighbourhoods, workplaces, schools and other areas of day to day life. Scotland's National Action Plan for Human Rights will provide a practical roadmap to move from assumption to assurance that human rights laws and institutions, strategies and policies are informed by and consistently influence practice. Adopting such a systematic approach will demonstrate a clear commitment to making human rights real for everyone in Scotland.

In publishing this report SHRC is also launching a process to develop Scotland's National Action Plan for Human Rights. To find out more, visit www.scottishhumanrights.com/actionplan

Contexts

Human rights do not exist or operate within a vacuum. To appreciate the current status of human rights in Scotland it is important to examine and appreciate the broader political, economic, social, technological, legal and environmental contexts. Although there is a robust legal framework in place, Scotland's political debate on human rights has too often been slowly reactive in design.

Political decisions in response to the current economic crisis are threatening the realisation of human rights. However public service reform presents clear synergies and opportunities for the integration of a human rights based approach. Socially, Scotland's ageing population presents challenges that social policy is seeking to address while significant disparities in poverty levels remain and our social attitudes do not always match our self-perception as being inherently 'fair'. Environmentally, Scotland has politically committed to a human rights based approach that it must now translate into reality. Technology is double sided, offering opportunities where internet connectivity can be advanced, but the proportionality of interference with the right to private life through intrusive use of technology has to be more systematically ensured.

Legal Context

The UK has made a range of international legal commitments to respect, protect and fulfil human rights. However, it has been slow to grant the population the right to petition international human rights bodies where they believe their rights have been violated and they have not received a domestic remedy. Similarly, the UK has only incorporated one international human rights treaty, the ECHR, which mainly protects civil and political rights. The majority of the ECHR is incorporated via the HRA, which also includes a series of mechanisms to pursue the realisation of those rights in practice:

- Domestic courts are required to take account of the case law of the European Court of Human Rights (ECtHR).
- All laws must also be understood so far as possible in a manner compatible with the rights contained in the HRA.
- Public authorities and others who undertake a public function must refrain from acting incompatibly with the rights in the HRA.

Additional measures may be required to clarify duties under the HRA, and to maximise its contribution to a human rights culture.

The HRA is also referenced in the Scotland Act 1998 and hence is embedded in the devolution settlement. The Scottish Parliament may not pass laws which are incompatible with the rights in the HRA. The Scotland Act also prevents the Scottish Government from making law or doing anything else which is incompatible with the HRA. The constitutional consequence is that any act of the Scottish Government which is incompatible with the ECHR would have no legal effect, and any legislation passed which was outside legislative competence is not law. While Scottish courts can only make "declarations of incompatibility" in respect of Acts of the UK

Parliament, they can invalidate Acts of the Scottish Parliament if they are judged not to be compatible with the ECHR. In addition, both the Scottish Government and Parliament are required to take into account the whole range of international human rights obligations by observing and implementing them. The UK Government can also act to implement international obligations in Scotland, even in areas within the competence of the Scottish Parliament. In practice the Scottish Parliament has at times enacted laws which consciously adopt a human rights based approach. This has led to a number of laws of the Scottish Parliament being cited as good practice in human rights and in their subject field. In other cases, however, successive Scottish Governments and the Scottish Parliament have taken a more reactive approach, reluctantly engaging with some human rights issues.

Political Context

In Scotland, human rights are embedded in the present constitutional settlement and as such the balance of powers between legislative, executive and judiciary in Scotland is closer to increasing international experience where Parliaments are constrained to act in ways which are compatible with human rights rather than the British doctrine of Parliamentary sovereignty. This provides a formal basis from which to develop a more positive and proactive political engagement on human rights.

The current mechanisms to consider human rights in the work of the Scottish Parliament include statements of compatibility and a mainstreaming approach to human rights across its committees. The former may be contested as lacking transparency and public scrutiny, the latter as missing the potential for the Parliament to develop a specialist committee and clear space to discuss human rights issues.

In the case of Government Bills a member of the Scottish Government and the Presiding Officer must both issue statements to the effect that the Bill is considered compatible with the Scotland Act (including that it is compatible with the ECHR). Scotland's current political parties all express enthusiasm for human rights and a range of rights based legal and policy measures have been adopted since the Scottish Parliament was established. Nevertheless, political action to respect, protect and fulfil human rights remains at times reactive rather than proactive as demonstrated by successive Scottish Governments' responses to a series of cases. The place of human rights in Scotland's constitutional settlement was an element in discussions surrounding the passage of the Scotland Act 2012, which seeks to implement recommendations of the Commission on Scottish Devolution (the Calman Commission).

At local government level Scotland has 32 elected local authorities which each has a Single Outcome Agreement with the Scottish Government. Such agreements have been politically contested. On the one hand they offer the potential for greater participation in decision making at the local level. On the other it has been argued that they create a challenge for national accountability and ensuring delivery of better outcomes across the country. Given that they currently represent a significant devolution of decision making over local services in areas such as education and

housing, Single Outcome Agreements should be clearly linked to human rights realisation.

Economic Context

The global economic crisis has presented a significant challenge to human rights protection in the UK. Human rights can assist in responses to the crisis, offering an objective framework for fair decision making on the prioritisation of resources. Since the 2010 General Election the UK Government has prioritised the reduction of the public debt, pursuing a programme of austerity and cuts in public spending. This has had consequential impacts on the availability of resources for the realisation of human rights in Scotland.

In recognition of the need to adjust the delivery of public services to the new economic environment, the Scottish Government established an independent Commission to Consider the Future of Public Services (the Christie Commission). The Christie Commission concluded that there was a need for urgent and sustained reform to public services based on a series of principles and these findings have been endorsed by the Scottish Government. SHRC identifies significant opportunities for synergy between the principles of public reform recommend by the Christie Commission and a human rights based approach.

Domestic and international human rights bodies have called on UK and devolved administrations to consider more effective processes for assessing the impact of legal, policy and practice steps on equality and human rights. A good practice model for undertaking such impact assessments is currently being developed by SHRC with the EHRC and in collaboration with many other public bodies. Some international human rights bodies have also called for the development and use of human rights budget analysis.

Social Context

Scotland's population is changing and this has notable implications for the promotion and protection of everyone's human rights. At just over 5.2 million, the population is now at its highest since 1977. Within this overall rise, the demographic structure variance between urban and rural authorities is marked, and the overall population is ageing. This rise in population (particularly linked to a projected rise in the number of 'very old' people) is predicted to reach 5.54 million by 2033. This also includes a projected rise of almost 75 per cent of people living with dementia by 2031 from current figures. These changes will have a marked impact on access to public services, with particular requirements to increase the availability and accessibility of services for older people. Scotland is developing significant policy responses such as the integration of health and social care and there are clear opportunities and benefits to be drawn from including a human rights based approach in major policy responses to demographic change.

Barriers to realising human rights drive and deepen experiences of poverty and in turn social exclusion. Some anti-poverty initiatives in Scotland have adopted elements of a human rights based approach. The Poverty Truth Commission, for

example, highlighted key human rights messages such as the importance of ensuring people living in poverty are provided the opportunities and supported to participate in shaping responses. In practice, action to address poverty has made progress in respect of certain population groups such as adults of pensionable age and children, but not for others such as workless households.

Since devolution, considerable progress has been made in addressing many inequalities in Scottish society, for example, in relation to the proportion of people living in poverty, rates of those out of work and improved education outcomes. Yet significant problems remain and these inequalities act as barriers to the full realisation of human rights and some of the most widely reported inequalities challenging Scotland are in respect of health.

Scotland is often portrayed as a nation of people who value the concept of 'fairness'. This has strongly informed its self perception. While there is some evidence that Scotland has become more open and accepting there remains a distinct gap between perception and reality. Although some progress has been made in recent years in relation to the promotion of equality across a wide range of sectors of Scottish society, discriminatory attitudes have not reduced consistently. Attitudes towards gay and lesbian people have improved, but there remain high levels of discriminatory attitudes towards, among others, transgender people and Gypsy/Travellers. Likewise, disabled people appear to face a disproportionately high level of prejudice.

Environmental Context

Scotland has world leading legislation on climate change mitigation targets and an adaptation strategy, both welcomed internationally. Recently the Scottish Government committed to promote climate justice and a human rights based approach to climate change, including through the launch of a Climate Justice Fund based on recognition of the unfairness that those who had contributed least to the causes of climate change are suffering its most extreme consequences.

Despite these positive steps concerns related to human rights and the environment persist. In 2010 the UK was criticised for failing to ensure access to justice in environmental matters due to the prohibitive costs associated with challenging environmental planning decisions. This is an issue on which the European Commission is pursuing the UK before the European Court of Justice, and which has been the subject of a public petition to the Scottish Parliament.

Technological Context

Human rights defenders around the world have enthusiastically embraced technological advances to enhance their research, advocacy and campaigning goals. Access to the internet is increasingly required to fully exercise the right to access information, and consequently the right to participate in decisions. While access to the internet does not vary significantly between rural and urban areas in Scotland, differential rates do exist for older people, those on lower incomes, those

with fewer educational qualifications, the unemployed, disabled people and those with long term illnesses.

Technological progress also offers significant challenges to human rights. In Scotland these have often related to the right to respect for private life and how that is protected in public and private space, as well as security of information. Concerns related to the proportionality of interference with private life also arise in relation to the use of Closed Circuit Television (CCTV), monitoring of email, telephone and other communications. Similarly the use of new technologies in combating crime has to be considered through the lens of human rights. Recent controversies relate to the retention of DNA and other forensic data, and the use of electro-shock weapons.

Themes in Focus

The report presents issues under eight broad thematic areas:

1. Dignity and care
2. Health
3. Where we live
4. Education and work
5. Private and family life
6. Safety and security
7. Living in detention
8. Access to justice and the right to an effective remedy

Theme 1: Dignity and care

While human dignity is an underlying principle relevant across all rights and all spheres of life, the theme of Dignity and care is used here to refer to a range of issues and the report provides an overview of what appear to be some key human rights gaps and good practices under the headings of:

Quality of care:

A great deal of attention was paid in the research reviewed to the quality of care services in Scotland, especially those aimed at children and young people, older people, and people with disabilities. There are a wide range of human rights that are potentially affected by the delivery of care services, such as the right to life and the right to freedom from torture, inhuman or degrading treatment or punishment and the right to respect for private and family life. Article 8 of the ECHR is most relevant here. Other issues identified include: funding and the extent of “free” personal care; the integration of a human rights based approach into the procurement of care services. The benefits of a human rights based approach identified from the Care about Rights project developed by SHRC in partnership with a range of other organisations are also presented.

Independent living:

The right to live independently as part of a community is guaranteed in Article 19 of the UN Disability Convention. It focuses on the choice of a disabled person of where and with whom to live, and being able to live in a community in a manner that

supports and fosters inclusion and participation. The “co-production” approach to independent living and de-institutionalisation were identified as positive steps. However there were concerns regarding portability of care. The moves towards Self-Directed Support and personalisation were highlighted as opportunities for further integration of a human rights based approach. Access to services by disabled people is also considered.

Self-determination:

Self-determination, autonomy and participation are central principles in human rights law. Issues which arose from the scoping project included legal capacity, the use of guardianships and end of life decisions.

Carers' rights:

The report highlights increasing recognition of the connection between the impact of unpaid caring responsibilities and human rights, including the right to an adequate standard of living, the right to work and the right to respect for private and family life.

Theme 2: Health

Under the theme of Health the report provides an overview of what appear to be some human rights gaps and good practices in the following areas:

Integrating a human rights based approach in health, law and policy making: The opportunities to advance human rights in health care through the Patients' Rights Act and Charter as well as the development of Health Inequalities Impact Assessment processes are identified in the report, as are steps to increase participation in decision making in health contexts. The report also considers the extent to which accountability mechanisms fulfil the requirements of a human rights based approach and opportunities arising from the pursuit of No Fault Compensation.

Healthcare quality:

The report considers opportunities for the further integration of human rights in healthcare delivery connected with the Healthcare Quality Strategy. Despite a general satisfaction with the quality of care received some research suggests concerns related to, amongst other things: unintentional harm; contracting infections such as MRSA; and concerns related to delayed discharge.

Health promotion:

Addressing underlying determinants of health is a core component of the right to the highest attainable standard of health. The report cites research demonstrating that lifestyle choices remain a significant health challenge in Scotland including in relation to smoking, diet and alcohol consumption. Research also indicates that health outcomes are also related more “fundamental” factors such as deprivation and poverty, an ageing population and a complex geography with large and sometimes sparsely populated rural areas. The impact of increased pressure on public funds in a time of recession was also identified in some sources.

Non-discrimination within health care:

The right to health includes an obligation to ensure that health facilities, goods and services are accessible to all without discrimination. In this context there are four dimensions to consider: non-discrimination (in law and fact), physical accessibility (including in rural areas and for disabled people), economic accessibility and information accessibility. The research identifies issues faced by groups such as minority ethnic and religious communities, as well as people with disabilities and LGBT people, and the research also indicates particular challenges in accessing health services faced by those living in rural areas.

“Health care services need to be both well resourced and competent, we often struggle to attract staff to the islands ... it’s not uncommon to have clients kept in hospital or respite because of the lack of resources in the community.”

Karen, 3rd sector advocacy worker

Mental health care and treatment:

The care and treatment of patients in and outside of mental health institutions engages a range of human rights including the right to life, the right to liberty, the right to freedom from torture, inhuman or degrading treatment or punishment, and the right to respect for private and family life. The report considers responses to mental health stigma, access to mental health care, quality of mental health care of treatment (including restraint, seclusion and reports of individuals being forced to take certain medications) and specific concerns for those patients receiving dementia care.

Theme 3: Where we live

The theme of Where we live is used here to refer to a range of issues and the report provides an overview of what appear to be some key human rights gaps and good practices under the headings of:

The right to adequate housing:

The right to adequate housing has various dimensions, including security of tenure; availability of services; affordability; accessibility; habitability and cultural appropriateness of housing. Some of the issues identified in the report include: the availability of housing and steps to address homelessness; access to adequate housing for all without discrimination; affordability and security of tenure; habitability including the appropriateness of the current standard of “tolerable housing” and fuel poverty. Discrimination in seeking housing is also an issue that emerged from the scoping project, especially for minority ethnic communities and groups such as ex-offenders.

The rights of those living in rural areas:

Disparities in access to services between those in rural and urban areas potentially raise human rights concerns. Issues identified in the report include: increased poverty; a lack of available and accessible services including housing, care and support, education, transport and healthcare; lower than average income levels, with employment concentrated in a small number of low productivity sectors.

Where Scottish Gypsy/Travellers live:

The rights of members of Gypsy/Traveller communities in Scotland have been the subject of review by a number of national and international human rights bodies which have made repeated recommendations. Concerns identified in the report centre on a persistent shortage of adequate permanent and transit sites throughout the country, resulting in frequent evictions and tensions with the majority settled population.

Theme 4: Education and work

Under the theme of Education and work the report provides an overview of some apparent human rights gaps and good practices under the headings of:

Access to education:

The right to education includes an obligation to ensure that education is available, accessible, acceptable and adaptable. The report highlights research raising concerns related to the equal realisation of the right to education of: disabled children; children of Gypsy/Travellers; children of asylum-seekers; children excluded from education; non-attendees (due to sickness, family obligations etc) - pregnant young women and young mothers of school age. In relation to disabled children, research also suggests barriers such as inaccessible educational institutions and policies that do not cater to disabled students as well as the continuation of prejudicial attitudes. Disparities in relation to social economic status and questions around access to higher education by UK residents from outside Scotland were also identified.

Inclusive education:

The right to education includes a duty to pursue an overall goal of full inclusion of children with disabilities. The report reveals competing views as to what inclusion means, in particular for children and young people with complex needs - for example, some commentators argue for adapted and supported provision within mainstreaming education whilst others argue for placing pupils in designated special needs institutions. Children considered particularly vulnerable include those with Autism Spectrum Disorders (ASD) or Attention Deficit Hyperactivity Disorder (ADHD).

Access to and fair treatment at work:

The right to work and fair treatment at work includes a duty to ensure non-discrimination in access to work, and a spectrum of rights at work. The report cites research which suggests that a range of groups in Scottish society experience discrimination and inequality in accessing work as well as a lack of support mechanisms to assist such groups to first gain employment and then be treated fairly whilst in work. Examples of such affected groups are: parents with children in

working families, ethnic minorities, migrants and asylum seekers, disabled people and people who have mental health conditions.

“Are you going to be treated worse because you have said that you are a Gypsy/Traveller, are you going to be treated better or worse? You’ve got this attitude because you have been harassed all your life, ‘collar and ties’, ken? Services with authority, I have never trusted and I still don’t trust.”

Mary, Scottish Gypsy/Traveller

Fair pay:

The right to remuneration sufficient to secure an adequate standard of living is a core element of human rights at work, as is the right to equal pay for work of equal value. The report notes research indicating a significant gender pay gap in Scotland and that fair pay is a productive way to assist individuals and families to combat poverty. Research suggests that young people and those with dependent children are more vulnerable to poverty in unstable and low paid employment. Concerns have also been raised by international human rights bodies at the adequacy of the minimum wage, although the pursuit of a living wage was identified as positive by some. However, some continue to have concerns that groups such as migrant workers may not be receiving the wages they should.

“... the rent is extortionate and they can be in there for 6 months to a year, sometimes plus and it is financially impossible for them to work during that time... it becomes an absolute nightmare to manage because they are then having to pay towards their rent which can be about £200 plus a week. A lot of the young people I work with are in that situation - they are on job seekers allowance and they are getting a lot of pressure from the job centre to prove that they are seeking work, when in actual fact it’s just not within their interests financially to do that because they don’t gain anything from it and if anything they are out of pocket, so that is a barrier for them, but the odds really are stacked against them.”

Francis, Personal Development & Employability Worker

Theme 5: Private and family life

Under the theme of Private and family life the report provides an overview of what appear to be some human rights gaps and good practices under the headings of:

Domestic abuse:

States have human rights obligations of prevention, protection and remedy to address domestic abuse. The report notes that anti-domestic abuse initiatives have featured prominently in public policy in Scotland and have received attention and funding from Government. This focus reflects its prevalence in society as well as increased awareness. Some have, however, raised questions about the definition of domestic abuse in law, as well as the adequacy of policy attention to perpetrators and specific groups of victims/survivors including minority ethnic women, transgender people and men. The positive experience of a domestic abuse court is also highlighted in the report.

“I asked I don’t know how many times for social work to help and intervene with my son. You could see he was having problems dealing with the aftermath of what had happened, but no, the request had to come from the school or another agency, it couldn’t come from me. There I was saying, please help us, we need help now, but it had to come from someone else.”

Lisa, mother and victim of domestic abuse

Forced marriage:

Forced marriage is a human rights abuse. Though the scoping project found limited evidence of forced marriage in Scotland, in 2011 new legislation was adopted bringing Scotland into line with the approach in England, Wales and Northern Ireland. The report cites research suggesting that, as yet, little use has been made of its provisions.

Same-sex marriage:

States may extend the right to marry to same sex couples. The report considers debates surrounding Scottish Government plans to provide for same-sex marriage including the appropriate balance between the human rights to marry, to be free from discrimination and to freedom of religion.

The right to respect for family life for people with learning disabilities:

Research cited in the report indicates that people with learning disabilities continue to face particular barriers to realising their right to respect for private and family life, including establishing relationships. The report considers the appropriate balance between state duties of protection, and the freedom that individuals have to establish relationships, including sexual relationships. The application of domestic law related to legal capacity, adult support and protection and sexual offences is also

considered. Despite measures to raise awareness of these issues and how to respond to them, focus group participants working in different settings with people with learning disabilities considered that more remained to be done.

The rights of parents and children:

Children and adults have a right to respect for private and family life . A range of other rights in the UN Convention on the Rights of the Child are also relevant. Some research cited in the report indicates a lack of recognition of the rights of the child in practice. The report also considers the implications of the differences in treatment of mothers, and married and unmarried fathers. For example the report notes concerns among some with regard to the rights of the child as well as the rights of fathers to see their children after the breakdown of relationships.

Parental imprisonment:

The UN Convention on the Rights of the Child upholds the child's right to maintain personal relations and direct contact on a regular basis, except if it is contrary to the child's best interests. An estimated 16,500 children in Scotland are reported to be affected every year by the imprisonment of parents and carers. The report cites research suggesting that, as a result and in addition to the emotional loss of contact with a parent, children may suffer from bullying, shame, stigma, stress, financial disadvantage, the loss of a carefree childhood and a need to move house.

Theme 6: Safety and security

Under the theme of Safety and security the report provides an overview of what appear to be some human rights gaps and good practices under the headings of:

Asylum:

Other than in narrow circumstances where rights are explicitly limited to citizens, human rights apply to everyone in the jurisdiction without discrimination on any ground. Asylum does not fall within the competence of the Scottish Parliament. However research cited in the report points to discrimination faced by refugees and the need for support in access to employment, welfare and healthcare.

Offences aggravated by prejudice:

States have human rights obligations to prevent and investigate crimes aggravated by prejudice including on grounds of ethnicity, disability, religion, sexual orientation and gender identity (or "hate crimes"). The report cites research which indicates that in the current economic climate hate crime appeared to be a growing concern in Scotland. Research appears to consistently note a link between discrimination and violence or other offensive behaviour. Questions raised by some regarding recent legislation on sectarianism in football are summarised. Some participants in focus groups also expressed concern that the authorities could at times do more to promote a climate where the reporting hate crimes is less intimidating. Emerging examples of good practice are also identified.

Abuse prevention, protection and remedy:

The prohibition of torture, inhuman or degrading treatment or punishment includes positive obligations of prevention, protection and response. The report highlights that Scottish legislation on adult support and protection is founded on human rights principles. However concerns have been raised by some regarding the balance in the legislation between principles of autonomy and the State duty to protect people at risk of ill-treatment.

Trafficking:

Effective measures of prevention, protection and investigation of trafficking in human beings are a human rights concern. Criminal offences in relation to human trafficking are included in a number of Acts in Scotland. However, the report cites research indicating that there has been a lack of prosecutions for trafficking offences in Scotland with the first convictions only secured in September 2011. Research suggests that victims of human trafficking may be missing out on support because authorities in Scotland have trouble identifying them as trafficking victims and this absence of recognition of their status means they are unable to access appropriate services or help police with their inquiries.

Policing:

The Human Rights Act 1998 requires all public authorities, including the police, to act in a way which is compatible with the individual rights and freedoms contained in the ECHR. Policing reform in Scotland is currently underway including the creation of a single police service for Scotland under the Police and Fire Reform (Scotland) Act 2012. Ways in which this structural change could afford the opportunity to strengthen the framework of police accountability in Scotland are discussed, as are debates surrounding the explicit referencing of human rights during the drafting of the Act. The report discusses the concerns raised by the proposal to transfer the functions of the Police Complaints Commissioner for Scotland (PCCS) to the Scottish Public Services Ombudsman (SPSO) and also welcomes the establishment of the Police Investigations and Review Commissioner as a new independent investigation mechanism. The report also discusses particular concerns in relation to policing and human rights identified in the scoping, which includes, the use of the stop and search powers as well as the Strathclyde Police pilot to roll out the use of electro-shock (TASER®) weapons beyond trained firearms officers.

“We teach our children this kind of hatred. Kids are colour blind and have no concept of religious difference ... They are not biased, they learn their behaviours from others, they learn from their families and society. And it stays with them for a long time ... you see how much hatred can come out of someone for someone else that they have never met before, it is incredible. Hopefully with the legislation, and given some time, people might start to think about the implications of their behaviour, start to think, I might have to pay for the implications of my act. In the past I did what my father did, but now I look at this and

think, this is not something I am meant to do, it is not worth paying this price.”

Chiwetel, survivor of a racially motivated hate crime

Theme 7: Living in detention

Under the theme of Living in detention the report provides an overview of what appear to be some human rights gaps and good practices under the headings of:

Conditions of detention:

All detainees have a right to be treated with humanity and dignity. Research identified in the scoping project raised continuing concerns, to a greater or lesser extent, on issues such as overcrowding, ‘slopping out’, addiction (including a lack of needle exchange programmes), healthcare and mental health services (including mixed experiences of access to mental health care), and levels of suicides and deaths in custody. Access to productive activity, including education, work and exercise have also been reported as areas of concern.

Mental health detention:

Persons deprived of their liberty on mental health grounds must be detained in an appropriate therapeutic environment. The scoping indicates that the Mental Health (Care and Treatment) (Scotland) Act 2003 has been widely welcomed as having created a new framework for the use of compulsory measures, and placing emphasis on treatment and care in the community, on safeguarding patients’ rights and on enabling the participation of patients and carers in treatment and on-going care. Research cited suggests that since it came into effect there has been a decrease in use of compulsory powers, although this may vary across the country. Mental Welfare Commission reports identify a range of areas for improvement in mental health care and treatment in practice. Concern has also been raised regarding young people who are detained in adult wards as well as geographic variation in the standard and quality of provision of care and treatment. An independent evaluation of the human rights based approach at The State Hospital indicated significant benefits to staff, patients and carers.

Women in detention:

Significant concerns have been repeatedly raised regarding conditions of detention for women in Scotland, particularly in Cornton Vale. The report highlights that many consider there to be a need for further measures to increase and enhance educational, rehabilitative and resettlement programmes for women in prison and to ensure the provision of adequate health facilities and services, including mental health services, for women in prison. Multi-agency work is regarded as being important in the Scottish context. In 2012 the Commission on Women Offenders made 37 recommendations for change focusing on key areas including: alternatives to prosecution; alternatives to remand; sentencing; prisons; community reintegration; and leadership, structures and delivery.

Young people in detention/secure accommodation:

Under the UN Convention on the Rights of the Child children in detention should be separated from adults. In Scotland, most children who are accused of offences are dealt with under the Children's Hearings System which the report notes has been widely praised nationally and internationally. The Children's Hearing System takes a welfare approach which UK Children's Commissioners consider has made it less likely that children in Scotland will be punished or locked in comparison to children in England. Nonetheless, the Scottish system has been criticised with regards to the level of deprivation of the liberty of children and young people over 16. Concerns have also been raised regarding the conditions of detention of children and young people in Scotland and with regard to the detention of asylum-seeking children.

Theme 8: Access to justice and the right to remedy

Under the theme of Access to justice and the right to remedy the report provides an overview of what appear to be some human rights gaps and good practices under the headings of:

Access to justice (including access to legal advice and legal aid):

Under the European Convention on Human Rights there is a general duty on states to ensure practical and effective access to justice. The report highlights concerns related to steps taken following the Cadder decision on access to a lawyer during questioning including: the provision of legal advice over the phone; periods of detention without charge; the option to waive the right to legal advice and inferences which can be drawn from a suspect's silence. The report also notes that concerns have been raised regarding the availability and distribution of legal aid in times of recession and in steps to review financial contributions in criminal legal aid. A range of research has also identified ways in which certain groups and communities may be disadvantaged in the legal process, including: disabled people, victims/survivors of domestic abuse, asylum seekers and immigrants, and so-called "vulnerable" suspects and witnesses. Amongst specific issues identified in the research are: physical access; access to legal advice; information and communication barriers; and attitudinal issues. The potential implications of a more expansive approach taken by the UK Supreme Court to standing to raise public interest cases are noted as are the requirements of international agreements on access to justice in environmental matters, where UK practice has been found to be inadequate.

Juvenile justice:

The UN Convention on the Rights of the Child provides that children who have been charged with criminal offences must be dealt with in a manner which takes full account of their age, level of maturity and intellectual and emotional capacity. The report notes that the Children's Hearings System is widely praised, but cites recommendations to increase its funding to reflect an increasing number of cases. The report also notes concerns at the low age of criminal responsibility in Scotland.

Criminal procedure:

The research notes concerns which some have been raised regarding the operation of the disclosure regime. These relate to the disclosure of previous convictions and disclosure of medical or mental health records. It also notes debates surrounding the operation of the rule requiring corroboration in criminal trials.

The duty of effective investigations:

Positive obligations under the right to life and the prohibition of torture, inhuman or degrading treatment or punishment include an obligation to hold an effective official investigation. In Scotland, Fatal Accident Inquiries (FAIs) are the means of investigation in cases of sudden, suspicious or unexplained death, or death in circumstances that give rise to serious public concern. Consideration has been given to the sufficiency of this mechanism to comply with investigation requirements until international human rights law.

Victims'/Survivors' rights & the right to remedy:

The human rights of everyone involved in the criminal justice system, victims/survivors and witnesses as well as suspects, must be respected, protected and fulfilled. A common concern is with delays with legal proceedings and the impact of such delays on victims' rights to effective remedies. The report highlights views that there remains a lack of recognition and that there are opportunities for further realisation of the human rights of victims/survivors of crime and human rights abuses. Further, opportunities to advance the right to an effective remedy are identified including facilitating effective apologies and revisiting the operation of the system of time limits for civil remedies. In addition, the report highlights recommendations made to address access to justice and remedies for survivors of historic child abuse.

“My expectations were that I would be treated fairly and that my rights as a human being would be respected. I would have access to information, the same range of resources and the same standards afforded to that of the man accused of stalking me ... My experience of the criminal justice system was one of dismay and horror. If ever a system abused victims and denied vulnerable people of their very basic human rights, this was it. The focus of the criminal justice system is purely on the accused or offender and the system has been structured for this specific purpose. It had provided a pathway for these people and none for the victims ... My stalker's rights were catered for at all levels. His right to a fair trial, his treatment within the system, his access to services, his human rights being respected and fairness surrounding his sentencing ... My experience highlighted that offenders have rights and victims have policies and guidelines.”

Emma, Victim of Crime

Moving Forward: A Scotland's National Action Plan for Human Rights

This paper presents a summary of some of the apparent gaps and good practices which the SHRC scoping project has revealed. It is not intended to be a comprehensive “state of human rights in Scotland” report, but a prompt for discussion in the development of Scotland's National Action Plan for Human Rights. Addressing the gaps and replicating good practice should be a concern of all bodies with responsibilities, including Government, local authorities, other public authorities and private providers of public services. Identifying the shared framework of responsibilities and agreeing steps to address gaps requires an inclusive process of engagement. It should result in clarity on what action such bodies will take and when concrete improvements can be expected - it should result in specific, measurable, achievable, relevant and time-bound objectives. An independent system for monitoring progress should also be agreed. In short, the report supports the conclusion that Scotland needs a National Action Plan for Human Rights. To develop this SHRC will host human rights InterActions involving a broad range of public and private bodies, civil society and individuals. These InterActions will follow a F.A.I.R. approach:

Facts:

What are the key gaps and the good practices in the realisation of human rights in Scotland?

Analysis of rights at stake:

Which human rights are at stake? Is any restriction on the rights justified? Is the extent of realisation of the right reasonable?

Identify responsibilities:

What changes are necessary? Who has responsibilities for helping to make the necessary changes?

Recall and review progress:

Independent monitoring according to agreed indicators and periodic review of progress.

This process will allow for constructive dialogue between those with responsibilities and those whose rights are affected. Further, it will clarify the steps that are required to improve human rights practice in Scotland, taking a pragmatic approach to understanding financial and other constraints. It is hoped that Scotland's National Action Plan for Human Rights will launch in summer 2013.

To inform the process of developing Scotland's National Action Plan for Human Rights responses are requested to the following questions:

1. Based on the evidence presented in the report *Getting it right? Human rights in Scotland*, or your own experience, what do you consider to be the most urgent human rights issues which should be addressed in Scotland's National Action Plan for Human Rights?
2. What specific and achievable actions do you consider would best address the concerns you identify in your response to question 1?

Please use the form at the end of this report and send your response to actionplan@scottishhumanrights.com or post it to us at Scottish Human Rights Commission, 4 Melville Street, Edinburgh, EH3 7NS

Table 2: Key Dates

Date	Action
May 2012	The UK Universal Periodic Review at the United Nations began.
September 2012	The final report and recommendations of the UK's Universal Periodic Review was delivered.
October 2012	Publication of SHRC's scoping project and launch of a process of participation to shape Scotland's National Action Plan for Human Rights.
December 2012	A National InterAction to address the findings of the scoping project and facilitate negotiation of commitments to address them.
Aiming for Spring 2013	A draft of Scotland's first National Action Plan for Human Rights is published for comment.
Aiming for Summer 2013	Scotland's National Action Plan for Human Rights will be launched.
June 2014	UK's progress on Universal Periodic Review recommendations is considered in a mid-point review. Progress on Scotland's National Action Plan for Human Rights will be reviewed, to feed into this process.



National Action Plans for Human Rights have already been developed in around 30 countries across the world including New Zealand, Australia, Sweden, Spain, Finland and South Africa. Plans from a selection of countries can be viewed at the website of the United Nations High Commissioner for Human Rights.

Over the past two decades the UN has encouraged and supported countries to develop National Action Plans, stressing their importance in identifying gaps in human rights protection, clarifying the responsibilities of States, and establishing monitoring systems so that progress made in promoting and fulfilling human rights protection can be measured over time.

Scotland has the benefit of learning from the experience of others in developing a National Action Plan, and the Scottish Human Rights Commission is grateful for their support in this process.

Navi Pillay, United Nations High Commissioner for Human Rights:

“It is very important that countries develop and implement national action plans with the participation of civil society, public bodies, United Nations experts, academics, parliaments and individuals. National action plans can bring clarity to States in identifying the steps they must take to improve the promotion and protection of human rights, especially for the most vulnerable people. I am pleased to welcome the initiative taken by the Scottish Human Rights Commission to carry out this broad consultation.”

Nils Muižnieks, Commissioner for Human Rights, Council of Europe:

“I welcome the development of a National Action Plan for Human Rights in Scotland. To develop an action plan openly presenting problems and a process of developing practical solutions is a signal of commitment to human rights. Scotland is joining an increasing number of countries across Europe that have developed and implemented National Action Plans to support the full realization of human rights in practice. I look forward to engaging with this process.”

Mattias Falk, International Coordinator of the Swedish Equality Ombudsman:

“Our experience of National Action Plans in Sweden, where the Government is currently drafting its third action plan, has been both positive and productive. The purpose of the National Action plan was to carry out a coherent review of the human rights situation in Sweden and, on the basis of the review, to propose measures for more systematic work with human rights at the national level. We warmly welcome the development of a National Action Plan for Scotland and strongly recommend that everyone works together with the Scottish Human Rights Commission in this important process for securing human rights in Scotland.”

[Sirpa Rautio, Director of the Human Rights Centre of Finland:](#)

“Finland has recently adopted a National Action Plan on Fundamental and Human Rights, which translates into concrete terms the duty to guarantee the observance of fundamental rights and human rights imposed on public authorities by the Constitution. The action plan will enhance the implementation of fundamental and human rights in Finland, and was drafted by a working group which brought together representatives of all Ministries, the Office of the Chancellor of Justice and the Office of the Parliamentary Ombudsman. The drafting process also involved open dialogue and engagement with representatives of NGOs and other human rights actors

”We are very pleased to learn of the development of a National Action Plan in Scotland and offer our full support. National Action Plans are an important tool in the realisation of human rights, they can hold states to account, ensure coordination in implementing and reporting on international obligations and promote a culture of human rights.”

[The Hon Catherine Branson QC, President, Australian Human Rights Commission:](#)

“In Australia, the process of establishing a human rights action plan has been led by the national government. To date it has been a positive process - with a focused dialogue with the community about the most important human rights issues that we face. The plan will be in place from July 2012. Our aim has been to achieve a better connection between the domestic actions taken to protect human rights and our international obligations. There is a particularly clear connection between the outcomes of the Universal Periodic Review of Australia and the proposed priority actions by government over the next 3 years. As the national human rights institution of Australia, we intend to use the Action Plan to hold the government to account in meeting its human rights obligations, and in measuring our progress in improving human rights over time.”

“We encourage everyone in Scotland to engage with the Scottish Human Rights Commission in developing your national action plan on human rights. Our Commission’s motto is ‘human rights: everyone, everywhere, everyday’. Your engagement in this process contributes to making these words true. Everyone has a role in shaping the human rights priorities for their country: I urge you to make your voice heard. National action plans can help to hold governments to account, and bring about real change in institutions and organizations, as well as giving clarity on human rights obligations for the future.”

[A list with links to all National Action Plans can be viewed at the website of the United Nations Office of the High Commissioner for Human Rights.](#)

[The United Nations office of the High Commissioner for Human Rights has also produced a Handbook for national human rights institutions which gives detailed information and background to forming National Action Plans.](#)

1: Introduction

Human rights impact on all of our lives every day. They belong to all of us and they can be a powerful driver of humane, dignified and fair treatment in our homes, our workplaces, our schools, in fact, everywhere we go. They set the conditions in which each of us should be able to live with dignity, free from degrading treatment and with the capability to live a full life. The more that people in Scotland understand about human rights laws and principles, the more likely we are to use human rights to be able to overcome the barriers that prevent us from living full, free and dignified lives.

Helping to empower people in Scotland to understand and to claim their rights has been a core Strategic Goal of the Scottish Human Rights Commission (SHRC, 2008) since the Commission began its operational work on the 60th Anniversary of the Universal Declaration of Human Rights, December 10 2008. This report is the first of its kind in Scotland and presents a picture of where Scotland currently stands with regards to its international and domestic human rights obligations.

Producing this report involved an ambitious programme of activity which ran from October 2009 until March 2012 in order to gain an understanding of the degree to which people all across Scotland were able to realise their rights in their day-to-day living. The report highlights the gaps and good practices that currently exist in the promotion and protection of the full spectrum of human rights (civil, political, economic, social and cultural) in Scotland.

The main aim of this scoping project was to provide a solid evidence base that would:

- Help prioritise SHRC's work in its second Strategic Plan (2012-2016);¹
- Influence the UN's Universal Periodic Review of all of the UK's human rights obligations in 2012;²
- Inform the development of Scotland's first National Action Plan for Human Rights.

The remainder of this introduction presents a brief summary of the overall scoping project methodology³ and an explanation of the report structure.

1.1 Taking a Human Rights Based Approach to information gathering: A FAIR Methodology

Taking a human rights based approach (HRBA) is about putting the human being at the centre of the scoping project. The HRBA was first developed in relation to international development processes and more recently it has been applied to public services, as well as business practices, around the world. Essentially a HRBA helps to integrate the norms, standards and principles of the international human rights system into everyday policy and practice and it can be applied to all areas of public life that affect human rights.

SHRC seeks to integrate a HRBA into everything that it does in promoting awareness understanding and respect for human rights in Scotland. It informs

SHRC's activities in education, training, awareness raising, impact assessment development, promotion of best practice, and SHRC's programme of research.

Since 2008, SHRC has sought to operationalise the principles behind a HRBA through the development and adoption of a 'FAIR' methodological framework. That is to say:

F – Facts: What are the important facts to understand?

A – Analysis: What are the human rights or issues at stake?

I – Identifying Shared Responsibilities: What changes are necessary? Who has responsibilities for helping to make the necessary changes?

R – Recall: Over time have the necessary changes occurred? If not, who is to be held accountable?

Using the FAIR methodological framework throughout this programme of work has allowed SHRC to identify the facts and provide a common framework for exploration and analysis. The conclusions to this scoping project provide the necessary platform for SHRC to work with others to identify the shared responsibilities through the development of Scotland's first National Action Plan for Human Rights and to monitor progress and recall over time in order to see if the necessary changes have happened.

1.2 Summary of Scoping Project Methods

The scoping project began in 2009 and was divided into two key phases of data collection which began in 2010. The first phase focused on the collection and analysis of a range of secondary research and the development of a stakeholder database of third Sector organisations involved to some degree in the promotion of human rights in Scotland.⁴ This database provided SHRC with a greater understanding of the range of groups and organisations which view part of their work to be promoting human rights in Scotland and provided a sampling framework for invitations to participate in the focus groups and in-depth interviews convened by SHRC. The data sources collated and analysed in the first phase included:

- an annotated bibliography of published and grey social research (Driver et al., 2010);⁵
- three legal literature reviews exploring specific Conventions/Acts in relation to the law in Scotland (Smith et al., 2010b, Normand and Webster, 2010, Flanigan, 2011);
- all individual enquiries received by SHRC and all general intelligence on systemic human rights issues in Scotland collated by SHRC (2008-2010);⁶
- all responses to SHRC's 2009 national consultation (SHRC, 2009a);⁷
- initial Scottish data from the development of a 'Human Rights Measurement Framework' (Candler et al., 2011).⁸

The second phase involved the development of the thematic and contextual framework presented in Sections 2 and 3 and the undertaking of focus groups and in-depth interviews to explore the thematic areas in further depth through a series of in-depth interviews and focus groups across the country. In line with SHRC's statutory mandate, particular focus was placed on hearing from those who are marginalised and whose voices are less often heard⁹. In taking this approach SHRC sought to put a 'human face' on the issues raised.

1.3 Structure of the Report

This report has been structured in such a way that in addition to being read as a whole, each thematic area is also accessible independently from the overall report.

Following this introductory section (Section 1), the report is divided into four further sections. The first of these sections (Section 2) aims to contextualise human rights in the day-to-day lives of people living in contemporary Scotland. This includes the legal, political, economic, social, environmental and technological contexts which are each explored in turn. Section 3 then presents eight core themes that have been drawn from the rights analysis of the research. Each of these themes deals with a range of issues which were selected for further study following a prioritisation process, as described in Appendix 1. These overarching themes also formed the basis for discussion in phase 2 of the scoping project.

Section 4 provides a discussion on the key findings of the research and provides an overview of the current gaps and good practices in rights realisation. The final Section (5) concludes the report by exploring the systematic approach required to assure and not assume the realisation of human rights in practice. In other words to translate strong rights based legal and policy frameworks into more consistent positive outcomes to which individuals are entitled, through the development of Scotland's first National Action Plan for Human Rights.

2: Our Human Rights in Context

2.1 Introduction

The aim of this chapter is to explore the various contexts within which the people of Scotland currently live their lives. The chapter provides a lens with which to view and to make sense of the different contexts within which people live and how they may impact positively or negatively on the realisation of rights of people in Scotland. The six contextual themes presented below are: Legal, Political, Economic, Social, Technological and Environmental.

2.2 Legal context

As the table below shows, the UK has made a wide range of international legal commitments to respect, protect and fulfil human rights. However it has been slow to grant the population the right to petition international human rights bodies where they believe their rights have been violated and they have not received a domestic remedy. Until it ratified¹⁰ the Optional Protocol to the International Convention on the Elimination of Discrimination Against Women in 2004 the UK had not accepted any of the UN individual petition mechanisms and only the jurisdiction of the ECtHR in the Council of Europe. Since then it has also ratified the Optional Protocol to the Convention on the Rights of Persons with Disabilities (in 2009) but has yet to allow individual petition on other treaties. For example, the UK has been denounced by the UN Human Rights Committee as the only state in the European Union which is not a party to the Optional Protocol to the International Covenant on Civil and Political Rights (UN CCPR, 2008).

Similarly, the UK has only incorporated (brought into domestic law)¹¹ one international human rights treaty, the European Convention on Human Rights (ECHR), which mainly protects only civil and political rights.¹² Domestic implementation of non-discrimination instruments is achieved in part through equality legislation, although that does not contain the full range of rights in international human rights instruments. As such it cannot be considered that these are fully incorporated.¹³ Steps towards a duty on the Scottish Government to have “*due regard*” to the UN Convention on the Rights of the Child are positive but are not an alternative to incorporation.

Domestic and international human rights bodies have consistently called for incorporation of a range of international human rights treaties UN Docs (UN CCPR, 2008, UN CEDAW, 2007, UN CERD, 2011, UN CESC, 2009, UNCRC, 2008a).

Table 1: UK's international human rights commitments (examples)

Treaty ratified by the UK	Complaints mechanism accepted?	Incorporated into domestic law?
International Convention on the Elimination of Racial Discrimination 1965	No ¹⁴	No ¹⁵
International Covenant on Economic, Social and Cultural Rights 1966	No ¹⁶	No
International Covenant on Civil and Political Rights 1966	No ¹⁷	No ¹⁸
International Convention on the Elimination of all forms of Discrimination against Women 1979	Yes ¹⁹	No ²⁰
Convention Against Torture and other forms of cruel, inhuman and degrading treatment or punishment 1984	No ²¹	No
Convention on the Rights of the Child 1989	No ²²	No
Convention on the Rights of Persons with Disabilities 2006	Yes ²³	No
European Convention for the Protection of Human Rights and Fundamental Freedoms 1950	Yes ²⁴	Yes via the HRA 1998 ²⁵
European Social Charter 1961	No ²⁶	No
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987	Not applicable	No
European Charter for Regional or Minority Languages 1992	Not applicable	No
Framework Convention for the Protection of National Minorities 1995	Not applicable	No
Council of Europe Convention on Action against Trafficking in Human Beings 2005	Not applicable	No

The majority of the ECHR is incorporated via the HRA, which also includes a series of mechanisms to pursue the realisation of those rights in practice. Domestic courts are required to take account of the case law of the ECtHR.²⁷ All laws must also be understood so far as possible in a manner compatible with the rights contained in the HRA.²⁸ Public authorities and others who undertake a public function must refrain from acting incompatibly with the rights in the HRA.²⁹ Evidence collected by SHRC indicates that this duty can result in improved respect for human rights in practice and achievement of related public policy aims such as personalisation of health and social care.³⁰ SHRC has consistently proposed that potential for 'human rights culture change' is most enhanced where rights holders are empowered to know and claim their rights, where duty bearers have the ability to put those rights into practice and where there is sufficient accountability (SHRC, 2008).

International human rights mechanisms including the UN and the Council of Europe Commissioners for Human Rights have joined SHRC and over 80 domestic civil society organisations in expressing concern at debates on the future of the HRA and a possible UK Bill of Rights. SHRC's concerns relate primarily to the risk that current negative political and media debate on human rights – focusing on emblematic and often misrepresented cases of the 'undeserving' few - will lead to a roll-back on rights protection, affecting the whole population. Political and media debate has tended not to focus on the benefits of the HRA such as those identified by the Ministry of Justice, British Institute for Human Rights, Equality and Diversity Forum and the UK's national human rights institutions.³¹

Additional measures may be required to clarify duties under the HRA and to maximise its contribution to a human rights culture. For example, there continues to be a lack of legal certainty as to the extent to which the HRA extends to private bodies providing public services.³² Whilst this has been addressed in relation to some providers,³³ it is important that this is clarified for all providers of public services. A recent amendment to the Health and Care Bill, for example, sought to clarify that private providers of social care fall within the ambit of the HRA.³⁴

The HRA is referenced in the Scotland Act 1998 and hence embedded in the devolution settlement. The Scottish Parliament may not pass laws which are incompatible with the rights in the HRA.³⁵ The Scotland Act also prevents the Scottish Government from making law or doing anything else which is incompatible with the HRA.³⁶ The constitutional consequence is that any act of the Scottish Government which is incompatible with the ECHR would have no legal effect, and any legislation passed which was outside legislative competence is not law.³⁷ So, while Scottish courts can only make declarations of incompatibility in respect of Acts of the UK Parliament, they can invalidate Acts of the Scottish Parliament if they are judged not to be compatible with the ECHR.³⁸

In addition, both the Scottish Government and Parliament are required to take into account the whole range of international human rights obligations by observing and implementing them.³⁹ The UK Government can also act to implement international obligations in Scotland, even in areas within the competence of the Scottish Parliament.⁴⁰

In practice the Scottish Parliament has at times enacted laws which consciously adopt a human rights based approach.⁴¹ In some cases this has gone beyond requirements at the time of pure compatibility (i.e. compliance with the minimum standard required by ECHR), at least at the time the laws were adopted (see Assuring good practice in human rights,

below). This has led to a number of laws of the Scottish Parliament being cited as good practice in human rights and in their subject field.⁴² In other cases, however, Scottish Governments and the Scottish Parliament have reluctantly engaged with human rights (see section below on political context).

Assuring good practice in human rights

The Adults with Incapacity (Scotland) Act 2000 (the Act) was considered the first law of the Scottish Parliament which tackled a significant policy area.⁴³ It addressed a global trend towards a more individualised, functional or “*tailor made*” approach to assessing whether an individual has capacity to make decisions and its passage followed:

“unprecedented openness, involvement of affected citizens, and responsiveness to their views” (Ward, 2008).

The Act itself is explicitly built on human rights foundations, taking account of Council of Europe Regulations on the subject. For example it provides that any intervention in the affairs of an adult should be the:

“least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.”⁴⁴

This seeks to apply the test of proportionality in an interference with the right to private and family life. Subsequently the Act has been considered a model of best practice and taken into account in similar legislative processes across the world and in deliberations at the European Court of Human Rights (ECtHR).

The HRA requires that all laws should be read through the lens of the ECHR, a “*living instrument*”. Since the entry into force of the Act in 2002 understanding of the requirements of the ECHR in this area has developed significantly. The UN Convention on the Rights of Persons with Disabilities (adopted in 2006 and binding on the UK since 2009) is increasingly influencing how the ECtHR is addressing legal capacity.

Recent decisions of the ECtHR in this area have 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.⁴⁵

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.⁴⁶

As these decisions make clear, 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.⁴⁷

A series of reports suggest practice in Scotland remains uneven.⁴⁸ Following a consideration of practice and the developing approach of the ECtHR the Public Guardian concluded that:

“several aspects of the current system e.g. use of interim guardians, use of indefinite orders and the granting of unnecessary welfare powers arguably breach human rights legislation.”

In response the Public Guardian has recommended a more explicitly human rights based approach.⁴⁹

To ensure the consistent application of human rights best practice SHRC has recommended that the Scottish Government and others with an interest and responsibilities related to mental health should engage in the process of shaping Scotland's first National Action Plan for Human Rights.⁵⁰

2.2.1 National Human Rights Institutions

In terms of the national promotion, protection and monitoring of international human rights the UK has established three national human rights institutions, namely: The Northern Ireland Human Rights Commission⁵¹ (NIHRC) operationalised in 1999; the Equality and Human Rights Commission⁵² (EHRC) in 2007 and the Scottish Human Rights Commission⁵³ (SHRC) in 2008. All are currently accredited at A (the highest) status internationally, in recognition of their compliance with best practice.⁵⁴ A memorandum of understanding has been agreed between the three commissions in order to foster cooperative working relations and avoid duplication of work activity. This has led in particular, to cooperation on a number of projects between SHRC and EHRC Scotland (as noted below) and has enabled EHRC Scotland to undertake two high profile inquiries into sex trafficking (EHRC, 2011f) and disability harassment (EHRC, 2011e) in Scotland.

All three UK NHRIs have recently been subjected to budgetary cuts which so threaten their abilities to comply with their functions in accordance with the Pairs Principles. When SHRC was established in 2008 its budget was £1 million which equated to approximately £0.20 per head of population per annum. Subsequently, its budget has reduced by 19 per cent⁵⁵ although it has retained its ten staff. In August 2010 it was announced that, with effect from April 2013, NIHRC's budget was to be cut by 25 per cent (from £1.7m in 2010-11). NIHRC also underwent a major restructuring losing two of its four management posts in July 2011. Further staff cuts have been made since 2011 and this pattern is expected to continue as a result of further budget cuts. The budget of the EHRC will have fallen from £70million in 2007 to £26.8million by the end of 2015 representing a 62 per cent cut. This has and will continue to result in a significant change in both its staffing levels (72 per cent reduction) and programme of work (including the loss of its national Helpline) during its second strategic plan (2012-2015).⁵⁶ Particular concerns have been noted in Westminster Parliamentary debates⁵⁷ about the impact that the loss of independence, lack of financial control and lack of funding could have on the EHRC's current 'A' accreditation status.⁵⁸

Despite its recently reduced budget, the Scottish Human Rights Commission has managed to achieve a great deal of progress against the four Strategic Priorities it set in its first Strategic Plan (2008-2012). A selection of SHRC's many achievements in pursuit of these strategic priorities are set out in Appendix 2.

2.3 Political context

Political debate on human rights at the Westminster Parliament has led some to suggest that *“human rights today suffer a democratic deficit”* in that context (Hunt et al., 2012). The

tension between the role of Parliament and the courts is often expressed in terms of the fundamental UK constitutional tenet of Parliamentary sovereignty. That principle is taken into account in the way in which the HRA is drafted in that courts cannot strike down laws of the Westminster Parliament which are found to be incompatible with Convention rights. Rather they may issue a “*declaration of incompatibility*”.⁵⁹ It is then for the Westminster Parliament to consider how to respond. The debates around prisoner voting demonstrate continued tension in the way the relationship between the UK Parliament and courts operates in respect to human rights.⁶⁰

In Scotland, human rights are embedded in the present constitutional settlement. As such the balance of powers between legislative, executive and judiciary in Scotland is closer to increasing international experience where Parliaments are constrained to act in ways which are compatible with human rights rather than the doctrine of Parliamentary sovereignty.⁶¹ This provides a formal basis from which to develop a more positive and proactive political engagement on human rights.

The current mechanisms to consider human rights in the work of the Scottish Parliament include statements of compatibility and a mainstreaming approach to human rights across its committees. The former may be contested as lacking transparency and public scrutiny, the latter as missing the potential for the Parliament to develop a specialist Committee and clear space to discuss human rights issues.⁶² In the case of Government Bills a member of the Scottish Government and the Presiding Officer must both issue statements to the effect that the Bill is considered compatible with the Scotland Act (including that it is compatible with the ECHR).⁶³ SHRC alongside a wide range of other bodies and organisations routinely raises human rights concerns during the passage of Bills.⁶⁴ Furthermore Acts of the Scottish Parliament are open to challenge on human rights grounds as was the case with the very first Act – the Mental Health (Public Safety and Appeals) Scotland Act 1999.⁶⁵

SHRC has made a series of recommendations on how the Scottish Parliament could ensure more systematic, proactive and transparent engagement. These included refraining from the use of emergency procedures to enact human rights laws; considering the creation of a Committee on human rights⁶⁶ and amendments to legislative scrutiny (SHRC, 2011i).

The provision of detailed memoranda on human rights considerations in a proposed Bill (rather than simply a statement of compatibility) would also enable Parliament to fully consider its human rights dimensions. As the UK Joint Committee on Human Rights has stated,

“the case-law of the European Court of Human Rights clearly shows [that] laws which are passed following detailed and informed parliamentary scrutiny of their human rights compatibility are more likely to withstand subsequent judicial scrutiny.”⁶⁷

Scotland’s current political parties all express enthusiasm for human rights⁶⁸ and research demonstrates a range of rights based legal and policy measures adopted since the Scottish Parliament was established. Nevertheless political action to respect, protect and fulfil human rights remains at times reactive rather than proactive as demonstrated by successive Scottish Governments’ responses to a series of high profile cases. The approach to the *Cadder* case is one in a series which, as SHRC’s Chair has said, does not show Scotland at its best (Miller, 2011b). In that case and in others the Scottish

Government inappropriately and unnecessarily used the Parliament's emergency powers to respond to court decisions in human rights cases, even where the need for change had long been recognised.

A reactive approach to human rights: waiting for an 'emergency'

A gap in Scottish practice on access to a lawyer during questioning in police detention had been identified by international human rights bodies at least as early as 1994. Following its visit to Scotland in that year the Council of Europe Committee for the Prevention of Torture recommended:

"that all persons taken into police custody [in Scotland] be entitled to have access to a lawyer from the very outset of their custody."

European Committee for the Prevention of Torture, 1994.
(Council of Europe, 1996)

However it was not until 16 years later, following a decision of the UK Supreme Court in 2010⁶⁹ that the Scottish Government introduced legislation to secure access to a lawyer during police questioning in detention. It used the Scottish Parliament's emergency procedure to do so.

At the time SHRC expressed the view that:

"This is no time for emergency legislation as there is no emergency. The floodgates have not been opened – this decision clearly does not apply to concluded cases. Rather, now it's time to get it right, and we have the time to get it right" (SHRC, 2010e).

SHRC also raised concerns with a range of its provisions in the emergency legislation which it considered went well beyond the requirements of the Supreme Court's decision cautioning that rushing through such changes risked further court challenge (SHRC, 2010e).

The Scottish Government subsequently established a review of criminal procedure led by Lord Carloway. Commissioner Shelagh McCall was a member of the Reference Group to the Carloway review and SHRC welcomed several of the themes of the recommendations in Lord Carloway's report (Carloway, 2011). However, SHRC felt that the recommendation to abolish corroboration for all crimes would be a radical change in Scots Law and therefore it is important to take time properly to consider the implications for those accused of crime, victims/survivors⁷⁰ and witnesses, the police, and the courts.⁷¹

The Cadder case is not alone. Most infamously, a political decision not to invest £13m in upgrading sanitation in Scottish prisons is reported to have cost the taxpayer "*tens of millions of pounds*" in remedies for the resultant human rights abuses.⁷²

The place of human rights in Scotland's constitutional settlement was an element in discussions surrounding the passage of the Scotland Act 2012, which seeks to implement recommendations of the Calman Commission. Again following an individual decision of the courts, the Scottish Government appointed a review group to consider the structure of appeals to the UK Supreme Court, particularly in relation to criminal cases. SHRC

reiterated the importance of a domestic superior court which considers human rights implications of both civil and criminal cases⁷³ and this was ultimately accepted by the Scottish Government. How this works in practice will require monitoring.

Scotland's internal political settlement is currently established in a series of Single Outcome Agreements between the 32 local authorities and the Scottish Government. Such agreements have been politically contested and in principle require close consideration from a human rights perspective. On the one hand they offer the potential for greater participation in decision making at the local level. On the other it has been argued that they create a challenge for national accountability and ensuring delivery of better outcomes across the country. Given that they currently represent a significant devolution of decision making over local services in areas such as education and housing, these agreements too should be clearly linked to human rights realisation. Some organisations, such as the Scottish Association for Mental Health, have called for their greater linkage to human rights in the context of United Nations human rights reviews (Scottish Executive, 2003b). While some local authorities have undertaken equality and human rights impact assessments of their Single Outcome Agreements, most have found no relevant human rights impacts, suggesting a need to improve the process.

2.4 Economic context

The global economic crisis has presented a significant challenge to human rights protection in the UK. Yet human rights should assist in responses to the economic crisis too, offering an objective framework for fair decision-making on the prioritisation of resources.

Since the 2010 General Election the UK Government has prioritised the reduction of the public debt, pursuing a programme of austerity and cuts in public spending. This has had consequential impacts on the availability of resources for the realisation of human rights in Scotland. The reduction in UK public spending has coincided with a significant decrease in the Scottish Government's budget.⁷⁴

Policy responses from the UK and Scottish Governments have varied significantly. The UK Government has responded with drastic public spending cuts, a reduction in state provision, localism and 'Big Society' (Farnsworth, 2011). Radical policy shifts such as those in welfare reform and in health service delivery have been highly controversial with many organisations raising concerns at the impact on human rights and equality. Particular concern has been raised in relation to the impact on disabled people.⁷⁵ Concluding its inquiry on welfare reform, for example, the UK Joint Committee on Human Rights criticised the UK Government for a lack of information on how it had assessed the human rights and equality impact of the new Welfare Reform Act 2012 (Joint Committee on Human Rights, 2011). The Committee further raised concerns that the Welfare Reform Bill (as it was) may risk breaching human rights in leading to destitution (engaging the prohibition of degrading treatment), discrimination and retrogression in the realisation of economic, social and cultural rights (Joint Committee on Human Rights, 2011).

In recognition of the need to adjust the delivery of public services to the new economic environment, the Scottish Government established an independent Commission to Consider the Future of Public Services (the Christie Commission). The Christie Commission concluded that there was a need for urgent and sustained reform to public

services based on a series of principles (Christie Commission, 2011b). The Christie Commission findings have been endorsed by the Scottish Government.⁷⁶

SHRC has promoted a human rights based approach to public service reform. As the table below demonstrates there is significant potential for synergies between the Christie Commission recommendations and the UN endorsed PANEL principles of a human rights based approach. Adopting a more explicit linkage to human rights would ensure the empowering potential of human rights for the population – to act as rights holders not service users in prioritising and shaping interventions. It would also add an objective and enforceable legal basis to ensure positive outcomes in terms of human rights. All public service providers should already ensure that no decision is made if it risked a negative outcome in terms of absolute rights such as the right to life and the right to be free from degrading treatment. They should also ensure the proportionality of impact on qualified rights such as the right to private and family life. Extending this provision to internationally recognised economic, social and cultural rights would introduce an objective legal framework within which to ensure fair and just allocation of resources. Those rights require, for example, that the maximum of available resources is prioritised towards the immediate realisation of at least minimum essential levels of rights to housing and healthcare etc. for everyone, prioritisation of those in the most marginal situations, and ensuring non-discrimination.

Table 2: Public Service Reform and Human Rights principles aligned

Christie Commission principles	Human rights based approach PANEL principles
Increased participation	Participation: everyone has a right to take part in decisions which affect their rights
Accountability; integration of services	Accountability: indicators, monitoring, access to justice state responsibility and the need for joined up approach to realisation
Reduction of inequalities; prioritisation of vulnerable and disadvantaged people	Non-discrimination and the pursuit of equality and the prioritisation of the most marginalised
	Empowerment of people to know and claim their rights
Outcome focus; transparency; preventative spending	Legality: duties to respect, protect and fulfil all human rights (including prevention, protection and remedy duties)

The elements of PANEL described above raise cross-cutting concerns that emerged from all thematic issues presented in Chapter 3. For the purposes of this scoping project, the value of the PANEL approach is explored in particular in Sections 1 and 2 (in Chapter 3) on Health and Dignity & Care, highlighting the sustainable impact that taking a human rights based approach could have across the full range of thematic areas.

Domestic and international human rights bodies have called on UK and devolved administrations to consider more effective processes for assessing the impact of legal, policy and practice steps on equality and human rights (Scottish Government, 2011k). A good practice model for undertaking such impact assessments is currently being developed by SHRC with the Equality and Human Rights Commission and in collaboration with many other public bodies. Some international human rights bodies have also called for the development and use of human rights budget analysis, similar to equality budgeting which is already a feature of practice in Scotland. The Council of Europe Commissioner for Human Rights for example considers that:

“budget review from a human rights perspective is a tool for making elected representatives and officials better informed of the consequences of their decisions”(SHRC, 2011g).

2.5 Social context⁷⁷

2.5.1 Demographic change

Scotland’s population is changing and this change has notable implications for the promotion and protection of everyone’s human rights. At just over 5.2 million, the population is now at its highest since 1977.⁷⁸ Within this overall rise, the demographic structure variance between urban and rural authorities is marked and the overall population is ageing.⁷⁹ This rise in population⁸⁰ (particularly⁸¹ linked to a projected rise in the number of ‘very old’ people) is predicted to reach 5.54 million by 2033.⁸² This also includes a projected rise of 75 per cent of people living with dementia by 2031 (based on a 2007 baseline).⁸³

These changes will have a clear impact on access to public services, with particular requirements to increase the availability and accessibility of services for older people. Many have highlighted that, without significant changes to public policy, existing service models - in health and social care in particular – will be overburdened.⁸⁴ Scotland is developing significant policy responses such as the integration of health and social care.⁸⁵

There are clear opportunities and benefits to be drawn from including a human rights based approach in major policy responses to demographic change. This has been recognised through rights based initiatives such as the National Dementia Strategy, SHRC’s *Care About Rights* capacity building and the Scottish Parliament Health and Sport Committee Inquiry into Health and Social Care. A similar approach has yet to be adopted in other policy areas. Concerns have for example been raised that existing housing stock is inadequate to respond to the needs of an ageing population.⁸⁶

2.5.2 Poverty and Inequality

Barriers to realising human rights drive and deepen poverty and in turn social exclusion in Scotland as elsewhere.⁸⁷ In 2009 the UN Committee on Economic, Social and Cultural

Rights called on the UK to adopt human rights based anti-poverty strategies to address the persistence of considerable levels of poverty and social exclusion as a matter of 'high priority'. It called for particular focus on poverty among certain sections of population, such as ethnic minorities, older and disabled people (UN CESCR, 2009). The UK's failure thus far to tackle child poverty was also recently highlighted as part of the 2012 Universal Periodic Review of the UK's human rights obligations, where a recommendation on reducing child poverty was called for by Norway to:

"Set a clear pathway to meet the goal of ending child poverty in the UK by 2020 as stated in the Coalition's programme for government" (UN Human Rights Council, 2012).

Some anti-poverty initiatives have adopted elements of a human rights based approach. The Poverty Truth Commission in Scotland for example highlighted key human rights messages such as the importance of ensuring people living in poverty are provided the opportunities and supported to participate in shaping responses.⁸⁸ The UK Child Poverty Act 2010 introduces elements from the Convention on the Rights of the Child.⁸⁹ The Act formalised reduction and eradication targets⁹⁰ and required child poverty strategies to be developed by both the UK and the Scottish Government in relation to matters within their respective competence.⁹¹

In practice, action to address poverty has made progress in respect of certain population groups such as adults of pensionable age⁹² and children but not for others such as workless households (McKendrick et al., 2011b).⁹³ Current policies focus on working your way out of poverty, however, entry into work accounts for less than half of UK exists from poverty. The European Committee on Social Rights has repeatedly raised concern over the difference in minimum wage between older and younger people, as well as finding that the level at which the UK minimum wage as a whole is set, is manifestly unfair (Council of Europe, 2008, Council of Europe, 2010a, Council of Europe, 2010b, Council of Europe, 2012). Critics argue that as long as low wages persist and a lack of progression from low paid unskilled jobs remains, the central aim of 'making work pay' will not achieve the desired reduction in poverty and inequality in Scottish society (Scott, 2006, Bradshaw, 2011a, McKendrick et al., 2011b, Poverty Alliance, 2011, Poverty Alliance, 2010).⁹⁴ Poverty is also not distributed evenly across Scotland and whilst there are higher numbers (and proportions) of people in poverty in urban areas, poverty and income deprivation are both prevalent in rural Scotland (McKendrick, 2011a).⁹⁵

Concern has also been raised by Inclusion Scotland with regard to the impact that cuts in disability premiums and the proposed cuts on benefits will have on families with a disabled child. Inclusion Scotland have estimated that families with a disabled child will lose £3,000 each by 2015. Together (2012) further note the results of a recent survey by Contact a Family⁹⁶ of parents of children with disabilities which revealed that in households with paid work one in seven is missing meals and one in six cannot afford to heat their homes. These rates increased to almost a quarter going without food and a third without heating in homes where family members could not work due to their caring responsibilities (Together, 2012).

Since devolution, considerable progress has been made in addressing many inequalities in Scottish society, for example in relation to the proportions of people in poverty, rates of those out of work and improved education outcomes (Palmer, 2010). Yet significant problems do still remain.⁹⁷ These inequalities act as barriers to the full realisation of

human rights (Mooney, 2011) and one of the most noted persistent inequalities challenging Scotland is its health record (Palmer, 2010).⁹⁸

As with broader public service reform Scotland has sought to take a long-term view, moving away from crisis management towards prevention, which may also generate significant financial savings at later stages (Scottish Government and COSLA, 2011).⁹⁹ Along with other broad Scottish social policy approaches such as those directed towards self-direction, de-institutionalisation, independent living, personalisation and integration SHRC has identified many opportunities for enhanced linkages between social care and public health policy and human rights (Joint Committee on Human Rights 2012, Chetty et al., 2012, SHRC, 2011b, SHRC, 2012c).

2.5.1 Social attitudes

Scotland is often portrayed as a nation of people who value the concept of fairness (Dobbie et al., 2010). This has strongly informed the nation's self-perception. While there is some evidence that Scotland has become more open and accepting (EHRC, 2010b, Ormston and Webster, 2008, Ormston et al., 2011, Ormston and Curtice, 2011), there remains a distinct gap between perception and reality.¹⁰⁰

Whilst some progress has been made in recent years in relation to the promotion of equality across a wide range of sectors of Scottish society, discriminatory attitudes have not reduced consistently (Ormston et al., 2011). While attitudes towards gay men and lesbians have improved,¹⁰¹ there remain high levels of discriminatory attitudes towards, among others, transgender people and Gypsy/Travellers (Ormston et al., 2011).

However, around two thirds of Scots recently expressed the view that everything possible should be done to rid Scotland of prejudice of every kind (Ormston et al., 2011) leading to the suggestion that this belief and self-perception of inherent fairness can be a basis to shape further concrete action to advance these aims (Reicher, 2010).

Disabled people appear to face a disproportionately high level of prejudice. EHRC recently exposed how widespread disability harassment remains in Scotland, criticising a lack of action by public authorities (EHRC, 2011e). Many have argued that public discourse around welfare reform has significantly contributed to negative attitudes towards disabled people in particular (Scope, 2011), with the use of pejorative language and representations of disabled people widely criticised by civil society and human rights bodies alike (Poverty Alliance, 2011, Scope, 2011, Walker, 2012, Joint Committee on Human Rights 2012).

A range of voices have also increasingly challenged media and political misrepresentation of human rights and of marginalised groups. Beyond those already given examples include representations of Gypsy/Traveller communities; representation of people with mental health problems; refugees and asylum seekers; and people in receipt of social security and other forms of social protection (Joint Committee on Human Rights, 2012, Scotland's Futures Forum, 2009, Poverty Alliance, 2011, Amnesty International Scotland, 2012a).¹⁰²

Public attitudes on the value of human rights in the period under review in this scoping project appear to depend significantly on the types of questions asked. Polling with questions which appear politically motivated (e.g. do you agree that the Human Rights Act has become a 'criminals' charter'?) has produced predictably slanted results.¹⁰³ Conversely, an opinion poll of 14,000 people on which human rights they believe in

demonstrated that a majority believe in a broad range of civil and political as well as economic, social and cultural rights (Vizard, 2010). All rights were classed as having between 70 per cent+ and 95 per cent+ support. The research concluded that:

“the (UK) Government’s perception of what the public thinks about rights has often been impressionistic and media driven, rather than based on in-depth social scientific analysis” (Vizard, 2010).

2.6 Environmental context

Scotland has world leading legislation on climate change mitigation targets¹⁰⁴ and an adaptation strategy, both welcomed internationally.¹⁰⁵ SHRC has supported efforts to increase understanding of the connections between human rights and climate change,¹⁰⁶ co-hosting a conference on a human rights based approach to climate change.¹⁰⁷ SHRC has recommended that the Scottish Government adopt such an approach (SHRC, 2011j). Recently the Scottish Government committed to promote Climate Justice and a human rights based approach to climate change, including through the launch of a Climate Justice Fund based on recognition of the unfairness that those who had contributed least to the causes of climate change were suffering its most extreme consequences (Scotland on Sunday, 2012).

Despite these positive steps concerns related to human rights and the environment persist. In 2010 the UK was criticised for failing to ensure access to justice in environmental matters due to the prohibitive costs associated with challenging environmental planning decisions.¹⁰⁸ This is an issue on which the European Commission is pursuing the UK before the European Court of Justice (Europa, 2011), and which has been the subject of a public petition to the Scottish Parliament (SHRC, 2011d). SHRC has contributed to these debates encouraging the Scottish Government to take a holistic approach to ensuring rights to information, participation and access to justice in environmental matters.¹⁰⁹

2.7 Technological context

Human rights defenders around the world have enthusiastically embraced technological advances to enhance their research, advocacy and campaigning goals. Here in Scotland, for example, SHRC in partnership with others has piloted the use of interactive internet seminars to advance the participation of disabled people in rural and remote areas in its work to promote, protect and monitor the implementation of the Disability Convention. This process was welcomed by participants, it was viewed as an effective way of consulting with those who face the intersectional problem of being disabled and living in rural Scotland (EHRC and SHRC, 2011).

Access to the internet is increasingly required to exercise the right to access information, and consequently for the right to participate in decisions. Rates of connectivity in Scotland, however, remain low in comparison to England (Myant, 2012).¹¹⁰ Furthermore, while access to the internet does not vary significantly between rural and urban areas in Scotland, differential rates do exist for older people, those on lower incomes, those with fewer educational qualifications, the unemployed, disabled people or those with long-term illnesses (Myant, 2012).

Technological progress also offers significant challenges to human rights. In Scotland these have often related to the right to private life and how that is protected in public and

private space, as well as security of information (Scobie, 2012, McKinstry et al., 2009, Raab and Goold, 2011, Scottish Government, 2010h, EHRC, 2011b, Scottish Government, 2011e, Miller, 2011a, Miller, 2011c). Concerns related to the proportionality of interference with private life also arise in relation to the use of Closed Circuit Television (CCTV) (Bannister et al., 2009, Scottish Government, 2009a, SCSWIS et al., 2011, SHRC, 2011e) (SCSWIS et al., 2011, Crawley et al., 2011, Bannister et al., 2009, Healthcare Improvement Scotland, 2011)¹¹¹ monitoring of email, telephone and other communications (Fraser, 2008).¹¹²

Similarly the use of new technologies in combating crime has to be considered through the lens of human rights. Recent controversies relate to the retention of DNA and other forensic data (Fraser, 2008, Equal Opportunities Committee, 2012),¹¹³ and the use of electro-shock weapons.¹¹⁴

3: Human Rights Thematic Topics

This section presents an in-depth analysis of the eight core themes (and associated sub-themes) drawn from the rights analysis of phase one of this scoping project.¹¹⁵ These overarching themes formed the basis for discussion within the second phase of the scoping project involving focus groups and in depth interviews with a range of individuals and groups sampled from SHRC's stakeholder directory. What is presented below under each thematic heading are syntheses of the existing research evidence collected in phase one and the analysis of the focus group and interview data from phase two.

The focus of this scoping project has primarily been on issues of human rights concern that are within the competence of the Scottish Parliament. Across all thematic areas, there are some, often complex issues, which raise issues of concern that are devolved, whilst others are reserved to Westminster,¹¹⁶ including equality legislation. The Equality Act 2010, however, does place a duty on the Scottish Government to abide by the public sector equality duty,¹¹⁷ which could bring about a more substantive role for Scottish equality duties in the future.¹¹⁸

3.1 Dignity and Care

3.1.1 Introduction to Dignity and Care

This thematic section explores the theme of 'Dignity and Care' in Scotland, which is one of the eight themes which emerged from the research review. The theme is broad, to enable coverage of a range of issues which were identified following a prioritisation process,¹¹⁹ including the quality of care, independent living, self-determination and carers' rights. Some related topics have been considered in other thematic sections, including abuse prevention, protection and remedy (under "Safety and Security"), mental health care and treatment (under health) and mental health detention (under living in detention).

In relation to the safeguarding of those in receipt of care services in Scotland, the Care Inspectorate¹²⁰ carries out both unannounced and announced inquiries to monitor compliance with the National Care Standards [NCS] and investigates complaints. The general principles of the Care Inspectorate are: the protection and enhancement of the safety and wellbeing of all persons who use, or are eligible to use any social service; the promotion of the independence of those persons; promotion of diversity in the provision of social services; and affording choice and good practice in the provision of social services is to be identified, promulgated and promoted.¹²¹ NCS cover services for adults; children and young people; everybody; and independent healthcare standards¹²² and were created in an attempt to ensure that every individual in Scotland, irrespective of where they lived, would receive the same (high) quality of care, with six central principles of:

- Dignity;
- Privacy;
- Choice;
- Safety;
- Realising Potential;
- Equality and Diversity.

Each standard explains what can be expected for any given care service, written from the perspective of the care user.

In its recent response to the Inquiry Report of the Health and Sport Committee into the Regulation of Care for Older People (Health & Sport Committee, 2011) and the Scottish Government's own response to that report (Scottish Government, 2012k), SHRC welcomed the Committee's recommendation that a review of the NCS should embed equality and human rights for service users (SHRC, 2012c). However, SHRC also notes that whilst the NCS are underpinned by the human rights principles of: dignity; privacy; choice; safety; realising potential; and equality & diversity, a shared understanding of what this means in practice cannot be assumed and must be fostered through collaborative engagement in the issues (SHRC, 2012c).

SHRC believes that in order to apply the NCS in practice, in a way which squares the rights of the individual and is person centred, requires a thorough understanding of the human rights framework. SHRC will therefore continue to encourage the Care Inspectorate and others in the sector to develop their understanding of human rights standards as they apply in care settings (SHRC, 2012c).

In an effort to improve the way in which the NHS and Local Authorities work together and in partnership with the third and independent sectors, in May 2012, the Scottish Government launched a consultation on a set of proposals to change the way in which adult health and social care services are currently planned and delivered.¹²³ The aim of these proposals is to work towards providing a *"seamless experience from the perspective of the patient, service user or carer"*(Scottish Government, 2012c). In response to this consultation SHRC has raised a number of key points. First, SHRC has asked that the Scottish Government to build human rights into the nationally agreed outcomes and outcome indicators or measurements that are to be established. Moreover, while the draft health and social care integration outcomes outlined in the consultation proposals both align and reference human rights, SHRC note that the full range of rights protection is not explicitly included in the seven outcomes and that there are significant gaps which should be addressed. SHRC also highlight that a human rights foundation ought to be explicit to the professional and workforce development that will be required to lead to the necessary cultural change to put the proposals into practice. In other words, in relation to joint strategic commissioning a shift to an outcome-based approach is required (SHRC, 2012d).

SHRC also raised three further points for the Scottish Government to consider regarding the integration of health and social care. First, there is a need for appropriate protection and regulatory measures, including of the home care sector and of those providing services directly to the service user. Second, the physical and psychological wellbeing of carers must also be considered where there is an increased reliance on their services without appropriate support and respite (see the final section of this theme for more discussion on carers). Finally, the proposals anticipate that:

"A more integrated approach to sharing information across services and local systems within appropriate boundaries... will be required to enable and evidence improvement"
(SHRC, 2012d).

Therefore, the Scottish Government must take on board the fact that privacy concerns which engage Article 8 of the ECHR may also be raised here and should be given further consideration (SHRC, 2012d).

3.1.2 Quality of care

The 2010 Scottish care homes census revealed that a total of 1,375 care homes provided care to 36,359 long stay residents as of 31 March 2010, 44 per cent of whom had diagnosed dementia.¹²⁴ As of 31 July 2011 there were 16,171 children in Scotland who were looked after, the highest number since 1981. The proportion of those children in residential care has, however, declined over the last four decades with corresponding increases in particular amongst foster carers, prospective adopters and other community placements (Scottish Government, 2012a).

In Scotland, the policy of free personal and nursing care is supported through *Better Health, Better Care: Action Plan* (Scottish Government, 2007a). In particular, there is support for community care, where individuals are supported and cared for at home, if possible, in order to maintain their independence. There are also particular aims to support carers, including the provision of respite, and also to improve care home quality. A significant shift in the balance of care towards increased provision of care at home had occurred before the introduction of free personal care, and has continuing since.

Research has highlighted widespread misunderstandings of free personal care in Scotland concluding in 2007 that there was a gap in information and data available as to costs (Bowes and Bell, 2007) and in 2010 that there remains limited understanding of the policy amongst clients, carers and the media, where there is a common misconception that all social care for older people in Scotland is free (Bell, 2010). The research also highlighted the difficulties local authorities face in calculating the costs of free personal care and that there was unanticipated demand for free personal care. It has also been suggested that the provision of free personal care to over 65s only, may be open to challenge on age discrimination grounds (Bell, 2010).

A recent survey commissioned by the Scottish Government¹²⁵ found that a larger percentage of people felt that the care needs of older people are not currently being met (48 per cent compared to 36 per cent who felt those needs were being met). Nevertheless over three quarters (77 per cent) felt that care should continue to be provided in a similar way as at present with a majority (63 per cent) supporting the current system for funding care (Ipsos MORI, 2011). Moreover, in the future, the majority (68 per cent) believed that care should be paid for, as at present, from a mixture of general taxation and personal contribution. Even among those who oppose the current system for funding care, 45 per cent believed that care should be funded as it is at present, suggesting that, while they do not support the current system, they do not favour the possible two alternatives. Almost half (47 per cent) of people who oppose the current system believed that care for all older people should be paid for from general taxation.

The provision of free personal care policy has been challenged by some due to the increasing costs which have risen from £133m in 2003-4 to £342m in 2010-11, a rise of 150 per cent (Inclusion Scotland, 2012).¹²⁶ The amount of money spent by councils on free personal and nursing care to self-funding residents in care homes has increased from £86m to £108m, an increase of 25 per cent (Peterkin, 2011) and the number receiving free personal care at home has also increased by 42 per cent over the same period, from 32,870 in 2003-04 to 46,720 in 2010-11 (Inclusion Scotland, 2012)

A great deal of attention was paid in the research reviewed to the quality of care services, including those for children and young people, older people, and people with disabilities. Human rights based interventions too have been delivered in recent years, including the *Care about Rights?*¹²⁷ capacity building programme developed and delivered by SHRC. *Care about Rights?* is a programme of training and awareness raising which, at the time of writing, has reached over one thousand social care workers and managers across Scotland. It was designed to highlight the practical applications of human rights in the care sector for older people. It aims to demystify human rights to make it easier for care managers and staff to make decisions about care and to design policies for care that are well informed and grounded in the duties to respect, protect and fulfil human rights. An independent evaluation demonstrates tangible benefits for improving person centred and rights respecting care as well as in increasing awareness of human rights and in improving person centred care.¹²⁸

As that training explains a wide range of human rights are engaged in the delivery of care services. Among these are absolute rights such as the right to life and the right to freedom from torture, inhuman or degrading treatment or punishment. Each of these includes positive obligations relevant in health policy and practice to prevent, protect and remedy. For example obligations related to the right to life (Article 2, ECHR) include: A positive obligation on the State to do *“all that could have been required of it to prevent the applicant’s life from being avoidably put at risk”*¹²⁹ and in some cases an investigation or other effective remedy to ensure that cause of death can be determined, lessons learned and where civil or criminal negligence is an issue, those responsible made accountable.¹³⁰

While this includes an element of individual accountability where appropriate its purpose is constructive accountability to learn lessons and improve standards in the future. Although the application of these principles in case law has tended to be limited to situations of detention, they may be relevant in care settings, particularly given that definitions of detention can be taken to include situations of de facto detention (such as where entry requires a door code which a resident with dementia may not remember). They have also at times been extended to hospital settings, the rationale for which would apply equally in care settings. As the ECtHR has stated:

*“More general considerations also call for a prompt examination of cases concerning death in a hospital setting. Knowledge of the facts and of possible errors committed in the course of medical care are essential to enable the institutions concerned and medical staff to remedy the potential deficiencies and prevent similar errors. The prompt examination of such cases is therefore important for the safety of users of all health services”.*¹³¹

Similar obligations exist in relation to the prohibition of torture, inhuman or degrading treatment or punishment (Article 3, ECHR). That right would be relevant to severe instances of abuse or neglect¹³² where for example an individual is left in degrading conditions. For example the UK was found in violation of this Article where an individual who was four limbs deficient was left in a situation in which she:

*“[was] dangerously cold, risks developing bed sores because her bed [was] too hard or unreachable, and [was] unable to go to the toilet or keep clean without the greatest of difficulty”.*¹³³

Qualified rights, such as the right to respect for private and family life, home and correspondence (Article 8, ECHR), are also relevant in social care policy and practice. That right has a very broad definition and includes the right to a home life, family life,

physical and mental integrity, quality of life, well-being, autonomy, legal capacity and right to participate in decision-making. As a qualified right any limitation should have a basis in law, pursue a legitimate aim or goal and be proportionate, i.e. the least restriction which is capable of achieving the legitimate aim.

As outlined in the Care about Rights? Training materials: *“Article 8 relates to the following main interests:*

- **Privacy** – this is defined broadly and relates to all aspects of privacy both in and outside of an individual’s private home
- **Family life** – this covers all close and personal ties of a family kind - not only those of a blood or formalised nature
- **Physical, psychological and moral well-being** – this covers the right to wellbeing through retaining autonomy, choice and dignity. It requires that there is access to information and participation in decisions that affect an individual’s life
- **Home** – this is not about a right to a house but rather a right to respect for the home life of an individual
- **Correspondence** – this covers all forms of communication with others such as phone calls, letters, emails etc.”¹³⁴

In relation to care of children the rights in the UN Convention on the Rights of the Child (CRC) should also be borne in mind. Among relevant rights are:

- the general principle that the best interests of the child must be a primary consideration in all actions concerning the child (Article 3, CRC);
- the right of the child, as far as possible, to know and be cared for by his or her parents (Article 7, CRC);
- the right to preserve family relations without unlawful interference (Article 8, CRC);
- the right of the child not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child (Article 9, CRC);
- the right of the child to participate in decisions, their views being given due weight according to age and maturity (Article 12, CRC);
- the right to privacy, family and correspondence (Article 16, CRC);
- the right to protection from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” (Article 19, CRC);
- the duty to ensure that the best interests of the child is the paramount consideration in a system of adoption (Article 21, CRC);
- the right to freedom from inhuman or degrading treatment or punishment (Article 37, CRC).

The UN Convention on the Rights of Persons with Disabilities (CRPD) spells out what should be done to break down the barriers which people with long term physical, mental, intellectual or sensory impairments may face in realising their human rights. As such the CRPD is relevant to people in care that, for example, have a visual or hearing impairment, or those who have dementia. Among relevant rights in the CRPD are:

- the right of disabled people to make their own decisions in all areas of life, on the same basis as other people and there are duties to provide the support people need to exercise that capacity. Decisions should only be made on behalf of people with disabilities where necessary, and with appropriate safeguards (Article 12, CRPD);

- the right to live independently and be included in the community (for example the right to choose where they live and who they live with and not to be unlawfully forced into a particular living arrangement) (Article 19, CRPD); and
- the right to be as mobile as possible (Article 20, CRPD).

Internationally, initiatives have begun which may lead to the development of a Convention on the rights of older people. SHRC's Legal Officer Kavita Chetty has been involved in these initiatives, sharing experience gained from SHRC's *Care about Rights?* training and capacity building programme and supporting understanding of the relevance of existing international human rights law, identifying any gaps for the rights of older people.¹³⁵

3.1.2.1 Procurement of Care Services

In Scotland we have many contracted out and privatised public services such as social care, housing, prison services, and utilities. All of these types of services can have an impact on the delivery of human rights protections. The State has a 'duty to protect' against human rights abuses and the State's role as an economic actor is a key, but under used, leverage point in promoting corporate human rights awareness and preventing abuse. Public procurement and the contractual relationship between the state and private entities is one clear way in which businesses can be better held to account for their human rights responsibilities. One example is the growing concern around the commissioning and procurement of social care services.

In its response to draft Guidance on Social Care Procurement produced by the Scottish Procurement Directorate Joint Improvement Team, SHRC noted three potential problems with the proposed methods of social care commissioning (SHRC, 2010f). The first was the lack of consultation and participation with service users for whom re-tendering can cause uncertainty about the future of their service with an impact for the service user and family of disruption, stress and anxiety. The second concern related to the quality of care, as re-tendering can cause the breakdown of cooperative relations and partnerships and there may be a lack of staffing continuity as re-tendering upon expiry of contacts may provide a disincentive to providers to invest and develop their workforce. Third, the quality of care may also be driven down by re-tendering as competitive tendering can lead to deterioration in service quality as a result of downward pressure on pay and conditions of staff (SHRC, 2010f).

The Scottish Government Guidance on Social Care Procurement was published in April 2010 (Scottish Government and COSLA, 2010) and SHRC was pleased that human rights are referenced throughout. SHRC believes that this Guidance has opened the door to human rights being incorporated into: the service specifications; the selection and award criteria; and contractual clauses. In this way it is a progressive piece of guidance highlighting both the relevance and the way in which human rights can be integrated and become part of the fabric of the commissioning, procurement and delivery of these services (SHRC, 2012e).

In August 2012 the Scottish Government called for all those working within procurement across Scotland to consider current proposals for procurement reform, as the government hope to increase the impact of public procurement on apprenticeships and getting unemployed people back into work (Scottish Government, 2012f). SHRC will submit a response to this consultation in due course, once again outlining the positive benefits of placing human rights at the heart of procurement.

3.1.2.2 Older people

There has been growing press attention in recent years to the issue of abuse of the elderly within care settings.¹³⁶ Between 2004 and 2009 the Care Commission (now Care Inspectorate) recorded 1,529 specific complaints of abuse and neglect against adult care homes, 57 per cent of which were upheld or partially upheld (Adams, 2009). In June 2011, Elsie Inglis Nursing Home in Abbeyhill was closed down following police investigations into the deaths of two residents (BBC News, 2011g).¹³⁷ Research in 2007 also showed that three per cent of people¹³⁸ aged 66 and over living in private households (including sheltered housing) in Scotland reported that they had experienced mistreatment involving a family member, friend, or care worker (Biggs et al., 2007, O’Keeffe et al., 2007). The predominant type of mistreatment reported was neglect, followed by financial abuse, psychological and physical abuse and finally sexual abuse (Biggs et al., 2007, O’Keeffe et al., 2007). Other research has revealed often unacceptable standards in the provision of care to older people in their own homes in the UK, most commonly in the form of neglect (EHRC, 2011a, Triggle, 2012, Triggle, 2011, Age Scotland, 2012, STV News, 2009).

Some concern was also raised by participants in this scoping project¹³⁹ about the lack of dignity often felt by those in receipt of health and social care services as well as the low status, pay and training of people who work in the care sector. As one participant noted:

Carers, whether they are employed or informal actually have the poorest paid jobs and often non-qualified. Scotland as a whole is becoming an older population and there is going to become a requirement for more care, care providers etc. and it’s ok for us to say that [here] we are going to have X population over 60, over 70, over 80 and so on, but [here] it is an expensive place to live, how are you going to attract a younger population into this city to undertake such a low paid job?

Rosie, Representative of an ethnic minority society and a volunteer interpreter

Another participant who was training to be a social worker noted that during a placement in a care home for older people he had witnessed substandard care:

I was recently on a placement in an old folk’s home here and what I saw shocked me. Where I worked the routine was get up in the morning, have a shower or whatever and then they just get put in rows in front a TV that is really far away where no one can really see it...lots of them hadn’t been out of the building in a long time. One guy I spoke to hadn’t been out of the building in 3 years, he hadn’t even been in the garden or anything like that, no one had taken him out...because it was still under staffed and you would have a whole floor to look after with maybe 12 people and you would be on your own ...it’s not really ideal because you would be a male working and half the people you would be helping would be female and you would be expected to clean and wash them and help them on the toilet and this would be really degrading for the women...you don’t have time to sit down and talk because you are rushed off your feet all the time, and then when you do try to talk to them the nurses or managers are like, what are you doing you should be cleaning up or something like that.

Eric, Trainee social worker (and care home agency worker) with experience in residential care of older people

Concern has also been raised about the lack of sensitivity to the care needs (and cultural needs) of different minority ethnic groups (MacDonald, 2004, Netto, 2001, Bowes and MacDonald, 2000), although little recent research was identified which explored the needs of minority ethnic groups in care facilities (or in receipt of care services). A participant in SHRC's national consultation (SHRC, 2009a) noted a specific example of a member of a minority ethnic group living in a care home who required medical treatment. This person did not speak English and it took ten days for an interpreter to become available to accompany them to see a doctor. A number of participants in this scoping project highlighted this lack of knowledge and suggested that future research should focus on the experience of such groups in care homes.

In 2011, the Mental Welfare Commission, the Scottish Human Rights Commission and the Care Inspectorate (then SCISWIS) were made aware of the use of closed circuit television (CCTV) in a very small number of individuals' rooms in a registered care facility. A joint statement was issued giving guidance on the use of CCTV in care homes and emphasised that this must be the exception, rather than blanket use, and that it must only be used where it can be justified as the least intrusive means of keeping a person safe (SCSWIS et al., 2011). As the guidance stated,

"The disproportionate use of CCTV is an intrusion into an individual's privacy and dignity (Article 8 of the European Convention for Human Rights). The presence of a camera, whether or not it is activated, may be deemed a threat to individual privacy. Any such interference must be proportionate, for a legitimate aim and lawful. In particular, it must only be undertaken where there is the proper legal authorisation in place, e.g. authorisation via a guardianship order with the specific power to use CCTV in respect of the individual's welfare" (SCSWIS et al., 2011)

Participants in this scoping project also raised concern about a particular proposal in one local authority to place CCTV cameras into the homes of those who are elderly or disabled and more vulnerable to accidents. The idea was to use new technology to provide an extra layer of care to those living in sheltered housing units.

In relation to care home environments, previous research has shown that care home environments are generally good and getting better but more needs to be done to make them appropriate to those with dementia (Care Commission and Mental Welfare Commission for Scotland, 2009). Areas of good practice, have been highlighted, such as evidence of creative thinking to maximise quality of life such as planned outings with a resident to lunchtime music concerts and to a cafe he used to frequent (Care Commission and Mental Welfare Commission for Scotland, 2009). Similarly, in 2010 MWC found many good practices in residential care for people with learning disabilities, including homely, pleasant bedrooms where residents could spend time with their personal belongings, music and TV and with some choice in decor and furnishings. There was also a good level of understanding about the need to encourage and support residents to stay in touch with family and friends¹⁴⁰ (Mental Welfare Commission for Scotland, 2010c). [NB. efforts to enhance independent living and reduce institutionalisation of people with learning disabilities are discussed below].

However, in their joint investigation into the treatment of people with dementia in care homes MWC and the Care Commission also found areas of concern. These included a lack of activities and stimulation in a care home setting, with 50 per cent of residents never going out of the home. This was alongside a finding that insufficient priority was given to

understanding the person as an individual, their life history, likes and dislikes. The report recommended that residents' finances should be used creatively to maximise their quality of life. (Care Commission and Mental Welfare Commission for Scotland, 2009). [NB. The issues of consent to treatment, which was also raised, is considered in the section on mental health care and treatment in the thematic section on health].

In June 2012, attention was drawn to the large turnover of carers for those receiving care at home and the impact that can have on the dignity, privacy and distress of older people. Following the death of her husband Jeanette Maitland recorded that she and her husband had received over 100 different carers in their home in the year before his death.¹⁴¹ This approach to care delivery raises questions of the proportionality of the impact on the right to respect for private and family life, under Article 8 of the ECHR.

A number of participants in this scoping project also reported that those in receipt of care services at home often found the constant change of care staff very distressing and believed that more consistency in who provided care could dramatically improve how services were received:

... it's the dignity aspect as well, dignity for older people. I was doing cleaning for an elderly brother and sister. He was about 90 and she was 87 and I felt when the lassies were coming in to shower them and stuff... different girls all the times... she'd ask me to tell them to go she wasn't feeling well... It wasn't the fact that it was a young girl so much, but it was the constant changing of carers all the time, and different days and different times, there was no set pattern, she was terrified by this point. She needed some kind of continuity of care and she wasn't getting it. It was good that they were coming to her house, but too many people, maybe if it was just 2 people and they spoke to her first rather than just going straight into showering them...

Flora, Domestic cleaning worker and a member of a women's support group

Participants in this scoping project also reported practices which may leave those in receipt of care services at risk of abuse. In one area of provision, older people who were receiving a large number of services from a range of different individuals were reported to be required to leave their doors unlocked when they couldn't afford sufficient keys to be cut. Overall, however, participants in this scoping project did feel that people should be able to remain in housing, living independently and out of institutional care (if this was their choice), and most participants felt that the provision of free social care was something that the Scottish Government should be proud that it provides. However, there was some scepticism about the Scottish Government's ability to continue to provide, for free, the level of care required for an ageing population. As one participant noted:

They say people want to live at home, well, yes and no, people want to live at home when there is a good level of care and where their dignity is intact, but that is not always happening. In the current economic climate and with an aging population how realistic is this policy?

Arnold, Area senior citizens chairman

Participants in this scoping project also spoke to positive experiences in care settings in Scotland. Some participants in this scoping project discussed the various ways in which they felt that it was the quality of the staff and the way they approached their work that made the difference:

This is the best care home in Scotland! I think we are really lucky here.....when you look at the news and see what has happened elsewhere, we really are amazingly lucky here. The staff are delightful and varied, the standards of food and cleanliness are very high... One thing is very simple, the staff here are careful and helpful. It makes a huge difference. I was speaking to someone who came here from another home and she said the staff there were rough and unforthcoming, they did their job but that was it. Our staff are really friendly and nice which I think is very important, quite apart for the standards like cleanliness and laundry and food and things as well...aye it is the staff that really make the difference.

Audrey, Resident in a privately run care home for older people

Staff at the home referred to by Audrey had reinforced how important they felt that it was to treat all residents with respect and ensure that they lived dignified lives. The manager had undergone *Care about Rights?* training which she felt had been valuable in reinforcing good working practice.¹⁴²

A number of participants in receipt of care services in rural areas talked of a service of befriending social support that had helped them to feel less socially isolated. This service would match up friends and befrienders in some cases as pen pals and in other cases via telephone calls. Most found this service a lifeline:

Fred ...rings me every Thursday and we get on like a house on fire, we have got an awful lot in common so at the minute I have asked the manager about another day for him to call me during the week. I know he is busy, but the depression in here every day, it really gets to you. The only ones you have to talk to are the carers really, that's the only way to find out what is happening in the outside world. The contact with Fred has made a lot of difference.

Eric, Recipient of a rural befriending service and a person living with multiple physical disabilities

My befriender is, I think, a big civil servant and he tells me about his hobby of model railways. He's got a caravan and he uses half of it for his modern railways and his wife gets the other half for her craft stuff. When they went on their holiday it was as if I was taken with them, they gave me photographs of every place they'd been over the 3 weeks and I got a window on the world with them.

Timothy, Recipient of a rural befriending service and a resident in a privately run care home (mental health care needs)

3.1.2.3 Children and young people

Particular issues emerged from the research review regarding 'through-care', the process by which the local authority prepares young people for life after care services for children.¹⁴³

Scotland's Commissioner for Children and Young People (SCCYP) has called for further work to be done in relation to young people leaving care after they turn sixteen. Social workers are required to assist and encourage young people to remain in care until they are eighteen, but there is evidence that this does not always happen in practice (Scotland's Commissioner for Children and Young People, 2008b). SCCYP calls for changes to the law to prevent councils placing young people in homeless hostels and bed and breakfast establishments, and ensuring that there are options open to young people if their first

steps towards independence don't work out. Recommendations include semi-independent living units to be put in place as a stepping stone (Scotland's Commissioner for Children and Young People, 2008b).

Research has revealed that compared with other young people, those leaving care are more likely to have poor educational outcomes and access to further and higher education and to experience low paid employment or unemployment (Reed in Partnership, 2011). They are also more likely to experience poor health, particularly poor mental health, misuse alcohol and drugs and have difficulties with relationships with family and friends (Elsley et al., 2007). Research has also repeatedly shown a strong relationship between living in care and teenage pregnancy. A quarter of care leavers have had a child by the age of 16, with almost half of care leavers becoming mothers within the first two years months of leaving care (SCIE, 2005).

Research has also highlighted areas for improvement for those children and young people living in care. For example McGuinness reports that incorrect understandings of health and safety regulations often curtail the enjoyment of outdoor play by children in care, which can cause undue stigmatisation (McGuinness et al., 2007). Similarly, research by SCCYP has also revealed difficulties faced by young people with mobility difficulties in accessing outings and activities as a result of inadequate and inconsistent moving and handling procedures (Paton, 2008). Young people have reported feeling embarrassed, humiliated, undignified and excluded because of moving and handling difficulties (Paton, 2008).

The Scottish Government's Action Plan to implement recommendations made by the UN Committee on the Rights of the Child, *Do the Right Thing* (Donnelly, 2009), included commitments to improving outcomes for looked after children, including challenging stigma/ reducing discrimination and improving support for care leavers. The coalition of children's rights organisations in Scotland, Together,¹⁴⁴ has also recommended that the Scottish Government should put in place a framework to enable the on-going monitoring and evaluation of policies affecting looked-after children, in order to see what impact they have in reducing the number of children coming into care, and improving the lives of looked after children (Together, 2011a, Together, 2012). Moreover, they have called on the Scottish Government to provide better support to improve contact proceedings for children separated from their family. Participants in this scoping project who lived within some of Scotland's island communities were particularly critical of the lack of contact with family when living in care, as children were often placed in care on different islands from family due to a lack of available care services.

3.1.2.4 Autism

It has been estimated that approximately one per cent of the UK population (i.e. 50,000 people in Scotland) have some form of autism spectrum disorder (ASD)¹⁴⁵ (Mullen, 2010). Of those the National Autistic Society reports that only 7,500 are known to local authorities.¹⁴⁶ The results of a survey published in 2011 by the National Autistic Society in Scotland found that:

- *A third of people have waited more than two years for a diagnosis of autism, and some people told NAS that they have been waiting more than ten years to get a diagnosis.*
- *52 [per cent] of adults with autism are financially dependent on their families*
- *Although many adults with the condition want to work, only 13 [per cent] are in full-time employment*

- *Over half of adults with autism have experienced bullying or harassment since they were 18*
- *In the UK, 27 [per cent] of children with autism have been excluded from school. Children with autism are three times more likely to have mental health problems than other children.”¹⁴⁷*

Participants in an event on the UN Disability Convention organised by the EHRC and SHRC were also critical of the lack of suitable support services provided locally and of facilities for those over 16 with ASD (EHRC and SHRC, 2011). Similarly participants in this scoping project who were parents of autistic children were generally critical of a lack of a whole range of services for their children including out of hours specialist care, support workers in school to facilitate engagement with mainstream school and dieticians.¹⁴⁸ For example, one mother spoke of her struggle to access a dietician for her autistic child:

My main issue is support for people with additional needs and their families. For example, there is one dietician in the whole of the Highlands for children that is specialised in autism and I have been waiting months and months and months, I couldn't even tell you how long and I couldn't even tell you when I am going to get to see him, it is ridiculous.

Freya, Mother of a child with autism and a member of a women's support group

Participants in this scoping project, particularly those who had or knew of children with these conditions also felt that society in general was not well educated about ASD:

Society does not know enough. People know more, a bit more now about learning difficulties and disabilities now, and we know more about physical disabilities, but with autism, ADHD, Asperger's, hidden disabilities people often question, hmm have they really got it...?

Lina, Mother of a child with Autism, Member of women's support group.

Deficiencies in the provision for care for people with ASD have also been the subject of a report by the MWC (Mental Welfare Commission for Scotland, 2009c). The report on the care and treatment of Mr Q¹⁴⁹ a 35 year old man with Asperger's Syndrome who ordinarily lived with his mother but from July 2004 until April 2008 was detained in hospital. Concerns were raised about the care received whilst in hospital and ultimately the MWC investigation found:

“little evidence that the clinical team actively considered how they could provide a therapeutic environment and a care regime suited to someone with ASD” a “lack of coherent joint planning which kept Mr Q in hospital for almost 4 years with little obvious benefit to him” (Mental Welfare Commission for Scotland, 2009c).

The report makes a range of recommendations in respect of the care of people with Asperger's in non-specialist wards (Mental Welfare Commission for Scotland, 2009c).

Civil society organisations and movements of affected people have also raised questions, including with SHRC, over the effectiveness of both hospital detention and the use of antipsychotic drugs (Autism Rights, 2009, Autism Rights, 2007, Tomsho, 2009). In further testimony to SHRC, affected people have also raised concerns regarding, among other things: difficulties in the establishing a diagnosis of ASD; general treatment of those with ASD including what they believe to be an over reliance on (inappropriate) medication; a lack of appropriate facilities close to home, particularly for those who are transitioning from children's services and for those with severe ASD conditions; the facilities and

management of some services (lack of grounds access, disproportionate use of seclusion with a lack of stimulation) and inappropriate informal detention.¹⁵⁰

Following the failure of the Autism Bill, introduced into the Scottish Parliament by Hugh O'Donnell MSP,¹⁵¹ in November 2011, the Scottish Government published the Scottish Strategy for Autism to be delivered in partnership with the Convention of Scottish Local Authorities (COSLA) (Scottish Government, 2011n). It was developed as the result of collaboration with the ASD Reference Group of users, carers, local and central government representatives, voluntary organisations, NHS staff and academics (Scottish Government, 2010k) which has been reconvened and expanded to support delivery of the strategy. The strategy is underpinned by the values of dignity, privacy, choice, safety, realising potential and equality and diversity. Each of these has human rights counterparts. The promotion and protection of human dignity is the fundamental rationale for human rights. Human rights both protect people from treatment which infringes dignity (or inhuman or degrading treatment or punishment, Article 3, ECHR); and promote the right of individuals to live with dignity, including autonomy, and protections of the requirements of a life with dignity such as the right to education and to the highest attainable standard of physical and mental health. Similarly privacy is upheld in human rights in the right to respect for private and family life (Article 8, ECHR) (Scottish Government, 2011n).

The strategy includes a range of goals, indicators and recommendations which are indirectly linked to human rights and a small number which include explicit links. Among those that have indirect links are those related to access to services; the participation of people with autism and their carers in developing local strategies, policies and plans; Amongst other elements of the strategy which reference human rights explicitly are a recognition that:

“Local authorities and health boards would benefit from having a central resource which showed how legislation, guidelines and statutory obligations fit together. This would give greater clarity and would encourage agencies to work better together to meet their statutory obligations. It would include reminding them of their obligations under the equality and human rights legislation to ensure equality of access to mainstream public services” (Scottish Government, 2011n).

3.1.3 Independent living of disabled people

The right to live independently as part of a community is guaranteed in Article 19 of the UN Disability Convention. Article 19 provides that disabled people have the right to choose how to live their lives, to be fully included and to participate in society. It focuses in particular on the choice of where and with whom to live and being able to live in a community in a manner that supports and fosters inclusion and participation. That in turn requires that there should be access to support services and that general services should be equally available and accessible for disabled people. As the Council of Europe Commissioner for Human Rights, in his recommendation on the right to independent living summarised:

“The overarching objective of Article 19 of CRPD is full inclusion and participation in society. Its three key elements are: choice; individualised supports that promote inclusion and prevent isolation; and making services for the general public accessible to people with disabilities” (Council of Europe Commissioner for Human Rights, 2012).

A study supported by the European Commission (European Foundation Centre, 2010) has specified that the obligations under Article 19 should include, among other things, taking effective measures to make a variety of living arrangements available to disabled people. Under the Convention those should include a range of options for residential, shared sheltered accommodation, and for providing the same choices as are available to others (UN CRPD, 2009). Amongst other things Article 19 has been said to establish a strong presumption against long-term institutional care, or in favour of de-institutionalisation (European Foundation Centre, 2010). As the Council of Europe Commissioner has further expressed:

“This right is violated when people with disabilities who need some form of support in their everyday lives are required to relinquish living in the community in order to receive that support; when support is provided in a way that takes away people’s control from their own lives; when support is altogether withheld, thus confining a person to the margins of the family or society; or when the burden is placed on people with disabilities to fit into public services and structures rather than these services and structures being designed to accommodate the diversity of the human condition” (UN CRPD, 2009).

The Council of Europe Commissioner for Human Rights makes 15 recommendations as to how States should act to comply with Article 19, including:

“...adopt a no-admissions policy to prevent new placements of persons with disabilities in institutional settings...set deinstitutionalisation as a goal and develop a transition plan for phasing out institutional options and replacing them with community-based services, with measurable targets, clear timetables and strategies to monitor progress” (UN CRPD, 2009).

Other obligations include identifying and addressing barriers that disabled people face in realising the right to independent living, undertaking housing audits, involving disabled people in all efforts to advance independent living and assessing the availability of the support services, access to in-home support and safeguards against isolation (Joint Committee for Human Rights, 2011).

The right to independent living does not exist as a specific right in UK law, and whilst it is protected and promoted by a range of rights, the UK Parliament’s Joint Committee on Human Rights has stated that this is not sufficient. The Joint Committee criticised the UK Government first, for viewing the UN Convention on the Rights of Persons with Disabilities as ‘soft’ rather than ‘hard’ law (and for conveying that opinion to the general public) and second, for failing thus far to fulfil their obligations under the UNCRPD (Joint Committee on Human Rights, 2012).

In Scotland, the Scottish Government, the Convention of Scottish Local Authorities (COSLA) and the Independent Living in Scotland (ILiS) Steering Group signed a Shared Vision for Independent Living in Scotland in 2009 (Reid Howie Associates, 2007c).¹⁵² In 2010 NHS Scotland became the fourth signatory. That Vision defines independent living is linked to choice, control, freedom and dignity, that it covers every aspect of an individual’s life – at work, at home and in the community, and established a model of ‘co-production’ with each signatory an equal partner in an Independent Living Core Reference Group (CRG). The CRG operates across government and is co-chaired by the Scottish Government Director for Strategy and Performance and the Convener of the ILiS Steering Group. There remains no overarching strategy on independent living in Scotland, although there have been repeated calls for one.¹⁵³

The Independent Living Fund supports people to live independently in Scotland by supplementing funding from the local authority for people with high support needs. The funding is flexible and portable and could include support in the home, in the community, at college or university, to gain the skills needed to participate in work, or merely to carry out the role of a parent. The Independent Living Fund¹⁵⁴ income to Scotland was £59.6 million (Independent Living in Scotland, 2010). The fund was unique in terms of its flexibility, portability and efficiency, with 97p for every pound (£) going direct to the service user. In January 2010 it was announced that the Independent Living Fund would be closed to new applications and in December 2010 it was announced that it would be phased out completely by 2015 (BBC News, 2010). ILiS expressed concern about the impact of this decision, which was reportedly made without consultation or an equality impact assessment. It also noted concern that these decisions are an obstacle to the Government's expressed commitment to approaching community care with the aims of achieving inclusivity, dignity, equality, fairness, empowerment, enablement, choice, control and freedom (Independent Living in Scotland, 2010).

Participants involved in EHRC/SHRC events to promote the UN Disability Convention have consistently identified independent living as an “*overarching priority*”.¹⁵⁵ In doing so participants have referenced the broad understanding of independent living promoted by the Independent Living in Scotland project:¹⁵⁶

“[It involves] disabled people of all ages having the same freedom, choice, dignity and control as other citizens at home, at work, and in the community. It does not mean living by yourself or fending for yourself. It means rights to practical assistance and support to participate in society and live an ordinary life” (Independent Living in Scotland, 2010).

3.1.3.1 De-institutionalisation

In 2000 the Scottish Executive published a report entitled *The same as you?* (Scottish Executive, 2000) which included 29 recommendations aimed at improving services so that:

“people with learning disabilities had the right to be included in, and contribute to, society, to have a voice, and to have access, with their families, to support to live the life of their choosing” (Scottish Executive, 2000).

Key among its recommendations was a move away from long-term institutional care for people with learning disabilities. By 2007, of 120,000 adults with learning disabilities 388¹⁵⁷ remained within in-patient services (Perera et al., 2009). In a 2008 report, the Mental Welfare Commission for Scotland considered that:

“there is a large group of people who could move out of hospital if appropriate support was available. There is a clear need for health boards and local authorities to agree local strategies to develop the services necessary to enable people to move on from hospital” (Mental Welfare Commission for Scotland, 2008b).

Nevertheless the evaluation of *The same as you?* in 2012 found:

*“Since 2000, more than 1,000 people have moved out of hospital into homes in the community. The closure of all the long-stay learning disability hospitals is a key achievement from *The same as you?* The overwhelming majority of adults with learning disabilities now live in the community. More people have experience of supported living, although some people are still in inappropriate placements and there is a wide variation in packages of support” (Scottish Government, 2012i).*

The evaluation also, however, pointed to a need for:

“a much greater emphasis on support that builds people’s capacity to lead independent, healthy lives” (Scottish Government, 2012i).

Similarly, evidence gathered indicates that there is not currently enough short break provision for people with learning disabilities and their carers (Trew, 2010).

In addition it has been estimated that around 869 people with learning disabilities, many of whom are under 55, were resident in care homes for older people in 2009 (Learning Disability Alliance Scotland, 2010). Many of these residents were found to be around twenty years younger than the other residents. The report raised concerns that staff in these homes lacked specialised training in supporting people with learning disabilities. Often the activities on offer in a care home environment were found to be infrequent and not appropriate for people with learning disabilities. In a specialised care home for people with learning disabilities, the average number of residents is nine, as opposed to forty in a residential care home for older people. The report calls on local authorities to ensure that every person with learning disability living in a residential care home has a person centred plan to support them to lead a full life and for a review of the practice of such placements (Learning Disability Alliance Scotland, 2010).

3.1.3.2 Self-Directed Support

The goals of maximising independence in the community are acknowledged in the principles which underpin key legislation in Scotland. In December 2010 the Scottish Government published a draft Bill on self-directed support. The Social Care (Self Directed Support) (Scotland) Bill aims to empower people to take as much control as they want in the process of obtaining good quality care and support and is premised on principles of increased choice, control, independence and dignity. The goal is to move away from ‘gift and service based models’ towards person centred support and better outcomes for people. Direct Payments, which have until now been optional for some service users, will become the norm in future. The Bill’s proposals include:

- introducing the term self-directed support into statute and providing for general principles on user choice and control,
- placing a duty on local authorities to provide people with a range of options so that the citizen can decide how much choice and control they want e.g. the individual receives the payment and chooses what type of service they wish, but employment and other issues continue to be dealt with by the local authority,
- powers for local authorities to provide support to carers along with a duty on the local authority to empower the carer to direct their support,
- encouraging and underpinning self-directed support in relation to packages involving joint social and health care funding,
- consolidating and modernising current statute on direct payments (Campbell, 2011).

SHRC has broadly welcomed the Bill, welcoming the introduction of self-directed support as a positive step towards increasing independent living but reiterated that the intentions of the Bill do not overshadow the obligations of the state to respect, protect and fulfil human rights – including through adequate support and safeguards to ensure care and support is provided at a level which does not fall below minimum thresholds. SHRC recommended that the Bill include a duty on local authorities to have regard to the right to independent living, with appropriate assistance and support to make informed choices. SHRC also recommended that clauses in the Bill which provided for assistance in decision making to those who may “benefit” from it due to “mental disorder” or “difficulties in communicating

due to physical disability” should be clearly linked to legal protections for legal capacity in decision making. Further, concern was expressed at the proposed blanket exclusions from eligibility for self-directed support and direct payments of categories of persons such as those subject to compulsion orders, emergency or short term detention certificates, supervision and treatment orders (SHRC, 2011b).

A small number of participants were in receipt of care services at home and were in the process of moving onto a system of Self Directed Payments. All were optimistic about the potential that this system offered their ability to participate in decisions about their own care and to have a level of control over what they personally prioritised in their care package. For example, Eric is in the process of starting his self-directed payments. On the morning of this interview he had just found out that he had been allocated a social worker to help him put everything in place. Even before he had received confirmation of this he had already been discussing the prospect of self-directed care with two women who currently provided care for him and he had already devised a rota in his mind of how his care could work. He described how the self-directed payments would increase his autonomy by allowing him to “*stay in control of the purse strings*” and prioritise what care he wants and when he wants it:

I will be able to decide what I want to get and how long I get it for rather than them saying what I can have. Just now they can say my first call is at half 9 in the morning and my last call is at 5.45 at night and that’s it until the next morning – they class that as a bed call, but nobody really wants to go to bed at 6.15 or 6.30 at night. And nobody else comes to make sure that you’ve got your medication or that you are ok until the next morning. So with the direct payment I can get someone in at 9pm at night just for 15 minutes to make sure I am alright, that I’ve taken my pills on that occasion and they can then get me into bed and then once I’m there I am fine until the next morning.

Eric, Recipient of a rural befriending service and a person living with multiple physical disabilities

Eric also spoke of the value he found in the personalised approach to care:

If I hadn’t the girls coming in now I don’t know where I’d be to be honest. I really have become very much dependant on them and I do enjoy my chats with them, it breaks my day...The contact and the time to talk to me are just as important as the things that need done...For me, losing your independence, I might as well be dead. So my carers are so important to me... they do it because they care, it’s not pity or feeling sorry for you, they just care.

The close linkages between a personalisation and a human rights based approach has been outlined in a recent policy paper published by The Centre for Welfare Reform (Chetty et al., 2012). This paper argues that Scotland’s current health and social care system lacks any explicit guiding principles and is now in need of development in order to develop a modern, coherent values base to fit with new structures and expectations with an emphasis on human rights at the very heart of a personalised system of care and support.

Chetty et al. (2012) argues that human rights-based and person-centred approaches share the same starting point: the personal experiences of the individual and they share the same end goal: empowering individuals to fulfil their potential by giving them the authority, capacities, capabilities and access needed to change their own lives, improve their own communities and influence their own futures. Although the origins of the concept of

personalisation goes back to the activist history of the disability movement and other marginalised groups, the more recent articulation of the idea as a public policy places relatively little emphasis on human rights. Despite concern to improve whole systems of public services, social and health care by placing the individual at their centre, this is being done without an attendant or consequent stress on the human rights of that individual.

There is indeed, significant scope for the Convention rights in the Human Rights Act to be better understood and applied more consistently to advance the personalisation agenda. To date, however, Chetty et al. (2010) note that the framework of rights has not been central to the development of personalisation as a key driver of public policy. As a consequence, much of the new autonomy proposed through personalisation has the feel of a set of '*privileges*' that can be variously afforded, denied or withdrawn by professionals acting on behalf of the state through the apparatus of local government. In other words the service that is received, feel as if it is driven not by what people need but by what the system can deliver.

Some research has also revealed concerns that the personalisation process has coincided with significant budgetary cuts.¹⁵⁸ According to Learning Disability Alliance Scotland there will be 1,800 people with learning disabilities on individual budgets with other client groups to follow over the course of the next two years. In Glasgow (one of the Scottish Government's three test sites for Self-Directed Payments), the Council's budget options report a £13 million saving over the next two years leading to anecdotal concerns amongst carers such as the impact of potential savings to care packages leading to carers having to make difficult choices regarding quality and quantity of care, short timescales and the bureaucracy of managing direct payments.¹⁵⁹

A number of participants in this scoping project who were working within the health and social sectors were concerned that the climate of shrinking resources may impact on the personalisation of care:

I think trying to tailor a service to the individual is a nice idea, but how realistic is that? And how much money does it cost in this day and age with all the public spending being cut? We have to look over the next 20 years and beyond...Especially with the turnover of staff in the caring sector as well, are you going to cater for different cultures and beliefs that might be very different?

Larissa, Civil servant and third sector volunteer worker

Chetty et al. (2012) do argue that the Self-Directed Support Strategy together with the associated legislation in progress, create a solid platform to build on and should be implemented locally in such a way that the human rights principles that lie at its core. They note a word of caution, however, that there is a risk with Self-Directed Support legislation that unless deliberate steps are taken to address the human rights deficits and power imbalances, there will be too narrow a focus on the system and process changes required to implement the mechanisms of self-directed support; and existing managerial and clinical models of service delivery will persist.

A human rights based approach is helpful in addressing these issues, providing a framework of responsibilities which places the individual's choice and control at the centre of decision making while balancing this with responsibilities to safeguard the individual from harm, the broader public interest and the rights of others.

3.1.3.3 Service delivery

In March 2010 the Scottish Government estimated that 66,222 disabled people access home care and support in Scotland.¹⁶⁰ In 2009 ILiS expressed the view that:

“the provision of health and social care services does not always meet disabled people’s needs, with inequalities evident in health outcomes” (Independent Living in Scotland, 2009).

Their report noted amongst other things variations in standards of care and a lack of provision for specific groups of disabled people (Independent Living in Scotland, 2009).

The impact of funding cuts has also been linked to reduced quality of care. A recent survey into the funding decisions by 111 UK¹⁶¹ councils and health and social care trusts revealed that 82 per cent of the sample had cut the visiting times for some clients receiving home care and the average visit had fallen from 48 minutes to 38 minutes. The visits affected include those for safety checks, social contact, help with washing, bathing and continence, managing finances, cleaning, shopping and laundry (Dunning, 2011).

The impact of tendering processes has also raised concern in research. For example Ross reports that retendering of respite services in the Highlands and Islands may result in a reduction in the number of hours of respite care available to carers by over 60 per cent in some areas (Ross, 2011a).

ILiS has promoted the importance of portability of care to realising the right to independent living and the right to mobility under the UN Disability Convention. They argue that if the government understands the importance of inclusion and family life, and the essential contribution to care in the community made by the 660,000 informal carers in Scotland, then it is essential that people are able to move to be closer to friends and family and it is counterproductive to present barriers to this (Independent Living in Scotland, 2008). At present the Ordinary Residence rule determines which local authority area pays for an individual’s community care package (Scottish Government, 2010e). COSLA itself has also recognised that:

“the level at which people begin to pay charges [for non-residential social care services] varies significantly across local authorities” (COSLA, 2010).

As a result COSLA has developed some guidance which attempts to develop a framework within which local authorities make decisions on charging for non-residential social care services (COSLA, 2010).

Disabled people have expressed concern to SHRC and EHRC and to the ILiS project about problems in the portability of care which include variations in eligibility criteria between local authorities, requirements for different assessments in different areas meaning a lack of assurance on similar level of provision and variation in charging for community care meaning that it may be financially unviable for disabled people to move. It has been suggested that this results in barriers to disabled people accessing work and higher education in other local authorities, as well as generally exercising their right to freedom of movement and choice of residence within the country. The Independent Living Movement in Scotland has called for a human rights based approach to portability of care that identifies and then removes this barrier to their right to independent living, and that this should be progressed together with disabled people (Independent Living in Scotland, 2009).

Gaps in service provision which were identified by disabled people during participation events on the UN Disability Convention included a lack of accessible transport, particularly in rural areas (EHRC and SHRC, 2011). This confirmed previous research which found that disabled people remain 50 per cent less likely to make any kind of journey than non-disabled people (Scottish Executive, 2006e).

3.1.4 Self determination

Issues of self-determination, autonomy and participation permeate a human rights analysis and have been highlighted in many thematic sections (see e.g. sections on participation and informed consent in thematic section 2 on Health; and family life of people with learning disabilities and forced marriage under private and family life). This section will consider issues of legal capacity, including guardianships, as well as end of life decisions.

3.1.4.1 Legal capacity

As noted above, the right to respect for private and family life includes a right to self-determination, autonomy and decision making. It is closely linked to the right to legal capacity (Article 12 of the UN Disability Convention) and is indispensable to the right to independent living, amongst others.

In Scotland the Adults with Incapacity (Scotland) Act 2000 (AWIA) was considered the first law of the Scottish Parliament which tackled a significant policy area.¹⁶² It addressed a global trend towards a more individualised, functional or “*tailor made*” approach to assessing whether an individual has capacity to make decisions and its passage followed:

“unprecedented openness, involvement of affected citizens, and responsiveness to their views” (Ward, 2008).

AWIA itself is explicitly built on human rights foundations, taking account of Council of Europe Regulations on the subject. For example it provides that any intervention in the affairs of an adult should be the:

“...least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.”¹⁶³

This seeks to apply the test of proportionality in an interference with the right to private and family life. Subsequently AWIA has been considered a model of best practice and taken into account in similar legislative processes across the world and in deliberations at the European Court of Human Rights (ECtHR).

The Human Rights Act requires that all laws should be read through the lens of the ECHR rights, and the ECHR is a “*living instrument*”. Since the entry into force of AWIA in 2002 understanding of the requirements of the ECHR in this area has developed significantly. The UN Convention on the Rights of Persons with Disabilities (adopted in 2006 and binding on the UK since 2009) is increasingly influencing how the ECtHR is addressing legal capacity.

Recent decisions of the ECtHR in this area have 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.¹⁶⁴

- 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.¹⁶⁵
- 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.¹⁶⁶

A series of reports suggest practice in Scotland remains uneven¹⁶⁷ and a study from 2005 suggested that there may be low levels of awareness of the AWIA among health workers (Ramsey, 2005). Following a consideration of practice and the developing approach of the ECtHR the Public Guardian concluded in 2011 that:

“...several aspects of the current system e.g. use of interim guardians, use of indefinite orders and the granting of unnecessary welfare powers arguably breach human rights legislation.”

In response the Public Guardian has recommended a more explicitly human rights based approach (Office of the Public Guardian, 2011).

The Mental Health (Care and Treatment) (Scotland) Act 2003 also introduces a number of steps to advance legal capacity, including advance statements,¹⁶⁸ and a right to access independent advocacy.¹⁶⁹ A key review of the legislation, however, pointed to low take up of such measures and recommended greater publicity be given to them.¹⁷⁰ Likewise concerns have been raised regarding the electoral registration of older people, including those with dementia, living in care homes. In response SHRC launched a campaign, together with the Electoral Commission, and the Care Commission (now Social Care and Social Work Improvement Scotland). The commissions issued a leaflet stating:

“It is important that you do not make an assumption about an individual’s capacity to vote or apply a “one size fits all” approach to all residents. Each individual must be assessed on a case by case basis at the time of their decision making and in relation to voting. The fact that an individual has dementia, for example, does not necessarily mean that they will lack capacity to vote on 5 May 2011” (SHRC et al., 2011).

Following the Scottish Local Authority elections in May 2012, Highland Council has produced a review of the turn out and an evaluation of the impact of methods used to encourage voting. The campaign by SHRC, the Electoral Commission, and the Care Commission was noted as one of the methods by which older voters were informed about how to vote and the evaluation further noted that there would be value in reviewing the processes (in health and social care or with care homes) by which the Electoral Registration Office are informed of a change in circumstances when an older person moves into residential care, in order that they are notified to update their electoral registration (especially for postal voting which was found to be the most utilised method of voting in the Highlands) (Highland Council Chief Executive, 2012).

A further area of controversy in the exercise of autonomy is in relation to end of life decisions. In the case of *Pretty v. United Kingdom*¹⁷¹ the ECtHR considered the balance to be drawn between the right to autonomy under Article 8 of the ECHR and the right to life in Article 2 of the ECHR. It found that the right to life does not imply a right to die, nor does the right to autonomy entail a right to “decide when or how to die.”¹⁷² In the case of *R (on the application of Purdy) v Director of Public Prosecutions*¹⁷³ the House of Lords required the Director of Public Prosecutions in England to clarify his position on the prosecution of those who assist suicide. He subsequently issued guidelines in February 2010 which

clarified the factors to be taken into account in determining whether a prosecution for assisting suicide is in the public interest (Director of Public Prosecutions, 2010). More recent cases, including the case of Tony Nicklinson who died in August 2012, have sought, as yet unsuccessfully, to challenge the ban on voluntary euthanasia.¹⁷⁴

In Scotland the Lord Advocate made it clear that the Director of Public Prosecutions; Guidelines on Assisted Suicide would not apply and that *“any change in the current law related to homicide is properly a matter for the Scottish Parliament”* (The Journal, 2009). In response SHRC considered that:

“It is possible to imagine a Purdy-style challenge being brought in Scotland since at present there is no way of knowing how the prosecuting authorities might respond to a relative who assisted the death of an individual. The concern is the lack of sufficient foreseeability. In order to be sufficiently foreseeable, there must be a sufficient degree of clarity in the law and its application. The law should be formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate her conduct”(SHRC, 2012b).¹⁷⁵

It called on the Lord Advocate to issue interim guidance to further clarify the position in Scotland in relation to prosecutions for assisted suicide.

Margo MacDonald MSP has made two as yet unsuccessful attempts to introduce legislation on the matter.¹⁷⁶ Informed by papers prepared by Dr. Mary Ford and Professor Sheila McLean, SHRC’s submission on the End of Life (Assistance) (Scotland) Bill 2010 noted that there was no consensus on the subject of assisted dying at European level and that the ECtHR has not taken the view that the Convention requires either the prohibition or the permission of assisted suicide. It noted that a clear policy as to when it would, and would not, be appropriate to prosecute individuals who help others to die is indispensable.

The Commission also noted concerns that a disproportionate focus on the exercise of autonomy in conceptualising human dignity may discriminate against people with disabilities. As Baroness Campbell of Surbiton (a member of the UK Parliament’s Joint Committee on Human Rights and former Commissioner with the EHRC) has highlighted the risk associated with such decisions related to the lives of people with disabilities:

“Society today still discriminates against people with severe disabilities and illnesses. Our lives are seen by many as inferior to those of non-disabled people. Against this background, there is the inherent danger that actions to withdraw treatment and legalized assisted dying will place disabled people at greater risk” (Clements and Read, 2008).

3.1.5 Carers’ rights

SHRC’s Chair, Professor Alan Miller, has described Scotland’s unpaid carers as *“heroes, who save the public purse many millions of pounds”*.¹⁷⁷ While in doing so they support the realisation of the rights of those they care for to human dignity, as outlined above, unpaid caring also has an impact on the rights of carers themselves. Amongst other rights engaged are the right to respect for private and family life (Article 8, ECHR) as unpaid caring responsibilities have an impact on the autonomy, physical and mental integrity, quality of life, and well-being of carers. Their rights to an adequate standard of living (Article 11, International Covenant on Economic, Social and Cultural Rights, ICESCR) and the right to work (Article 6, ICESCR) of unpaid carers are also engaged.¹⁷⁸

There are estimated to be approximately 660,000 of people in Scotland (one in eight of the population) who provide unpaid care today.¹⁷⁹ It is estimated that this represents a saving

to the public purse of between £7.6-10.6 billion a year (Carers UK, 2011, Payne, 2011) equivalent to the majority of the total NHS budget for Scotland. Indeed there are more carers in Scotland than the entire health and social care workforce added together. Of the total 660,000 carers, more than 115,000 provide in excess of 50 hours a week of informal care. Moreover, more than 100,000 of Scotland's unpaid carers are young carers aged from three to eighteen and a fifth of those carers provide from 29-30 hours a week of care (Carers UK, 2011).

Unpaid carers are:

"Individuals who care for a friend, relative or neighbour without receiving paid income in addition to income received through the benefits system" (Care 21, 2006).

Within legislation an unpaid carer is:

"someone who provides substantial amounts of care on a regular basis for either an adult or a child, where that adult or child receives, or is eligible to receive, support services under the Social Work (Scotland) Act 1968¹⁸⁰ or the Children's (Scotland) Act 1995".¹⁸¹

These two pieces of legislation and the Community Care and Health (Scotland) Act 2002, provide all carers with the statutory right to request an independent carer's assessment of their ability to care for another individual/s, on top of any assessment that the person needing care receives (Stewart and Patterson, 2010). Young carers have also been further recognised as having specific support needs because they are children and young people first, carers second (COSLA and Scottish Government, 2010b).

In 2011 Carers UK undertook research into the impact of informal, unpaid caring. The results showed amongst other things that, of informal carers surveyed in Scotland:

- 82 per cent felt their health had been affected by fuel poverty
- 79 per cent had experienced mental ill-health as a result of caring
- 74 per cent had to cut back on leisure activities
- 47 per cent had to cut back essentials (like food and heating)
- 45 per cent were currently in debt as a result of caring
- 45 per cent felt that money worries was impacting on their health
- 32 per cent were using an overdraft to cope
- 29 per cent were using credit cards to cope
- 12 per cent had taking out a loan to cope.

(Carers UK, 2011)

3.1.5.1 Policy and strategy responses

Recognition of the needs of carers has developed over time. In 1999 the then Scottish Executive launched the Strategy for Carers in Scotland (Scottish Executive, 1999) which aimed to improve the information available to carers; introduce new legislation; ensure the existence of national standards on short breaks; and to improve local services available to carers. This was followed in 2005 by the Care 21 Report on The Future of unpaid care in Scotland (Care 21, 2006) which provided 22 recommendations for improving the lived experience of carers in Scotland. Priority action areas included: understanding and providing for the needs of young carers; carer training; improving respite care and improving the health of carers.

In 2010 the Scottish Government launched *Caring Together* (COSLA and Scottish Government, 2010a) which set out ten key actions to support carers in recognition of the vital role they play as partners in delivering care. Amongst the actions were:

- the development of a Carers' Rights Charter;
- measures to improve the uptake of carers assessments and support plans;
- ensuring carer representation on Community Health Partnerships;
- the investment of £281,000 in carer training; and promotion of carer friendly employment practices.

The report acknowledged the need to take positive steps to identify and support 'hidden' carers in the minority ethnic communities (including Scottish Gypsy/ Travellers) and in rural areas. Further funding was allocated to support young carers alongside the publication of *Getting it Right for Young Carers: The Young Carers Strategy for Scotland 2010-2015* (COSLA and Scottish Government, 2010b).¹⁸²

One of the manifesto commitments of the SNP Government elected in 2011, in support of carers in Scotland, was the development of a Carers Parliament which would meet annually to allow carers of all ages to raise any issues that impacted on their lives with Scottish Government Ministers and MSPs in order to facilitate a more direct channel for the voices of carers to be heard in the decision-making process. This Carers Parliament met for first time on 1 October 2012 (Carers Scotland, 2012) with a focus for the day on how all partners can find a way to deliver better services and support to carers and the people that they care for. At this inaugural Parliament, Alex Neil MSP, Cabinet Secretary for Health and Wellbeing, emphasised the need for the Scottish Parliament to "*listen to carers*". One session focused in particular on carers' rights, concluding that there already exists a great deal of legislation and policy that could help carers, in other words the structures and some of the processes already exist. However, not enough carers are aware of their rights as carers or their human rights, to be able to access those rights. For example, whilst every carer is eligible to a carer's assessment a,¹⁸³ this is not on the whole happening in practice. Only when carers ask for an assessment is this happening.

Improving the support provided to unpaid carers in Scotland is included in a number of Single Outcome Agreements between the Scottish Government and local authorities. It is further supported by a specific Community Care Outcome which aimed to ensure that user and carer satisfaction and support were embedded at the heart of community support services (Stewart and Patterson, 2010).

3.1.5.2 Particular groups of carers

In 2012, following an awareness-raising afternoon with Gypsy/Travellers, where the Scottish Parliament Equal opportunities Committee heard evidence from Gypsy/Travellers with caring responsibilities about the many difficulties they face, the Committee launched an inquiry into Gypsy/ Travellers and Care.¹⁸⁴ Evidence sessions began on March 27 2012 with oral evidence from a range of third sector organisations with a broad experience of carers' issues including evidence from MECOPP [Minority Ethnic Carers of Older People Project] who began a new project in May 2011 working with Gypsy/ Travellers in three areas of Scotland to better understand the views and experiences of Gypsy/ Travellers carers (MECOPP, 2012).

Initial findings from the MECOPP Gypsy/ Travellers carers project (MECOPP, 2012) highlighted that most Gypsy/ Travellers did not view themselves as carers or use the term 'carer', they were fulfilling 'family duty', something which participants involved in this scoping project considered to be part of their everyday family responsibilities. The research also highlighted that many Gypsy/ Travellers carers encountered community and

service isolation, struggled to trust official services and would often travel considerable distances to use a trusted service rather than face rejection from a local one (MECOPP, 2012). Participants involved in this scoping project talked about their distrust of anyone in a position of authority, with many feeling unable to make use of certain services or to admit to those services that they were a traveller for fear of receiving a poorer service:

Are you going to be treated worse because you have said that you are a Gypsy/ Traveller, are you going to be treated better or worse? You've got this attitude because you have been harassed all your life, 'collar and ties', ken? Services with authority, I have never trusted and I still don't trust.

Mary, Scottish Gypsy/Traveller

The MECOPP (2012) research also found that most Gypsy/ Travellers carers are not making regular use (if at all) of social care services (voluntary or statutory) and most are unaware of (and in turn not in receipt of) Carers Allowance. Finally, the general health of most Gypsy/ Travellers carers was found to be visibly poor, with nearly all reporting mental health problems as a direct result of their caring responsibilities (MECOPP, 2012).

The Equal opportunities Committee published its report on its inquiry into Gypsy/ Travellers and Care on the 24th of September 2012, concluding that:

"...in spite of the various reports and initiatives of recent decades, little has changed for Gypsy/Travellers. Our finding has been guided by evidence outlining repeated failures: recommendations have not been implemented, initiatives have often been small-scale or short-term and, according to Gypsy/Travellers themselves, they have been fighting the same battles for decades. Access to health and social care alongside other public services must be universal; it is clear that this is not the experience of Gypsy/Travellers living in Scotland today. We look to the Scottish Government to take the strategic lead, with speed and commitment, in making real, significant changes to the lives of Gypsy/Travellers and, by taking positive action to improve their future, to begin to earn Gypsy/Travellers' trust".¹⁸⁵

Previous research (Netto, 2001)(now over ten years old) also revealed some evidence that many minority ethnic carers face additional hurdles in accessing information regarding their rights and in accessing culturally appropriate care. This research highlighted that an attitude that ethnic minorities "look after their own" continues to prevail despite evidence to the contrary (Netto, 2001). The research suggests that little is known about the extent of unmet need amongst ethnic minority communities (Netto, 2001). The research made a number of recommendations including better involvement of ethnic minority communities in shaping local authorities' approaches as well as in the planning and development of health and care services. Finally the research suggested that targets should be set for the employment of members of ethnic minorities at all levels in the community care sphere (Netto, 2001). In a more recent study, Richardson and Laird (2012) suggest that in order to enhance carer-involvement in care-related research a number of factors are relevant, including being involved in initiatives that have a practical beneficial outcome for carers or those they look after. Further, the authors propose that for Black and minority ethnic carers, interpreter and translation resources, gender sensitivity and flexibility around their involvement are key factors to encourage participation (Richardson and Laird, 2012).

Other research has suggested that carers in rural areas face cumulative pressures of increased travel, higher travel costs, fewer support services and more problems accessing

employment suitably flexible to work around caring responsibilities. The research recommended that the Scottish Government abolish the 'one size fits all' approach to carer's allowance and increase investment in rural initiatives (Carers UK, 2008).

A number of participants in this scoping project provided unpaid informal care for their families. Many noted their daily struggle to combine financial survival and caring responsibilities, with many unable to work due to their caring duties, making it difficult to lift themselves out of poverty. One woman spoke of the difficult situation her husband was in as a result of having to stop work to care for her:

My husband can't actually get a decent payment; he gets £14 a week on income support, after working for 38 years in one job. He gets £14 a week on income support because I get incapacity, now where is the sense in that? Where are his rights to having some money? There are times he needs to get out and have a break, maybe to visit his friend who lives on the other side of the island. I have to pay for that, I have to give him money because he gets £14 a week.

Cherie, Participant at a rural mental health association

Finally, as noted above, approximately 100,000 of Scotland's unpaid carers are young carers. The caring responsibilities undertaken by these children and young people means that most struggle to have what others would consider to be a 'regular' childhood, seeing friends, going out to the cinema, playing sports, and so on. A recent survey comparing the activities and experiences of young carers (aged 10-19) with young people who participated in Schools Adolescent Lifestyle and Substance Use Survey (SALSUS) revealed that only 11 per cent of young carers see friends every day and 9 per cent had the opportunity to visit the homes of friends less than weekly or never. Of those young carers who responded to the survey, 60 per cent cared for more than 20 hours a week, whilst 20 per cent cared more than 50 hours a week. The majority cared for their mother.¹⁸⁶

Louise Morgan, Young Carers Services Development Manager for The Princess Royal Trust for Carers in Scotland, responded to this scoping project noting:

"Young carers take on a hugely important role in our society, providing care for their families and saving the country millions of pounds. The least we can do is recognise this by doing our best to support them and prevent them taking on too much responsibility at a very early stage in their lives".¹⁸⁷

3.2 Health

3.2.1 Introduction to Health

This thematic section explores the theme of health in Scotland, one of the eight themes that emerged from the research reviews. Following a prioritisation process, four areas within the broad theme¹⁸⁸ were selected and are presented in further detail in this thematic section. These are: Integrating a human rights approach in health law and policy making; healthcare quality; health promotion; non-discrimination within health care; mental health care and treatment.

Health is primarily a devolved matter falling within the legislative competence of the Scottish Parliament.¹⁸⁹ The primary legal framework for the organisation of the NHS in Scotland and the duties in respect of the arrangement of provision of services is the National Health Service (Scotland) Act 1978¹⁹⁰ and the Public Health etc. (Scotland) Act 2008. This sets out the duties of Scottish Ministers, health boards and local authorities to continue to make provision to protect public health in Scotland.

Scotland has infamously been labelled the “*sick man of Europe*” (McCartney et al., 2011). It is well known that it has very high rates of cancer,¹⁹¹ lower life expectancy than elsewhere in the UK, and a wide range of adverse lifestyle choices which contribute to these outcomes – notably high rates of smoking and alcohol abuse (Bromley and Shelton, 2010).¹⁹² Outcomes also vary across the country. Taking life expectancy as an indicator, eight of the ten areas of lowest life expectancy for men in the UK are in Scotland, the top four of which are all on the west coast of Scotland.¹⁹³

As the Chief Medical Officer for Scotland, Dr Harry Burns has noted there have however been:

*“...significant reductions in premature death rates from cancer (22 per cent), CHD (60 per cent) and stroke (54 per cent) between 1995-2009.”*¹⁹⁴

Nevertheless:

*“The Scottish Health Survey seems to indicate that around 25[per cent] of Scots eat a poor diet, take insufficient exercise, drink too much alcohol and are overweight or obese. Numerous attempts have been made over the years to encourage individuals to alter their behaviour. Health promotion campaigns usually have a positive effect on some people but often those in most need of changing their behaviour are least likely to take notice of such campaigns.”*¹⁹⁵

In response Dr Burns considers:

*“...if we are to make a significant impact on the incidence of ill health in Scotland, we need to pay attention to the ways in which we create health.”*¹⁹⁶

This approach emphasises enhancing individuals’ capacities to control their own lives and to shape health responses. This appears to provide useful opportunities for encouraging human rights based approaches that emphasise principles of participation, accountability, non-discrimination, and empowerment, underpinned by legality. It also seems to have echoes in the co-production model promoted in the independent living movement in Scotland by disabled people (see the thematic section on Dignity and Care). Dr Burns concludes:

*“Instead of doing things to communities, public services need to develop a mind-set which sees them working with individuals and communities to co-create health and wellbeing.”*¹⁹⁷

3.2.2 Human rights context

Health engages a very wide array of human rights. Among these are absolute rights such as the right to life and the right to freedom from torture, inhuman or degrading treatment or punishment. Each of these includes positive obligations relevant in health policy and practice to prevent, protect and remedy. For example obligations related to the right to life (Article 2, European Convention on Human Rights [ECHR]) include: A positive obligation on the State to do “*all that could have been required of it to prevent the applicant’s life from being avoidably put at risk*” in health care,¹⁹⁸ and in some cases an investigation or other effective remedy to ensure that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined, lessons learned and where civil or criminal negligence is an issue, those responsible made accountable.¹⁹⁹ While this includes an element of individual accountability where appropriate its purpose is constructive accountability to learn lessons and improve standards in the future. As the European Court of Human Rights [ECtHR] has stated:

*“...more general considerations also call for a prompt examination of cases concerning death in a hospital setting. Knowledge of the facts and of possible errors committed in the course of medical care are essential to enable the institutions concerned and medical staff to remedy the potential deficiencies and prevent similar errors. The prompt examination of such cases is therefore important for the safety of users of all health services”*²⁰⁰

Clearly there is a duty to protect mental health patients from a risk of suicide, whether they are compulsorily detained²⁰¹ or voluntary patients.²⁰²

Similar obligations exist in relation to the prohibition of torture, inhuman or degrading treatment or punishment (Article 3, ECHR). That right would be relevant to severe instances of abuse or neglect²⁰³ where for example an individual is left in degrading conditions. That may be particularly relevant in relation to patients in situations of vulnerability due to age or mental disorder or for example to those with complex needs. For example the UK was found in violation of this Article where an individual who was four limbs deficient was left in a situation in which she:

“[was] dangerously cold, risks developing bed sores because her bed [was] too hard or unreachable, and [was] unable to go to the toilet or keep clean without the greatest of difficulty”.²⁰⁴

Likewise in cases of severe neglect a violation of Article 3 may be found.

Qualified rights, such as the right to respect for private and family life, home and correspondence (Article 8, ECHR), are also relevant in health policy and practice. That right has a very broad definition and includes the right to a home life, family life, physical and mental integrity, quality of life, well-being, autonomy, legal capacity and right to participate in decision-making. As a qualified right any limitation should have a basis in law, pursue a legitimate aim or goal and be proportionate— i.e. the least restriction which is capable of achieving the legitimate aim.

For example participation in decision-making and legal capacity is pivotal to the realisation of an individual’s dignity and rights.

*“The freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment, is vital to the principles of self-determination and personal autonomy.”*²⁰⁵

Capacity to make decisions should be assumed and individuals provided with such reasonable support as they require to enable them to make informed decisions – understanding the implications of their decisions. Efforts should be made to understand the previously expressed wishes of an individual who may lack capacity and to support people to make decisions while they have capacity for what should happen to them if their capacity reduces.²⁰⁶

Allied with the right to participate in decisions which affect the exercise of human rights is the right to information.²⁰⁷ The right to information is a component of the right to autonomy in decision making under Article 8²⁰⁸ and access to information is an element of the right to freedom of expression.²⁰⁹ It is also increasingly recognised as a freestanding right to information in a form and language which enables an individual to participate in decisions which affect their human rights. This includes the right to accessible information for people with physical and mental disabilities. The Convention on the Rights of Persons with Disabilities requires the provision of:

*“...other appropriate forms of assistance and support to persons with disabilities to ensure their access to information”.*²¹⁰

In addition economic, social and cultural rights are engaged in this topic. Principal amongst these is the right to the highest attainable standard of physical and mental health (Article 12 of the International Covenant on Economic, Social and Cultural Rights). The full realisation of this right is to be achieved progressively, according to the maximum of available resources. In its authoritative interpretation of the right to health the United Nations Committee on Economic, Social and Cultural Rights has clarified the nature of states obligations (UN CESCR, 2000). In summary:

The right to health is not the right to be *healthy*;

It includes freedoms and entitlements: *“The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health”* (UN CESCR, 2000).

It extends to rights related to healthcare as well as to the underlying determinants of health:

*“The right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life”.*²¹¹ *“[It is] an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels”* (UN CESCR, 2000).

The right to health has the following elements:

Availability – health related facilities, goods, services and programmes have to be sufficiently available across the country.

Accessibility – health facilities, goods and services have to be accessible to everyone without discrimination. This has four dimensions: non-discrimination (in law and fact), physical accessibility (including in rural areas and for disabled people), economic accessibility and information accessibility.

Acceptability – including issues related to medical ethics.

Quality - scientifically and medically appropriate and of good quality (UN CESCR, 2000).

3.2.3 Integrating a human rights approach in health law and policy making

Among the achievements of the Scottish Parliament in upholding human rights, as discussed in Chapter 2, has been the development of human rights based laws. This has been particularly clear in the thematic areas covered in this section and in that on Dignity and Care.

The Mental Health (Care and Treatment) (Scotland) Act 2003, discussed below, is built on the foundations of human rights principles. Similarly, the Patient's Rights (Scotland) Act 2011 provides that it is the right of every patient that the health care received is patient-focused, which means that the provision of health care takes into account the patient's needs. The Act, provides that regard must be had to the importance of providing the optimum benefit to the patient's health and wellbeing, allows for patient participation in decisions about their healthcare and provides appropriate information and support to allow them to do so. It provides for the development of a Patients' Rights Charter, Patients' Rights Officers and strengthened complaints' processes. Secondary legislation outlining a series of "*Health Care Principles*" was developed in 2011 and a consultation on the Charter of Patient Rights and Responsibilities was launched in April 2012.

SHRC welcomed the Patient's Rights (Scotland) Act, in so far as it is based on human rights principles, aims to empower health service users to claim their rights, and strengthens the accountability of NHS bodies and people who provide NHS healthcare to patients. While most who engaged supported the principles which lay behind the Act some questioned the need for legislation. The Royal College of Nursing Scotland (RCN), for example stated its view that:

"Legislation is not the best course of action to improve the rights of patients. We continue to be concerned that money spent on implementing the Act would be better used to improve patient rights through the work of the NHS Scotland Quality Strategy" (Royal College of Nursing Scotland, 2011).

RCN pointed among other things to the challenges in freeing up staff time to attend training, particularly in the current economic crisis. SHRC has recommended an explicit and consistent connection with binding human rights law, and the need to ensure clarity and consistency in the relevance of enforceable human rights in health care (Royal College of Nursing Scotland, 2011).

SHRC noted:

"Only with direct reference to the related rights in the HRA will health workers be enabled to properly assess the impact of decisions on absolute rights, which must be respected and ensured in all circumstances, and qualified rights which can be interfered with where there is a legal basis, a legitimate aim and where the interference is a proportionate means of achieving that aim" (SHRC, 2011a).

The Act also introduced a Treatment Time Guarantee, which according to the consultation report was broadly welcomed by civil society, albeit questioning the extent of limitations to it, and not welcomed by some professional bodies such as the British Medical Association and RCN (Scottish Government, 2011i).

Aside from legislation the Scottish Government and NHS Scotland has also pursued the development of strategies and concrete policy approaches which offer significant potential for the further integration of human rights based approach in practice. Key among these is the Healthcare Quality Strategy (NHS Scotland, 2010), which seeks to achieve person-centred, safe and effective healthcare for everyone. Similarly aligned is the “*assets based approach*” to health discussed above.

A significant initiative to integrate equality and human rights approaches into health policy making has been the development of Health Inequalities Impact Assessment (HIIA) processes, which includes human rights impact assessment.²¹² This was formally launched by the Scottish Government in 2011. SHRC has supported the integration of human rights into this process from the outset, most recently working with NHS Health Scotland to develop case studies demonstrating the added value of human rights in the HIIA process.

Strategic, policy and practice measures have also been put in place to advance a range of core principles regarding human rights based approaches (participation, accountability, non-discrimination, empowerment and legality).

3.2.3.1 Participation

Many initiatives in Scotland reflect the value of participation of patients and others in shaping health policy and practice. These include the Patient Focus Public Involvement (positively evaluated in practice in The State Hospital) (SHRC, 2009b); the emphasis on patient-focussed care in the Health Care Quality Strategy and repeated references to participation in the Patient’s Rights (Scotland) Act 2011 and related initiatives such as the Healthcare Principles and the Charter of Patients’ Rights and Responsibilities.

SHRC has expressed its view that understanding and applying the human right to participate in decisions and the right to information will be of critical importance in interpreting the application of the Healthcare Principles under the Patient’s Rights (Scotland) Act 2011 of patient participation and communication, which are closely interconnected (SHRC, 2011a). The recent guidance issued by the Mental Welfare Commission for Scotland, for example, to which SHRC contributed significantly, presents a useful framework for medical decision making (Mental Welfare Commission for Scotland, 2011e).

3.2.3.2 Accountability

All duty bearers must be accountable for the realisation of human rights. To be accountable requires effective monitoring (through data collection and inspections), effective remedies (including independent complaints mechanisms and access to justice) and effective corrective action to be taken where deficiencies are identified. It requires the existence of appropriate law and policy structures, institutions, administrative procedures and other mechanisms where individuals can seek remedies and have access to justice where needed.

The research review highlighted a range of inspection reports by bodies such as the Mental Welfare Commission and NHS Quality Improvement Scotland (now Healthcare

Improvement Scotland), see below. The issue of healthcare complaints processes also emerged as a recurring theme.

An essential component of accountability is a mechanism by which complaints can be made, effectively (ideally independently) investigated and action in response determined. Complaints about the NHS are handled by internal complaints processes with the Scottish Public Services Ombudsman acting as the final stage as it does for all Scottish public authorities. The Scottish Government has taken steps towards improving and strengthening complaints mechanisms under the Patient Rights (Scotland) Act 2011 by providing for the establishment of the Patient Advice and Support Service, which will have a role in advising patients wishing to give feedback or make a complaint.

In its response to a consultation related to the Patient's Rights (Scotland) Act 2011 SHRC highlighted that complaints processes must comply with the right to a fair hearing, patient confidentiality, as well as the right to a remedy – including access to justice and effective investigations in relation to serious human rights violations. Further, SHRC considered it essential that the Patient Advice and Support Service (PASS) must include human rights in the advice and support that it provides (SHRC, 2011a).

In 2007 the Scottish Health Council commissioned research into the experiences of patients of the NHS complaints system (Britain et al., 2009). This research found that on the whole, the majority of patients experience good quality care and more than two thirds had never experienced any problem with an NHS service, as was also the case with the majority of participants in this scoping project. Where problems had arisen, they were commonly as a result of unacceptable waiting times; poor attitudes or behaviour of staff; or poor medical care and treatment. The research also found an unwillingness to complain. Common reason for this reluctance included:

'It wouldn't make any difference' (64 per cent);
'It might affect future treatment' (37 per cent),
'Too busy coping/caring to complain' (26 per cent); or
'I didn't know how to complain' (15 per cent)
(Britain et al., 2009).

This research produced 15 key recommendations for action to improve the complaints process. The Scottish Health Council then identified how these recommendations could be translated into practice which included focusing on the following: developing a national feedback portal; encouraging feedback within NHS Boards; raising awareness of independent advice and support services; making the distinction between formal and informal feedback; developing good and effective practice; consistency in response times; demonstration projects and encouraging feedback and complaints from seldom heard voices (Scottish Health Council, 2010).

Research has also found a need to support staff to be supported through the process of a complaint in order that lessons are learned rather than a focus being placed on who to blame. Complaints must also be viewed as a genuine method of facilitating service improvements and a better understanding of patient needs (Walter, 2009).

In 2008-09 the Scottish Public Services Ombudsman (SPSO) received 82 enquiries and 684 complaints in relation to the health sector²¹³ with 32 enquiries and 888 complaints for 2010-11.

Some participants in this scoping project had been involved in taking complaints against the NHS, most of whom had not had what they described as a satisfactory experience. Most described their experience using language that depicted a struggle:

I don't know how anyone manages to actually fight their way through the maze of health board protocol to make a complaint...Trying to get them to admit anything as well, very difficult.

Seamus, Addiction support case worker.

It was impossible to get anywhere; I said I would take it to SPSO and they said fine, do that then, with almost like a "see if I care" attitude.

Karen, Informal carer for a family member with physical disabilities.

In terms of patient satisfaction as a whole, results of the 2012 Scottish Inpatient Experience Survey, published in August 2012, showed that patients were most positive about the care they received from staff and least positive that they were ready for life outside of hospital on discharge.²¹⁴ On this latter issue the UK Parliament Joint Committee for Human Rights has raised concerns in particular about the premature discharge of older patients in an effort to combat delayed discharge. The Joint Committee considered that premature discharge, without effective provision of aftercare may engage the patient's right to respect for private and family life under Article 8 of the ECHR (Joint Committee on Human Rights, 2007).

In response to complaints, the Scottish Government has recently been considering changes in its approach to compensation. The general policy in relation to NHS complaints has been that financial compensation is not available, and information about NHS complaints has usually stated that if you want financial compensation you should seek legal advice.

In 2005, *the Skipton Fund* was set up²¹⁵ as a scheme which allowed ex-gratia payments to be made to, or in respect of, people who had been infected with hepatitis C through NHS treatment (Scottish Government, 2011h). Considering the issue more broadly, a No Fault Compensation Review Group was set up on June 2009 and tasked with considering the potential benefits for patients in Scotland of a no-fault scheme for injuries as a result of medical treatment, and whether such a scheme should be introduced alongside the existing clinical negligence arrangements. Problems with the current scheme were identified as including: length of time whereby claims can take months or even years to resolve; the adversarial culture which can lead to a lack of openness and a delay in revealing expert opinions; and the legal expenses involved can be disproportionate to the value of the claim. The report suggested that that when an error has occurred, patients expect doctors to make a meaningful apology, provide an explanation and take steps to prevent the error from recurring. The findings of their research would appear to support the contention that for many, if not most, patients this is the primary aim, rather than a financial award. The report concluded²¹⁶ that if such a scheme is to be set up, it is essential that the scheme is: compatible with the European Convention on Human Rights; treats staff and patients fairly and equitably; is affordable, easy to access and use; and that decisions about compensation are timely, robust and independent. An independent appeal system would be essential and a reasonable time limit would be set (Scottish Government, 2011h).²¹⁷

The Scottish Government recently launched a consultation on the implementation of the recommendations of the No Fault Compensation Review Group.²¹⁸

A related issues emerging from research is the approach towards internal NHS staff complaints or “*whistle blowing*”. A recent survey by the British Medical Association in Scotland found that many doctors (40 per cent) failed to report concerns that they have about the care of patients by others for fear that it will damage their career and that it would not be acted upon. Moreover the research finds that ten per cent of doctors who had raised concerns were effectively told that if they were to take this further, “*speaking out could have a negative impact on their employment*” (BMA Scotland, 2010). The research made a series of recommendation to the Scottish Government including in relation to awareness raising and protection on whistle blowing (BMA Scotland, 2010).

3.2.3.3 Empowerment

In order to effectively uphold their rights people need to know what their rights are and how they can enforce them.

Health Rights Information Scotland (HRIS) publishes information on patient rights in Scotland and the Independent Advice and Support Service provides advice to patients on their rights and how to make a complaint. HRIS describes health rights as including rights enforceable in Court such as access to medical records, as well as rights in the broader sense, based on policy. Research investigating how much people knew about their health rights, and how easy it was for them to find out, revealed that only around a fifth of people surveyed felt that they knew a lot about their health rights (36 per cent knew a bit and just under 25 per cent knew very little and 16 per cent reported knowing nothing). Over 90 per cent of respondents were aware that people on a low income can get help with NHS costs and that you can refuse treatment even if recommended by your doctor. With both these questions the highest percentages of correct answers came from the 45- 64 age group (MacDonald and Pulford, 2006).²¹⁹

SHRC has repeatedly pointed to the importance of linking awareness-raising on broadly defined “*health rights*” with human rights in healthcare. Recent materials do make some limited reference to human rights.²²⁰

Participants in this scoping project who worked within the health sector felt that they did not know enough about what human rights were in relation to health care and as such did not know how to respond effectively when someone invoked their human rights. Some felt the media confused facts in any debate around human rights and that NHS staff would benefit from having a better understanding of human rights.

3.3 Healthcare Quality

Quality of healthcare provision has been undergoing increased scrutiny in Scotland and the rest of the UK over the last two decades (Batalden and Stoltz, 1993, Ferlie and Shortell, 2001, Ham et al., 2003, Teasdale, 2008). This increased focus on quality has led to an acknowledgement that it is a complex issue and a realisation that how quality is defined and how healthcare systems are organised are integral to good quality healthcare provision (Powell et al., 2008). The conceptual definition of ‘quality’ in healthcare provision is contested and defined differently by a range of people (both healthcare users and providers)²²¹ and it is not a static concept. Rather it can change as a result of whose

perspective is being taken, the timescale over which it is being examined and the purpose of any particular measures being applied (Powell et al., 2008).

This increased focus on quality has permeated throughout the healthcare system in the UK, with all systems striving to provide good quality and safe health care. The quality agenda has, however, been moving forward in different ways throughout the UK.²²² In Scotland, the Government's commitment to healthcare quality and quality improvement is demonstrated through its HealthCare Quality Strategy which was launched in May 2010 (Scottish Government, 2010f). A key element of this strategy being delivered in collaboration with the Institute for Healthcare Improvement (IHI) is the Scottish Patient Safety Programme (SPS). The objective of SPSP is to steadily improve the safety of hospital care right across Scotland.

This drive for improved quality of care in recent years has been fuelled by reported estimates that one in ten patients admitted to an NHS hospital in Scotland is likely to be harmed unintentionally. This could be as a result of: contracting an infection such as MRSA; experiencing a post-operative complication or drug-error; or developing a pressure sore. It is further estimated that 50 per cent of these unintentional events could have been prevented (School of Health Nursing and Midwifery UWS, 2011). Moreover, in addition to the personal cost to and impact on patients, this reportedly is estimated to cost NHS Scotland approximately £200 million annually in lost bed days and additional treatment (Scottish Patient Safety Programme, 2011).

The NHS Scotland Quality Strategy emphasises the provision of “*high-quality, person-centred, clinically effective and safe health care services*” as the key drivers for the improvement of healthcare quality (Scottish Government, 2010f). In 2011 a Healthcare Improvement Scotland conference brought together a range of practitioners with experience in quality improvement in order to discuss different approaches to quality improvement and the merit of developing a Scottish approach to healthcare quality improvement. A key outcome of this meeting was the acknowledgement of those involved that of all the different drivers for improvement, ‘patient-centeredness’ was seen to be the most important criteria (School of Health Nursing and Midwifery UWS, 2011).

The Schedule to the Patient Rights (Scotland) Act 2011 describes ‘Quality Care and Treatment’ as based on current clinical guidelines with regard to the optimum benefit to the patient’s health and wellbeing and the range of options available in each patient’s case. The Schedule also refers to no avoidable harm to be caused and that patients are to be cared for in an appropriate environment. SHRC recommended to the Scottish Government that reading this Principle in the light of human rights standards will help ensure the achievement of the aim of the Healthcare Quality Strategy that healthcare is consistently patient centred, rather than a more traditional clinical model of healthcare where patients are, in the worst case, the passive recipients of care deemed to be in their best interests. For example, a human rights based and patient focussed approach to determining what “*optimum benefit*” to the patient would be or how to avoid harm will require the participation of the patient in decision making, account of the patient’s previously stated wishes, and will usually require the patient’s consent. Consequently SHRC has recommended that this Principle must always be read in the light of the right to free, prior and informed consent to treatment, and to other rights in the Human Right Act (SHRC, 2011a).

Two independent evaluations of human rights capacity building projects provide evidence of the value of human rights based approach to health and social care in achieving a more consistently patient focussed approach. First, an independently commissioned evaluation of the HRBA at The State Hospital concluded that staff, patients and carers all considered that the HRBA had meant a:

“move towards more patient-focussed approaches to care and treatment with an increased individualisation of policies and practice, ‘the end of blanket policies’” (SHRC, 2009b).

Second, an independent evaluation of SHRC’s *Care about Rights?* project,²²³ related to the care and support of older people, demonstrated how public, private and voluntary care providers in care homes and care at home settings found that implementing human rights based approaches in practice was instrumental in helping them deliver person centred, or patient focussed care. Ninety-seven per cent of survey respondents who participated in human rights training indicated that more effective delivery of person centred care and increased quality of life for service users were potential benefits of a human rights based approach.²²⁴ A further 93 per cent of survey respondents felt, following the training, that a potential benefit of applying a human rights based approach was that it helped care providers balance risk in decision making while 97 per cent felt that human rights can help providers develop positive relationships with service users and families (GEN et al., 2011). These findings strongly demonstrate how an understanding of human rights can assist the delivery of patient focussed or person centred health and social care.

While taking account of human rights is already a duty under the HRA, the Act and accompanying Directions and Regulations, represent an opportunity to ensure that this is brought to the fore in healthcare and that the other Principles are read in this light. Without this, tensions may arise between the patient focus and other Principles. In addition, there may be important rights, for example the right to freedom of religion, to respect for private, home and family life or non-discrimination (among others) which are not explicitly referenced as “*concerns, opinions and preferences*” in the Directions but are fundamental to delivering services with a patient focus (SHRC, 2011a).

Participants involved in this scoping project shared some of their experiences as users of healthcare services which did vary in quality. For the most part, participants were happy with the majority of health care that they had received. Where the greatest level of dissatisfaction arose, however, was in the lack of the ‘personal’ in the care that they received. Most noted that this was not through a deliberate effort to be impersonal, but rather, a lack of staff time and resources. One participant in this scoping project recounted what he felt was the de-personalising effect of long term care in a hospital ward:

The last time I was in for any length of time cause I’ve been in and out that much, I was in a month and at the start it was ok but after a while it just sort of got, they were coming round to give you your medication and one person read the number off your arm band to check it match the number on the medication and then you got the medication and that was it. You just felt as if you were on a conveyer belt.

Eric, Recipient of a rural befriending service and a person living with multiple physical disabilities

Participants involved in this scoping project who worked to support people with addiction problems also noted that often the treatment and care provided for their clients within hospital settings was often punitive and lacking in respect, as a result of personal opinions about people with addiction problems:

The main issues I have in the clinical setting is pain management of drug users, which is a clinically difficult area but there is evidence and in fact clinicians have told me that have punished people by not giving them adequate pain relief and the punitive use of naloxone which will quickly detoxify somebody over a period of seconds, just to get someone out of accident & emergency because they've turned up in some state and they're behaving badly and they just want to get them out of here. People would say that they used to do that quite often in the past, but they still do. Recently, there were quite a few cases of anthrax contaminated drugs out there and particularly in Dumfries & Galloway, we saw a lot of people being treated very poorly because the view was well, they are dependent on opiates and therefore we shouldn't give them appropriate levels of pain relief. Underlying that is the fact that drugs users are effectively being punished for their addiction, it's dressed up as something else but underneath it's a chance to hand out a little bit of retribution.

Robin, Policy officer of a drugs support organisation

There have also been some high profile cases of severely inadequate healthcare quality in recent years, such as that of Mrs V. an 80 year old woman with dementia who died after receiving care at Ninewells hospital that was *"woefully inadequate, wholly inappropriate and utterly unacceptable"*.²²⁵ Participants in this scoping project noted that cases such as these and news stories about outbreaks of MRSA and C. diff made them less willing to go to hospital for care that was not deemed to be emergency or urgent. This heightened fear also comes at a time when cases of C. diff amongst the over 65s and MRSA are in fact at their lowest levels since recording began.²²⁶ Efforts to reduce healthcare associated infections [HAI] have been high on the Scottish Government agenda in recent years.²²⁷ From January to March 2012 there were:

- 48 MRSA cases - down 30.4 per cent (from 69) when compared with the same quarter last year, and a reduction of four per cent (from 50) on the previous quarter
- 334 C. diff cases in over 65s - down 6.2 per cent (from 356) when compared year-on-year and down 2.9 per cent (from 344) on the previous quarter.
- 380 cases of SAB infections overall (MRSA and MSSA combined) – a decrease of 10.4 per cent (from 424) when compared with the previous year, and down 6.9 per cent (from 408) on the previous quarter.²²⁸

A further issue of concern raised in relation to healthcare quality in this research was that of delayed discharge. The issue itself has been identified as a concern throughout the UK since the Welfare State was created and there have been a number of policy responses aimed at tackling this issue.²²⁹ Delayed discharge, where people are prevented from moving on to the next stage of their care is monitored through the Health and Social Care Programme.²³⁰ In recent years, delayed discharge has become increasingly problematic as care in the community has become the preference to care within long stay hospitals. For example, a national review of learning disability services in Scotland in 2000 (Scottish Executive, 2000) recommended that Health Boards should close all long stay beds by 2005.²³¹ A review of whether or not these recommendations had indeed been met revealed that overall, 17.5 per cent of hospital based placements were defined as a 'delayed discharge', either because *"no suitable facility in the community or service development needed"* or *"social care reasons."* Overall the report recommended pooling of resources between health boards and local authority as overuse of hospital beds can result in insufficient community placements and vice versa (Perera et al., 2009).

In their 2007 report into the *Human Rights of Older People in Healthcare*, the Joint Committee on Human Rights noted that whilst many older people received excellent care, concerns over poor treatment including ill-considered discharge were raised.²³² The Committee raised concerns both about the levels of delayed discharge and also about over the operation of the Delayed Discharge Regulations, whereby often the short timescale afforded to arrange a placement led to an infringement of an individual's right to respect for private and family life (Article 8 ECHR).²³³

3.4 Health promotion

3.4.1 Lifestyle choices

Lifestyle choices engage an individual's autonomy under the right to private life (Article 8, ECHR). As the ECtHR has found this includes:

*"The ability to conduct one's life in a manner of one's own choosing [which] may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned."*²³⁴

This will be engaged in legal and policy measures to *restrict* ability to pursue unhealthy lifestyle choices such as smoking, alcohol abuse and unhealthy eating. This right is qualified, not absolute. As such any interference must have a legal basis, pursue a legitimate aim (such as the protection of health or the economic well-being of the country) and be a proportionate means of achieving that aim – that is the least restrictive alternative which is capable of achieving the aim.²³⁵

This exists alongside a positive obligation under the right to health to *promote* healthy lifestyles by, amongst other things,

"(i) Fostering recognition of factors favouring positive health results, e.g. research and provision of information;

...

(iii) Ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services;

(iv) Supporting people in making informed choices about their health" (UN CESCR, 2000).

Similarly, under the UN Convention on the Rights of the Child, adolescents have a right to access essential health related information regarding issues such as the use of tobacco and alcohol and other substances, safe and respectful social and sexual behaviours, diet and physical activity (UNCRC, 2003). In accordance with the overall Convention this should be in a manner appropriate to their age and stage of development.²³⁶

As noted above, lifestyle choices remain a significant health challenge in Scotland. When compared to the rest of the UK, some of the biggest health-related behavioural differences in Scotland are found in relation to smoking, diet and alcohol consumption (Bromley and Shelton, 2010). Research also consistently shows poorer health outcomes for people in Scotland in relation to conditions which are considered to be connected to lifestyle choices.²³⁷ The research review suggests key challenges in addressing these statistics include their relationship with other factors such as: deprivation and poverty; an ageing population; and a complex geography with large and sparsely populated rural areas. This is coupled with the pressures on public funds in a time of recession, where it has been

estimated that NHS Boards will need to achieve efficiency savings of at least three per cent in order to break even, in addition to annual efficiency savings of two per cent since 2007/08 (Robson, 2011).

Successive Scottish Governments and the Parliament have taken a range of legislative and policy measures to address these challenges. Many of these focus on improving the health of children and young people and influencing lifestyle choices such as healthy eating, smoking and alcohol/drug misuse and on changing attitudes to mental health issues.

Over the past couple of decades, there has been a great deal of emphasis on reducing levels of smoking in Scotland,²³⁸ including legislation banning smoking in public places,²³⁹ raising the age at which it is possible to buy tobacco products to 18,²⁴⁰ and banning tobacco displays.²⁴¹ Current initiatives include consideration of standardised packaging across the UK (Department of Health, 2012). The reduction in smoking rates and lung cancer incidence in men since the mid-1990s has been considerable, although the uneven rate of improvement has actually sharpened inequalities.²⁴²

Whilst these initiatives have been broadly welcomed, some commentators have questioned their indirect impact on some people with mental health issues. For example, Warner (2009) has noted that smoking rates among mental health service users in the community are lower than those among in-patients; however, they are still much higher than those in the general population.²⁴³ People with a diagnosis of a psychotic illness such as schizophrenia or bipolar affective disorder are more likely than those in the general population and other mental health service users to smoke and to smoke heavily. The risks associated with cigarette smoking are, therefore, unevenly distributed amongst the population, with mental health service users at the 'sharp-end' of risk. Warner (2009) further argues that the mobilisation of stigma that has been used to encourage people to give up smoking in the general population, in the context of mental health actually adds to the stigma that mental health service users already experience.

In 2011 the Scottish Government and NHS Health Scotland published guidance for mental health services on how to achieve a fully smoke free environment (NHS Scotland and Scottish Government, 2011). It has been argued, however, that the implications of the smoking ban for mental health service users who wish to smoke but are compulsorily detained are significant because people in this position will not be able to smoke unless they are allowed leave or are accompanied off-site or to the designated smoking area to smoke. Going out for a cigarette therefore depends on there being adequate staff numbers available (Warner, 2009). The implications of smoking cessation for people with a diagnosis of some mental illnesses may not be as straightforward as for those with good mental health.²⁴⁴ For example smoking appears to reduce the effects of positive and negative psychotic symptoms and increase concentration levels. However, there is also evidence that smoking might intensify some forms of mental disorder such as anxiety and panic disorders. Higher doses of anti-psychotic drugs are required by people who smoke and some drugs appear to encourage smoking (Warner, 2009).

In preparation for their move to their new-build premises, The State Hospital at Carstairs took the decision to pursue their journey to a smoke-free environment in order that both staff and patients would benefit from not being subjected to the effects of smoke pollution. This journey involved a number of processes throughout 2011, including wide consultation,

strong smoking cessation services and a phased approach.²⁴⁵ The hospital went smoke-free in December 2011, despite legal efforts from some patients to allow the continuation of the partial ban on a permanent basis. Since the complete ban was enforced, internal research has shown that patients have noted how surprised they were at how they were coping in the new environment and were pleased with their achievements in relation to stopping smoking. The State Hospital noted that there were a number of factors that they felt were key to the successful transition to a smoke-free environment which included, strong leadership, effective planning, wide and repeated consultation of all key stakeholders; suitable funding and resources for the smoking cessation programme (including Nicotine Replacement Therapy; support of staff and the phased process of going smoke-free, allowing patients to adjust over time (The State Hospital, 2012).

Alcohol abuse in Scotland has significant financial as well as health impacts. The Scottish Government has reported the costs to the economy to be £3.5 billion a year in lost productivity, crime and hospital costs. Its human cost is put at approximately 3,000 lives a year (Carrell, 2012). In August 2011 Scotland's alcohol statistics revealed 23 per cent higher sales in Scotland than in England and Wales. It showed that on average adults in Scotland consume 22.8 units of alcohol adult per week - above the recommended upper weekly limit of 21 units for men (BBC News, 2011a, NHS National Services Scotland, 2011). In response the Scottish Government published a strategy to reduce alcohol consumption in 2009 (Scottish Government, 2009b), and more recently has pursued the introduction of minimum pricing. This latter move has led to significant political debate, but remains on the political agenda²⁴⁶ as the Scottish Government still considers:

"Minimum pricing to be the most effective and efficient way of reducing alcohol consumption and hence alcohol-related harm".²⁴⁷

Evidence regarding the effectiveness of a minimum pricing policy reveals that low minimum price thresholds (for example 25p) have virtually no impact in reducing negative outcomes. However, as the minimum price increases: alcohol related admissions and deaths; alcohol-related crimes; absenteeism from work and unemployment from work are all estimated to decrease (Meier et al., 2012).

Others firmly believe that minimum unit pricing of alcohol is illegal and will both damage the alcohol (whisky) industry in Scotland and be ineffective in tackling alcohol misuse.²⁴⁸ Whilst the Scotch Whisky Association clearly have a vested interest in this issue, they use the same research (Meier et al., 2012) as the Scottish Government to make their points, namely, that evidence shows that minimum pricing will not reduce the number of drinkers at hazardous levels. They further argue that whilst there is clearly an alcohol misuse problem in Scotland, recent statistics show that alcohol-related harms and deaths are decreasing, including deaths from alcoholic liver disease, rates of which have been in decline since 2006 (The Scotch Whisky Association, 2012).

Participants in this scoping project readily acknowledged the health problems that existed in Scotland with respect to alcohol and accepted that there was need for some kind of action. Many thought that legislation regarding alcohol would, however, wrongly impact on the majority rather than tackling the problem minority, as one participant noted:

I don't know about minimum pricing, will it really impact on the ones it needs to? And to be honest do we know who 'they' are? It's easy for me to sit at home and say, oh those kids and their irresponsible drinking, while I sit there and drink half a bottle to a bottle of wine most nights if I'm honest. And why on earth is the extra money raised going to the

supermarkets as profit? Surely it would make more sense if that money went back into NHS frontline services that have to deal with the after effects of alcohol abuse?

Alice, School teacher

A number of initiatives have also been developed to improve Scotland's diet. An independent evaluation of a 1996 UK Government action plan showed poor results, partly relating as it lacked intensity, resources and focus.²⁴⁹ More recent measures have been more focussed, in particular on nutrition of children and school meals.

The Schools (Health Promotion and Nutrition) (Scotland) Act builds on the work of *health promoting schools*²⁵⁰ and *Hungry for Success* (Scottish Executive, 2003b). The Act ensures that food and drink served in schools meets nutritional requirements specified by the Scottish Ministers by regulations. It seeks to reduce the stigma associated with free school meals by requiring local authorities to protect the identity of those eligible for free school meals, gives local authorities the power to provide pupils with healthy snacks and drinks, either at a cost or free of charge and requires local authorities to consider sustainable development guidance when they provide food or drink in schools. The Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2008 commenced in primary schools on 4 August 2008. The regulations commenced in secondary schools on August 3, 2009. The duty to provide free drinking water to pupils at all times commenced in both primary and secondary schools on August 4, 2008.

According to the Scottish Government website,

"Access to free school lunches is an important part of the school lunch service in Scotland. It is important that pupils entitled to free school lunches get them without fear of stigmatisation. They should not be made to feel different from those who pay nor be readily identified by others. Local authorities should work to promote increased uptake of free school meals amongst those currently eligible".²⁵¹

Pupils entitled to free school meals are those within families who receive Income Support (IS) or Income-based Job Seekers Allowance (IBJSA). Those within families who receive support under Part VI of the Immigration and Asylum Act 1999 may also be entitled. Children who receive IS or IBJSA in their own right are also entitled to receive free school meals. Also entitled are children whose parents or carers receive Child Tax Credit, do not receive Working Tax Credit and had an annual income (as assessed by the Inland Revenue) of below £16,040 in 2009/10. As of August 2009 eligibility was extended to include children whose parents or carers are in receipt of both maximum child tax credit and maximum working tax credit and an annual income below £6,420. In October 2008 following a pilot project in several areas which provided free school meals to all children in primary 1-3, the Government announced plans to roll out the project across Scotland. The £5m pilot was reported to be a success with teachers positive about the outcomes of the scheme (BBC News, 2008).

The Scottish Government pledge to roll out free school meals to all children for the first three years of school, however, did not meet with complete success by April 2010. Only one local authority had succeeded in meeting this goal as many local authorities struggled to fund the initiative (Seith, 2012). Furthermore it was reported that Edinburgh and Glasgow had no plans to change their policy as they were providing free school meals to 20 per cent of pupils.

Some research has questioned whether information campaigns on healthy eating are sufficient to improve the diet of Scotland's children. Crombie et al. (2008) reported on a survey of 300 mothers²⁵² of 2-year-old children from areas of high deprivation in Scotland deriving a "diet quality score" from reported consumption of carbohydrates, protein, fruit and vegetables, dairy products and restriction of sugary fatty foods. The results demonstrated that 85 per cent of children were classified as having a poor quality diet. Mothers' general knowledge about healthy eating was high, but did not predict the quality of the children's diet. A significant contributor was high intake of sweets and reported difficulty in providing two to three portions of fruit a day. The authors concluded that interventions to improve children's diet could promote more positive intentions about preparing and serving of foods, particularly of specific meals at which the family eats together. The benefits of these behaviours to the child (improved diet, weight control) should be emphasised (Crombie et al., 2008).

In an interesting case study on measures to promote healthy eating, The State Hospital attempted to improve the dietary health of patients by reducing their access to food and drink that was high in fat and sugar.²⁵³ The move was, however, successfully challenged in a judicial review.²⁵⁴

3.5 Non-discrimination within health care service provision

"Health inequalities are complex. Socio-economic factors such as low income, gender, social position, ethnic origin, age and disability increase the risks of poor health. Behavioural factors such as smoking, alcohol, drugs, poor diet, poor sexual health and low physical activity also increase the risk of health-related problems. Many of these factors are interlinked and further increase the risk of health problems. A key function of Community Health is to 'tackle health inequalities, enhance anticipatory and preventative care, shift resources to community settings and provide a wider variety of services at local level'" (Audit Scotland, 2011).

As noted above the right to health includes an obligation to ensure that health facilities, goods and services are accessible to all without discrimination. This has four dimensions: non-discrimination (in law and fact), physical accessibility (including in rural areas and for disabled people), economic accessibility and information accessibility (UN CESCR, 2000).

Economically, a bedrock of health service provision in Scotland is that the NHS is free at the point of access and access is based on need.²⁵⁵ A point that was acknowledged by many participants in this scoping project:

People I have spoken with as well who have come to live in Scotland have been very impressed with the NHS, with all its faults... they recognise that the system is much better than what they had at home. For me too, I lived in London for a couple of years before coming up here and the provision difference is like chalk and cheese. I would much rather get sick in Scotland. In that way, you do something right here.

Gregory, Member of a rural mental health support group

A key *Quality Ambition* in the *Healthcare Quality Strategy* (NHS Scotland, 2010) is that interventions, support and services will be provided at the right time to everyone and this section will review literature which discusses strategies working towards equal access to public health services for all.

Overall there has been significant policy attention towards addressing health inequalities in Scotland, including inequalities in access to healthcare as well as inequalities in health outcomes. A Ministerial Task Force produced a report *Equally Well* which led to a joint action plan with COSLA (Donnelley, 2008a). Reconvening to review progress in 2010 the Ministerial Task Force agreed new actions including that the Scottish Government and the Local Government Improvement Service would support Community Planning Partnerships to deliver change (Scottish Government, 2010c).

An independent evaluation of the implementation of *Equally Well* (Fyfe et al., 2011) found that all test sites had made progress towards partnership working, although far fewer had yet (after 30 months) made progress on improving outcomes for service users (only 3 per cent of respondents felt such change had been achieved). There were concerns that reducing public sector budgets may threaten the sustainability of progress. When asked for views on how national policy could help deliver local results in advancing health equality, respondents suggested a range of measures, including a greater focus on early intervention; linking different Scottish Government approaches better; making sure that all relevant parts of the NHS were fully involved; national outcomes and targets for public sector organisations should clearly reflect the need to tackle health inequalities; spreading learning widely, so that approaches could be transferred to other areas where this was appropriate (Fyfe et al., 2011).

3.5.1 Ethnic and religious minorities

Despite such policy attention to address health inequalities, life expectancy still remains markedly lower for some minority groups – notably Scottish Gypsy/Traveller communities.²⁵⁶ There are also varying rates of difference pathologies within different ethnic groups population with debate having centred on the relative causalities of genetic and socio-economic factors (Coccia, 2010). Rates vary, with some ethnic minorities reportedly having significantly higher rates of cardio-vascular disease (notably South Asians) and diabetes, and lower rates of cancer than median rates in Scotland (Coccia, 2010).

Despite some policy initiatives to promote racial equality in access to healthcare (e.g. Fair for All (NHS Scotland, 2002)), there is continued evidence of inequality in practice. For example, in 2005 the Mental Welfare Commission (MWC) carried out simultaneous unannounced visits to 19 acute admission wards. The report noted that there were 240 patients in the 19 wards visited, of which 13 were from a minority ethnic group and 8 of those did not speak English as a first language. While all wards reported that there was access to an interpreting service, the MWC made a series of recommendations on how communication could be improved with patients whose first language was not English. These a review of written guidance information to make sure that it is available, as far as practicable, in the languages of the people who receive treatment in hospitals (Mental Welfare Commission for Scotland, 2005).

Research on the experiences of Polish immigrants accessing health services in Aberdeenshire reported many positive experiences. However key among the research recommendations were addressing language barriers through availability of translation or Polish language medical staff and the translation of written material into Polish (Love et al., 2007b).

Recent research has also suggested that there is a lack of awareness and understanding of the needs of Muslims within public services. For example, it has been suggested that often mainstream mental health and maternity services do not operate in a religiously and culturally sensitive manner. Therefore young British Muslims do not feel comfortable accessing mainstream support services, for fear of being misunderstood (Kidd and Jamieson, 2011).

Worth et al (2009) have also concluded²⁵⁷ that despite a robust Scottish diversity policy, services for South Asian Sikh and Muslim patients with life limiting illness were wanting in many key areas. They propose that active case management of the most vulnerable patients and carers, and “real time” support, from where professionals can obtain advice specific to an individual patient and family, are the approaches most likely to instigate noticeable improvements in access to high quality end of life care.

Participants in that scoping project suggested that the low level of uptake of hospice places in Scotland, compared to that in England, arises in part from cultural differences, language barriers and lack of culturally appropriate dietary options, whereas in England there are more hospices run by Asians for Asians. Moreover, patients may feel uncomfortable in accepting care from non-Asian care givers and may be concerned at potential lack of sensitivity or discriminatory treatment from staff (Worth et al., 2009). The research concluded that within minority ethnic groups the most vulnerable people, such as recent migrants, have the poorest access to services. Active case management of high risk patients should help to overcome many of these barriers and Professionals need ready access to information and support specific to an individual patient and family (Worth et al., 2009).

Participants in this scoping project referred to recent efforts within their local area to work with minority ethnic groups to ensure that they understood their health rights, as noted by a trainee social worker:

...we did a dialogue day between the NHS and ethnic minorities, we did a couple and that's one of the things that popped up all the time, people not knowing what services to access, things like going to an optometrist is free for a child, they said that the only way they found out about services was through friends. Information when people arrive in the country would have been useful.

Eric, Trainee social worker

Perth and Kinross Council also ran a similar event for Scottish Gypsy/ Travellers aimed at improving the health and wellbeing by promoting different services to members of the Gypsy/Traveller community. Services represented at this event included health but also included: the Council; Police; Live Active; and the voluntary sector. Members of the local Gypsy/Traveller community were involved in planning the event by advising on different activities that may be of interest to their community. Forty-five Gypsy/ Travellers attended the event which was very well received by the community and perceived by those who attended as a model of good practice for engaging with Scottish Gypsy/ Travellers on health and wellbeing (McPhee, 2012).

During the past decades, the UK has become an increasingly multicultural society and in the UK, all minority ethnic groups have a higher incidence of diabetes than the general population (Baradaran et al., 2006).²⁵⁸ Previous research assessing diabetes care in minority ethnic groups has found that recording of ethnic group has not been considered a

priority by Local Health Care Cooperatives. This information is an important starting point in the ability of NHS organisations to reach a position to target their finite resources more effectively. The absence of robust information is concerning given that diabetes is reported to be specifically identified by 71 per cent of Local Health Care Cooperative plans (Baradaran et al., 2006).²⁵⁹

Research also indicates that many failed asylum seekers are unaware that they are eligible for free healthcare or are anxious about contact with authorities so do not seek medical help (Smith et al., 2010a). Asylum seeking participants in this scoping project were, thanks to the help of a support group, aware of their health rights, and the majority faced no problems in accessing primary health care services. They did, however, highlight cases where access had not been straightforward due to a lack of knowledge amongst service providers, as the following case shows:

We had a woman who was told she would not get any care for her maternity, ante or post natal. She went twice during her pregnancy to A&E at the [hospital] and the second time she was told you have no GP you cannot come back to A&E. So we had a lady who was one of our volunteers and she took [the pregnant woman] to every single GP, because [the pregnant woman] had gone and every GP had said no. So [the volunteer] went to her best determined upper class accent and said 'someone must give this woman attention, she is having a baby' and no she never got a GP. How could you deny this woman a GP? They did the same thing that we have experienced with the solicitors, they would say of course and then sometimes they would phone [the volunteer], never [the pregnant woman], and say sorry we checked into it and we can't.

Claire, Support worker for women seeking asylum

3.5.2 People with disabilities

Article 25 of the UN Convention on the Rights of Persons with Disabilities guarantees the right to health for disabled people and includes a range of specific obligations on States to realise that right. These include: requiring the same quality of care is provided to disabled people, including raising awareness of the right to free and informed consent of disabled people (including those with mental disorders); prohibiting discrimination against disabled people in life insurance.

Participants in a joint SHRC and Equality and Human Rights Commission [EHRC] participation event with disabled people (EHRC and SHRC, 2011), noted problems in accessing health services, as the following two cases illustrate:

"In my local hospital, a wheelchair [user] inpatient cannot independently access a toilet and close the door - meaning anyone can see them on the toilet. More needs to be done to ensure the rights of disabled people and that they are treated in a dignified manner. No able bodied inpatient would accept treatment like this but disabled people are expected to shut up and put up with it. All public buildings should be forced, by law, to have properly qualified Access Auditors undertake access audits and be forced, by law, to complete the work recommended by the Access Auditor".

Another woman told of how her GP arranged with her to meet with another doctor at a clinic where there was no disabled access. She was, therefore, made to meet with the

doctor in the back of a taxi because she could not access the doctor's office in her wheelchair. The subject matter of their discussion was very personal and both she and the taxi driver sitting in the front were left embarrassed at the end of what was supposed to be a confidential meeting (EHRC and SHRC, 2011). This level of care would raise issues of compatibility with ECHR Article 8 on the right to respect for private and family life. The underlying apparent failure to ensure reasonable accommodation and access to health services to people with disabilities also raises compatibility issues with both the Convention on Persons with Disabilities and the Equality Act.

Similarly, people with sensory impairments have been found to face numerous hurdles in accessing services. Lack of access to sign language interpreters compounds common feelings of social exclusion and hearing impaired people felt that they waited too long for allocation of equipment (Skellington Orr and Leven, 2006).

As part of its work towards reducing health inequalities, NHS Quality Improvement Scotland²⁶⁰ has taken steps to improve and encourage the involvement of people with learning disabilities in health service review teams. An independent evaluation concluded that the inclusion of people with learning disabilities in NHS QIS review teams in Scotland was an innovative step, and the evaluative feedback from everyone involved was generally very positive. The makeup of review teams also had a positive impact on how health services viewed these 'expert patients' and how their health needs can be met in a more inclusive way. This methodology adopted by NHS QIS showed the importance that the evaluation team attached to the principle of 'participation' and to both understanding and valuing the perspectives of those who are in receipt of these particular services. The innovation also resulted in a number of unforeseen consequences, during and after reviews, which challenged traditional assumptions about the balance of power between professionals and people with learning disabilities (Campbell and Martin, 2010).

Further work has been carried out in respect of a small number of patients with learning disabilities suffering cancer (Forbat and McCann, 2010).²⁶¹ The research noted that people with learning disabilities have traditionally been excluded from involvement in decision making about services that affect their lives. The research noted positive experiences of communication where people with learning disabilities were provided with adequate information and were able to ask direct questions of the healthcare practitioners. It was commonly reported that people were being bypassed with information provided to their families. This was occasionally the case even when the intellectually disabled person asked direct questions of healthcare practitioners. Other negative experiences which were reported included a lack of patience demonstrated by some health workers (Forbat and McCann, 2010). The researchers reported a paternalistic approach in failing to discuss "taboos" of the reality of life with cancer and an overall feeling amongst 'gatekeepers' i.e. friends and relatives, that discussing experiences of cancer would be too upsetting for people with learning disabilities.

3.5.3 Sexual Orientation and Gender Identity

The research review identified a relative lack of consideration of the experience of LGBT people, and Transgender people in particular, in health care. Macpherson and Bond (2009) reported that a significant percentage of research on access to healthcare by LGBT people has focused on HIV which is most common among gay men, at the expense of broader health and wellbeing (Macpherson and Bond, 2009). An exception is research commissioned by Stonewall Scotland into the experiences of 500 lesbian and bisexual

women in the health sector in Scotland. Of the participants, half had negative experiences in the health sector in the previous year. One in ten said that a healthcare worker ignored them when they did reveal their sexuality/sexual identity. Seven in ten reported that healthcare workers made inappropriate comments when they came out. Just one in nine felt that their partner was welcome during a consultation (Hunt and Fish, 2008).

One participant in this scoping project talked about the inappropriate treatment she had received whilst in hospital, which she perceived to be the result of a lack of quality diversity training:

I think the problem with health is sometimes a lack of dignity and I think that that is down to a lack of training, I don't think health boards pay any more than lip service to training people. If you've never met a Trans [gender] person, you have no idea... I was in casualty and when they cut my trousers off due to an injury to my legs and they found tights underneath and they all had a little giggle and then when they cut the tights off I still had my toe nails done and that caused another giggle and I saw more medical staff than I have ever seen in my life because they were all coming to have a gawk at me, being voyeuristic. Now that was wrong and I was strong enough to call the senior consultant out and say what was wrong with the way the staff were acting. But I am a strong person and what about those people who are not, what about those whose voice isn't strong enough? I said to him, this is not professional conduct from your staff, I am here as someone who has had an accident and I said here I am in your unit being treated like some kind of freak, it's not good enough and there was an apology. In the initial stages, Trans [gender] people are not just in the closet, we are so far back we're in a cave, and so the dignity of Trans [gender] people is so important.

Catriona, Trans [gender] woman, diversity trainer for public bodies

Research supported by Engender into the experience of trans women in gender reassignment services (Burrows et al., 2011). The research involved a number of methods including the largest survey of Trans [gender] women to date (49 participants across nine Scottish health boards). The survey revealed a relatively positive picture in relation to support provided by GPs (92 per cent had good support).²⁶² This was supported by participants in this scoping project, who on the whole found their own GPs were supportive:

My GP is very good... But the GP didn't really know anything, so when I said this is what I am going to do, she was quite enlightened and she asked me if we could grow together, which I thought was really nice. So whenever I went to appointments at the Sandyford I'd fill her in and tell her next steps and who she would hear from and so on. So we went on a discovery path together and it was advantageous to her and to me, the two nurses at the practice were also very supportive especially after my surgery. It's great except on the odd occasion when they get a locum in and then that's a laugh. By and large I am lucky, but also now as a result of my experience, several Trans [gender] people now go to my surgery to see that doctor because they feel comfortable. But I know people who have not had that experience and have had to move.

Jane, Trans [gender] woman

Access to Gender Reassignment health services, however, has not been found to be as common (Burrows et al., 2011). One participant in this scoping project reported that it can be very difficult for anyone who lives outside of the central belt as no matter where you

live, you must attend pre-surgery specialist counselling at the Sandyford clinic in Glasgow. Further, only a fifth of the Engender participants had received NHS funding for the treatment of facial hair removal (43 per cent had paid privately); 29 per cent of respondents had received Health Board funding for private surgery, with only six per cent having had NHS surgery.

Almost a fifth of the respondents in the Engender survey (Burrows et al., 2011) had to wait over two years for this surgery, which had brought about episodes of anxiety, depression, self-harm and attempted suicide for two-thirds of those required to wait so long. As a participant in this scoping project said:

One woman I talked to, when I met her I was so upset because she sat and told me how she had tried to end it all because she couldn't cope anymore, not being able to get treatment and no matter what she did, no one at the NHS was listening. She was a woman at the end of her tether and I'd never met someone like that before and it really hit me and it hurt... How can there be women and all they want to do is live their lives as a woman and everyone seems to be against them? No-one is listening. We don't want preferential treatment, we just want treatment.

Catriona, Trans [gender] woman, diversity trainer for public bodies

Overall the Engender research highlighted a need for greater funding both in Gender Clinics and for Gender Reassignment treatments. This was seen as crucial given the serious mental health problems that delays in funding and lack of access to services has led to. They suggest that a “*funded patient pathway*” would be one means by which to improve the treatment of Trans women as well as reducing the impact of funding delays and refusals (Burrows et al., 2011).

3.5.4 Economic and social situation

While domestic equality legislation is limited to enumerated grounds or ‘protected characteristics’, international human rights law is non-exhaustive in its approach to non-discrimination and equality. Both the ECHR and the International Covenant on Economic, Social and Cultural Rights prohibit discrimination on a range of enumerated grounds “...or other status”. The UN Committee on Economic, Social and Cultural Rights has authoritatively interpreted, this extends, in relation to the right to health, to economic and social situation (UN CESCR, 2009).

Patterns of illness are inequitably spread across the socio-economic spectrum, with those living in poverty more likely to die early and to suffer from a range of health problems (Donnelley, 2008a, O'Flaherty et al., 2009, Conway et al., 2007). The EHRC Triennial Review reported that in Scotland 32 per cent of adults over sixteen in the most deprived areas reported a longstanding illness, disability or health problem compared to only 14 per cent in the least deprived areas (EHRC, 2010b).

Research suggests that poor health is an even greater problem amongst the homeless population. Research amongst homeless people in Aberdeenshire revealed that homeless people suffer higher levels of morbidity than people in the general population (Love et al., 2007a). Moreover, in relation to long-standing illness and disability, the research established that three-fifths of participants reported having such a condition (61 per cent), with drug problems, mental health problems and alcohol problems the most reported conditions suffered. Fifteen per cent of those, reported some kind of long-term physical

illness or disability such as heart disease, paralysis, joint problems (i.e. painful legs), back trouble, blindness epilepsy, kidney disease, asthma, osteoporosis and a general lack of fitness (Love et al., 2007a).

Pilot projects were established in 2004 to provide evidence in relation to whether increasing resources to deprived areas would lead to an improvement in access to NHS services. These pilot projects ran in Argyll and Clyde, Greater Glasgow²⁶³ and in Tayside Health Boards. Examples of unmet need included access by people with coronary heart disease in deprived areas to a range of services, attendance at breast screening clinics, uptake of winter flu vaccinations (Donnelley, 2008b).

Evaluating the pilots Donnelley (2008b) recommended, amongst other things that services should be shaped and adapted to fit the needs of service users, adapted to times which accommodate lifestyles and childcare; delivered in community based venues; integrated; provided with consistent support along the whole patient pathway and personal for example considering the allocation of a specific health worker.

3.5.5 Access to health care in rural areas

Research on the differential access to health care in rural areas is considered in the thematic section entitled “Where We Live”.

3.5.6 Mental Health

3.5.6.1 Strategy

Following consultation the Scottish Government launched a new Mental Health Strategy in August 2012 focussing on four main areas of challenge: child and adolescent mental health services; rethinking approaches to common mental health problems; community; inpatient and crisis services; other services and populations (Scottish Government, 2011f). The strategy contains a number of commitments, including that the Government will:

“work with the Scottish Human Rights Commission and the Mental Welfare Commission to develop and increase the focus on rights as a key component of mental health care in Scotland.” (Scottish Government, 2011f)

On the specific issue of suicide, the UN Committee on Economic, Social and Cultural Rights recommended in 2009 that the UK intensify the efforts to decrease the number of suicides (UN CESCR, 2009). The Scottish Government’s ten-year ‘Choose Life’ strategy and action plan was launched in 2002 and evaluated in 2009. The evaluation concluded that there was a continuing need for action on suicide prevention and to link with drug and alcohol services, primary care and clinical mental health services (Russell et al., 2010). Statistics indicate that suicide rates fell by 13.8 per cent in Scotland between 2000-2002 and 2008-2010 (Scottish Government, 2011f). Further areas where the Government reports success include significant reductions in readmission rates, and increasing rates of dementia diagnosis.

In relation to dementia, Alzheimer’s Society and Alzheimer Scotland mapped rates of dementia diagnosis finding the highest rates of diagnosis in Scotland (64.5 per cent in 2011, in comparison to 61.5 per cent in Northern Ireland, 41.1 per cent in England and 37.4 per cent in Wales). Five of the top ten NHS areas and eight of the top ten most

improved in diagnosing dementia were also found to be in Scotland (Alzheimer's Society and Alzheimer Scotland, 2012).

The Government has committed to reviewing the state of all mental health services in Scotland in 2013-2014 (Scottish Government, 2012d).

3.5.6.2 Addressing mental health stigma

Research found that 81 per cent of people you had experienced mental health problems had been subject to stigma, with reporting that they found the stigma worse than the mental health problem itself (McArthur and Dunion, 2007). As SAMH has reported experience of such stigma can also be at the hands of medical practitioners, including psychiatrists (Stuart, 2006).

The 'See Me' campaign was launched in October 2002, with the aim of addressing the negative attitudes and behaviours which systematically disadvantage people with mental health problems and those close to them and with the purpose of tackling the stigma and discrimination experienced by people with mental health problems (Myers et al., 2009).

An evaluation of its first four years found the campaign had drawn attention to the stigma and discrimination experienced by people with mental health problems. It recommended further consideration of equality and diversity in campaign targeting, design and delivery. Progress was seen to be hindered by a lack of funding, of strategic approach and a failure to encourage others to take responsibility for overcoming the inequality and exclusion faced by people with mental health problems (Myers et al., 2009). Scottish Government also surveys public attitudes to mental health, with results continuously improving (Davidson et al., 2009).

The campaign has achieved international recognition in a publication of the World Health Organisation (World Health Organisation Europe, 2008) and was well-known amongst most participants in this scoping project. Participants considered 'See Me' has slowly begun to dig away at entrenched societal attitudes about mental health. As one participant with longstanding mental health problems explained:

I am much older than most of you and in our generation until quite recently we did not talk... talking about mental health issues was an absolute taboo. It was a shame to the family. If a member had mental health problems, it was not spoken about and that meant that people with mental health problems felt isolated, they thought that there was nobody else in the same situation. We didn't know that anybody else was suffering, we were freaks. We were to keep our problems under wraps. So the openness that has been developing since I got involved in helping with See Me is great... Nothing will change overnight but in these ten odd years that I have been actively involved, I have started seeing a change in attitudes and increased knowledge which is the most important thing in my mind, because the stigma that is experienced by all of us, it is largely fear of the unknown and if we don't talk about these things, we will never learn and nothing would ever change.

Clarissa, Participant at a rural mental health association

Participants involved in a joint Voices of Experience, SHRC and EHRC event (VOX Scotland et al., 2012) were critical of some aspects of the 'See Me' campaign, believing it to be directed too much at educating professionals rather than aiding people with mental health problems. Some felt that the youth campaign 'Free Your Mind' run by

the Highland Users Group (HUG)²⁶⁴ was a more effective model as it targeted mental health stigma among schoolchildren.

In 2012 the revised campaign strategy for See Me was one of four case studies which used integrated Health, Inequality and Human Rights Impact Assessment in policy and strategy setting processes. This drew out various ways in which a reframing of the campaign strategy could further advance the human rights of people with mental health problems by emphasising that people with mental health problems have the full range of human rights and that Government and other public authorities have obligations to identify and address barriers to the realisation of those rights.²⁶⁵

3.5.6.3 Access to mental health care

Previous research highlights that one in four people is not provided with the access to mental health services that they require (Beaton, 2001, Spicker et al., 2002, Love et al., 2007a, Green, 2007, VOX Scotland et al., 2012, Mental Welfare Commission for Scotland, 2011c, BMA CCSC Psychiatry Subcommittee, 2008).

Scotland has a target to ensure access to specialist Child and Adolescent Mental Health Services within 26 week by March 2013. The Scottish Government reports it is on track to meet this goal (Scottish Government, 2012d). However, freedom of information requests by Mary Scanlon MSP in 2011 demonstrated that delays at that time range from 16 weeks in Dumfries and Galloway, to 182 weeks in Tayside (National Health Executive, 2011). Citing a MWC report from 2008, the Scottish Association for Mental Health (SAMH) has raised also concern at reported increases in the numbers of young people admitted to adult psychiatric wards in some areas.²⁶⁶ Together also raise this issue in their most recent report on the *State of Children's Rights in Scotland (2012)*, noting that even a 26-week waiting period still leaves many children waiting too long for the support that they need. They state that:

"A more ambitious target for access to CAMHS is needed to send a message to health boards that this is a priority" (Together, 2012).

In 2009 the UN Committee on Economic, Social and Cultural Rights recommended that the UK strengthen the provision of psychological counselling services (UN CESCR, 2009). Scotland has a target of ensuring access to psychological therapy, irrespective of age or disorder within 18 weeks by 2014. This is described by the Government as uniquely ambitious (Scottish Government, 2012d).²⁶⁷ The target has been welcomed by mental health service user representatives such as Voices of Experience (VOX) who note the value of cognitive behavioural therapies (CBT)²⁶⁸ and other psychological therapies and the need to address current delays in accessing them. As Gordon Johnston of VOX stated:

*"I have personal experience of this: my GP referred me for cognitive behavioural therapy some ten months ago. I have still to receive an appointment."*²⁶⁹

Almost every participant in this scoping project who had the need for mental health services had had to wait considerable lengths of time to be seen by an appropriate service. This was the case whether they lived in urban or rural areas. However, participants reported particular challenges for those living on outer lying Scottish islands. For example, participants in this scoping project reported that anyone living on the outer Orkney Islands who required mental health contact time must travel, often at their own expense, to the main island.

Most participants who had experienced mental health problems had had to wait for access to services, often causing additional stress to themselves and others such as family members:

Over a year ago I had to put my daughter into care because I wasn't well enough to look after her because my mental health was so bad, and she was in care for 14 months and it should have been 6 weeks, while I waited for CBT treatment, I am still waiting for CBT treatment. They gave me my daughter back because they couldn't afford to keep her in care and my husband has had to give up his job which he has had for 38 years to look after my daughter and I am still waiting.

Cherie, Participant at a rural mental health association

This scoping project also revealed problems faced by asylum seekers in accessing mental health services.

Access to mental health appears to be a different story [compared to access to a GP]. It took a very long time before Meena eventually got an appointment...two years ... In that two years her memory was impacted by stress levels, her sleep patterns were impacted by stress levels and ... she has got some joint and muscle skeletal problems... And that is outrageous; they have ruined this woman's health... You cannot leave someone who has expressed a need to engage with mental health services two years, that is like saying it's hopeless anyway there is no point in trying. You need someone to at least assess you to see how pertinent your needs are.

Claire, Support worker for asylum seeking women

Further, as Claire described, often there may be underlying cultural or religious barriers to accessing mental health services which should be considered:

... to get mental health support you have to say you are 'suicidal' – it is not an African thing to say 'I feel suicidal'... and it is completely taboo to talk about suicide in both Christianity and Islam, so you've got cultural taboos, faith taboos and I think it would be incredibly difficult to expect one of these women to have to say to a health care worker, it's bad, I need help because I no longer wish to live, I don't think they can say that. And I don't think it is fair, because if I go to my GP and say that I will be triaged and get help straight away. I couldn't tell Meena to say that, she couldn't say that and then go to church on Sunday.

Claire, Support worker for asylum seeking women

3.5.6.4 Mental health treatment and care

The relevance of human rights in mental health care and treatment is perhaps more often recognised than in any other area of healthcare. In this section we are concerned not with the liberty of patients subject to mental health detention (which is considered in the thematic section entitled 'Living in Detention') but with care and treatment in and outside of mental health institutions. This raises issues under a wide range of human rights, including but not limited to the right to life (and positive obligations noted at the start of this thematic section to protect people from real and immediate threats to their life from themselves or others); the right to be free from torture, inhuman or degrading treatment or punishment; and the right to respect for private and family life (including autonomy, physical and mental integrity) (Bartlett et al., 2007). Persons deprived of their liberty on mental health grounds (under Article 5(1) (e) of the ECHR) must be detained in an appropriate therapeutic

environment.²⁷⁰ Such a requirement does not apply to those detained under Article 5(1) (a) (those detained upon conviction by a competent court).

The Mental Health Care and Treatment (Scotland) Act 2003 (2003 Act), which came into force in October 2005, is described as having brought the most fundamental change to mental health law in 40 years (Ridley et al., 2009). It draws on the Millan Principles (2001) of non-discrimination, equality, respect for diversity, informal care, participation, respect for carers, least restrictive alternative, child welfare, reciprocity and benefit. In this way the 2003 Act has been recognised national and internationally as human rights based and described by among others SAMH as “one of the most advanced pieces of mental health legislation in the world”.²⁷¹

A 2009 review²⁷² of the Mental Health (Care and Treatment) (Scotland) Act 2003 found amongst other things:

- awareness and use of advance statements²⁷³ (whereby a patient can set out the way they would like to be treated in the event of becoming mentally unwell) had had low take up and needed further promotion;
- That the provision of advocacy services to everyone with a mental disorder (as outlined in the Act) should be pursued in practice by increasing their availability in some areas;
- The Scottish Government’s response proposed, amongst other things, a general duty to promote the use of advance statements.²⁷⁴

Much research has focussed on the extent to which the human rights based approach in mental health legislation has consistently translated into realisation of human rights in practice. Among the specific issues which have been the focus of attention are: restraint and seclusion; consent and necessity of medication; and locked door policies (Mental Welfare Commission for Scotland, 2010e, SHRC, 2009b, Mental Welfare Commission for Scotland, 2006, Mental Welfare Commission for Scotland, 2007, Mental Welfare Commission for Scotland, 2010c, Mental Welfare Commission for Scotland, 2010a, Scottish Government, 2011o, Scottish Government, 2011l, Care Commission and Mental Welfare Commission for Scotland, 2009, Mental Welfare Commission for Scotland, 2011d, Mental Welfare Commission for Scotland, 2011e, Mental Welfare Commission for Scotland, 2011f, SPSO, 2011).

In 2010 NHS QIS published the results of a national audit of Intensive Psychiatric Care Units (IPCUs), conducted in collaboration with the MWC, VOX and Better Together. It found in general a high quality of care but nonetheless found a range of areas in which there was scope for improvement. These included that some people remained in IPCUs longer than necessary; that problems exist in accessing IPCUs, particularly where such services are not available locally; a “range of unmet needs” in terms of activities, rehabilitation and a therapeutic environment; a “one size fits all” approach to risk management; a lack of opportunities for meaningful involvement in the care process. In response a series of recommendations were made for national and local level improvements (NHS QIS, 2010).

In 2011 MWC published an overview of findings and recommendations on visits to individuals with severe and enduring mental illness in rehabilitation and continuing care in psychiatric hospitals. Whilst it reported improvements since it last considered this group of patients it nonetheless recorded “serious concerns about their care” including that:

- “Almost half did not have an individual activity plan tailored to their needs.

- Many were subject to unnecessary restrictions because of blanket policies.
- Many felt unsafe and did not feel that staff acted on their concerns.
- We were not convinced that enough was being done to check their physical health.
- Some were still being subjected to the outdated and institutional practice of queuing for medication.
- We found that most of them were living in environments that were poorly deco-rated or maintained”.

(Mental Welfare Commission for Scotland, 2011a)

It made a series of recommendations as a result.

SAMH has called for “*targets and incentives for NHS Boards to act upon ... recommendations [in the 2010 NHS QIS and the 2011 MWC reports]*” (SAMH, 2011).

3.5.6.4.1 Dementia Care

MWC investigations into the living environment for dementia patients in hospitals found that only half of the 29 patients’ records examined showed the recording of a life history (Mental Welfare Commission for Scotland, 2007). This is despite the importance of the recording of a life history for dementia patients, given that it helps staff to understand the patient as an individual including his or her likes and dislikes, cultural and ethnic backgrounds. This person-centred approach is central to a human rights based approach to care, as outlined by SHRC in its training on social care and human rights, *Care about Rights?*²⁷⁵

The difficulties associated with provision of appropriate support and care for those people with dementia are reported to be particularly acute in rural areas of Scotland (Innes et al, 2006). Four key problems have been identified in providing quality dementia services in rural areas, namely: distance and transport; the cost of the service for the user; the lack of choices in services; and a shortage of skilled staff. The use of generic mental health services means that the specialist needs of dementia sufferers are not being met. Research has highlighted, therefore, that health and social policy in Scotland needs to consider a rural dimension to training and education to ensure that practitioners in rural areas are appropriately skilled and policy makers need to base their rural decisions about service provision on research and consultative based evidence which reflects the unique requirements of remote and rural dementia care service users (Innes et al., 2006).

Scotland’s National Dementia Strategy, adopted in 2010 includes explicit commitments to apply human rights based approach principles of participation, accountability, non-discrimination, empowerment and legality (the so-called PANEL approach which SHRC has promoted).²⁷⁶ This built on work of the Cross Party Group on Alzheimer’s at the Scottish Parliament, supported by SHRC and the organisation Alzheimer Scotland, to produce a Charter of Rights for People with Dementia and their Carers.²⁷⁷

3.5.6.4.2 Restraint and seclusion

The use of seclusion, restraints or other interventions with physical and mental integrity must be carefully considered to ensure that their use is consistent with human rights in each case.²⁷⁸ In recent years both UN human rights bodies and the European Court of Human Rights have been specific that the prohibition of inhuman and degrading treatment includes a prohibition of mental, as well as physical trauma. For example the UN Human Rights Committee states that:

“Article 7 [of the ICCPR] relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim” (UN Human Rights Committee, 1992a).

The European Court of Human Rights has also stated that special scrutiny is necessary where people have been detained in psychiatric facilities²⁷⁹ and whether an act is classed as amounting to ill-treatment will depend on the situation of the individual:

“The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of [the convention.] The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim.”²⁸⁰

UN and other regional human rights bodies consider that the use of seclusion, particularly for people with mental disabilities, may amount to ill-treatment.²⁸¹

In Scotland the National Care Standards²⁸² define restraint as control to prevent a person from harming themselves or other people by the use of:

- physical means (actual or threatened laying on of hands on a person to stop them carrying out a particular action);
- mechanical means (for example, wrapping someone in a sleeping bag or strapping them in a chair);
- environmental means (for example, using cot sides to prevent someone from getting out of bed); or
- medication (using sedative or tranquilising drugs for the symptomatic treatment of restless or agitated behaviour) (Scottish Government, 2007c)

Care facilities using restraint techniques must have a written policy and staff must be fully trained and supported in the use of restraint. Where it is necessary to restrain a resident, this must be recorded in the personal plan and records kept of any incidents requiring restraint.

The MWC has also produced detailed guidance on the use of restraint in residential care setting (Mental Welfare Commission for Scotland, 2006). The fundamental principle of the guidance is that restraint is a last resort where there is no other alternative. The MWC take a similar definition of restraint, to include the planned or unplanned, conscious or unconscious actions of staff to prevent a resident or patient from doing what she or he wishes to do and as a result, places limits on his or her freedom.

In a series of unannounced visits to investigate the conditions in 16 continuing care dementia wards, the MWC found that whilst in 12 of the 16 wards there was a policy in place regarding the use of restraint, 14 wards indicated that mechanical restraint was used at times (mostly bed rails or lap straps), with 11 using some form of restraint at the time of the visit. The MWC noted concern that training in restraint had been undertaken by staff in only 7 of the wards visited (Mental Welfare Commission for Scotland, 2007). The use of restraints is an area highlighted in a review of the Mental Health (Care and Treatment) (Scotland) Act 2003 as one which requires clarification and where Scottish hospitals require additional guidance.²⁸³

In its independent evaluation of the use of a human rights based approach at The State Hospital²⁸⁴ SHRC reported that staff, patients and carers noted a shift towards more patient-focussed approaches to care and treatment where individual risks and needs were assessed (SHRC, 2009b). As part of this approach SHRC found that the policy on the

Prevention and Management of Violence and Aggression was revised in 2006 to make extensive reference to human rights and highlight in particular the need to ask three key questions of legality, necessity and proportionality:

“In the case of procedures for the prevention and management of violence and aggression, especially those that potentially may involve greater infringement of patients’ rights, the staff response must be justified, appropriate and proportionate to the assessed actual or potential risk.” (SHRC, 2009b)

Following the introduction of this policy number of recorded violent incidents was found to have fallen by 25 per cent and seclusion was no longer used routinely, but rather only as a last resort.²⁸⁵ In relation to the use of seclusion SHRC found “*striking*” results:

*“In statistical terms the reduction in the use of seclusion is striking. Figures provided from the late 1990s, prior to the human rights-based approach, show that it was not be unusual for the number of seclusions on **one ward** in the period of **one month** to be over 30. Last year 12 seclusions were reported for the **whole year**, across the **whole hospital**” (SHRC, 2009b) [emphasis added].*

3.5.6.4.3 Consent to medication

SHRC worked with the MWC to produce extensive guidance on consent to treatment in 2010 (Mental Welfare Commission for Scotland, 2010a). The guidance took a human rights based approach - emphasising the presumption in favour of capacity and the importance of providing sufficient information to the patient to facilitate an informed choice. The guidance notes the importance of taking a functional approach to determining capacity, focussing on whether an individual is capable of making a specific decision at a specific time and outlines factors to be taken into account when determining whether a patient has capacity, as well as awareness of potential coercion. The guidance also covers the provisions of the Act which relate to situations in which treatment can be provided to a patient with capacity that nonetheless refuses treatment.²⁸⁶

Specific guidance also exists on the use of covert medication. In general terms, the decision to give medication to an individual without their knowledge requires consideration of issues including: capacity; least restriction; consultation with relevant others; taking account of past and present wishes; and there are specific steps to be taken to record the use of covert medication and to keep it under review (Mental Welfare Commission for Scotland, 2006).

The 2011 Scottish Government dementia review addressed the need to respond better to behaviours that staff and carers find challenging, and discussed the overuse of psychoactive medication for dementia patients in all care settings²⁸⁷. The Dementia Strategy commits to reducing the use of this medication in 2011 and beyond:

This commitment is designed to help drive wider changes such as involving those with dementia and their carers in promoting positive care in order to help behavioural issues from arising; always exploring therapeutic approaches as the first alternative in intervening in such circumstances; always regarding the use of psychoactives as the last treatment option and complying fully with the law in assessing someone’s capacity to consent to treatment ; and always reviewing prescribing at regular intervals to assess its continued appropriateness (Scottish Government, 2011l).

Research has shown, however, that 33 per cent of care home residents are taking antipsychotic medications and 6 per cent were taking olanzapine or risperidone, despite warnings about the use of these drugs (Care Commission and Mental Welfare

Commission for Scotland, 2009).²⁸⁸ This research also raised concerns relating to prescription medication such as: over prescribing; failure to keep prescriptions under review; little input from pharmacists; and a lack of a comprehensive medication recording system. Medication to manage challenging behaviour should always be a last, not a first resort. Nine out of the thirty care homes inspected in this research used covert medication (Care Commission and Mental Welfare Commission for Scotland, 2009).

The MWC also reported on lessons to be learned from the death of Mrs V, an 80 year old lady who died whilst on a Compulsory Treatment Order. An independent doctor had raised concerns about discomfort caused by being prevented from eating and from receiving intramuscular and rectal medication. In the 16 days between 3 December 2008 until her death on 19 December 2012 she received a total of:

- 13 intramuscular injections of chlorpromazine;
- 16 intramuscular injections of lorazepam;
- 57 administrations of rectal diazepam
- Latterly, 9 administrations of oral chlorpromazine

The MWC were extremely concerned about the amount, frequency and route of administration of medication and about why the medication was being given (Mental Welfare Commission for Scotland, 2011f).

The Scottish Public Services Ombudsman has also upheld a number of complaints²⁸⁹ relating to the use of unlawful injections of antipsychotic drugs such as haloperidol. Many recommendations have emerged from these cases including the need to: review the means by which medical and nursing staff are trained in the assessment and management of acute confusion, including use of appropriate legislation and documentation; and undertaking peer review on the use of physical restraint and restraint by medicines.

3.3 Where We Live

3.3.1 Introduction to Where We Live

This thematic section explores the theme of 'Where We Live' in Scotland, which is one of the eight core themes which emerged from the human rights analysis of the research reviews. Overall, the research reviews identified a number of ways in which where we live impacts on the realisation of human rights. Following a prioritisation process²⁹⁰, three core areas are discussed in further detail in this thematic section, namely: the right to adequate housing (including availability of housing and the reduction of homelessness, accessibility of housing for all, affordability, security of tenure); the rights of those living in rural areas; and where Scottish Gypsy/Travellers live.

3.3.2 The Right to Adequate Housing

Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights requires States parties to:

"Recognize the right of everyone to an adequate standard of living for himself and his²⁹¹ family, including adequate food, clothing and housing, and to the continuous improvement of living conditions".

The full realization of this right is to be achieved progressively, according to the maximum of available resources. In its authoritative interpretation of the right to adequate housing the United Nations Committee on Economic, Social and Cultural Rights outlined the constituent elements to the right to adequate housing (UN CESCR, 1991). These are:

1. **Legal security of tenure:** this can take a variety of forms including public and private rental accommodation, cooperative housing, lease, owner-occupation, and informal settlement including occupation of land or property. Notwithstanding the type, everyone should be guaranteed security of tenure at least sufficient to protect against forced or arbitrary evictions or other forms of harassment;
2. **Availability of services, materials, facilities and infrastructure** such as drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage, refuse disposal, site drainage and emergency services;
3. **Affordable housing:** costs associated with housing should not threaten the ability to afford other essential goods and services including protection against unreasonable rent levels or unreasonable rent increases;
4. **Habitable housing:** including adequate space and protection against the cold, damp, heat, rain, wind or other threats to health or structural hazards and ensuring physical safety;
5. **Accessible housing:** housing should be accessible to everyone without discrimination. Priority should be given to the most marginalised including homeless people and those who are inadequately housed, and special measures should be taken to ensure adequate housing for people with disabilities, older people, those living in areas vulnerable to natural disasters and others who require them;
6. **Location:** housing should be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. It should not be located on polluted sites nor in the immediate proximity to pollution sources;
7. **Culturally adequacy:** housing policy and practice must appropriately enable the expression of cultural identity.

Previous research has identified a variety of issues relating to adequate housing, many of which are outlined in the sub-sections below. The Scottish Government has acknowledged a number of these areas in recent policies such as the *Affordable Housing Investment Plan 2011-2012*²⁹² and the *Scottish Housing Quality Standard*²⁹³ and through the development of the *Scottish Social Housing Charter*²⁹⁴ which, following consultation was approved by the Scottish Parliament on 14 March 2012 and came into effect on 1 April 2012.

The purpose of the Scottish Social Housing Charter is to:

“Help to improve the quality and value of the services that social landlords provide and support the Scottish Government’s long-term aim of creating a safer and stronger Scotland”.

It aims to do this by:

1. Stating clearly what tenants and other customers can expect from social landlords, and helping them to hold landlords to account,
2. Focusing the efforts of social landlords on achieving outcomes that matter to their customers,
3. Establishing a basis for the Scottish Housing Regulator to assess and report on how well landlords are performing. This assessment will enable the Regulator, social landlords, tenants and other customers to identify areas of strong performance and areas needing improvement.

(Scottish Government, 2012l)

The Charter addresses issues of quality assurance, for example social houses must be kept in a good state of repair by the landlord and all social housing is to meet the Scottish Housing Quality Standard by 2015. The Charter also provides for securing affordable rent and service charges (Scottish Government, 2012l). Previous research has confirmed that investing in social housing can improve people’s lives (Monk et al., 2010).

Unfortunately the Charter does not take a human rights based approach,²⁹⁵ despite recommendations made in 2009 by the Scottish Human Rights Commission that the Housing Bill, Charter and Regulator which it was proposing to establish, all be human rights based (SHRC, 2009c).²⁹⁶

3.3.3 Availability of housing and the elimination of homelessness

3.3.3.1 Available Housing

The United Nations Committee on Economic, Social and Cultural Rights referred in 2009 to the chronic shortage of accommodation, in particular social housing, for the most disadvantaged and marginalised individuals and groups, such as persons with disabilities placing a particular emphasis on Scotland (UN CESCR, 2009).²⁹⁷

Previous Scottish Government research also concluded that under-investment and the more limited resources available in the current economic climate pose particular challenges to securing access to adequate housing, particularly for those living on low incomes or in poverty (Scottish Government, 2010g). In response the Scottish Government has reasserted a policy commitment to continue to ensure the provision of affordable housing and to reverse the decline in council house building with a view to

building new homes and improving existing ones (Scottish Government, 2011j).²⁹⁸ This is underpinned by a commitment that:

“all people in Scotland [should] live in high-quality, sustainable homes that they can afford and that meet their needs”(Scottish Government, 2011m).

Whilst this commitment is a crucially important starting point, it cannot be taken to imply that all need is currently being met. The trend in investment in housing continues to decline significantly. How and whether the commitment is being achieved and how this achievement is monitored need to be clearly identified.

3.3.3.2 Homelessness

The legislative framework on homelessness emerged from the research reviews as an area which has attracted significant attention internationally. The work of the Homelessness Task Force established (post Devolution) in 1999 to make recommendations about homelessness could be prevented and tackled in Scotland, informed the introduction of the Homelessness etc. (Scotland) Act 2003 which has radically changed both the culture and processes through which local authorities deal with homelessness in this country. Alongside the Housing (Scotland) Act 2001, it has been described by Shelter as *“the most progressive homelessness legislation in Western Europe”* (Shelter, 2003).

International human rights bodies too have recognised the potential of the legislation. The United Nations Committee on Economic, Social and Cultural Rights in its report on the UK in May 2009 pointed to the Homelessness etc. (Scotland) Act 2003 as a model of good practice legislation that should be considered in other jurisdictions of the UK (UN CESCR, 2009).

The Homelessness etc. (Scotland) Act 2003 set a target to end the test of priority need in accessing housing by 2012 and in effect introduced a right for all non-intentionally homeless people to access secure accommodation by 31 December 2012 (Shelter, 2003). This target was seen as an unprecedented commitment and has been interpreted, including by the Scottish Government itself, as a commitment to an enforceable right to housing by the end of 2012.

The experience of many participants in this scoping project who had sought accommodation as a result of homelessness, however, suggests that a priority needs system may in effect still be in use:

I was in homeless accommodation since February. I got access quite quickly because I had so many points because of my health and I was homeless at the time.

Colin, Recipient of a rural befriending network

The housing provision in this area is appalling but because our young people have specific needs and they tick a lot of the right boxes, access is a lot better than it used to be a few years ago. So it's fine for us, but if you're the general public, there's a problem because if you don't have these extreme needs then your chances of getting in the housing market out here are non-existent, you'd need to be on the waiting list 20 years before you are going to get anything.

Jack, Director of a project supporting young people making life's transitions

From the end of 2012, the use of this type of priority need system should be completely phased out and one would expect to find less evidence of this in future reviews.

Overall promising progress has been made in reaching the 2012 target under the Homelessness (Scotland) Act 2003. Scotland has progressed from considering 70 per cent of unintentionally homeless persons as “*priority need*” (i.e. at that time subject to a local authority duty to ensure access to secure accommodation) in 2003/4 to 91 per cent in 2011/12. Of the 32 local authorities in Scotland, 14 have so far met the 2012 target of considering 100 per cent of unintentionally homeless persons as equivalent to “*priority need*”. A further nine areas had over 90% of homeless assessments assessed as having a priority need and two further areas assessed that less than 70% of homeless assessments had priority need (Scottish Government, 2009e). Graeme Brown (director of Shelter Scotland) has noted:

“This success should not blind us to the scale of Scotland’s on-going housing crisis. Nearly 50,000 people still presented as homeless in the last 12 months so this progress needs to be a catalyst for even greater change”²⁹⁹.

Participants in this scoping project were generally positive about the progressive change brought about by the Homelessness etc. (Scotland) Act but some were doubtful that the Scottish Government’s targets would be met. Some (who dealt with local authority housing as part of their job) felt that their local authorities whilst progressing well now, had left it too late to address the problem by the end of 2012. Other issues raised that potentially have an impact on efforts to increase the availability of housing include planning restrictions.

Recent research has also identified the difficulties that the Scottish Government and local authorities have faced in realising the 2012 target (Anderson, 2007, Anderson, 2009, Anderson, 2012). Some of the challenges identified include, the provision of suitable accommodation for an ageing population and for those with disabilities in supporting independent living. Accommodation shortages are most prevalent in the East of Scotland and in rural areas and regeneration has been identified as most in needed in the West of Scotland (Scottish Government, 2010g).

3.3.3.3 Access to adequate housing for all without discrimination

Research reviewed and focus groups also suggest continued disadvantages faced by particular groups in accessing adequate housing. For example research has consistently highlighted gaps in securing sufficient accessible accommodation for disabled people. Local authorities are required to prepare a Local Housing Strategy which assesses need including:

“The needs of persons in the area for and the availability of, housing accommodation designed or adapted for persons with special needs”³⁰⁰.

Inclusion Scotland has reported a continuing shortage of suitable accommodation to enable disabled people to realise their right to independent living and has recommended an emphasis on ensuring all new build housing is suitable for disabled people rather than readjusting existing unsuitable accommodation (Inclusion Scotland, 2009).

Some participants in this scoping project also highlighted that their specific medical problems were not taken into consideration when being housed which resulted in isolation, worsening physical health and subsequent problems with mental health, for example:

They moved me to a flat on the 3rd floor where there was no lift. The social worker had told them I should not be placed there because of my knee problems but they said I had to move there. I was there 7 months, the doctors wrote letters but I was kept there. I would go weeks without being able to go outside and my back and legs got stiffer and I just became more depressed.

Mariana, asylum seeker

Furthermore, those participants in this scoping project who were victims/survivors of domestic abuse³⁰¹ discussed a range of problems in accessing accommodation and avoiding homelessness. These included: extended time periods in refuges waiting for accommodation to become available; a lack of suitable refuges for transgender people; a lack of suitable refuges for men; being re-housed away from their community because the abusive ex-partner still lived in the community; and no accommodation or refuge for women who have no recourse to public funds for women.

Another thing is lack of available accommodation. I have been in the refuge since January [now October] and I feel like really I could have been out of there a few months ago I was ready, but that's me only finally been offered a house but it has taken 10 months and there are other people in the refuge that have been there for 2 years.

Emma, single mother of two children, victim/survivor of domestic abuse

Men don't have anywhere, nowhere. [After 18 years of abuse] I had left my house in an old battered car with the only belongings I had from 18 years in the back of the car without anywhere to go. I spoke to a woman who came to see me from the housing department and I said to her – "you are asking me, as an employee of this council [teacher], to turn up 5 days a week and teach maths at XXX school and sleep behind a hedge?" and she said, "yes... yes". They could offer me nothing, despite the fact that I could have produced medical evidence as to my wife's condition, despite that, it's just unbelievable and I was left to sink or swim. Eventually having slept in the car for some time, I eventually managed to get a room in a farm cottage, but I went for years there after that, because I couldn't afford to buy another house. So if I couldn't get help from the council and I couldn't buy one I was stuck. But obviously, if I was going to be able to continue doing my job I couldn't sleep in doorways you know? But that meant rooms in cottages, rooms in other people's houses. I moved about for several years until some help from my widowed mother, I managed to get a little house. And of course this meant to that I had nowhere to put my children.

Andrew, victim/survivor of domestic abuse

Participants in this scoping project who work within the housing sector were also concerned about the lack of access that certain migrants had to accommodation, particularly those who are classed as having no recourse to public funds,³⁰² as one participant noted:

As far as the Homelessness Act goes, if certain [migrants] present as homeless but it is stamped in their passport as no recourse to public funds then they won't be given... accommodation. They are homeless but they are not allowed to be classed as homeless.

Caroline, ethnic minority housing support worker

Research has also questioned whether housing services in Glasgow have been sufficient to accommodate a far higher than average proportion of Scotland's refugee and asylum seeking population (Netto and Fraser, 2009, Sim and Bowes, 2007).

Previous research has also warned of the extent of homelessness amongst offenders and has similarly advised that an increased level of support is required if ex-offenders are to make a successful transition back into society (Kirkwood and Richley, 2008, Money, 2008, McHardy et al., 2011, Scottish Government, 2011c, Flanigan, 2011). One participant in this scoping project who works with ex-offenders highlighted the importance of 'home' in the process of preventing reoffending:

Preventing re-offending...part of it is about having a home. People need homes not houses. They need somewhere that's secure and somewhere they are happy in, that they can take pride in and moreover something that they don't want to lose. Once you've put your own signature on a place and you've got it the way you want it, you realise that you have something of value and when you have things of value to you, you are less likely to put them at risk and therefore reoffend.

Craig, Ex-offender and support liaison for offenders leaving prison.

Previous research has also indicated a gap in providing awareness training in access to accommodation for minority groups (Communities Scotland, 2007). This was most prevalent in relation to asylum seekers, minority ethnic groups, people with disabilities and lesbian, gay, bisexual and transgender (LGBT) people. For example, it is reported that LGBT people continue to experience discrimination in accessing accommodation and, as a result, a culture of non-disclosure prevails (Communities Scotland, 2007). Recommendations from previous research include the importance of taking a human rights and equality based approach to the allocation of accommodation which recognises the needs of these different minority groups (Communities Scotland, 2006).³⁰³

Research into the needs of various different groups including the elderly, disabled, and different minority ethnic groups has suggested that if equality and human rights were to be considered through impact assessments at the planning stage this may result in the availability of more suitable accommodation that meets the needs of these different groups (ODS Consulting, 2007). The importance of participation³⁰⁴ of those in need of accommodation in the planning process has also been highlighted in previous research as a form of best practise (Reid Howie Associates, 2007d). It has been noted that participation with client groups is also a feature of the Housing Charter although it must be noted that the focus of the participation is at the stage where housing has been occupied and not necessarily at the early planning stage. Participants in this scoping project were generally critical of planning processes, noting that different planning protocols for different districts (especially across the Highlands) made it very hard for people to engage in the planning process. Some were also critical of how difficult it was to access information on planning processes.

3.3.3.4 Affordability and Security of Tenure

The UN Committee on Economic, Social and Cultural Rights also emphasised the importance of intensifying efforts to ensure everyone has access to adequate housing and to reviewing policies and developing effective strategies, including impact assessment, aimed at increasing the levels of affordable housing, including social housing (UN CESCR, 2009).

Participants in this scoping project who worked within local authority housing support also described how people that approached them for support who had no recourse to public funds, were on low incomes and unable to access social housing, were often forced into the private sector and became vulnerable to “rogue” landlords.³⁰⁵ One participant described how many of these individuals and families would be in a great deal of debt, often would not have an official contract for their tenancy and as such had no security of tenure, and vulnerable to homelessness. However, they would not be classed as homeless or they would be seen as intentionally homeless, as one housing support officer noted:

I have many people coming to me who are in a situation where perhaps they have no tenancy agreement, the landlord is coming round for cash every week sometimes with threats, or dogs, it is almost like going back a hundred years, but those people can't afford a better place to live and they are not allowed to apply for social housing.

Caroline, Ethnic minority housing support worker.

Caroline also spoke of the lack of will to deal with rogue landlords:

We've had situations in one area of hot-bedding where workers who are on minimum wage have rented a flat where there is maybe 8 or 9 of them in a 2 bed flat and as one gets off shift the next one is hoping into the bed – this shouldn't be the situation in this country and it is due to the rules in this country and the lack of affordable housing and the lack of... well we do have legislation to prevent rogue landlords, but there is no will and no money to prosecute. So I think there should be a zero tolerance of the rogue landlords.

At a meeting opened by Deputy First Minister, Nicola Sturgeon, in February 2012 in Glasgow on *Scotland's New Migrant Community - Meeting the Needs of Roma*, the issue of substandard, poor quality, overcrowded and expensive housing was also raised. Of noted concern was the exploitation faced by the many Roma families (estimated to include 3000 Roma) who live predominantly in Govanhill in the South East of the City. Most Roma families are accommodated within flats which are privately owned. Some reportedly do not have tenancy agreements and hence no security of tenure (McLelland, 2012, Romano Lav, 2012).

Concerns have also been increasingly raised in the media and by civil society with regard to the likely impact of the UK Welfare Reform Act 2012,³⁰⁶ including the direct impact on housing benefits. The Scottish Government previously expressed concern at the lack of consultation on the proposals between the UK and Scottish Governments (Berry, 2011). The Scottish Government's impact analysis suggested that:

“...at this preliminary stage it is quite clear that the changes to Housing Benefit will have a significant negative impact in Scotland” (Scottish Government, 2011c).

A February 2012 survey of parents in Scotland found that almost two thirds of families have less money coming in than at the same time in 2011 with more than six out of 10 families (61 per cent) short of money every week.³⁰⁷ Many of these families are living on benefits and over half surveyed (seven in 10) said that they were “*living on the edge*”. In other words, if one thing was to change, such as child care costs going up or benefits going down - they would face financial hardship (Carvel, 2008).³⁰⁸ Elsewhere, the Child Poverty Action Group (CPAG) have expressed concern that the considerable achievements in addressing child poverty in Scotland that saw a reduction of 100,000 in

the number of children living in poverty over the past decade (1998/1999 – 2009 / 2010) will be reversed entirely and lead to an annual increase of 100,000 children living in poverty in Scotland by 2020 unless the (Central UK government) Coalition's plans to reduce spending on Welfare by £20 billion by 2014 is halted and ways found to address parental unemployment (CPAG, 2012).

Research also suggests a need for increased support for young people transitioning out of care into secured tenancy, pointing to a current risk that they end up living in homeless hostels (Scotland's Commissioner for Children and Young People, 2008b).

3.3.3.5 Habitability

The habitability of some housing remains an issue of concern in Scotland. The interrelated consequences of poor conditions of living on health and wellbeing have been documented in previous research (Love et al., 2007a, Love et al., 2007b). The nature and extent of the effects of deprivation, poverty and poor living conditions, however, could be further explored with a particular focus on the health impacts of overcrowding, cold, damp, air quality, stress and mental health and the experience of homelessness.. As one participant noted:

The house was so run down and dirty when we arrived. In my physical condition and with a compromised immune system... To move someone into a house who is sick and the house is full of years of grime is not right.

Amelia, Asylum seeker

A number of participants also expressed concern about the lack of quality housing in Scotland and the placement of the most vulnerable in the poorest quality housing:

Housing, there is not enough housing available in Scotland that is of a good enough standard I think. It always seems that people in need are put in the worst housing...

Nigel, Housing support officer

With respect to the point Nigel makes, the association between poverty and poor social housing has long been established. In a 20 year period from the late 1960s to the late 1980s council housing became 'residualised' and the relationship firmly established between the worst off people living in the poorest quality accommodation. Thus the proportion of council tenants who were amongst the poorest 30 per cent of all households rose from 31 per cent in 1968 to 60 per cent by 1986 (Kemp, 1989). The situation persists such that today, although deprivation is not the preserve of council estates, around half of all people in social housing are on low incomes compared to one in seven within the owner occupied sector (Department of Work and Pensions, 2011).

The Scottish Government uses two specific measures to track progress on the standard of housing stock. The first is the 'tolerable standard' which highlights where it is not reasonable to expect people to continue to live in a house that falls below this standard.³⁰⁹ Local authorities have a statutory duty and specific powers to deal with houses that fall below the tolerable standard.³¹⁰ The second measure, which was announced in 2004, is the Scottish Housing Quality Standard (SHQS). This standard includes a target that all social landlords must make sure that all their accommodation passes the SHQS by 2015. This target apparently does not extend to private owners and private landlords.³¹¹ In 2010 it was estimated that approximately 1.4 million or 61 per cent of dwellings in Scotland

failed the SHQS. Whilst this figure remains high, it represents a significant decrease from 2004/5 when that figure was 75 per cent (Máté et al., 2011).

Criticisms were levied at many local authorities by participants in this scoping project about the general standard of repair of much social housing and the length of time people had to wait before repairs were undertaken. Of most concern to participants in this scoping project were, first, time taken for repairs which were ultimately more expensive as a result of the delays. Second, safety and security concerns for individuals where properties were not sufficiently secured (e.g. broken front door locks).

Another issue which has been focus of much research and attracted much policy attention is fuel poverty. The UN Committee on Economic, Social and Cultural Rights expressed concern in relation to fuel poverty (UN CESCR, 2009) and research supports the view that this is a concern in securing habitable housing in Scotland (Morrison and Shortt, 2008, Scottish Poverty Information Unit, 2009, Sheldrick and Hepburn, 2007). Research has also highlighted that the elderly are particularly susceptible to fuel poverty.³¹² In 2002 the Scottish Executive set a target to eradicate fuel poverty as much as possible by 2016. In August 2012 the Scottish Government published a major review of evidence on fuel poverty, based on the Scottish House Condition Survey. The research found that fuel poverty rates had gradually increased between 2002-2009, to a peak of 766,000 households, falling to 658,000 in 2010 (Wilson et al., 2012). It concluded: If current trends continue, it is projected that the median household will be pushed into fuel poverty from 2012 (Wilson et al., 2012).

The report however challenges the definition currently used for fuel poverty, noting that: “a much lower proportion of households than one might expect, given the (modelled) level of fuel poverty in Scotland, actually say that they are unable to maintain their home at a satisfactory level of thermal comfort (7 per cent in 2010)” (Wilson et al., 2012). It concludes with a range of recommended steps to improve how fuel poverty is measured and how interventions are targeted to improve thermal comfort, reduce fuel costs, maximise income and to improve understanding of energy use to change behaviours (Wilson et al., 2012).

A number of participants in this scoping project discussed the problems they faced in relation to fuel poverty. There was a general feeling that whilst building standards were improving, people were currently paying the price for social housing having previously having been built to low standards, with minimal insulation, as one participant with experience in house building noted:

The downside is quite often that they have not taken into consideration certain things when building. They've not put in the best heating system because it's more expensive but in the longer term it costs people more, it's not as good for the environment and it is not as fuel efficient. Up here in the Highlands, fuel efficiency is even more important because of the prolonged colder weather and damp, and that is not improving with the new social housing builds.

Harry, Volunteer with a rural befriending network.

Another participant who was confined to his social housing for considerable periods of time due to his disabilities also noted:

The drafts in this house [social housing] are a problem. It is very cold once you turn the heating off you will notice the difference in a short space of time. So it's a case of staying in bed to stay warm when it is really cold. And then the condensate pipe out the back, if it

freezes up it just stops the heating completely and so they say to keep the thermostat in the hall turned up to 30, and then the boiler will fire every time, but if you do that where do your heating costs go? It begs belief, if you could afford to have your heating at 30 all the time, you wouldn't be living in a house like this.

Eric, Recipient of a mental health befriending network.

The Scottish Government has charged local authorities with the responsibility of eradicating fuel poverty by 2016. Age UK is of the view that reaching those targets would be aided by the introduction of more stringent mechanisms to measure thermal comfort in accommodation (Age UK: 2011). Such measures would need to take account of the current variation across Scotland. In 2010, only twenty nine per cent of homes in rural Scotland had an energy efficiency rating of 'good', compared to sixty-eight per cent of homes in non-rural Scotland (Máté et al., 2011).

3.3.4 Rights of those living in rural areas

To fulfil its human rights obligations Scotland should be identifying and addressing disparities on any ground – not only those grounds of discrimination included in national equality laws, but also differentials between those living in rural and urban areas. The grounds on which discrimination is prohibited are not limited in human rights law, with Article 14 of the ECHR and in non-discrimination provisions in other international human rights instruments extending to any other status. Human rights bodies have increasingly considered this to include place of residence. As the UN Committee on Economic, Social and Cultural Rights has stated in an authoritative interpretation:

The exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence; e.g. whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle. Disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution in the availability and quality of primary, secondary and palliative health-care facilities.³¹³

Similarly obligations to ensure progressively the full realisation of economic, social and cultural rights include accessibility. As the International Convention of Economic, Social and Cultural Rights has said in relation to the right to health, for example: Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas.³¹⁴

As noted above obligations to progressively realise the right to adequate housing, as guaranteed in Article 11 of the ICESCR, include location:

Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households.³¹⁵

Current data shows that 160,000 people living in rural Scotland are estimated to be living in income poverty, amounting to one in seven people. This amounts to one in every six people living in poverty in Scotland, living in a rural area (McKendrick, 2011a).

Previous research has identified a range of differential measures in the realisation of human rights of people living in rural areas in Scotland. These have included increased poverty; a lack of available and accessible services including housing, care and support, education, transport and healthcare,³¹⁶ as well as lower than average income levels, employment concentrated in a small number of low productivity sectors (Pacione, 2004). Research has suggested that the extent of the barriers to realising rights faced by those living in income poverty in rural areas may be underestimated due to a failure to adequately take into account the higher cost of living in rural areas (Smith et al., 2010a). The argument has therefore been made, that the impact of rural living needs distinct policy solutions which are appropriate to rural settings (McSorley, 2010).

Participants in this scoping project were concerned about how rural poverty is currently measured:

A major problem is that rural poverty measures don't work – currently poverty is measured by “concentrated deprivation” which just doesn't work in rural areas. Or it is measured by benefits sought in an area, which doesn't work either. A further problem is that communities don't want to declare themselves as poor.

Eleanor, Council equalities officer.

McKendrick et al. (2011a) explore in some detail better ways of attempting to measure rural poverty in the future. However, overall, the evidence base required to develop effective rural policies is considered inadequate, especially in relation to issues such as deprivation/disadvantage, concepts of ‘*thriving rural communities*’, motives for inward and outward migration, productive ageing, innovative services in remoter communities, rural innovation systems and local enterprise, and ‘*quality of life*’, as well as the impacts of a wide range of policies on different rural areas and communities (McKendrick et al., 2011a, UHI Policy Web, 2006b). Previous research has suggested that this can be tackled in a number of ways (UHI Policy Web, 2006b). These include ensuring the under-representation of rural communities is addressed in respect of national surveys and data collection, improving access to information on human rights within rural communities and providing forums where communities can be heard on emerging issues.³¹⁷

Scottish Government commissioned research (EKOS Ltd, 2009) reported significant challenges in relation to the impact of rural living and recommended a different and “*joined up approach*” to addressing rural poverty in relation to social care, accommodation, transport, sustainable development, rural development and social exclusion. In order to deliver change the research suggested a more flexible approach to service delivery, with a greater focus on outreach and mobile services.³¹⁸ Many of the issues identified in the research relate to the dispersed nature of rural communities and the risk of isolation faced by vulnerable people. The report recommended supporting increased social interaction and continuity of support.

To date, policies of the Scottish Government have tended to focus on wider society, such as the *Scottish Community Empowerment Action Plan 2009* and the *Achieving Our Potential - A Framework for Tackling Poverty and Income Equality in Scotland 2008*. McKendrick et al. (2011a) noted that in Scotland the tendency by politicians, social commentators and researchers has been to focus on urban rather than rural deprivation as a result of the higher number of individuals affected. They suggest that a regrettable consequence of this is that the problem of deprivation in rural Scotland has been dismissed, ignored, marginalised or downplayed (McKendrick et al., 2011a). Whilst the

impact of rural living has been considered within the wider policy framework, there is a need to focus more attention on specific issues, such as the inequalities in services for: children and young people with special needs, disabled people, ethnic minorities and migrants and those living in poverty.

Research suggests that some groups of people are at a heightened risk of experiencing poverty in rural areas including single pensioners, single parents, disabled people, people with mental health problems and migrant workers. Some have therefore argued the benefits of addressing this issue through a “*rural proof*” approach (EKOS Ltd, 2009), whereby the impact of policy and other initiatives on those living in rural areas would be assessed during the policy development process.³¹⁹

3.3.4.1 Specific issues in rural areas

3.3.4.1.1 Availability of housing

The Title Conditions (Scotland) Act 2003³²⁰ aims to ensure that affordable accommodation benefits local people and in the long term is not sold on for use as a second or holiday home. Research has noted however that poor access to good quality and affordable accommodation continues to be further compounded by much affordable accommodation being bought by second-home owners as holiday property in more remote rural areas (De Lima et al., 2011). This is apparently resulting in rural accommodation shortages (Satsangi and Crawford, 2009) and further entrenching deprivation and exclusion amongst people living in rural areas (Bertolini et al., 2008).

A number of participants in this scoping project also noted the difficulties they or their families had had in trying to become property owners, with some noting that their area had the second highest property prices in Scotland, because of the extent of second home owners in the area. As one participant noted:

Another thing with housing is that it has become acceptable for people to use housing as a means of making money, buying houses, doing them up selling them, keeping the prices high, having second and third homes, developers building for the high end and the people at the bottom end of the ladder haven't got a chance, people with low paid jobs haven't got a chance really. We need land as well but most land is very expensive here.

Jeremy, Volunteer with a rural befriending organisation.

3.3.4.1.2 Access to services

Participants in this scoping project noted a range of problems in accessing services. Many problems stemmed from access to transport (discussed below). Others spoke of the lack of specialist services across the Highlands with many services being concentrated within the larger towns or cities such as Inverness. One participant who was in need of care services was offered a place within a residential home that could provide for his needs. The most suitable home, however, was in Glasgow and he came from north of Inverness, where his daughter and family also lived. As he felt that spending time with his family was what kept him going in life, he felt that a move so far away from them would shorten his life. Examples such as this demonstrate the impact of limited availability of services on the right to private and family life, protected in Article 8 of the ECHR.

Social isolation for many who live in rural and remote parts of Scotland (especially disabled people, people suffering from mental health problems and the elderly) was of concern to many participants in this scoping project. Outreach and befriending programmes were viewed as crucial for many who have limited social contact due to

location and or mobility problems. See Thematic section 1 on Dignity and Care for further discussion of this issue.

Many participants also wanted to see improvements made to the provision and speed of broadband internet in rural areas to decrease the isolation faced by many, both to decrease social isolation and to increase people's ability to participate in decisions that may impact on their lives and their rights.

3.3.4.1.3 Access to remote and rural health care

"Access to healthcare should be as local as possible, for the whole population of Scotland, no matter where they live" (Scottish Government, 2008b)

The principle in the quote above motivated the establishment of the Remote and Rural Steering Group, tasked with developing a policy for sustainable remote and rural healthcare services. Amongst its recommendations was that the community hospital should be a resource hub where core services should be ensured. These include an out of hours minor injury and illness unit; first line resuscitation; triage, transfer or admission as appropriate (based on a risk assessment of the patient's condition and proximity to secondary care); diagnostic services; outpatient clinics by visiting specialists; pre-operative assessment; intermediate care beds which are accessible by all practitioners (i.e. some nurse-led); midwifery service; palliative care; designated place of safety for mental health crisis (Scottish Government, 2008b).

The major shifts proposed by the Remote and Rural Steering Group related to the need to move towards anticipatory rather than reactive care and shifting the balance of care to local resources rather than multiple trips to secondary care (Scottish Government, 2008b). The report by the Remote and Rural Steering Group also recommended professionals within this model must be robustly trained generalists, with educational packages specifically designed for remote and rural practitioners, have good supporting networks from larger centres, and, be supported by technology, transport and retrieval systems. The report made recommendations on the provision of care in rural general hospitals, and emphasised the importance of allocation of funding to rural communities (Scottish Government, 2008b).

Previous research has revealed some evidence of the particular challenges in provision of specialist health care to children in more remote areas. In 2008 the Scottish Government published the Draft National Delivery Plan for Children and Young People's Specialist Services in Scotland (Scottish Government, 2008f). The aims of the plan were to provide the best possible treatment and outcome for every child and young person requiring specialist care and to improve accessibility and quality of care. It acknowledged the barriers that exist such as geography, area by area inequalities and small pools of staff. A budget of £32m was committed over three years in order to implement the plan. An implementation group was established in September 2008 to coordinate the implementation process for the Delivery Plan (Scottish Government, 2008f).³²¹ The North of Scotland Planning Group³²² was responsible for the development of the National Delivery Plan proposals, its implementation and evaluation. Evaluation of the first two years of this plan has shown that by adopting a regional approach, it has been possible to develop specialist paediatric regional services, which allow continued access to quality specialist paediatric services through a network approach, even from very remote areas and are sustainable. The Planning Group recommend that this approach should continue

to be monitored and extended, where it would be considered to be beneficial (North of Scotland Planning Group, 2011).

Participants in this scoping project from Island communities also noted that a number of professional services were lacking within island communities because qualified staff could not be attracted to these more rural posts:

Health care services need to be both well-resourced and competent, we often struggle to attract staff to the islands... it's not uncommon to have clients kept in hospital or respite because of the lack of resources in the community.

Karen, 3rd sector advocacy worker

Similar concerns have been raised in media reports indicating that continuity of emergency medical care may be at risk for residents of other island communities as changes are made to the roles of local nurses (Bradford, 2012).

Efforts have, however, been made to improve access to emergency medical services in rural areas through the introduction of the Emergency Medical Retrieval Service. This is an air retrieval service which responds to the needs of seriously ill and injured patients in remote and rural areas. It seeks to stabilise patients and escort them to further care. The project was piloted in the West of Scotland and began on 1st June 2008. An evaluation of the pilot one year on recommended it should continue and be scaled with avenues explored to expand to other rural parts of Scotland (Boyle et al., 2010). In March 2010 the Cabinet Secretary for Health announced a roll out to cover the whole of remote and rural Scotland (Scottish Government, 2010d), which commenced on the 25 October 2010. The service's 1000th critically ill patient was helped in August 2011.³²³

The GP Access Survey reported that in general, people in rural areas reported more positive experiences of access than those in urban areas. In ninety-two per cent of practices in rural areas at least 90 per cent of patients obtained access within 48 hour access, compared with 60 per cent of urban practices (Donnelley, 2009a). Participants in this scoping project however reported delays in accessing general practitioners and the use of phone triage systems:

Doctors – There is never an appointment 2 days down the line...2 weeks minimum cause I had the same problem yesterday...and we've got the surgery here at the county hospital but last week I had to go all the way to another town for a doctor, it is unbelievable, they never have appointments up there...they work a triage system, if you phone and say you need to see a doctor today, they take your name and number and a doctor phones you back and speaks to you and assesses whether or not you need to be seen. My husband had a bite, an insect bite and we ended up taking him to A&E to get him seen because at the doctors, 2 weeks for the next appointment. It's not just the odd occasion it is all the time.

Helen and Jackie, Support workers of a rural befriending network.

3.3.4.1.4 Transport

Lack of access to and affordability of transport can have a very negative impact on quality of life, participation in society and access to services (SHRC, 2011c). Previous research has indicated significant problems in relation to transport in rural areas (Currie and Heaney, 2008, Scottish Executive, 2006a, Wilson and Edwards, 2008, Scottish Government, 2008b, Scottish Government, 2009d, NHS Scotland, 2007, Halden et al., 2002, McKendrick, 2011a). Access to transport and the cost of transport are essential factors in living and doing business in rural areas and for more than two decades the Scottish Government³²⁴ has acknowledged that inadequate public transport is a major

cause of social exclusion in rural areas (Halden et al., 2002, Scottish Executive, 2006a). Research has continued to highlight access to public transport (including the integration of different services) and the rising cost of private transport (cost of fuel and the lack of petrol stations) (Scottish Executive, 2006f, Scottish Affairs Committee, 2007).

In rural areas, household survey data suggests that the lack of a service is the most common reason for not using public transport, with approximately 50 per cent of the population in the most remote rural areas citing this as a reason.³²⁵ A lack of adequate transport and its consequent impact on access to services, education, work and leisure was one of the most frequently raised issues by participants from rural areas in this scoping project. Many islanders reported a lack of availability of public transport especially at weekends and in the evenings and many felt that the various modes of public transport were not well linked with buses, planes and ferries not well coordinated and many reporting missing connections. In one example an island resident reported having been discharged from hospital and left stranded at the airport as the public bus left before the last plane of the day arrived.

Participants in Orkney reported dissatisfaction at a requirement to provide photographic identification to travel with one ferry company to the mainland. The majority felt that this requirement was a disproportionate invasion of their personal privacy. Some reported that this impacted on their willingness and in some cases ability to travel to the mainland at all.³²⁶ The company introduced this requirement for 'safety and security' reasons³²⁷ but apparently not following consultation. A subsequent survey of island residents revealed a general dissatisfaction with the policy (Hedde, 2008).³²⁸

Among challenges to transport noted by participants in focus groups in rural areas were ending publicly funded bus services for accessing care services and a lack of bus services accessible to disabled people. Participants for example noted that while some new single decker buses had gas cylinders to lower the bus entrance for easier access most older [high step] single decker buses remained inaccessible although some have been fitted with a hoist facility. However, some reported that drivers appeared or suggested they lacked training to use the equipment.

Participants also reported that there was no way for someone to know if the bus that they are trying to catch will be a coach (no facilities for prams or wheelchairs) or if it will be a bus with a gas or hoist mechanism:

The coach ones are no use, but most other buses are good for buggies and wheelchairs, but you don't necessarily know if that's the bus that is coming. I have seen women standing outside waiting and then the bus that comes is a coach one and they can't get on with the buggy so they have to wait another half an hour for another one... and the bus drivers are not allowed to help, I asked once, and there's some reason or other, probably health and safety...

Erica, Mother of a child with additional support needs and a member of a women's support group.

Buses are also restricted with regard to how many wheelchairs (or prams) that they can have on board at any one time which has often resulted in participants in this scoping project being able to travel somewhere but with no guarantee of getting back. It also means that two companions with wheelchairs are prevented from travelling together.

These issues faced by participants in this scoping project are also commonly raised in other research literature. Scottish Government research has previously found that disabled people remained 50 per cent less likely to make any kind of journey than non-disabled people (MacLeod et al., 2006). As a result of these findings, the Scottish Government made accessibility of buses a specific criterion for applications by providers for the Bus Route Development Grant Scheme. This has also been found to be the case for some local authorities in their contracting practice. Problems have, however, been noted in tracking progress (Scottish Government, 2008d).

During participation events run by SHRC and EHRC in 2010 and 2011 involving over 300 disabled people, the Commissions were informed that accessible transport was a key issue, particularly for those living in rural areas. In their evidence to the Joint Committee on Human Rights, SHRC highlighted that people reported feeling “trapped” both by the high cost of transport when it is available and also by the limited public transport options (SHRC, 2011c).

Support workers for young people living in dispersed urban and rural areas also pointed to the cost of public transport as a barrier to young people’s ability to undertake or seek work. They noted that around £10 for a 2hr round trip to access a low paid job, or job interviews, often amounts to a significant proportion of weekly income.

Participants also noted that for those who do have their own transport, the cost of upkeep and fuel is becoming increasingly difficult. In some areas (such as the Western Isles) complaints have been raised that petrol and diesel are significantly more expensive than the rest of Scotland. In addition residents on Orkney & Shetland feel that they are being denied the same transport services as other islands as a result of the extension of the road equivalent tariff pilot scheme (RET)³²⁹ from the Western Isles to other Islands but not Orkney or Shetland (Shetland Times, 2011, Scottish Government, 2011a).

Despite the wide range of challenges reported in accessing transport in rural areas, focus group participants also reported some good practice.

One participant described a social enterprise project in Fife called ‘MyBus’, which is a community transport group set up to provide a range of affordable, reliable, accessible transport services to groups and individuals unable to access suitable public transport. Participants felt that there could be much more support to set up these kinds of services in rural locations. However, participants did note the fragility of relying on volunteer provision such as this.

Participants discussed the entitlement that many had as a result of age or disability,³³⁰ to a bus pass, which many described as greatly enhancing their freedom of movement:

Despite all the problems we have talked about regarding our buses, the bus pass has been a life line actually for a lot of people that couldn’t afford otherwise to go out, especially the companion pass where you can take somebody with you.

Diane, Manager of a mental health befriending support network.

Others, however, were sceptical about the need for the universal provision of the bus pass, irrespective of means testing, and felt that this money could be better utilised in other public services. Audit Scotland and the Independent Budget Review also raised concern at the rising cost of universal free bus passes.³³¹

In addition to the bus pass, many people are also helped by the companion entitlement³³² bus pass mentioned above. If an individual's mobility is such that they require to be accompanied whilst travelling, they can apply for a National Entitlement Card containing the companion entitlement (C+1) which allows a companion to travel free of charge with them for the same journey by bus. However civil society organisations have raised concern at a lack of awareness of mental health leading to problems for some in using the service (VOX Scotland et al., 2012).

Highland Council also operate a 'Plus One Scheme' which has been designed to provide people in the Highland community who have high support needs with much greater access to a range of civic and cultural opportunities. Some participants in this scoping project who benefited from this scheme talked of how this allowed them to participate in a social life that they otherwise would not be able to do. The Scheme issues eligible individuals with a Plus One Card which provides free access for a carer to accompany them into a venue.³³³

3.3.5 Where Scottish Gypsy/Travellers Live

The rights of Gypsy/Traveller communities in Scotland, and across the UK generally, have been the subject of review by a number of national and international human rights bodies. In 2004, the European Court of Human Rights (ECtHR) issued a landmark judgment in the case of *Connors v UK*.³³⁴ In that case the ECtHR found for the first time that under the European Convention on Human Rights (ECHR) there is a "positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the [G]ypsy way of life".³³⁵

In its most recent opinion on the UK in December 2011 the Council of Europe Advisory Committee on National Minorities noted that:

"The situation of Gypsies and Travellers remains of particular concern, despite measures undertaken by the authorities, in particular in the area of education.³³⁶ They continue to experience significant difficulties in the field of accommodation, due to a persisting shortage of adequate permanent and transit sites throughout the country, resulting in frequent evictions and sometimes in tensions with the majority population."³³⁷

The Advisory Committee consequently included among its "issues for immediate action":

"Take more vigorous measures to meet the accommodation needs of Gypsies and Travellers; increase the delivery of sites, including by improving the coordination of the different levels of authorities involved in sites delivery; ensure that local authorities comply with their responsibilities in sites delivery and find adequate solutions to the accommodation needs of Gypsies and Travellers."³³⁸

Whilst acknowledging that the Scottish Government strengthened the requirements for local authorities regarding new housing provision for Gypsies/Travellers,³³⁹ the European Committee of Social Rights concluded in 2012 that the right of members of Gypsy/Traveller communities to housing is not effectively guaranteed across the UK. Moreover, the Committee has asked that the UK's next report indicates whether the number of available pitches in Scotland meets the needs of Gypsies/Travellers (Council of Europe, 2012).

United Nations human rights bodies have expressed similar concerns and made similar recommendations. These have included the UN Committee on the Elimination of all forms of Racial Discrimination (CERD) in September 2011³⁴⁰ and the UN Committee on Economic, Social and Cultural Rights in May 2009.³⁴¹

Scottish Gypsy/Traveller communities have long been identified as population groups who face barriers to the realisation of human rights, whether in relation to living environment or freedom from discrimination (Amnesty International Scotland, 2012a, Amnesty International Scotland, 2012b, Clark and Greenfields, 2006, Devenney, 2011, Cemlyn, 2008, Cemlyn et al., 2009, BEMIS, 2011, SHRC, 2012f). Among those most frequently reported is the lack of available and suitable stopping places (Devenney, 2011). Official stopping sites reportedly often continue to be inadequate in terms of habitability with poor sanitation, such as an inadequate number of toilets, and a lack of clean water (Scottish Executive, 2004b). Participants involved in this scoping project reported poor living conditions of Scottish Gypsy/ Travellers, and stresses associated with insecurity of tenure, food and employment. Many also reported their living conditions remained substandard despite paying council tax and high rental rates, as one participant noted:

I got an internal e-mail in January 2009, 7 years after we started campaigning for the chalets and site improvements, and what we wanted really was electricity and running water, because we never had that but my father always paid rent, council tax, community charge, the lot. They even charged people in caravans with no facilities. And they came and did a report in 2005 and said there were no facilities and yet we were being charged.

Kathleen, Scottish Gypsy/Traveller.

Previous research has indicated that the conditions of living in the inadequate stopping sites can have a serious detrimental impact on the health of the inhabitants (Van Cleemput, 2008). Research also consistently identifies a lower life expectancy of Scottish Gypsy/Travellers of 57 for males and 62 for female (Scottish Parliament, 2001, EHRC, 2009a, EHRC Scotland, 2010, Devenney, 2011, MECOPP, 2012). Scottish Gypsy and Traveller mothers are also reportedly 20 times more likely than the rest of the population to have experienced the death of a child (MECOPP, 2012).

Scottish Gypsy/Travellers have faced barriers to recognition as an ethnic minority under the Race Relations Act 1976.³⁴² However, an Employment Appeals Tribunal decision is often cited as having clarified that status in 2008.³⁴³ That decision clarified that:

“Scottish Gypsy/ Travellers have ethnic origins, with reference in particular to the 1976 act, and they therefore enjoy the protection of the act.”

In practice the Scottish Government has recognised Scottish Gypsy/Travellers as an ethnic group. This view continues to inform policy, for example, the draft Scottish Social Housing Charter provides explicitly for this community in that they should benefit from good quality, well-managed accommodation when using sites provided by social landlords (Scottish Government, 2012l).

The impact on local authority practice and the lived experience of Scottish Gypsy/Travellers has, however, been questioned. Devenney (2011) for example has noted that:

“Whilst on paper respect for these individual’s rights is referred to, in practice these have done little to improve the situation for Gypsy/Travellers in Scotland. There is no point in recognising a right, if action is not taken to uphold it in practice by undertaking some duty to meet this right or taking action when it is violated”.

This reflects a key argument by T. H. Marshall regarding the difference between ‘formal’ and ‘substantive’ rights made. He argued essentially that whilst it is possible to have all

the formal citizenship rights you'd like on paper, if they cannot be actioned in a substantive sense then in reality you are left with very little (Marshall, 1964).

Participants in this scoping project spoke positively about the Scottish Parliament's Equal Opportunities Committee Inquiry in 2001 (Scottish Parliament, 2001) but questioned progress since. Indeed, there was a strong feeling of discontent and disappointment in the failure to address the promises made via the 37 recommendations. Participants called for responsibility and action to be taken by the Scottish Government and the relevant other public authorities in respect of the 37 recommended points for action outlined in the 2001 Equal Opportunities Committee Inquiry (Scottish Parliament, 2001). Early in 2012, the Scottish Parliament Equal opportunities Committee heard informal evidence from Gypsy/Travellers about the many difficulties they face and as a result the Committee launched two short inquiries in March 2012: one into Gypsy/ Travellers and Care and the other into Where Gypsy Travellers live.³⁴⁴

3.3.5.1 Discrimination against Scottish Gypsy/ Traveller Communities

The 2010 Scottish Social Attitudes demonstrates that Scottish Gypsy/Travellers feature prominently on various discrimination indicators (Ormston et al., 2011). For example, 37 per cent of participants stated that they would find it difficult if a member of this community joined their family circle; 46 per cent said that a member of this community would not be suitable to be employed as a primary school teacher; and 42 per cent further stated that it would be a "very bad use" of government money if any public spending was directed to help this group (Ormston et al., 2011).

Acceptance of discrimination against this community is also reportedly widespread in Scotland. Previous research has demonstrated that in Scotland, it is:

"socially acceptable to be racist towards Gypsies and Travellers – numerous examples in media, policies and practices of public bodies demonstrate [this]" (Cemlyn et al., 2009)

Research indicates that there is a long history of discrimination based on the perceived refusal or rejection by Scottish Gypsy/ Travellers of 'sedentary' culture (i.e. to settle in one area) resulting in fear and mistrust (Shubin and Swanson, 2010). Participants in this scoping project from Scottish Gypsy/Traveller communities were highly critical of the role that they believed the media played in fostering negative attitudes towards their community. They were also critical of local politicians who they felt often contributed to such reporting:

In 2007 when we were looking for a decamp site, there was a lot of stuff in the papers about the industrial site [next to proposed site]. That it would be broken into and that the Travellers would cause problems and that the dogs would roam and so on. It was a local councillor that actually said all that about that community, he said that if we move there to this other industrial estate near the council houses, then there would be a higher risk of theft, a higher risk of vandalism, a risk of dog fouling, a higher risk for the children – and this was all said at a planning meeting where you were not allowed to talk, right, but there were 200 people there... I witnessed that and I could not say anything in my defence... we went to the police and we tried to get the councillor done for inciting racial hatred and you could have done it without even mentioning the meeting because it was all in the papers, it was printed leading up to the planning meeting that the councillors were getting all of this information about what would happen. Their objections were even on the internet, you could get all the information about what we would apparently do to the community it was

all online. So we took it to the police station.... we tried to get the councillor charged with defamation and inciting racial hatred, but the police wouldn't accept the complaint.

It's like all the complaints that have ever gone forward, they have never gone anywhere... First of all the police tried to tell us that there was no such thing as inciting racial hatred, then they backed down and said that it was very rare and very difficult to prove and that they didn't think that these circumstances would warrant being taken forward, so you couldn't budge them on it. Even although it was in print, in black and white... I think that it's become accepted, it's not the worst things that have been said about Travellers, it's not new, so it is just accepted. But at that time it was important to us because we were going to miss out on a site, and we don't have enough sites, we need more sites.

Mary, Scottish Gypsy/Traveller.

Research has further indicated that such stopping places as do exist are often in “out of the way” areas (Shubin and Swanson, 2010). This results in challenges accessing services such as education and health. Participants in this scoping project spoke of the difficulty they had in gaining planning permission to site permanent stopping places for Gypsy/ Travellers:

... I think there is still that bias and intolerance towards Gypsy/Travellers within [this area], we have found that very, very difficult to allocate sites for Gypsy Travellers here just because people don't want sites in their back yard. And the sites that are being considered just now are probably not the best sites for Gypsy/Travellers so it is an obvious issue here. Plus we have a very biased media here which doesn't help.

Amy, Local Authority housing officer.

Another participant stated in relation to her local authority area that:

The lack of provision is not recognised: 1. by elected members, 2. by the public and 3. by the popular press. Nationally we do not have enough parking spots for caravans and therefore like it or not they are forced into more and more high profile unsuitable locations, which then attracts all the negative coverage.

Maureen, Council equalities officer.

Research has shown that despite the existence of relevant policy, current practice in Scotland does not adequately promote or protect the human rights of Scottish Gypsy/ Travellers. Often the rights of Scottish Gypsy/ Travellers are:

“Portrayed as being at odds with, and conflicting with, the rights and interests of, the settled community” (Devenney, 2011).

Devenney (2011) further argues that when discussion takes place where decisions are made that rely on the rights of one group being weighed against the rights of another group, it is critical that the rights of Scottish Gypsy/ Travellers are considered “of equal worth” to those of the settled community if this balancing act is to take place on an equal level.

SHRC has recommended:

that the Scottish Government work with local authorities and all others with responsibilities as well as members of Gypsy/Traveller communities and of settled communities to develop

an Action Plan, consistent with international human rights law, to reconcile the human rights of Gypsy/Travellers and settled communities (SHRC, 2011j, SHRC, 2012f).

3.4 Education and Work

3.4.1 Introduction to Education & Work

This chapter explores the theme of 'Education & Work' in Scotland, which is one of the eight themes that emerged from the human rights analysis of the research reviews. The research review highlighted a number of areas in which human rights may be engaged in education and work in Scotland. Following a prioritisation process,³⁴⁵ four areas are discussed in some detail in this chapter, namely: access to education; inclusive education; access to and fair treatment at work; and fair pay.

3.4.2 Education

"Education is both a human right in itself and an indispensable means of realising other human rights."

UN Committee on Economic, Social and Cultural Rights (UN CESCR, 1999)

The right to education is protected under Article 2 Protocol 1 of the European Convention on Human Rights (ECHR). It is also guaranteed in Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in numerous other international treaties such as the International Convention on the Rights of Persons with Disabilities (UN Disability Convention)³⁴⁶ and the UN Convention on the Rights of the Child (CRC).³⁴⁷

The right to education in the ECHR is largely a civil and political right; it is a right to access educational facilities existing at the time and a right to freedom of education according to religious and philosophical convictions. Additionally, this right is subject in the UK to a reservation which provides Article 2 of Protocol 1 applies only in so far as:

"it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure."

This reservation is also reflected in the Human Rights Act 1998.³⁴⁸ The effect of this reservation has been found, for example, to exclude claims related to the closure of a primary school,³⁴⁹ and a failure to provide free public transport to a religious school 45 miles away.³⁵⁰

In other international human rights treaties the right to education includes both civil and political and economic, social and cultural rights components. It requires States to achieve progressively the full realisation of the right to primary, secondary, fundamental technical and vocational and higher education. It is thus not exclusive to children and young people and the human rights framework reflects the importance of life-long learning.

The essential elements of the right to education have been authoritatively interpreted by the UN Committee on Economic, Social and Cultural Rights (UN CESCR, 1999) as:

- **Availability** – educational institutions and programmes must be sufficiently available, this will include adequate educational infrastructure and trained teachers whose rights are upheld.
- **Accessibility** – educational institutions and programmes must be accessible to all without discrimination. This includes a duty to prioritise the most marginalised,

physical accessibility (“education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme)”) and economic accessibility (the obligations here vary by level and type of education).

- **Acceptability** – for example all education must comply with minimum educational standards and human rights law includes provisions on the aims and content of education,³⁵¹ and on the means and methods of discipline.³⁵²
- **Adaptability** – education is not a one size fits all and must adapt to the needs of diverse learners, for example there is an obligation to ensure reasonable accommodation of disabled people, and disabled people have the right to “receive the support required, within the general education system, to facilitate their effective education”.

Although not all aspects of the right outlined above are protected in law, the right to education is generally considered to be well established in practice throughout the UK. Research suggests that Scotland in particular is recognised as a country with a strong belief in education as a means of fostering democracy and meritocratic social systems (Devine, 1999), with the Church of Scotland and private landowners providing access to a system of parish schooling as far back as the 17th Century, although its quality and uptake have been questioned by (Smout, 1986). However, it was not until the Education (Scotland) Act of 1872 that compulsory schooling for all children aged 5 – 13 years was established, a provision that was expanded to include free access to secondary education with the Education (Scotland) Act 1944.

“It shall be the right of every child of school age to be provided with school education by, or by virtue of arrangements made, or entered into, by, an education authority”
Section 1, Standards in Scotland’s Schools etc. Act 2000

Since devolution legislation has aimed to improve the educational provision and standards within Scottish schools³⁵³ and has drawn on directly on international human rights law, particularly the UN CRC. The UN Committee on the Rights of the Child has consequently welcomed the “adoption of a rights-based approach to education in Scotland” (UNCRC, 2002). The Scottish Government has focussed its policy and strategy interventions on improving the various aspects of the right to education and lifelong learning in accordance with their commitment to equality, inclusion and social justice through initiatives such as the *Skills Strategy* and the *Curriculum for Excellence* (Riddell, 2009).

Under the Education (Scotland) Act 1980, children and young people could be classified as having special educational needs (SEN) if they have a learning disability or physical impairment. The concept of SEN was broadened in scope in Scotland via the Education (Additional Support for Learning) (Scotland) Act 2004 (implemented in 2005) which introduced ASN as a description of those who require additional support with their education (for whatever reason) in the long or short term. However, although children and young people facing social barriers are now more easily included,³⁵⁴ it is less obvious that children with an impairment are covered. The Education (Additional Support for Learning) (Scotland) Act 2004 does not place a duty on schools to know which children are disabled if they do not actually face barriers in addition to their impairment. Part 4 of the Disability Discrimination Act 1995³⁵⁵ [DDA] places a duty on schools to know how many children have an impairment and face disabling barriers, however, it is not clear that the DDA’s

duties are being met now the Education (Additional Support for Learning) (Scotland) Act 2004 is enforced.

The equivalent to the Record of Special Educational Needs under the Education (Additional Support for Learning) (Scotland) Act 2004 is the Co-ordinated Support Plan (CSP), a statutory document that specifies additional resources and the agency responsible for delivery of the resources. However, only children who now require co-ordinated support (from more than one agency i.e. NHS support and education, or education and social work) qualify. Therefore, children who face severe disabling barriers to education but who do not have medical or social support do not qualify. These children should be covered by an Individualised Educational Programme, however, these do not have a statutory status and so therefore cannot guarantee (even in theory) additional support to make education accessible.

There have been no studies yet to show how this has impacted directly on access to learning, however, in 2006, one senior education officer reported that of 400 Records that were reviewed, only 27 CSPs had been opened (about seven per cent). In another authority, of 300 Records reviewed, only ten CSPs were opened. Most children in special schools were not given CSPs because although they accessed additional services, (physiotherapy and speech and language therapy), these were provided within the school timetable and so did not need inter-agency co-ordination (Riddell et al., 2006).

The Scottish Government 's own report on the progress of *Do the Right Thing* (Donnelly, 2009) acknowledges that more is required to be done to improve the outcomes for children and young people with 'hidden' additional requirements, including children with mental health needs, young carers and looked after children. A recommendation from the UK's recent review of all of its human rights obligations at the Universal Periodic review in 2012 was that the UK

"Adopt a strategy so that children of vulnerable groups are not excluded from the education system (Costa Rica)" (UN Human Rights Council, 2012).

3.4.2.1 Access to education

3.4.2.1.1 Non-discrimination and equality

Evidence presented to the UN Committee on Economic, Social and Cultural Rights (UN CESCR, 2009) raised concern about several groups of children struggling to become enrolled, remain engaged or re-engage with formal education, either in regular schools or alternative educational facilities in Scotland. Concern was also raised about those who could not fully enjoy their right to education, including: children with disabilities, children of Gypsy/Travellers, children of asylum-seekers, children excluded from education, non-attendees (due to sickness, family obligations etc.) and pregnant young women and young mothers of school age (UN CESCR, 2009). Also, research suggests that Muslims are amongst the most educationally disadvantaged group in the country (UK) with over a third of those of working age having no formal educational qualifications (ONS, 2004), whilst children from Pakistani and Bangladeshi backgrounds are less likely than other groups to achieve five GCSE passes at A-C (British Muslims ' Media Guide' (Masood, 2006).

Barriers to education are also faced by disabled people for a number of reasons, for example, as a result of the inaccessible built environment of many educational institutions, exclusive policies which do not cater to disabled students, and the continuation of prejudicial attitudes (Glasgow Disability Alliance, 2008). As a result, disabled people are

twice as likely as other citizens to have no recognised qualifications further hindering their chances of reaching their full potential (DRC, 2006).

Research has also highlighted lower levels of educational achievement among disabled children and children from a Gypsy/Traveller backgrounds (Padfield, 2006, EHRC, 2010b). The research review also suggested that there may be some gaps in the literature in areas such as the ways and means of overcoming inequality of outcome related to socio-economic status, disability, and ethnicity as well as other marginalised children such as those who are placed in care (Connelly et al., 2008).

3.4.2.1.2 Gypsy/Traveller children

The National Equality Panel (National Equality Panel, 2010) reported that Gypsy, Roma and Irish Traveller pupils experience high levels of inequality in relation to attainment. Irish Traveller pupils are 2.7 times more likely than White British pupils to be categorised as having Additional Support Needs (ASN) and children from a Scottish Gypsy/Traveller backgrounds had the lowest educational performance compared to any other category of children and young people (Padfield, 2006, Equality and Human Rights Commission, 2010). With regards to ASN, however, Gypsy/Traveller children are potentially more likely to be labelled because they have contact with housing and social professionals. Therefore, this does not necessarily point at a deficit amongst Gypsy/Traveller children themselves, but rather, a recognition of more support required from social structures.

In 2004 the Scottish Traveller Education Project (STEP) found that:

“educational provision across local authorities and schools is patchy and varies from good to very poor, with little or no developed connections in or between schools for providing a relevant and continuous school education responsive to Gypsy/Traveller school-aged children and young peoples’ particular learning needs” (Padfield and Jordan, 2004).

The Equality and Human Rights Commission (EHRC) noted in 2009 that:

“Recent developments such as a limited fund to increase the portability of education between schools may assist but the widespread exclusion faced by Scottish Gypsy Travellers —, which has its root in a lack of access to sites and persistent “discrimination and vilification”, continues to mitigate against this” (EHRC, 2009b).

Participants in this scoping project also pointed to continuing inconsistencies in support for Gypsy/Traveller education:

It is fair to say it is on an ad hoc basis and it depends which school you go to, what resources there will be, what teachers there will be and who know what the issues are as well.

Maureen, Council equalities officer.

Participants in this scoping project who were from Scottish Gypsy/Traveller reported having experienced negative attitudes towards their communities among school staff and felt that very little had changed.

Professionals interviewed during this scoping project from areas of Scotland with significant concentrations of Gypsy/Traveller communities felt that engaging Scottish Gypsy/Traveller children in education was difficult in part due to their “nomadic existence”. However, while Gypsy/Traveller communities will often pursue a nomadic lifestyle, international human rights bodies have also pointed to the connection between patterns of

evictions and forced evictions of Gypsy/Traveller communities in the UK and an impact on the right to education.³⁵⁶ Furthermore STEP researchers have noted:

“much research, including our own, has included settled families who still identify problems of participation and racism” (Padfield and Jordan, 2004).

Pointing in particular to:

“Issues identified in the research in England, Scotland and Northern Ireland include: low educational participation/attendance, particularly at the secondary stages, low attainment, disproportionate disciplinary exclusion, racist harassment and bullying, a lack of continuity of work, interrupted learning, inconsistent/often inadequate support, problems with multiple registration, the failure of schools to pass on records/evidence of attainment; and children identified inappropriately with special educational needs” (Padfield and Jordan, 2004).

In 2005 HMIE published a self-assessment guide for schools on Gypsy/Traveller inclusion (HMIE, 2005). In it HMIE encourages schools, among other things, to respect the wishes of parents as to whether or not to remain private on their Gypsy/Traveller heritage, to develop positive attitudes and a welcoming ethos, ensure fairness and combat bullying, improve communication with Gypsy/Traveller communities.

The 2011 Revised National Guidance published by the Scottish Government and STEP builds on this to highlight how children and young people from Travelling communities with interrupted education can be better enabled to learn, including through the opportunities brought about by the Curriculum for Excellence (Scottish Government and STEP, 2011). The guidance aims to support policy makers, schools and families to make sure that children and young people are able to engage with relevant and appropriate education. The guidance encourages better communication and outreach to Gypsy/Traveller communities, provides examples of good practice and highlights where schools have responsibilities to tackle amongst other things, bullying and institutional discrimination whilst facilitating flexible learning.

3.4.2.1.3 Socio-economic status

As pointed out in the literature, Scotland mirrors other developed countries in that children and young people’s experience of education and educational outcomes are strongly associated with their social background (Riddell, 2009). Research evidence indicates that children from low-level income families are less likely to achieve a good level of educational attainment compared to those from a more affluent background (Paterson and Iannelli, 2007, Paterson, 2007, OECD, 2007). Findings from the *Growing up in Scotland* research series have revealed that children and young people from disadvantaged backgrounds can fall behind their peers cognitively as early as three years old (Bradshaw, 2011b). Indeed, by the time pupils leave school, the attainment of those pupils from the richest areas in Scotland is 137 per cent higher than those from the most deprived areas. With those from the most deprived areas achieved attainment levels 65 per cent below the national average (Scottish Government, 2012n).

The UN Committee on the Rights of the Child in its concluding observations in 2008 recognised the numerous efforts that had been made in Scotland to more effectively ensure the right to education, however, the Committee specifically and explicitly stated its concern that significant inequalities persisted with regard to school achievement of children living with their parents in economic hardship across the UK (UNCRC, 2008b). The Committee’s recommendation was to strengthen the efforts made to reduce the

adverse implications related to social background of children on their achievement in school.

3.4.2.1.4 Higher education

The issues of tuition fees for higher education attracted much attention in the media during 2011. Fees for undergraduate study at Scottish universities are currently only due to be paid by non-EU students or those from within the UK who are not domiciled in Scotland. In other words, students who normally live in England, Wales and Northern Ireland must pay tuition fees, whilst students who normally live in Scotland will not.³⁵⁷ The UN Committee on Economic, Social and Cultural Rights in its concluding observations in 2009 encouraged the UK to review its policy on tuition fees with a view to the progressive introduction of free higher education, as required by ICESCR. The High Court in England has granted permission to judicially review the decision of the UK Government to increase tertiary fees in England. Allowing the case to go to a full hearing the judge reportedly stated that,

*“The introduction of higher fees can properly be regarded as a retrogressive step which does require clear justification”.*³⁵⁸

Ultimately the tuition fee rise in England was found not to be unlawful, however the UK Government was criticised for having failed to assess the impact of the move on equality grounds. Whether or not the current situation in Scotland is consistent with human rights remains a matter of legal debate,³⁵⁹ which has yet to be tested in court.

3.4.2.2 Inclusive education

Article 24 of the UN Disability Convention provides for the right to education of disabled people. It provides in paragraph 2 that States must ensure amongst other things:

- That disabled people are not excluded from the general education system on the basis of disability;³⁶⁰
- That disabled people can access an *inclusive*, quality and free primary education and secondary education on an equal basis with others;³⁶¹
- Reasonable accommodation;
- Support within general education to enable effective education of disabled people;
- Effective individualized support measures are provided in environments that maximize academic and social development, *consistent with the goal of full inclusion*.

This Article is the subject of a reservation and a declaration by the United Kingdom. The latter provides that:

“The United Kingdom Government is committed to continuing to develop an inclusive system where parents of disabled children have increasing access to mainstream schools and staff, which have the capacity to meet the needs of disabled children... The General Education System in the United Kingdom includes mainstream, and special schools, which the UK Government understands is allowed under the Convention.”

The effect of this declaration is unclear, and is likely only to be formally considered at the UK's first review under the Disability Convention in 2014 at the earliest. It is unclear how the UN Committee on the Disability Convention will interpret references to inclusion in Article 24, whether it will consider that the *“goal of full inclusion”* requires, as the UK Government seems to have feared, abolishing separate special schools altogether. Some

in civil society and national human rights institutions have considered the UK declaration to be unnecessary.³⁶² Similarly the Education Minister for Northern Ireland has formally indicated that it would not be applied in that context.³⁶³

Research in Scotland reveals competing views as to what inclusion should mean, in particular for children and young people with complex needs. Some believe that supporting children and young people with additional needs is best achieved through adapted and supported provision within mainstreaming education rather than placing pupils in designated special needs institutions (Scottish Council Foundation, 2005) and some research evidence indicated that a move to this perception was a positive step for both disabled and non-disabled children (Macpherson and Bond, 2009).

Some research suggests an increasing move towards inclusive education in Scotland (Scottish Council Foundation, 2005). However, questions have been raised as to whether the policy of inclusion in mainstream education works in practise (Allan, 2008). As Riddell has noted that:

“there needs to be far better articulation and implementation of a rights discourse in schools, so that teachers and administrators accord much greater respect to children with additional support needs and their parents, rather than treating them as unwelcome customers” (Riddell, 2009).

In practice research highlighted access and continued participation in education of children and young people with additional support needs in general, and more serious and complex impairments in particular as a particularly problematic (Rosengard et al., 2007).

The Scottish Parliament and successive Governments have sought to address this in legislation, including the Education (Additional Support for Learning) (Scotland) Acts 2004 and 2009. The 2004 and 2009 Acts introduced a new system for identifying and addressing additional support needs and placed a duty on Scottish education authorities to provide for these needs.

Some who have contacted the Commission suggest children and young people with autism are a group who continue to face significant barriers in relation to appropriate recognition and support within educational settings. This is reportedly further exacerbated by competing approaches to treatment of autism within the health profession and a lack of awareness and training of health and education professionals (Simons, 2007, Autism Rights, 2009).

A number of participants involved in this scoping project were parents of children with Autism Spectrum Disorders or Attention Deficit Hyperactivity Disorder (ADHD). They spoke of their frustration in relation to how they felt schools had failed to effectively educate their children:

Marc’s teachers, I don’t know how much they know about ADHD, if anything. In Marc’s school the doctor is great but she’s had to write to the teachers five times to tell them simple things like – if he is allowed to doodle, when he doodles his brain is concentrating better. They still don’t allow him to do that. She gave him a specialist fidget toy which is like a snake that goes into different shapes, which effectively does the same as doodling, and two of his teachers have taken it off him. So the doctor has to keep writing. But when they take these things away from him, he ends up out of the class because he’s disruptive,

which is a result of these things being taken off him. At the school all they do is mismanage him and then he misbehaves and then they send him to isolation. The last time he got put out they put him into isolation for three days, he stayed in a room on his own, he wasn't allowed out for the same lunch time or the same breaks and he has got ADHD. You can't just stick him in a room on his own, he's going to go mental...

Lisa, Mother of a child with ADHD, Member of women's support group.

Another mother of a child with autism talked of the lack of understanding of and provision for autism in schools:

Basic stuff, it is common for people to try and get kids to look them in the face so they can connect what they are saying, but children with autism can't do that and I have seen people trying to make my son do that, physically moving his face – it doesn't work for children with autism, it can upset them more.

Freya, Mother of a child with autism and a member of women's support group.

The Scottish coalition of children's rights organisations, *Together*, has also reported that:

"training for teachers and support staff in mainstream schools on additional support for learning, equalities and inclusion is not adequate in Scotland. Only five local authorities provide mandatory training on equalities and inclusion, and none provide mandatory training on specific learning disability topics, e.g. autism or dyslexia" (Together, 2011b).

Participants in this scoping project also suggested that the availability of additional support in practice was often limited as adequate resources were unavailable for that purpose:

We struggled, we fell out with the educational psychologist in Edinburgh who was clearly trying to steer us towards what the council could afford, not what would be best for our child.

Jeremy, Father of a child with complex disabilities.

3.4.3 Work

The right to work is guaranteed in Article 6 of the ICESCR. It is to be progressively realised for all, according to the maximum of available resources and contains the right to access to employment without discrimination, free choice of employment, and a supportive structure that aids access to employment, including appropriate vocational education.³⁶⁴

Amongst other steps to realise this right, States should develop a national employment strategy which is founded in human rights principles and ensure that both the public and private sector employers are aware of human rights obligations.³⁶⁵

Rights at work are protected in a broad range of international human rights standards including conventions of the International Labour Organisation as well as core UN human rights treaties³⁶⁶ and Articles 1-6 of the Council of Europe European Social Charter. Article 7 of the ICESCR includes the right to fair wages, to equal pay for work of equal value, to safe and healthy working conditions, and to reasonable limitations on working hours, the prohibition of dismissal on the grounds of pregnancy, as well as equality of treatment in employment. For example under ILO Convention 111 States should:

"...declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof".³⁶⁷

As with ICESCR, Article 4 of the European Social Charter (ESC) provides a right to *"fair remuneration"*, which includes, amongst other aspects, the right to a remuneration which supports a *"decent standard of living"* for those working and their families. Guidelines to the ESC describe "fair" as meaning above the poverty line, although the concept of a 'poverty line' itself is highly contentious and open to interpretation. Across the European Union [EU], a measure of relative poverty is generally used to classify the most disadvantaged people in society. This measure is based on household income, adjusted for family size, in which those who have a disposable income of less than 60 per cent of the median average income are deemed to be living in poverty (Lelkes and Gasior, 2011).

In 2009 the UN Committee on Economic, Social and Cultural Rights expressed concern at the unemployment rate in the UK, particularly among marginalised groups (UN CESCR, 2009). Having fallen from over 10 per cent in 1992 to just under four per cent in parts of 2008, unemployment in Scotland rose to 8.6 per cent between September 2011 and January 2012, but for the period March 2012 to August 2012 had fallen to 7.9 per cent, just below the UK average of 8.0 per cent (ONS, 2012). In reviewing research on employment in Scotland concerns emerge regarding the comparatively high proportion of 15-19 year olds who are not in education, employment or training in Scotland (GARA, 2007). In addition, concerns have been raised that the Scottish and UK Government policy emphasis on work as an exit from poverty may be failing to address those who, despite being in work, are unable to realise an adequate standard of living (McKendrick et al., 2011b). Research suggests this policy direction may be overlooking those who do not work e.g. pensioners and those who are incapacitated (Jarvis and Gardner, 2009). It should also be allied with an appropriate emphasis on fair wages, whereas Scotland Futures Forum found that almost half of all children living in poverty in Scotland have a parent in work (Scotland's Futures Forum, 2009).

3.4.3.1 Access to and fair treatment at work

This section highlights some areas where access may be better facilitated by the state and by employers and explores potential barriers that could be removed through legislation,³⁶⁸ policy and by the acknowledgement of difficulties faced by potential employees.

The research review has identified a range of sources which identify discrimination and inequality in access to work by some of the most disadvantaged and marginalised people in Scotland, evidence which is supported by the conclusions and recommendations of the UN Committee on Economic, Social and Cultural Rights (UN CESCR, 2009). Research has also indicated that there are insufficient support mechanisms in place, for example, for parents with children in working families and that many structural barriers exist for marginalised groups such as asylum seekers who are prevented from entering employment whilst applications are pending.

3.4.3.1.2 Access to Employment for Disabled People and People with Mental Health Conditions

In 2009 the UN Committee on Economic, Social and Cultural Rights recommended that the UK:

"reinforce its measures aimed at ensuring that persons with disabilities, including those with learning disabilities, have equal opportunities for productive and gainful employment, equal pay for work of equal value, and provide them with improved, expanded and equal opportunities to gain the necessary qualifications" (UN CESCR, 2009).

The ‘*Employment and the Work Place*’ and ‘*See me*’³⁶⁹ campaigns are evaluated examples of good practise in addressing discrimination relating to disability and mental health through high impact social marketing at the macro level and community engagement at the micro level. Research literature cites both of these campaigns as initiating positive outcomes although there is also evidence which suggests that development has been limited due to funding constraints (Myers et al., 2009). [See Me is discussed further in the chapter on Health]

Research indicates that only 48 per cent of disabled people are in employment compared with 82 per cent of non-disabled people (Scottish Executive, 2006c, National Equality Panel, 2010).³⁷⁰ A range of possible factors affecting access to work have been identified by research, for example, poor health, lower qualifications, geographical location and access to transport (Riddell et al., 2005). However, more recent research evidence continues to demonstrate that economic inactivity amongst persons with a disability is significantly lower because of the difficulties faced in accessing employment in the first place (Macpherson and Bond, 2009), despite this being a requirement in law.³⁷¹ Furthermore, disabled people often have to overcome negative attitudes held by employers about productivity and the associated prejudices on the risks of employing disabled people (EHRC, 2010a) resulting in many disabled people being more likely to be subject to severe financial hardship and marginalisation (Larner, 2006, EHRC, 2010b).

2010 data on the implementation of the national strategy for people with learning disabilities, “*Same as You*”, found that 75 per cent of adults with learning disabilities for whom employment status was known were not in employment or training for employment. Of those who were employed or in training for employment, only around 20 per cent were working more than 16 hours a week (Scottish Government, 2012i). The Scottish Consortium for Learning Disability suggests the figures may be even higher, and that progress may have been marginal with 11.1 per cent of adults with learning disabilities in work or training in 2003 rising to 14 per cent in 2010 (SCLD, 2011b).

Participants at a SHRC/EHRC event on the UN Disability Convention felt that it was critical that more employers understood the importance of employment on an individual’s well-being and the importance of support to remain employed:

“An essential ingredient to empower, liberate and inspire disabled people in the 21st Century job market is meaningful employment... Meaningful employment, however, means more than just a job - it involves a range of support mechanisms like transport for example... A major concern for disabled people is the fear of being placed in meaningless jobs with no hope or prospect of progression, promotion or career path” (EHRC and SHRC, 2011).

Many participants at that event did not feel that potential employers were willing to spend the necessary money to make the reasonable adjustments that they required to facilitate employment. For those in employment, some felt that employers viewed necessary adjustments were a one-off fix, rather than something to be continually monitored. As one participant noted, the attitude he faced was:

“They have a ramp and a toilet what else do they want?” (EHRC and SHRC, 2011).

Often, organisations say they do not have the money to be able to make the required adjustments, as was the experience of one participant in this scoping project who applied for an opening with a civil society organisation:

I had asked if they could take me on as a councillor with me being registered blind and the answer I got was a definite 'NO, because our equipment isn't geared up for that', they couldn't take me on because their equipment is not geared so that it could bring the zoom up on their screens so that I could see. So I was denied the chance of doing voluntary work because of my disability and people were being denied the chance to get advice from someone who knows a bit more about how it feels to be disabled, and where they are coming from.

Eric, Person living with multiple physical disabilities.

Other participants at the SHRC/EHRC event believed that the reasons why many disabled people were being denied promotion in their jobs was a lack of funding to move their adaptations and equipment to new locations:

"Cumulatively these negative attitudes and misguided perceptions bring about a glass ceiling, limiting progression whilst impacting severely on disabled employees' hopes, aspirations and prospects" (EHRC and SHRC, 2011).

People with mental ill health or mental disabilities also face a range of problems in accessing employment. One study found that 79 per cent of people with long-term mental health problems were not in employment and highlighted the difficulty in overcoming inherent prejudices in people's perception of mental health problems that are not recognised as serious enough to inhibit capacity to work (Riddell et al., 2005). Other research has also indicated that those who are in work and suffer from a mental ill-health, are confronted frequently with prejudice surrounding their capacity to effectively perform in a job (Ormston and Webster, 2008). This was also a view held by many participants in this scoping project, as explained by this youth transition support worker:

... from my experience with employers, if I had anyone on benefit for any length of time³⁷² then they had an issue with that, they were a problem, they weren't someone who could go into employment and hit the ground running. There was very much a stigma attached. A lot of the time, they had to declare that they had health related issues and that was a big problem because they had to admit that they'd been off work for 6 months due to such and such and alarm bells would ring with employers. Mental health issues are also a lot harder with... with many employers because you can explain away a broken leg but a mental health problem there's always that fear it could happen again. There is a real lack of understanding of many mental health conditions and a lack of support within employment.

Erica, Employability support officer.

The Scottish Government has taken steps to improve public attitudes and behaviour towards people experiencing mental health problems and their access to and fair treatment at work (Myers et al., 2009). The Mental Health (Care and Treatment) (Scotland) Act 2003 makes provision for supporting those suffering from mental health problems in accessing training and employment.³⁷³ The Scottish Government Action Plan (2009), *Towards a Mentally Flourishing Scotland: Policy and Action Plan 2009-2011* (Scottish Government, 2009g), outlined a commitment to support the See Me campaign in delivering this objective.

In its Mental Health Strategy 2012-2015, the Scottish Government emphasises the value of “*place then train*” programmes to support people with mental health problems into work which accords with their preferences. The Government has committed to publicising the evidence base for what works in employability of people with mental health problems, including “*place then train*” and projects such as the WORKS in NHS Lothian (a vocational rehabilitation service which supports people with mental health problems into work, or educational opportunities) (Scottish Government, 2012d).

3.4.3.1.2 Migrant workers and ethnic minorities

Around 11 per cent of the European workforce is made up of migrant workers (OECD, 2011) with an additional unknown number of undocumented migrants accounting for between 0.4 per cent and 0.8 per cent of the population of the 27 EU member states (Vogel, 2009). With employment a major driver of migration to the European Union from developing countries, migrants could be the answer to the demographic challenges facing an ageing, less economically active Europe. However, the research evidence suggests that migrants are failing to find their way into appropriate employment with many being relegated to jobs in the unqualified and less regulated sectors of the labour market, with consequent economic, health and social difficulties (Ronda et al., forthcoming).

In 2009 the UN Committee on Economic, Social and Cultural Rights expressed concerns at the continued high unemployment rate among ethnic minorities and their continued over-representation in low paid jobs. It also expressed concerns related to:

“unsafe working conditions and low wages of some groups of migrant workers whose employers are registered outside the State party, in particular those employed in the fishing industry who enter the State party on transit visas” (UN CESCR, 2009).

Glasgow Anti-Racism Alliance suggests unequal rates of employment among ethnic minorities is connected with historical inequalities and discrimination resulting in low retention and high exit rates in employment (GARA, 2007). Research by the UK Government itself has highlighted that ethnic discrimination continues to play a role in employment. The research, which involved sending nearly 3,000 job applications to employers in seven cities across Britain (including in Glasgow) found evidence of discrimination against those perceived (based on the applicant’s name) to belong to ethnic minorities:

“16 applications from ethnic minority applicants had to be sent for a successful outcome in our test compared with nine white. That is, 74 per cent more applications from ethnic minority candidates needed to be sent for the same level of success” (Wood et al., 2009).

The level of discrimination was found to be considerably less among public sector employers (four per cent as compared to 35 per cent) (Wood et al., 2009).

In 2011 research supported by the Joseph Rowntree Foundation identified a number of barriers to migrants and ethnic minorities in accessing employment in Scotland (De Lima et al., 2011).

“Most participants, regardless of ethnicity, identified the following barriers to accessing employment:

- *difficulties in accessing training and skills development programmes due to inadequate provision and costs;*
- *a lack of appropriately trained staff with the relevant skills within employment agencies at a local level, e.g. Jobcentre Plus, in helping them to seek work.*

Furthermore, a number of ethnic- and/or gender-specific issues with regard to seeking employment emerged:

- *a lack of English fluency for work purposes among many Chinese and East European participants and low levels of literacy amongst Gypsy/Travellers;*
- *poor access to English language provision, particularly in Highland, owing to a combination of factors;*
- *insufficient provision, and an inability to access provision due to childcare responsibilities or shift work and long hours;*
- *a lack of affordable and appropriate (e.g. culturally sensitive) childcare, cited by single parent women (particularly Chinese) with school-aged children;*
- *a lack of recognition of overseas qualifications;*
- *language barriers that exacerbated the challenges faced in accessing training and skills development programmes; in addition, some eligibility rules appeared to create barriers to accessing language training;*
- *the legal status of some Chinese women participants (e.g. asylum seekers/recently granted refugee status), in particular, impacting on their ability to access employment as well as other state support;*
- *concerns expressed by some white Scottish men about the diminishing opportunities for accessing well-paid skilled, manual occupations in their local areas” (De Lima et al., 2011).*

According to the Close Business Barometer, 28 per cent of Scottish businesses employ migrant workers. Of those 57 per cent do so because they are best placed to do the job (Hamilton, 2011). However, many of the issues raised in the JRF research were also raised by participants in a participation event organised by Migrants’ Rights Scotland in 2011.³⁷⁴ Separately, Migrants’ Rights Scotland has also reported concerns related to patterns of low wages, de-skilling, and a lack of reliable statistics on migrant workers in Scotland (Kyambi, 2011). Participants in this scoping project also raised the issue of “de-skilling” linked to the difficulty in translating qualifications across borders, resulting in migrant workers not being able to realise their potential in their chosen fields or at the professional level that they previously worked. One initiative highlighted in the research is a Voluntary Code of Practice on Employing Migrant and European Workers developed by UNISON Scotland.³⁷⁵

A further issue raised by a number of participants was a lack of affordable English as a second language education provision for migrants, which could impact negatively on the Scottish economy in future years. Those working in the North East of Scotland recognised the difficulty in attracting people to work in certain sectors (e.g. Care providers) in areas where the cost of living was artificially high. As one participant noted:

We need to look at how best we can attract people to Scotland to fill those gaps, not deter or prevent people from coming...for better integration we need better English provision for adults and their children.

David, Housing strategy officer (local council).

Other research has highlighted the intersectional nature of discrimination in access to employment, for example, on religious as well as racial grounds (Jayaweera and Choudhury, 2008) and particularly among ethnic minority women (Equal Opportunities Commission Scotland, 2007). This latter point has been found to be linked to inherent prejudices, limited appropriate childcare, a lack of understanding of Islamic practises by

employers, difficulty with communication in English and potential lack of confidence (El-Nakla, 2007).

Participants in this scoping project from Scottish Gypsy/Traveller communities recounted difficulties in gaining employment, despite being suitably and adequately qualified. They felt this was particularly true where they were viewed as 'activists'.

I have gone 14 years without a day's teaching, I have got a degree, postgraduate training and several good references, but I've come back to an area where I am known as a Gypsy/ Traveller and suddenly I am unemployable. Five, six years ago the job centre said to me, you are going to have to go on new deal because you've not had a job for a year and a half and I said great what are you going to do to help me find a job? They came with a folder in induction week which had a fortnight's worth of work in it. I did it in one day. So they took me through to the manager and she said I don't know what to do with you, you have more qualifications than me... So anyway, there was a Gaelic job going, so she went over to the human resources because she couldn't get any joy from the education department who told her to keep her nose out and put the phone down. So she went over the head of human resources and she came back and said, it's political. So they couldn't get me a job anywhere, they phoned everywhere... they even shut down the Gaelic Medium unit in the town because they couldn't get a Gaelic teacher, so... that's the job centre for you and yet they still have to say, you have to make yourself available for work. But what work? That was 6 years ago, and still nothing.

Kathleen, Scottish Gypsy/Traveller.

Participants pointed to the importance of educating children and young people about discrimination and the facts related to migrant work in Scotland. As one youth worker noted:

We had one student come in and one of the girls turned around and said, see all you Poles coming in and talking our jobs, and she [Polish student] was really taken aback. It comes from their parents, the TV, they've read it in the paper, and they're just passing on information that they know nothing about, but because their dad said it or the daily record said it or whatever...

Lucy, Employability support officer.

3.4.3.1.3 Employment rights of parents

Various human rights standards pertain particularly to employment rights of parents. For example the International Convention on the Elimination of Discrimination against Women (CEDAW) provides in Article 11(2) (c) that States should take effective measures:

"to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities."

In 2009 the UN Committee on Economic, Social and Cultural Rights raised concern at the UKs approach to paternity leave, finding it: "...negatively impacts on equal rights between men and women." It has recommended that the UK "introduce a more flexible scheme for paternity and parental leave, taking into consideration the report 'Working Better' by the Equality and Human Rights Commission"(UN CESCR, 2009).

Similarly the European Committee on Social Rights has found that the UK arrangements for maternity leave are inadequate (Council of Europe, 2012).

Research suggests that it is particularly difficult for mothers to return to or access employment after the birth of a child, and more so again for lone parents (McQuaid et al., 2009, McQuaid et al., 2008).

The Work and Families Act 2006 made progressive changes to the support available to working families across Great Britain, such as through extended maternity leave, more flexible working arrangements and additional paternity leave if the mother returns to work. Additional support is also made available to working families through a tax credit scheme, however, accessing this support can reportedly be complex and bureaucratic (McQuaid et al., 2009) and recent changes to the eligibility rules have reduced the number of families who qualify for this support.

Research evaluating the *Working Family Fund*, an initiative of the Scottish Executive/Government (which operated between 2004-2008) found that one of the most significant barriers faced by parents in accessing the employment market was access to affordable and suitable childcare (McQuaid et al., 2009). This issue of access to affordable, accessible and quality childcare was also raised as an issue of concern by Together in their most recent review of the *State of Children's Rights in Scotland 2012*. They note in particular that:

"Work is the best route out of poverty, but for too many parents the high costs of childcare means that work simply doesn't pay. Cost coupled with additional barriers that prevent parents' accessing childcare means that many parents are not able to access suitable childcare" (Together, 2012).

Whilst most participants in this scoping project, (especially those who were parents) sympathised with the difficulty of obtaining suitable childcare in general, a number of mothers raised their specific difficulties in relation to children with additional needs. In particular, those who were parents to children with ADHD or Autism expressed particular difficulty in accessing suitable childcare when their children were pre-school age. This was apparently not resolved once their children were of school age, as the standard reaction of many schools to any difficulties was to call the mother to collect her child. In one example where a child was particularly challenging, the school had reportedly asked the mother to take her child home every lunch time for the previous eight years, severely limiting her ability to take on any employment:

Women's rights to work and children... not easy, especially if they have children with special needs, I think if there is a problem, schools just expect the women to drop everything and come running out. They are not basically allowed to work...

Elise, Women's support group leader.

Participants also reported difficulties with the costs associated with childcare, for example cost of deposits and registration fees which were required before the parent was able to return to work. This was summarised by one participant as a catch 22:

You cannot afford children without working and you cannot afford childcare to work.

Teresa, Working single mother and a member of a women's support group.

There has been an increase in flexible working arrangements in Scotland for parents, particularly more so for working mothers, however, research has indicated that this may also have unforeseen consequences in practice including: mothers working in lower status occupations after maternity leave (Johnes, 2006); lower average pay for part-time work

(Manning and Petrongolo, 2004); and parents not achieving their full potential (Darton and Hurrell, 2005).

Riddell (2009) has called for the adoption of a human rights based approach to working families in Scotland in order to better protect the rights of the child and the rights of parents to work .

3.4.3.1.4 Access to Employment for Asylum Seekers

Asylum and Immigration are also reserved areas³⁷⁶ and the UK Government is responsible for the arrangements surrounding financial support of asylum seekers. The rights of those seeking asylum to work, pending status determination, has been the subject of litigation in the UK. In 2008 the High Court of England and Wales found that rules which prevented an asylum seeker from taking employment “for a prolonged and indefinite period” were incompatible with the ECHR.³⁷⁷ In 2010 the UK changes immigration rules to comply with a European Union Reception Directive requiring that asylum seekers be granted the right to work if their status had not been determined after twelve months.³⁷⁸ A 2010 UK Supreme Court case, found that the Reception Directive protects the right to work for those affected, even where the outcome awaited is for a second application after a first application has been rejected.³⁷⁹

For those who are not yet able to seek protection under the Reception Directive, case law has clarified that those who face destitution should have access to employment or welfare support in order to comply with the ECHR.³⁸⁰

In 2009 the UN Committee on Economic, Social and Cultural Rights has highlighted that the unacceptable length of waiting time asylum-seekers face in the UK before taking up employment and has urged the UK to remove restrictions in accessing employment while waiting for a decision (UN CESCR, 2009). Many civil society organisations have also called consistently for a relaxation on the rules prohibiting asylum seekers from working.³⁸¹

Research literature has further highlighted the exclusion of asylum seekers as a result of financial deprivation (Mulvey, 2009) and the erosion of employment skills during long waiting periods for decisions (Smith et al., 2010b). Participants in this scoping project, themselves going through the process of seeking asylum, expressed a desire, in the absence of the right to work (for remuneration) to be allowed to undertake voluntary work. There was a general feeling that participation in unpaid work would not only help them to integrate better into the local community, but also to allow for the maintenance and/or improvement of work-related skills.

3.4.3.2 Fair Pay

3.4.3.2.1 The Gender Pay Gap

Various international human rights standards³⁸² and European Union regulations and directives³⁸³ require States to pursue equal pay for work of equal value. In 2009 the UN Committee on Economic, Social and Cultural Rights expressed “*particular*” concern at the continued wage gap between men and women, especially in the private sector and for persons employed in part-time work (UN CESCR, 2009).

Research identifies that although gender inequality in employment is being addressed in certain respects, it remains a reality in Scottish society (Reid Howie Associates and Equality Plus, 2010b, Macpherson and Bond, 2009). This inequality is noted both in the

type of work women do (horizontal segregation) and their ability to reach higher positions in employment (vertical segregation). As previously noted, women are also more likely to work part-time or make use of flexible working arrangements due to caring responsibilities for children or dependent adults and as a result, are more likely: to work in lower paid jobs; receive less in pay with less employment protection; and are less likely to be in positions of seniority (Wassof and Breitenbach, 2007, Macpherson and Bond, 2009).

Research has also highlighted that a gender pay gap continues to exist between men and women performing work of equal value (Reid Howie Associates and Equality Plus, 2010b). The research indicates that there needs to be more emphasis placed on both public and private sector employers addressing occupational segregation by accepting responsibility for developing inclusive practices, for example, by encouraging employees to avoid participating in a long hours culture in their place of work or by supporting employees to manage a better work/life balance (Reid Howie Associates and Equality Plus, 2010b). Research by Reid Howie Associates and Equality Plus also identified the need for Government led awareness campaigns to tackle the equality gap (Reid Howie Associates and Equality Plus, 2010b).

3.4.3.2.2 Pursuing poverty reduction by paying fairly

Research has indicated that low pay and in-work poverty are significant issues in Scotland (McKendrick et al., 2011b, Strauss and Kelly, 2011). The evidence tells us that most of those in the three lowest income deciles, who are in work, receive low hourly pay. The UK Government is responsible for setting the national minimum wage and the current rates (2012) are:

£6.08 - the main rate for workers aged 21 and over

£4.98 - the 18-20 rate

£3.68 - the 16-17 rate for workers above school leaving age but younger than 18

£2.60 - the apprentice rate, for apprentices under 19 or 19 or over and in the first year of their apprenticeship

In 2010 the European Committee on Social Rights found the UK minimum wage “*manifestly unfair*” (European Social Committee, 2010) and in breach of Article 4 of the European Social Charter. Both the UN Committee on the Rights of the Child and the UN Committee on Economic, Social and Cultural Rights have recommended (in 2008 and 2009) that the UK address age based discrimination by ensuring the same minimum wage for workers under 21 (UNCRC, 2002, UN CESCR, 2002).

Participants in this scoping project who work with especially vulnerable young people, helping them through their transition to adulthood, spoke in particular about the difficulties they have in convincing some young people to move from living on benefits to working when there is little difference between the two incomes and the wages appear grossly unfair, when compared to someone older:

How do I convince someone aged 17 that it is fair that they are paid [£3.84] an hour for doing exactly the same job as the person next to them who is over 21 and earns [£6.08]?
Lucy, Employability support officer.

An added difficulty arises where these young people are also being accommodated in private flats (as opposed to supported accommodation or Bed and Breakfast establishments) with very high rents which they would not be able to afford without housing support:

... the rent is extortionate and they can be in there for 6 months to a year, sometimes plus and it is financially impossible for them to work during that time... it becomes an absolute nightmare to manage because they are then having to pay towards their rent which can be about £200 plus a week. A lot of the young people I work with are in that situation – they are on job seekers allowance and they are getting a lot of pressure from the job centre to prove that they are seeking work, when in actual fact it's just not within their interests financially to do that because they don't gain anything from it and if anything they are out of pocket, so that is a barrier for them, but the odds really are stacked against them.

Francis, Personal development & employability worker.

Scottish research has indicated that working-age adults without dependent children make up a third of those in poverty and that income poverty for this group is on the increase (McKendrick et al., 2011b) and that those in the lowest paid jobs were not seeing the same proportionate rise in income as Scotland's top earners income (Palmer et al., 2006). Many Scottish researchers and commentators have stated their support for addressing poverty suffered by low income workers and their families as a matter of national urgency (McKendrick et al., 2011b, Strauss and Kelly, 2011).

The Scottish Government has adopted the Living Wage scheme, which encourages employers to adopt a sustainable wage for employees. The living wage is defined as a wage that gives individuals and families enough income to meaningfully participate in society and that meets socially acceptable standards (Scottish Government, 2010i). The literature commends the work being undertaken to encourage a living wage (McKendrick and Sinclair, 2009), however, the operation of such a scheme is not without its difficulties as income inequality traverses both the public and private sector. In addition, some participants in this scoping project who are employers of relatively small businesses noted the potential difficulties they would face with an increased minimum wage:

In relation to the national minimum wage, as an employer I personally believe that every member of my staff is worth more and I mean a lot more than I can pay them, but if I added 20p an hour onto everybody's wage this week, we would be closed within a month. So it's not always about companies, especially small companies, it's not that they want to provide such a small wage, but they have no option.

Nathalie, Care home manager.

A recent survey by Citizens Advice in Scotland (CAS) has revealed a Scotland wide deficit on payment of the minimum wage where employers are in some cases refusing to meet the minimum amount laid down in law (Citizens Advice Scotland, 2011).³⁸⁴ With wages starting as low as £1.62 per hour the report reveals that women, migrant workers and young people are the most likely to be affected. CAS also found that many workers are unaware of their rights, or lack confidence in how to fight for them (Citizens Advice Scotland, 2011). CAS has called for the introduction of a Fair Employment Commission to address a number of unfair employment practices (Citizens Advice Scotland, 2011).

3.5 Private and Family Life

3.5.1 Introduction to Private and Family Life

This thematic section explores the theme of 'Private and Family Life' in Scotland, which is one of the eight core themes that were drawn from the rights analysis. While the topic of private and family life is potentially very broad, following a prioritisation process,³⁸⁵ this thematic section focuses on six areas, namely: domestic abuse; forced marriage; same-sex marriage; the right to family life for people with learning disabilities; the rights of parents and children; and parental imprisonment.

3.5.2 Domestic Abuse

3.5.2.1 Terminology³⁸⁶

Within the existing research and literature on domestic abuse, it is clear that domestically and internationally, a number of definitions of domestic abuse are currently in use. Moreover, the terms domestic violence and domestic abuse are often used interchangeably. Domestic abuse, however, is often more than physical abuse or indeed not physical at all. It frequently takes the form of psychological, rather than physical abuse. As such, non-violent abuse and behaviour should not be excluded from any definition of domestic abuse. An earlier literature review on the subject of domestic abuse described a “*dizzying variety of definitions of domestic violence*” (Scott, 2008). The Scottish Government recognises domestic abuse as ‘gender based abuse’ that requires a response that takes into account and addresses the inequalities between men and women in Scotland.³⁸⁷

A number of participants in this scoping project expressed frustrations with current terminology used by the Scottish Government. One criticism centred on the name of the government unit being the ‘violence’ against women unit, which was felt by some not to recognise their experience of emotional and psychological abuse. Some participants felt that renaming the government department as one that dealt with domestic abuse would be a progressive step. As one participant noted:

The Scottish Government need to better recognise that there are different aspects of abuse... the government department ‘violence against women’ takes away from all the other forms of abuse... I have come across this recently with the police³⁸⁸ as well, they don’t seem to get it, they just think there’s been some kind of misunderstanding, you know that because he hasn’t actually hit me it’s not really abuse, police are meant to be trained to deal with domestic abuse, but that’s twice they’ve been out and they’ve not done the risk assessment or offered me a domestic liaison officer or anything like that... it’s like they respond to certain issues, violent issues, but not when it is other forms of abuse, the bruises heal but emotional abuse doesn’t heal. And what you suffer, the anxiety attacks, the depressions, you can’t focus, you can’t function properly because of the fear, and that wasn’t me getting beaten up it was the emotional abuse.

Elaine, Victim/survivor of domestic abuse and member of a women’s support group.

Why when we talk about domestic abuse is the focus always on the violence? We are talking about financial abuse, emotional abuse, we are talking about all these interconnected things, and the effect it has on mental health is terrible.

Aasimah, Interpreter.

I think that there is a lot of that type of controlling behaviour that doesn't necessarily get deemed as domestic abuse when indeed that is exactly what it is. I was isolated from my friends, isolated from my family, she would have the financial controls, she was very, very manipulative and able to put me into situations where I would give in to whatever her demands were. That was the controlling aspect of it.

Derek, social worker, victim/survivor of domestic abuse and parent of children with shared residence.

This report refers to domestic abuse in recognition of the fact that not all domestic abuse is violent. Where the terms domestic violence and violence against women (which also excludes men as potential victims/survivors) are used, this is the terminology used by the original authors.

3.5.2.2 International Law

The right to respect for private and family life, in Article 8 of the European Convention on Human Rights (ECHR) is a qualified right. As such interferences can be justified where they have a legal basis, pursue a legitimate aim, and are a proportionate means of achieving that aim. The State also has a positive duty to prevent, protect and remedy violations of physical and mental integrity including domestic abuse (or intimate partner violence, gender based violence or violence against women). The European Court of Human Rights (ECtHR) has for example found violations of Article 8 in cases where the authorities have failed to take adequate measures to punish and control abusive partners. They have also found that considering such abuse to be a 'private matter' is incompatible with obligations under Article 8.³⁸⁹

In the most extreme cases, domestic abuse may engage the right to life, particularly the positive obligation to protect the individuals from a real and immediate risk to life which the authorities either knew of or ought to have known of. A violation of this right was found by the European Court of Human Rights (ECtHR), for example, in a case where the police had assisted a woman to withdraw a complaint when she returned accompanied by her husband, who later went on to murder their children.³⁹⁰

Domestic abuse may reach the threshold of cruel, inhuman or degrading treatment or punishment which is prohibited under Article 3 of the ECHR.

In a landmark case in 2009 the ECtHR found a violation of Article 3 where the State had failed to protect a woman from a series of serious assaults by her husband, despite repeated complaints from her. The ECtHR found a violation due to a failure to set up and implement a system for punishing domestic violence and protecting victims/survivors. Amongst other things the ECtHR found that there should have been a legal framework allowing criminal proceedings to be brought irrespective of whether the complaints had been withdrawn (in the facts of the case the complaints were withdrawn by the women involved following further threats). The gender based nature of the violence meant the

State was found to have violated Article 14 (prohibition of discrimination), in conjunction with Articles 2 and 3.³⁹¹

The positive obligations under Article 3 may also be invoked where the facts demonstrate a series of incidents of harassment, which taken in their entirety may breach the threshold of Article 3. In such a case a State was found in violation of its positive duty where:

“...no serious attempt was made to assess the true nature of the situation complained of, and to assess the lack of a systematic approach which resulted in the absence of adequate and comprehensive measures” (Hurley et al., 2007).

The court found that other than police investigation into individual incidents there had been no systematic response, and a lack of inter-agency cooperation between for example the police and social services.

Violence against women and children also engages several Articles of UN human rights treaties including the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC). The Committees responsible for monitoring progress under those treaties have expressed concern at continued rates of domestic violence in the UK and at the closure of rape crisis centres and domestic violence shelters (UN CEDAW, 2009). They have made several recommendations including increasing efforts to raise awareness of violence against women, training of relevant public authority staff, increasing support services for victims/survivors, ensuring the prosecution and conviction of perpetrators and adopting and implementing a unified and multifaceted national strategy to eliminate violence against women and girls, which would include legal, education, financial and social components (UN CEDAW, 2009, UN CESCR, 2009).

In January 2012, the European Social Committee highlighted recognition of an example of good practise in Scotland, the existence of a specialist domestic abuse court in Glasgow.³⁹² In 2008, the Scottish Government was also commended for launching a toolkit "*Handling Domestic Abuse Cases*" to provide information to support the handling of domestic abuse cases in the justice system which was circulated to all Sheriffs Principal and a wide range of agencies and organisations dealing with domestic abuse, its victims/survivors and their families (Council of Europe, 2012). The Committee has asked for a more detailed description of measures taken to combat domestic violence in Scotland (measures in law and practice, data, etc.) before its next report.

In June 2012 the UK signed the new Council of Europe Convention on preventing and combating violence against women and domestic violence.³⁹³

3.5.2.3 Domestic Law

The Gender Equality Duty requires that all public bodies have due regard to eliminating discrimination and promoting equality between men and women. The actions which authorities and agencies undertake to address 'violence against women' are considered to be integral to complying with this duty.³⁹⁴ However, research has indicated that there is:

“an extreme lack of awareness about the impact of the Gender Duty on public sector workers” (Hurley et al., 2007).

There is no specific criminal offence of domestic abuse and the common law offences of assault and breach of the peace are most commonly employed by the police and prosecutors in response to domestic incidents (Scottish Government, 2010a).

There are a range of statutory remedies, civil and criminal, available to tackle domestic abuse. These remedies are found within a number of different statutes as there is no consolidated act dealing with domestic abuse.³⁹⁵ Furthermore, legislation is both UK wide, such as the Protection from Harassment Act 1997, and Scottish, including, most recently, the Domestic Abuse (Scotland) Act 2011. While the criminal law is recognised as insufficient to combat domestic abuse,³⁹⁶ problems also exist in over reliance on civil remedies. These include the undue burden that civil remedies place on the survivor of abuse to pursue court orders and subsequently enforce compliance, leading to limited use of such remedies (Rosengard, 2009).

The Domestic Abuse (Scotland) Act 2011 is intended to increase access to justice for victims/survivors of domestic abuse and enable police and prosecutors to provide a more robust response to civil protection orders which have been breached. It does this, first, by removing the need for a survivor to wait for a series of incidents before seeking a 'non-harassment order'. Second, it further extends criminal offences in the area of domestic abuse.³⁹⁷

For Norrie (2011), however, the most significant feature of the Act is the definition of domestic abuse:

"By s 3(2), a domestic abuse interdict is one granted for the protection of the applicant against his or her spouse or civil partner, cohabitant or person with whom he or she is in an 'intimate personal relationship'."

This, he notes is:

"...significantly narrower than the definition of 'domestic abuse' proposed in the original bill that became the Act, for there, domestic abuse meant any abuse by a 'partner in an established relationship of any length'."

Norrie considers the limitation of the definition to abuse by a partner (and hence the exclusion from the Act of inter-generational abuse) to be "*unfortunate*" and likely to be contradicted in practice by the definition which should be given to the term under the Children's Hearings (Scotland) Act 2011 (Norrie, 2011).

3.5.2.4 Scottish Policy Development

Since the late 1990s,³⁹⁸ domestic abuse has featured prominently in public policy in Scotland (Flueckiger, 2008, Hearn and McKie, 2010). It has also featured heavily, as is explored in the following section, within social research in Scotland over the last two decades. This in-depth analysis reflects its prevalence in society, increased awareness of the problem, as well as being indicative of the status that consecutive governments have afforded to tackling domestic abuse in Scotland. Tackling the problem of domestic abuse and, in particular, its impact on women and children has attracted significant resources from government:

"The protection of women and children from all forms of violence is one of our highest priorities and both the Scottish Government and local authorities have committed significant resources to ensure we reap the benefit of the expertise, commitment and passion of those taking this fight forward across Scotland" (Donnelley, 2009b).

The approach taken by Scotland in its work on 'violence against women' has gained international recognition (Donnelley, 2009b, Scottish Women's Aid, 2009). In 2007 the Equality and Human Rights Commission (EHRC) reported that the investment in frontline services made by Scotland had had positive outcomes and that, this therefore, was the model that the national and regional governments of the UK should pursue with regard to its strategic approach to developing 'violence against women' strategies (Coy et al., 2007).

Strong political support is considered to be crucial to tackling domestic abuse, at a local and national level. The Scottish Government is noted for having placed 'violence against women' and its impact on children high up the political agenda, funding 73 projects across Scotland and investing over £44 million in tackling 'violence against women' (Donnelley, 2009b, Brunner, 2010). High profile public awareness campaigns such as, *Domestic Abuse: There's no excuse*,³⁹⁹ specific criminal justice interventions such as the domestic abuse court in Glasgow⁴⁰⁰ and government strategising on the subject (including, for example, a strategy for dealing with the impact on children and young people,⁴⁰¹ a strategy for tackling 'violence against women'⁴⁰² and a national training strategy),⁴⁰³ have helped to make this gendered analysis of domestic abuse a 'mainstream' issue. The Scottish Parliament has also returned to the issue on a number of occasions, most recently in relation to the *Domestic Abuse (Scotland) Act 2011*, discussed above.

The Scottish Government's current strategy on domestic abuse, *Safer Lives: Changed Lives* (Donnelley, 2009b) is based on four themes: protection, provision, prevention and participation. Tackling 'violence against women' is one of two priority areas identified by Scottish Ministers for the advancement of equality of opportunity between women and men in Scotland, (Reid Howie Associates and Equality Plus, 2010a). Furthermore, tackling the causes and consequences of 'domestic violence' is considered necessary to achieving more general national outcomes such as: equality in Scottish society; improving the life chances of children, young people and families; and having strong, resilient and supportive communities (Reid Howie Associates and Equality Plus, 2010a).

The high level focus given to domestic abuse, driven by an energetic voluntary sector,⁴⁰⁴ has resulted in a significant degree of policy development as well as research by academic institutions, government, and civil society. The evidence base of the gendered analysis approach to the issue of domestic abuse in Scotland is very well developed, with a range of comprehensive literature reviews aiding the development of the *National Domestic Abuse Delivery Plan for Children and Young People* (Scottish Government, 2008g) and in the *Ministerial Priorities for Gender Equality* document (Reid Howie Associates and Equality Plus, 2010a).

However some identify aspects of the policy approach which they believe could be strengthened. Hearn and McKie (2010) have criticised the current approach for what they consider to be its relative failure to address perpetrators. For example, of the 13 priorities for action in the *National Domestic Abuse Delivery Plan for Children and Young People* (Scottish Government, 2008g) only two are directed towards the perpetrators of domestic abuse. Similarly a 2009 review of domestic abuse in North Ayrshire (Rosengard, 2009), found no domestic abuse offender programmes in operation. However, initiatives such as the creation of the Strathclyde Police Domestic Abuse Force, has reportedly attempted to change the emphasis within domestic abuse investigations from one which was 'victim/survivor' focused to one which is focused on challenging offenders.⁴⁰⁵

A limited amount of research has also been undertaken which has explored the prevention of domestic abuse (Brunner 2010); domestic abuse from a comparative perspective (Hearn and McKie, 2010, Zimmerman et al., 2009); the effectiveness of specific criminal justice interventions, such as the domestic abuse court (Reid Howie Associates, 2007b) and the experience of domestic abuse in particular localities (for example, North Ayrshire, (Rosengard, 2009).⁴⁰⁶

3.5.2.5 The Minority Experience

Another area in which current responses to domestic abuse have been criticised is in their approach to members of minorities.

Recent research has considered women's experiences of domestic abuse in a manner which identifies intersectional aspects of discrimination. Such research has considered the experience of older women,⁴⁰⁷ women with disabilities,⁴⁰⁸ ethnic minority women⁴⁰⁹ and women on the basis of their sexual orientation or gender identity. There has also been some research on a woman's status and how that impacts on experiences of domestic abuse. This has focussed on asylum seekers⁴¹⁰ and women with no recourse to public funds.⁴¹¹ In addition, research has considered children and young people who experience domestic abuse.⁴¹² The majority of research has, however, for the most part focused on the general experience of women as victims/survivors⁴¹³ and the rights and needs of particular groups of women are yet to be fully addressed in domestic abuse policy. For example, it is reported that older women are more likely to be living with their abusers and policy is more likely to focus on protecting and meeting the needs of women with dependent children than on the particular needs of older women (Scott, 2008, Scott et al., 2004, Hearn and McKie, 2010).

Participants in this scoping project raised particular cultural barriers to seeking support. As one participant who worked as an interpreter noted:

So when I am talking about domestic abuse in the Muslim women's community in this area of [the city] where it is quite a small community – not that everyone knows everyone, but almost, so domestic abuse is something we don't like to talk about it, we like to hide it behind closed doors. And even then if someone knows about it, would they be daring enough to come forward and provide help. And even then it is always done hush hush... and when it is linked to mental health it is even more taboo. People in our community don't want to talk about mental health. So it is like a domino effect isn't it –one is linked to another and it is like a disease, how do we cure it?

Aasimah, Interpreter.

Research commissioned by LGBT Youth Scotland and the Equality Network in 2010 is considered the first to examine transgender people's⁴¹⁴ experience of domestic abuse in Scotland (Roch et al., 2010). The picture emerging from that research was one of:

"High levels of prejudice and abuse in transgender people's relationships and home life, coupled with unacceptable negative experiences of accessing services and support" (Roch et al. 2010:1).

Eighty per cent of respondents stated that they had experienced emotionally, sexually, or physically abusive behaviour by a partner or ex-partner, although only 60 per cent recognised that behaviour as domestic abuse. The most frequently experienced abuse was both emotional and transphobic (73 per cent), with 60 per cent noting the experience

of controlling behaviour.⁴¹⁵ This compares with 28 per cent of women (approximately 1 in 4) and 16 per cent of men (1 in 6) having ever experienced domestic abuse since the age of 16 (Flatley et al., 2010). This research also found that few respondents (only seven per cent) who had experienced abuse felt able to approach a domestic abuse service to seek support, with many saying they did not do so because they expected to face prejudice and a lack of understanding (Roch et al., 2010).⁴¹⁶ Participants in this scoping project also highlighted the problems that transgender people are likely to face in accessing support following incidences of domestic abuse. This was seen to be particularly problematic in relation to refuge facilities:

Think of appropriate services, if a trans[gender] woman suffers domestic violence, there is no refuge place for her to go is there? You couldn't go to a men's hostel, that wouldn't be appropriate.

Catriona, Transgender woman and diversity trainer/consultant to public services.

Police domestic abuse figures have been published by the Scottish Government each November since 2001, though this has changed to alternate years. The charity Abused Men in Scotland used freedom of information laws to gather the figures for 2010-11. The charity found, for 2010- 2011 that the number of incidents in which a male was recorded as a victims/survivors of domestic abuse was 9,648, a rise of 11 per cent on the previous year and the 11th consecutive year the figure for male victims/survivors had risen (AMIS, 2011b).⁴¹⁷ Research in this area also suggests that men may tend to under-report even more than female victims/survivors, partly because of 'macho' attitudes and an anticipated unsympathetic police response (Mays, 2010, Waugh, 2010). Whilst it could be argued that services are available for male victims/survivors of domestic abuse through mainstream organisations, participants in this scoping project frequently stated that they were treated differently from women and felt consistently let down by mainstream services. All male victims/survivors who participated in this scoping project recounted experiences of the difficulty that they often had in getting services to recognise that they were suffering abuse, for example:

[Katriona] throughout my marriage was abusive, both physically and mentally, financially and in a lot of different ways. When I asked for services, initially when it started in 2002 or thereabouts, I phoned up the social work's domestic violence unit saying that I was getting physically assaulted, emotionally abused and threatened at night where she would pick up knives and threaten to stab me while I was asleep and mentally tortured to the extent where I was going in to a high pressured job the following morning with absolutely no sleep and then having to take days off because of scratches on my hands and face or whatever. So I phoned up to report that and to see if she could get some help and support to deal with her aggression in different ways and I never got any reply. The letter that [Katriona] got though, which was following quite a violent incident where she had thrown a deep fat fryer at me with hot fat in it, which splattered all over me... she got a letter from them asking if she was ok and if she needed any support with regards to the domestic violence, I never got any further support or offers of support.

Derek, social worker, victim/survivor of domestic abuse and parent of children with shared residence.

Participants in this scoping project raised a range of concerns at the lack of awareness and services directed at men as victims/survivors of domestic abuse, for example In

Scotland there are reported to be no refuges or safe houses that exist for male victims/survivors.⁴¹⁸

Clearly, the problem is not gender neutral, but neither is the current policy response to it gender fair. Appropriate services need to be provided regardless of gender, age, disability, ethnicity or any other factor. Abuse is abuse.

Alice, mother, victim/survivor of domestic abuse and a member of a women's support group.

The Scottish Government has since April 2010 provided a funding contribution towards the Men's Advice Line, a service based in London run by the charity, Respect. The only Scottish-based help line continues to be run by AMIS, funded initially but support from the Big Lottery and latterly via supporter fundraising and personal donations and now also by a charitable Foundation. AMIS has argued for the importance of maintaining a Scotland based helpline and in particular one that is not bound by any particular philosophy of domestic abuse.⁴¹⁹ Towards the end of 2011-2012 financial year, the Scottish Government Equality Unit provided £15,000 funding to AMIS for capacity building purposes and AMIS hopes to encourage further involvement from the Scottish Government to support the services that they provide, which male victims/survivors feel that they are currently unable to access through mainstream organisations.

A specific concern also included the gendered nature of representations of domestic abuse in school and professional education materials:

...it was all about what men do to women, the entire course is and if anyone raised a question as I did about what women do to men, or men do to men, or women do to women, you are told, well yes that can happen but that is not what we are focusing on, today we are focusing on what men do to women. But there is never a day when they talk about the other things.

Emma, support worker of male victims/survivors of domestic abuse and a school teacher.

I went on a course on domestic abuse run by the local domestic abuse partnership as part of my professional social work training, and I was sitting in there hearing all this training about what the man does to the woman, and I am sitting there knowing that on a more than weekly basis I was suffering this you know, this was happening to me.

Derek, social worker, victim/survivor of domestic abuse and parent of children with shared residence.

Research indicates that policy attention has increasingly addressed the impacts of domestic abuse on children. It has been estimated that 100,000 children and young people live with domestic abuse in Scotland (Weaver, 2006). Stafford *et al.* (2007) found that: "(c)hildren and young people experiencing domestic abuse have for some years now been identified as a priority group for service; their needs increasingly recognised and additional resources made available to meet identified gaps in service and levels of service".

In 2008 the Scottish Government and COSLA produced a *National Domestic Abuse Delivery Plan for Children and Young People*. The Delivery Plan included thirteen Priorities for Action under the themes of protection, provision, primary prevention through education, and participation. It was planned that £10m over the following three years would be devoted to its delivery (Scottish Government, 2008g).⁴²⁰

However, participants spoke of some continued problems in accessing support services for children. One of the priorities for action identified in the Delivery Plan is to:

“Ensure all children and young people affected by domestic abuse have access to specialist services that meet their needs” (Weaver, 2006).

But, as one mother noted:

I asked I don't know how many times for social work to help and intervene with my son. You could see he was having problems dealing with the aftermath of what had happened, but no, the request had to come from school or another agency, it couldn't come from me. There I was saying, please help us, we need help now, but it had to come from someone else.

Lisa, Mother and victim/survivor of domestic abuse.

Since 2006 the Scottish Government has funded the Cedar (Children Experiencing Domestic Abuse Recovery) Project⁴²¹ which works with children and their mothers recovering from domestic abuse. The projects have been shown to be effective at supporting children (and their mothers) through the aftermath of domestic abuse (Sharp et al., 2011). The projects are delivered primarily by organisations supporting female victims/survivors of domestic abuse.

Some male participants in this scoping project noted, however, that their children had been unable to access services that support children due to the gender of the parent being abused:

I think another whole problem as to how the domestic abuse issues are viewed, my child is unable to get support because it is not their mother but their father that was being abused. If it was happening to a woman they would get help.... But they are funded by the government's violence against women unit. It is, particularly for children, [important that for] any service whether it be the male or female that is suffering domestic abuse, it should be open to the child.

Derek, social worker, victim/survivor of domestic abuse and parent of children with shared residence.

3.5.2.6 Funding concerns

Scottish Women's Aid have expressed concern that in times of budgetary pressure it will be necessary to monitor the impact of any cutbacks on refuge accommodation and support services (Scottish Women's Aid, 2009). This concern was echoed by the UN CEDAW Committee.⁴²²

Scottish Women's Aid has also expressed concerned that devolving responsibility for addressing domestic abuse from national to local government, through Single Outcome Agreements (SOAs), may result in a patchwork response and the dilution of specialist domestic abuse services (Scottish Women's Aid, 2009). A subsequent study by Scottish Women's Aid expressed concern about the absence of meaningful compliance with the Gender Equality Duty at a local level and about how national policy on 'violence against women' is implemented and monitored at a local level (Scottish Women's Aid, 2010).

The Scottish Government has, however, committed to investing £34.5 million “to help tackle the issue of violence against women”, which will provide £11.5m of funding each

year from 2012-2015. The funding will be spread across 138 projects throughout Scotland which provide:

*“support for women and children who are suffering from domestic abuse, or for women who have been violently or sexually abused”.*⁴²³

3.5.3 Forced marriage

Under international human rights law men and women ‘of marriageable age’ have the right to marry (Article 12, ECHR) on the basis of free and full consent.⁴²⁴ In recognition of the principles of self-determination and human dignity, this extends to a right not to marry in the absence of free and full consent.⁴²⁵ It has been argued that forced marriage also violates the right to bodily integrity inherent in the right to respect for private and family life (Article 8, ECHR), and the prohibition of inhuman or degrading treatment or punishment (Article 3, ECHR). To be sure, forced marriage should not be confused with arranged marriage: the latter being where marriage is entered into with the consent of all parties.⁴²⁶

The Scottish Government regards forced marriage as a:

“violation of internationally recognised human rights and a form of violence against women” that “cannot be justified on any religious or cultural basis” (Scottish Government, 2008c).

In 2009, the UK Government’s Forced Marriage Unit (FMU) dealt with 375 cases of forced marriage, of which one per cent⁴²⁷ originated from Scotland (Reid Howie Associates and Equality Plus, 2010a). The majority of UK cases which the FMU dealt with involved people from Pakistan, Bangladesh and of Indian origin. In 2009-10, Shakti Woman’s Aid supported seven women fleeing forced marriage and Hemat Gryffe Women’s Aid supported 13 such women (Scottish Government, 2010b). The Scottish Parliament’s Equal Opportunities Committee expressed the view that:

“while numbers may be relatively low, the detrimental impact of forced marriage is extremely high and cannot be tolerated; that civil remedies are not sufficient; and that forced marriage must be addressed through more victim-centred legislation” (Taylor, 2011).

The Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 was enacted to provide a specific civil remedy for those threatened with forced marriage and those already in such a marriage. In particular, it makes provision for forced marriage protection orders (FMPOs) to protect people against being forced⁴²⁸ to enter into marriage without their free and full consent and for protecting those who have been forced to enter into marriage without such consent. An FMPO may be sought by the individual concerned, a local authority, the Lord Advocate or issued in the course of other proceedings to which the individual is party.⁴²⁹ Through it a Sheriff Court or the Court of Session may include such provisions as appropriate to stop a forced marriage or protect an individual from a forced marriage.⁴³⁰ Breach of an FMPO is a criminal offence. The 2011 Act brings Scotland into line with civil legislation in England, Wales and Northern Ireland, which came into force in 2008 (Taylor, 2010).

Prior to the Act research had noted problems in accessing civil remedies for forced marriage (Reid Howie Associates, 2009). In its first year in force approximately 50 people had been helped by the Scottish forced marriage and domestic abuse helpline and the first FMPO was reportedly issued in Scotland in April 2012 (Lavery, 2012). Eighty-six FMPOs

were issued in England and Wales during the first year of the equivalent Act coming into force.⁴³¹

3.5.4 Same-sex marriage

In July 2012 the Scottish Government announced that it planned to pursue legislation to provide for a right of same-sex couples to marry. That decision followed a consultation which attracted tens of thousands of responses and strongly held opposing views from across Scottish civil society and religious organisations (Scottish Government, 2012h).

In its submission to the consultation SHRC clarified a number of questions surrounding the human rights issues engaged (SHRC, 2011h). Firstly it clarified that there is no European consensus on same-sex marriages.⁴³² It noted that in the case of *Schalk and Kopf v. Austria*,⁴³³ the ECtHR had found that Article 12 of the ECHR (the right to marry and found a family) read with Article 14 (non-discrimination) did not create an obligation to grant same-sex couples access to marriage. It found that the matter was within the 'margin of appreciation' of States. In essence it is permitted but not required to grant access to same-sex marriage. It found that "*men and women*" in Article 12 no longer means that:

*"...the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex"*⁴³⁴

*"The Court notes that since 2001 ... a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples ... Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of 'family' ... In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8."*⁴³⁵

SHRC further noted that this approach built on emerging practice of UN human rights bodies (UN CESCR, 2011).

On the relation of this right with the right to freedom of thought, conscience and religion SHRC noted that this includes freedom to manifest in private or in community religious views.⁴³⁶ Nevertheless this freedom can be subject to limitations prescribed by law and necessary in a democratic society, such as not interfering with the rights of others. On balance, SHRC agreed with the Government's proposal that that no religious body or its celebrants should be required to solemnise same-sex marriages (SHRC, 2011h).

3.5.5 Right to family life of people with learning disabilities

Under Article 8 of the ECHR, as we have seen, everyone has the right to respect for private and family life. Article 23 of the UN Convention on the Rights of Persons with Disabilities (UN Disability Convention) further specifies with respect to people with physical, mental or learning disabilities, that States Parties should:

"Take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others".

In practice, as recognised for example by the UN Committee on Economic, Social and Cultural Rights, the rights to marry and found a family are:

"frequently ignored or denied, especially in the case of persons with [learning] disabilities" (UN CESCR, 1994).

In practice, people with learning disabilities⁴³⁷ continue to face particular challenges to exercising their right to respect for private and family life in Scotland.⁴³⁸ A 2012 evaluation of the Scottish Government's strategy on people with learning disabilities, *Same as You*, noted that:

"Having more friends and the chance to have a romantic and/or sexual relationship were among the priorities which people with learning disabilities chose for their lives in a survey conducted by the Scottish Consortium for Learning Disabilities (SCLD) in 2006"(Scottish Government, 2012i)

The law in Scotland relating to the sexual relationships of people with a learning disability is designed to strike a balance between protecting those people who do not have the capacity to consent to sexual relations or are vulnerable to harm, whilst upholding and preserving the rights of those people who do have the necessary capacity to consent.

The two central Acts of the Scottish Parliament in this area are the Adults with Incapacity (Scotland) Act 2000 (AWIA) and the Adult Support and Protection (Scotland) Act 2007 (ASP). AWIA was specifically designed to benefit, amongst others, people with learning disabilities.⁴³⁹ It provides for a functional approach (as opposed to a status based approach) to assessing capacity. This means that the existence of a learning disability, even a serious one, will not of itself be determinative of capacity to make a decision.⁴⁴⁰

Rather an assessment should consider whether the particular person has capacity to make a particular decision at a particular time – a so-called 'tailor made' approach.⁴⁴¹ ASPA introduces several measures aimed to improve protection for adults at risk of 'harm' (broadly defined to include physical, psychological, financial or self-harm). ASPA defines an adult at risk as those who:

- (a) Are unable to safeguard their own well-being, property, rights or other interests,
- (b) Are at risk of harm, and
- (c) Because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

Both ASPA and AWIA are founded on human rights principles such as participation, least restrictive alternative and non-discrimination. Nevertheless, there has been some concern at the impact of ASPA in particular on autonomy.⁴⁴² For example the civil society coalition the Campaign for a Fairer Society Scotland (supported by a range of disabled peoples organisations and organisations working with disabled people)⁴⁴³ has expressed concern that ASPA:

"...requires [public authorities] to have 'regard' for the adult's ascertainable wishes and feelings (past and present), capabilities, background and characteristics. The Act gives local authorities powers to:

- *carry out medical examinations to determine if an adult at risk has been sexually or physically abused and to determine their competence to make decisions*
- *remove an adult at risk (and not the abuser) from their own home and place them somewhere else where they can be protected*
- *exclude an adult suspected of abusing the adult at risk from their presence for up to six months – even if the adult at risk does not agree with the exclusion.*

Disabled people are alarmed by the idea of removing the adult at risk, rather than the person suspected, from their own home, which violates their rights to privacy and to

*private home and family life. In addition, the exclusion of the suspected adult without the consent of the adult considered at risk may be further violation of these rights, and overall creates a prejudice of limited legal capacity.*⁴⁴⁴

As SHRC has pointed out,⁴⁴⁵ the effect of section 3 of the Human Rights Act 1998 is that all other primary and secondary legislation (including AWIA and ASPA) 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.

In addition, Section 17 of the Sexual Offences (Scotland) Act 2009 makes provision regarding the capacity to consent to sexual activity of a person with a mental disorder. It states that a person is incapable of consenting to conduct where, by reason of a mental disorder,⁴⁴⁶ he or she is unable to do one or more of the following:

- Understand what the conduct is;
- Form a decision as to whether to engage in the conduct, or as to whether the conduct should take place; or
- Communicate any such decision.

Hollomotz (2009) suggested that many people with learning disabilities, who in the past were assumed to lack capacity, do in fact have the capacity to make decisions about sexual relationships. Current Mental Welfare Commission for Scotland (MWC) guidance for professionals and carers when considering rights and risks in sexual relationships involving people with a mental disorder states that:

"People with a mental illness, learning disability or other mental disorder, have the same personal and sexual needs and rights as anyone else. At the same time people with a mental disorder can be at particular risk of abuse or exploitation. Balancing those rights and risks raises a host of legal and moral dilemmas to which there are no easy solutions. Whilst the motivation may be to protect, professionals and carers need to consider carefully whether any interference with an individual's rights is ethical, lawful, necessary and in proportion to the risks" (Mental Welfare Commission for Scotland, 2010b).

For people with learning disabilities who live in residential group settings, having access to privacy in which they can conduct normal adult relationships should be the norm, not a privilege (Hollomotz, 2009). Furthermore, Hollomotz (2009) has argued that the safest way of responding to the sexual needs of people with learning disabilities is to create safe spaces that allow for privacy.

The issue of private and family life, including relationships, was raised during participation events organised by SHRC and the Equality and Human Rights Commission in Scotland on the UN Disability Convention.⁴⁴⁷ Also a small number of participants in this scoping project worked in different settings with people with learning disabilities, including residential settings, and all said that they were unaware of any strategies or policies available at the local, practice level to help staff understand the right to respect for private and family life of people with learning disabilities and how they should support it:

In supported accommodation for people with learning disabilities, I think it is often the case that they are almost seen like eternal children that they won't have any sexual thoughts or want to be in a relationship with anyone else. I have had a few experiences in accommodation where it was almost frowned upon by the staff where someone wants to

spend time with someone else, or in a room together, even although it is consensual... There are no real policies at the government or local internal level to educate people with learning disabilities or help them to understand what is acceptable behaviour or what's allowed, or even telling them about contraception or anything like that. It is just like people don't want to talk about this, they just think, oh they don't have these thoughts. The policies now, the government is always pushing for more inclusive policies to help people with learning disabilities to be included in society, but I think sex and relationships is something that, yeah you can be included as long as you don't have sex, that's what it seems like. So it stops people with learning disabilities from having a normal private and family life.

Eric, trainee social worker with experience in residential care of people with learning disabilities.

Condor and Mirfin-Veitch (2010) explore issues such as knowledge of contraception, the development of parenting skills and the importance of social support within the context of adults with learning disabilities who want to become parents.⁴⁴⁸ Whilst their findings are based on a very small research sample, they found that with the right family and social support, parents with an learning disability can provide a secure and loving environment for their child (Condor and Mirfin-Veitch, 2010). However, historically women with learning disabilities have been coerced into using long-term methods of contraception to prevent pregnancy or have had their child removed from their care (Condor and Mirfin-Veitch, 2010).

In an attempt to support and better prepare pregnant women and parents with learning disabilities for parenthood, NHS Health Scotland sought to make available easy read materials on parenthood. An evaluation by People First (Scotland), Parents Group, Create Consultancy and NHS Health Scotland found that these materials were well received by parents with learning disabilities but that they were not consistently given to them. The evaluation also made a series of recommendations which may be relevant for other education or awareness raising initiatives for people with learning disabilities (People First (Scotland) et al., 2011).

SCLD⁴⁴⁹ works in partnership with people with learning disabilities of all ages as well as family carers in order to challenge discrimination and to develop and share good practice. In 2009 SCLD published the Scottish Good Practice Guidelines for Supporting Parents with Learning Disabilities which provides the wide legal and policy context to parenting and child protection in Scotland and practical advice to professionals in how to support parents with learning disabilities well (SCLD et al., 2009). They also raised the progress that had been made with regard to the realisation of the rights of parents with learning disabilities in Scotland, in their submission to the United Nations Universal Periodic Review (SCLD, 2011a).

Participants in this scoping project, however, were still critical about what was happening in practice (as noted above). One participant who provides training on sex education for young people⁴⁵⁰ didn't feel that current programmes or materials went far enough to include the diversity of the needs of young people with learning disabilities in relation to sex education:

I add to that the complication of people with learning disabilities who are gay, bisexual or transgender, who face another hurdle altogether and when it comes to education

materials, the SHARE programme which is run in Scotland – I do believe that it is the best programme that we currently have but I think we need to look at what we are doing because I can go into schools and say this is how it is and they know it – but we are still seeing the same rates of teenage pregnancy and the whole layer of learning disabilities and getting this information across to people with learning disabilities there is one resource that SHARE has that has some good exercises in it, but it doesn't go anywhere near far enough. I think that's an issue, and if you widen out to people with disabilities we are saying that people with disabilities don't have a sex life, and yes they do. Just because they have a disability they should still be able to enjoy that.

Jim, Sexual health worker and SHARE trainer.

3.5.6 The rights of parents and children

The research review highlighted a range of areas in which the rights of parents and the rights of the child are engaged in family life, where controversies have arisen in Scotland. The right to a private and family life in Article 8 of the ECHR extends to everyone (adults as well as children), and is, as we have noted, a qualified right. The right to marry and found a family, as we have also noted, is a right of those of 'marriageable age' who have the capacity to fully and freely consent. Several rights in the CRC relate specifically to the family life of children. These include:

- the general principle that the best interests of the child must be a primary consideration in all actions concerning the child (Article 3, CRC);
- the rights and duties of the parent or guardian to provide direction and guidance in a manner compatible with the evolving capacities of the child (Article 5, CRC);
- the right of the child, as far as possible, to know and be cared for by his or her parents (Article 7, CRC);
- the right to preserve family relations without unlawful interference (Article 8, CRC);
- the right of the child not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child (Article 9, CRC);
- the right of the child to have their view sought and for that view to be given due weight in all matters affecting them (Article 12, CRC);
- the principle that both parents have common responsibilities for the upbringing and development of the child and that parents or legal guardians have the primary responsibility for the upbringing and development of the child, on the basis of the best interests of the child (Article 18, CRC).

Research by the *wee democracy project* (supported by the Children's Parliament) found that, despite some recognition of the CRC in the language of service providers, for the most part, there had been little or no explicit or formal focus on children's rights in family life and that for government and for many agencies, "*the family is still viewed as a private realm*". There was also evidence that human rights were not thought to be relevant to families who may be struggling with other aspects of life (i.e. living in poverty) and that children's rights are regarded as a "*middle class interest*" and not somehow relevant to the lives of all children (Morrison and Fraser, 2008).

The Children (Scotland) Act 1995 recognises a range of parental responsibilities and rights in respect of children living in Scotland. These include a responsibility and corresponding right relating to contact with a child by the parent that the child does not live with, where

this is practicable and in the best interests of the child.⁴⁵¹ Where a judicial determination of parental rights and responsibilities is necessary, the 1995 Act⁴⁵² provides that the welfare of the child is paramount and that decisions must be made in the best interest of the child. The Act⁴⁵³ also provides that, so far as is practicable, the child's view must be taken into account.

Under the 1995 Act, only the mother of a child and a father who was married to the mother at the time of conception or at a later date, automatically have parental responsibilities and rights. The Family Law (Scotland) Act 2006 provided an additional way in which unmarried fathers could acquire parental rights and responsibilities (by jointly registering the birth with the mother), but did not go so far as to provide them with automatic parental rights and responsibilities. Petition PE1362 to the Scottish Parliament reflected a degree of dissatisfaction with the operation of the law in relation to the rights of unmarried fathers and it asked the Scottish Parliament to consider action to advance equality of treatment for unmarried fathers. One of the key questions to emerge from the petition was whether the differential allocation of parental responsibilities and parental rights depending on the gender of the parent is compatible with the European Convention. This question was also at the heart of the recent decision of the UK Supreme Court in *Principal Reporter v K.*⁴⁵⁴ In that case the UK Supreme Court held that:

*“The initial allocation of parental rights and responsibilities to mothers alone can be justified because of the wide variations in the actual relationships between unmarried fathers and their children; but that if an unmarried father has in fact established family life with his child, it is no more justifiable to interfere in that relationship without proper procedural safeguards than it is justifiable to interfere in the relationship between a married father and his child”.*⁴⁵⁵

Scots law makes the distinction between mothers and married fathers who have automatic parental responsibilities and rights and unmarried fathers who are required to take some form of positive step to acquire them. In its submissions to the petition SHRC considered that it would not be justifiable to treat unmarried fathers who had acquired parental responsibilities and rights any differently from mothers or married fathers who had them, but that it can be justifiable to have a process to determine whether an unmarried father has in fact established family life with his child (SHRC, 2010d). In reaching this conclusion SHRC cited not only the domestic case of *Principal Reporter v K.*, noted above, but also the ECtHR case of *McMichael v United Kingdom*⁴⁵⁶ (which was based on the situation in Scots law prior to the 2006 Act). In the latter case the ECtHR found that the Scottish system had a legitimate aim of providing a mechanism to identify 'merit' (SHRC, 2010d).

Some participants in this scoping project felt that following the breakup of a relationship (including a marriage), that fathers were automatically relegated by professional services to the status of a relevant adult, not an equal parent, even where shared residency agreements existed, as one father noted:

The dentist and the school said that there could only be one main contact, so that was their mother. But I don't see why in this day in age with so many families that are separated and bringing up kids apart and both parents having parental responsibilities then I don't see why there cannot be a system where both parties can be fully involved... I am viewed as the second class parent that's got them 4 days a week! I have missed a lot of quite important elements of my children's schooling because I've not been informed about it.

Derek, social worker, victim/survivor of domestic abuse and parent of children with shared residence.

For those participants who had experienced difficulties in accessing information about their children following separation, schools were highlighted as one the most significant problem areas. The Scottish Schools (Parental Involvement) Act 2006⁴⁵⁷ makes it a legal requirement for schools to keep parents routinely informed with regards to a child's education, including: providing reports and information about parents evenings, exclusions, attendance, sports days and other school events. The Guidance published along with this Act made explicit reference to situations where parents lived apart and lays an expectation that schools engage with parents on an equal basis, and that schools are obliged to devise active schemes for engaging with non-resident parents.

Current research on the involvement of non-resident parents in education by the civil society organisation *Families Need Fathers*⁴⁵⁸ has collated information through freedom of information requests to all local authorities in Scotland about their policies. Early analysis shows a wide spectrum of action by authorities and schools and little reference to the Scottish Schools (Parental Involvement) Act 2006 in any policies that did exist (*Families Need Fathers*, 2012).

Participants in this scoping project who were non-resident fathers described generally strained relationships with schools, which viewed them as 'absent' parents. Some noted that if they received their child's school report at all, it would generally not be received in time to go to the child's parents evening. Most noted that despite requests for information to be provided to the non-resident parent directly it was most often placed in school bags that resulted in the father never receiving the information. In a couple of cases fathers described how 'rocking the boat' by asking for further information or items such as school photographs resulted in schools becoming obstructive, as one father noted:

I used to pick Adam up from school on a Monday, and because I picked him up one day there's a daily home school diary and I said I don't see this and my former wife used to guard info about the kids as a form of control and so one of his class teachers said ok, we'll do your own school diary so on Mondays you'll get a summary of what he has done through the week and it worked pretty well for a while and it meant I could feed back to the school. I mean, it wasn't about me, it was about how important it was that they knew what he did when he was with me, because it's what they talk about and build on in the class and I found out from them things that I didn't know he could do and then we'd build on from that with him and so it was a really important part of the exchange for his education. And I remember there was this one difficult woman, and I picked him up one day and there was a note saying that the deadline has passed for parents to request copies of the school photographs and so I went back in to the school and spoke to the headmistress and said I don't know anything about the school photographs and she said well it went home in his school bag and I said, well as you know I don't see that and it was really important to me to get a school photo and she was furious and she said that she was withdrawing my privileges and I was no longer to have my home school diary, and I didn't raise my voice or say anything rude and she was just furious and she instructed the teacher to stop doing my own home school diary.

Jeremy, victim/survivor of domestic abuse and non-resident parent.

3.5.7 Parental imprisonment

As noted above Article 9 of the CRC protects the right to the child not to be separated from his or her parents except by competent authorities subject to judicial review. Article 9 further acknowledges in paragraph 4, that such separation may arise from the detention or imprisonment of one or both parents. Where that happens, the child should be given information about where the parent is, unless that would be against the child's interests. The Convention further upholds the child's right to maintain personal relations and direct contact on a regular basis, except if it is contrary to the child's best interests (Article 9.3).

It is estimated that around 16,500 children in Scotland are currently affected by the imprisonment of a parent every year (Scotland's Commissioner for Children and Young People, 2011) and the continuing increase in numbers of prisoners inevitably means that there will continue to be an increase in the number of children affected by parental imprisonment. Indeed, in the UK as a whole, it is more common for a child to experience a parent's imprisonment than a parent's divorce (Action for Prisoners' Families et al., 2007). In the ten-year period 1997-2007, the average daily prison population in Scotland increased by 19 per cent. During the same period, the female prison population increased by over 90 per cent (Scotland's Commissioner for Children and Young People, 2008a).⁴⁵⁹ The fact that there is only one women's prison in Scotland further means that contact between women prisoners and their children is often disrupted by lack of access (EHRC, 2010b, Commission on Women Offenders, 2012). Moreover in relation to prison visits, Scotland's Commissioner for Children and Young People (SCCYP) has criticised the practice within some Scottish prisons of viewing a visit by children as a privilege of the parent (that can be withdrawn), rather than the right of the child (Scotland's Commissioner for Children and Young People, 2008a, Scotland's Commissioner for Children and Young People, 2011).

Together (2012) in their most recent publication on the *State of Children's Rights in Scotland*, highlight a case study of a prisoner who had his parent-child visits removed as punishment for being caught in possession of a mobile phone. This punishment was in addition to what a prisoner without a child would have received. In the letter from the Scottish Prison Service (SPS) to the prisoner explaining why his parent-child privilege had been removed, SPS incorrectly assert that the UNCRC "*has not yet become a living charter for children of imprisoned parents*" and furthermore, misrepresent a SCCYP report as the source for minimum visiting entitlements (Together, 2012).

As well as the emotional loss of contact with a parent, children may suffer from bullying, shame, stigma, stress, financial disadvantage, the loss of a carefree childhood and a need to move house (Scotland's Commissioner for Children and Young People, 2008a).⁴⁶⁰ Only five per cent of women prisoners' children remain in their own home once their mother has been sentenced (HMCIPS, 2008a). In a 2011 follow-up report on this issue, SCCYP found that progress had been made on some of the issues first identified in 2008, but it also highlighted that more action was required to embed a children's rights perspective into law, policy and the practice of the criminal justice system, and to ensure that those affected by parental imprisonment are properly supported (Scotland's Commissioner for Children and Young People, 2011).

To address what it found to be gaps in consideration of children's rights in the criminal justice system and penal policy in Scotland, SCCYP proposed that a sentencing judge should be obliged to consider the impact of a custodial sentence upon the human rights of

the offender's children and, where there is a choice between custodial and community sentence for an offender with children, the balance should fall in favour of the community sentence (Scotland's Commissioner for Children and Young People, 2011, Scotland's Commissioner for Children and Young People, 2008a).

It is worth noting that this is already the case in South Africa following the landmark ruling of the Constitutional Court in the 2007 case *S v M* (CCT53/06). The Court addressed the precise question of the application of the best interests of the child by a court when sentencing the primary carer of minor children. The Court set out guidelines to "*promote uniformity of principle, consistency of treatment and individualisation of outcome*", namely:

- The sentencing court should find out whether a convicted person is a primary carer whenever there are indications that this might be the case.
- The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
- If the appropriate sentence is clearly custodial and the convicted person is a primary carer, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the carer is incarcerated.
- If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
- Finally, if there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

This ruling set a precedent which requires all South African Courts to give specific consideration to the best interests of the child when sentencing a primary carer. If the proposed imprisonment will be detrimental to the child, a non-custodial sentence must be favoured, unless the case is so serious that it would be inappropriate.

3.6 Safety and Security

3.6.1 Introduction to Safety & Security

This thematic section explores the theme of ‘safety and security’ in Scotland, one of the eight themes that emerged from the human rights analysis of the research reviews. This topic covers a wide variety of issues which have particular relevance to human rights in contemporary Scotland. While a great deal of attention has focussed at the UK level on human rights in the prevention of terrorism, given the focus of this scoping project primarily on issues within the competence of the Scottish Parliament those issues are not included.⁴⁶¹ Following a prioritisation process,⁴⁶² five areas are selected for further consideration in this thematic section: asylum; offences aggravated by prejudice; abuse prevention, protection and remedy; trafficking; and policing.

3.6.2 Asylum

Everyone has the right to seek and to enjoy in other countries asylum from persecution.
Article 14, Universal Declaration of Human Rights (UDHR).

Although the right to asylum was not incorporated in the International Covenant on Civil and Political Rights (ICCPR), the 1951 UN Convention Relating to the Status of Refugees (Refugee Convention), to which the UK is a party, contains a wide range of obligations on the treatment of refugees. It should also be remembered that, other than in narrow circumstances where rights are explicitly limited to citizens (such as elements of the right to political participation and the right to vote), human rights apply to everyone, and the obligations on the UK apply to everyone subject to its jurisdiction or in its territory without discrimination on any ground. The Refugee Convention takes a tiered approach to rights of refugees within a country of asylum. It outlines rights which are to be accorded to refugees on the basis of the same treatment as nationals; others to be accorded on the basis of the same treatment as the most favourable treatment accorded to non-nationals; and a third group of rights which are to be accorded to refugees on the same basis as to non-nationals generally.⁴⁶³

According to the Refugee Convention, a refugee is a person who:

“Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country or return there because there is a fear of persecution...”

An asylum seeker is someone who is seeking recognition as a refugee.

Important rights in the refugee process include the right of individuals to have their status as a refugee determined and to be free from forced return to a country where an individual’s life or freedom would be threatened. This principle, known as “*non refoulement*”, is a fundamental principle of international law. Linked with this is the obligation under Article 3 of the European Convention on Human Rights [ECHR] not to return anyone where there is a real and immediate risk that they would be subject to torture, inhuman or degrading treatment or punishment.

The issue of asylum, for the most part does not fall within the competence of the Scottish Parliament: immigration, deportation, detention, and funding of asylum seekers are all matters reserved to Westminster. However implementation of asylum/refugee policy, and

matters such as education, health, child protection, housing, and the provision of support services, all of which contribute to the successful integration of asylum seekers and refugees living in Scotland, do fall within the Scottish Parliament's mandate.

In May 2011, the Scottish Refugee Council released the first stage of a three-year study on how well refugees and asylum seekers are integrating into Scottish life (Scottish Refugee Council, 2011a, Scottish Refugee Council, 2011b). It noted that there are significant barriers to refugees being able to rebuild their lives in Scotland. Over 70 per cent of those questioned said they had experienced discrimination since being in Scotland. Sixty-eight per cent said that they were struggling to cope financially, with only around 20 per cent of refugees in employment, despite the over three-quarters indicating that they wanted to work. Refugees who worked in professional roles in their own country often meet significant obstacles in seeking to re-engage professionally in Scotland, and end up working in low paid, unskilled jobs (Smyth and Kum, 2010).⁴⁶⁴ Follow up research combining responses to over 260 questionnaires and 30 semi-structured interviewed, noted that around 60 per cent felt safe, but only 48 per cent felt that where they lived had good community cohesion (Scottish Refugee Council, 2011c).

In contrast to the experiences described above, asylum seekers⁴⁶⁵ who participated in this scoping project were quick to express their happiness with the way that they had been welcomed into and supported by the communities in which they lived and that discrimination from the general public was not something which they had experienced. Despite this welcome, however, many were close to or facing destitution.⁴⁶⁶ This was also a common finding in recently published research by Morag Gillespie (2012) which explored the scale and nature of destitution amongst people in the asylum system in Scotland in 2012.

Gillespie notes that the Home Office argues that refused asylum seekers can return to their country of origin and therefore do not need to be destitute. In reality, however, she found that thousands of asylum seekers are left without any legitimate means of support and indicated that hundreds of people currently live in Scotland, trapped in destitution. Interviewees in that research said that they:

“hoped for a better life where their human rights would be respected, but they felt they have been treated very harshly” (Gillespie, 2012).

The research concludes that:

“The UKBA has cut asylum support and resources for support services. Funding cuts mean services supporting destitute people face growing demand, but reduced capacity... At present they can be left for years, trapped in destitution but unable to return to their home country... The existence of such extreme poverty in Scotland should be a focus of public policy concern and action to minimise its existence and mitigate its effects” (Gillespie, 2012).

Further concerns amongst the participants in this scoping project lay for the most part in the treatment received from the UK Borders Agency (UKBA), where the women recounted stories of harassment and bullying, often in front of their children, and of an alleged assumption by UKBA that they were not being truthful. They reported the UKBA interviewers rarely asked for the reasons as to why they were seeking asylum. This finding was reiterated in Gillespie's recent study of asylum seekers in Scotland (Gillespie,

2012). For example Claire, a support worker for these particular asylum seeking women recounted one such experience:

It is extremely rare for us to meet a woman who has not had her sexual health comprised and her sexual privacy and dignity violated... but they [UKBA] never ask, and the women don't necessarily volunteer this information because it may be that they do not recognise that this is a crucial fact... Plus they know some of the awful things that have happened to some of the other women. I had a woman come and stay with me and she had medical evidence (not everybody does) of rape and they wrote down that perhaps she liked rough sex with her partner and that has disturbed me to this day and I have never gotten over that... She had been hurt and there was no discussion about it and she was from a very extreme cultural environment where it is absolutely taboo to have any of these discussions. So for her to have been physically examined was so awful and for them to have found trauma was so awful, and for them to know that she'd been violated in these multiple ways was so terrible, but for the UKBA to put down on paper, perhaps she chose, perhaps that's what she liked... that's pretty serious.

Claire, Support worker for women who are seeking asylum.

They also reported feeling unable to talk freely and none of the women were told in advance what information they needed to provide for their first interview. This information often proved to be critical to their cases and credibility. Participants in this scoping project also raised concerns at the length of time taken for status determination processes.

Research has also previously drawn attention to the particular difficulties faced by unaccompanied asylum-seeking children in Scotland (Scottish Refugee Council, 2006), and to the various challenges involved in the transition from asylum seeker to refugee, particularly in relation to navigating the social housing system (Netto and Fraser, 2009).

In response to its findings, the Scottish Refugee Council has called for more support for refugees to contribute to life in Scotland (Scottish Refugee Council, 2011a, Scottish Refugee Council, 2011b). As of September 2011, the UK Government has withdrawn its funding of a dedicated Refugee Integration and Employment Service. The Scottish Refugee Council has therefore called on the Scottish Government to revisit its strategy for refugee integration. In a separate report, it has also pointed at a need for clearer guidance for service providers on the respective remits and responsibilities of the Scottish and UK Parliament in the area of asylum (Scottish Refugee Council, 2006). This issue was also raised by participants in the focus groups, who noted that asylum seekers had been refused access to pre-natal maternity care and frequently to primary mental health care,⁴⁶⁷ on the basis that services providers believed they were not entitled to it.

The Cabinet Secretary for Justice has said that the Scottish Government has a role in influencing the UK Government to ensure that fundamental Scottish values are taken into account in drawing up immigration legislation, especially with regard to protection for children, minimal use of detention, and integration. For example he has called upon the UK Government to give asylum seekers the right to work while they await the outcome of their application (Howie, 2008). This would help address labour shortages in Scotland and equip people with skills they can use if they are returned to their country of origin.

3.6.3 Offences aggravated by prejudice

Offences aggravated by prejudice (so-called 'hate crimes') are acts of violence or other

crimes motivated by prejudice or discrimination. States have human rights obligations to prevent and investigate such crimes. For example, the International Convention for the Elimination of Racial Discrimination, to which the UK is a party, provides in Article 4 that:

“States Parties ... undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, [racial] discrimination and, to this end ...

(a) Shall declare an offence punishable by law ... all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ...”

The right of disabled people to freedom from exploitation, violence and abuse is guaranteed in Article 16 of the UN Convention on the Rights of Persons with Disabilities (the Disability Convention). This includes explicit obligations to take effective steps to prevent exploitation, violence and abuse, to act to protect disabled people and to remedy its effects. Article 16(5) further requires that:

“States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted”.

In its case law the European Court of Human Rights (ECtHR) has clarified that states have a similar procedural obligation under the ECHR to investigate underlying prejudicial motives for violent crimes.⁴⁶⁸

Furthermore, some hate crimes will reach the threshold of cruel, inhuman or degrading treatment or punishment which is prohibited under Article 3 of the ECHR. Under that Article states have a positive obligation to prevent (including through effective laws and regulation) ill-treatment; to act to protect an individual where they knew or ought to have known of a real and immediate threat of ill-treatment; and to remedy ill-treatment when it occurs. In the recent case of *Dordevic v Croatia* the ECtHR found that acts of harassment taken in their entirety may breach the threshold of Article 3 and that Croatia was in violation of its positive duty where:

“No serious attempt was made to assess the true nature of the situation complained of, and to assess the lack of a systematic approach which resulted in the absence of adequate and comprehensive measures.”⁴⁶⁹

The Court found that other than police investigations into individual incidents there had been no systematic response, as well as a lack of inter-agency cooperation between, for example, the police and social services. Even where the incidents of harassment do not reach the threshold of Article 3, a positive obligation exists under Article 8 to put in place adequate measures to prevent further harassment.⁴⁷⁰

The most recent official statistics show a rise of eight per cent in 2011/12 in recorded cases of hate crime across Scotland⁴⁷¹, with religiously aggravated charges rising by 29 per cent (Crown Office and Procurator Fiscal Service, 2012). Deep-rooted prejudices are manifested in a variety of ways and can have pervasive impact on the well-being of individuals and the cohesion of communities. The damaging effects of prejudice and discrimination upon, in particular, the mental health of victims/survivors have been recognised (Gordon et al., 2010). Discrimination, social exclusion and targeted victimisation and harassment have been identified as some of the principal causes of significant inequalities in Scotland (EHRC, 2010a). This analysis has explored the issue of hate crime under two key headings: abuse and incidents motivated by prejudice in relation to race, religion, disability, sexual orientation and transgender identity, and sectarianism.

3.6.3.1 Hate crime in general

Hate crime is now formally recognised in Scots law. The Crime and Disorder Act 1998 introduced racially aggravated offences throughout the UK.⁴⁷² More recently, the Criminal Justice (Scotland) Act 2003 now provides for offences aggravated by religious prejudice,⁴⁷³ and the Offences (Aggravation by Prejudice) (Scotland) Act 2009 provides for offences aggravated by prejudice related to disability, sexual orientation, or transgender identity.⁴⁷⁴ In all cases, a sentencing court must take that aggravation into account in determining the appropriate sentence. The Lord Advocate has issued Guidelines to Chief Constables (Lord Advocate, 2010) on the 2003 and 2009 legislation. The guidance specifies:

“An incident is aggravated by prejudice if it is perceived to be aggravated by prejudice by the victim or any other person” (ibid.:1),

There must be evidence to support that belief. The Guidelines also emphasise the importance of police recording details of the impact of the crime on the survivor, when such crimes are reported.

Participants in this scoping project felt however, that not enough public information is available about what hate crime is; what can be done about it; and the importance of reporting incidents. As a result, participants felt that the public were unaware of the true extent of hate crime in Scotland. A number of participants told SHRC that they themselves were victims/survivors of hate crime. Few, however, had reported the issue, even although they were aware of a simple local process to facilitate this:

It happened to me and my husband and I admit, I didn't report it... and sometimes now I ask myself why didn't I report it?

Aasimah, Interpreter

Three participants in different focus groups had reported incidents of various natures to the police. In each case they felt the police had merely recorded the incident and had been unable to take further action due to a lack of corroboration:

I reported two cases of what I believe to be incitement to racial hatred to the police. Both were investigated by the police, both went as far as these kinds of things go. On the first occasion they said that there was insufficient evidence. On the second case, that was the one where they were talking about bringing about the 'final solution' [for Scottish Gypsy Travellers] it was pretty horrific stuff they said. On that case I got a phone call from one of the police that dealt with it saying that it wasn't being taken further because it wasn't in the public interest.

Kathleen, Scottish Gypsy/ Traveller

In addition, participants felt that schools were failing to deal with any 'hate' related aspects of bullying:

As a social worker I do a lot of work on hate crime, especially amongst children and I see that often education authorities don't recognise this as a hate crime or they tend to brush it under the carpet.

Jenny, Trainee social worker

I don't think the schools are taking it seriously at all, I know some kids are being bullied. One of our women [women's support group] at the moment, her kid is going through hell at school and they are not taking the fact that he's being bullied because he is Asian, seriously, at the end of the day that is against the law and

what are they doing about it?

Katie, Mother, victim/survivor of domestic abuse and a member of a women's support group

Finally, much criticism was levied by participants in this scoping project at the media for the way in which stories about particular groups in society are presented. This was particularly true in the case of disabled people and Scottish Gypsy/Travellers. As one participant with disabilities noted:

It almost feels like we've gone back to a World War II mentality, the category bit where 'we don't like the ...', you will get people who hate people with disabilities because they are getting DLA and there is a lot of that going on, a sort of hate culture. The [UK] government is fuelling a hate culture and that is what is quite frightening.

Wendy, Third sector administration support worker (mental health befriending organisation), and a woman with physical disabilities

3.6.3.2 Sexual orientation and Transgender identity

Scotland was slower than England and Wales to enact legislation on hate crime relating to sexuality and Transgender identity,⁴⁷⁵ but since 2007 this has been a core focus area for the work of the Equality and Human Rights Commission in Scotland (Forrest, 2007). Attitudes in Scotland are believed to be improving overall (Ormston and Webster, 2008, Stonewall Scotland, 2008), but a report by LGBT⁴⁷⁶ charity Stonewall Scotland (Stonewall Scotland, 2010) indicated that more than one in three LGBT people had experienced a physical attack. More than two in three had experienced a verbal attack. Fifty per cent said they did not feel safe in their neighbourhood because of their LGBT status and 42 per cent had had a negative experience when using the emergency services. This was found to be connected with a low reporting rate of hate crime related to sexuality and Transgender identity: seven in ten LGBT people who experience hate crime do not report it to the police, or to anyone else (Stonewall Scotland, 2010).

This has the potential to lead to an escalating problem, as community safety organisations do not have a clear picture of where, when and how frequently these incidents against LGBT people are occurring, and will not be able to tackle hate incidents as effectively as possible. Other factors such as fear of not being taken seriously, and not wishing to be forced to come out, inhibit victims/survivors from reporting incidents, and, as with other forms of hate crime, the research shows that many people who are victims/survivors of assault and harassment simply feel that it is to be expected, and “*merely part of being LGBT in Scotland*” (Stonewall Scotland, 2010). These feelings and fears were also reported by participants in this scoping project:

I met someone who had been hit with a cricket bat and it caused serious damage, broken shoulder, broken jaw, broken nose, and luckily they were able to say who the attacker was but didn't want to tell the police because they were frightened... while they were doing it they were shouting 'I hate Trannies' and so it was a trans-phobic attack, it's not just name calling, hate can take many forms.

Catrina, Transgender-woman and diversity trainer/consultant to public services

However, although participants involved in this scoping project were able to recount stories of personal attacks (or attacks on friends) and negative attitudes, they were also on the whole more positive about changing social attitudes and progress in particular by the

police in how they approach sexual identity related hate crime. There was a general consensus that as a survivor of abuse there is also a responsibility to report it to the police so that at the very least the police would have recorded data on it. One participant, who had experience of providing training to different police forces about transgender issues, appreciated that the police had reached out to her when they recognised that they did not have sufficient experience to help a survivor of transgender related hate crime. In the absence of in-house knowledge some Scottish police forces are turning to the communities concerned to work together. Stonewall is also now working in partnership with other organisations to try to raise LGBT people's expectations of community safety.

Research carried out in 2007 (before the enactment of the 2009 legislation) indicates that most areas of Scotland have some form of remote reporting or third party reporting of racist crimes, and such services are now being extended to disabled and LGBT groups, although that support remains patchy and is focused mainly in central Scotland (Reid Howie Associates, 2007a). That geographical imbalance in support reflects a lack of capacity in the voluntary sector, particularly outside of urban areas. A number of racist incident monitoring groups have been extended to include crime against disabled people and LGBT people and police forces are now extending their monitoring of hate crime to include crimes against disabled and LGBT people.

In a survey conducted in 2007 (prior to the Offences (Aggravation by Prejudice) (Scotland) Act 2009), half of the LGBT people questioned were not aware of third party reporting schemes in their area, and some Community Safety Partnerships acknowledge that their work in this area is 10 years behind their work on racial prejudice (Reid Howie Associates, 2007a). The report, therefore, called for increased tailored training for community safety workers, along with increased mainstream publicity about LGBT hate crimes, anti-hate crime initiatives, and available support. The publicity surrounding the recent Offences (Aggravation by Prejudice) (Scotland) Act 2009 appears to have helped raise awareness of LGBT hate crime to 88 per cent of those LGBT people questioned, however, awareness amongst a cross-section of the general population is likely to be lower than this (Stonewall Scotland, 2010).

In September 2011, a soldier from Kinross became the very first person in Scotland to be convicted of an offence aggravated by transgender prejudice (BBC News, 2011f). The prosecution for breach of the peace, aggravated by transgender prejudice, followed acts of verbal abuse and threatened violence. It resulted in a fine of £350, an increase of £150 on the basic sentence, to take account of the transgender prejudice.

3.6.3.3 Disability

In a poll commissioned by disability charity Scope more than half of the disabled people who took part reported having experienced hostility, aggression or violence from a stranger because of their condition or impairment (Scope, 2011). The same number reported experiencing discrimination on either a daily or weekly basis. One participant in a recent seminar hosted by SHRC and the Equality and Human Rights Commission said:

It is a sad indictment of disability discrimination legislation over several years that disabled people today are still living in fear of hate crime, bullying, victimisation, intimidation and negative societal attitudes towards them in both day-to-day activities and places of work (EHRC and SHRC, 2011).

The Equality and Human Rights Commission has recently conducted an inquiry into disability-related harassment (EHRC, 2011e). It found that the much-publicised cases of disability-related harassment, such as the English case of Fiona Pilkington and her daughter Francessca Hardwick, who died in 2007, are merely the tip of the iceberg. The reality is that many people with disabilities suffer harassment on a regular basis, and indeed come to regard it as inevitable. Mike Smith, Lead Commissioner for the Inquiry, identified two overall conclusions of the Inquiry. First, the EHRC found that there is a significant amount of disability harassment in Britain: “*almost certainly in the hundreds of thousands [of incidents] each year*”. Second, there is a lack of information, statistics on and awareness of what is going on (EHRC, 2011e). The EHRC (2011c) found that each of these is underpinned by a “*culture of disbelief*” that such behaviour takes place.

Various factors are cited as reasons for the failure to report incidents of harassment. These include lack of clarity as to who to report to; fear of repercussions; and fear that the police or others will not believe the survivor (EHRC, 2011e). Other research suggests that many disabled people do not in fact recognise that what happens to them may be an offence, or may be motivated by prejudice, malice or ill-will (Reid Howie Associates, 2007a).

The EHRC report (EHRC, 2011e) concludes that there is a systemic failure in the UK to recognise the extent and impact of disability-related harassment; to harassment, take action to prevent it happening; and to intervene effectively when it does occur. It recognises that Scottish law and policy are already significantly ahead of England and Wales in some respects, but more must be done to embed an equalities and human rights ethos into the work of public authorities in Scotland. As well as the necessary organisational changes, a transformation is needed in the way disabled people are viewed, valued, and included in society. Specific recommendations made in the report include: real ownership of the issue by organisations is critical in dealing with harassment; a need for greater availability of detailed, definitive data for monitoring purposes; the accessibility and responsiveness of the criminal justice system must be improved; effective training and guidance for front-line staff in recognising and responding to disability-related harassment is needed; and a more positive attitude towards disabled people in the wider community to be fostered.

3.6.3.4 ‘Race’ and religion

“Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.”

Grand Chamber of the European Court of Human Rights⁴⁷⁷

The number of both racially and religiously motivated crimes referred to the Crown Office and Procurator Fiscal Service has risen in recent years (EHRC, 2010b, Crown Office and Procurator Fiscal Service, 2012). Research conducted with minority ethnic young people in Edinburgh and Glasgow and with young Muslim men in Glasgow, however, indicates that violence and harassment are often seen as part of everyday life, and not worth reporting to police (Fronidigoun et al., 2007, Kidd and Jamieson, 2011). This was also felt to be the case by a number of the participants in this scoping project. In a 2007 study of Scottish

Gypsy/Traveller experiences of discrimination, 65 of the 82 individuals questioned had experienced prejudice and harassment in the previous 12 months (EHRC, 2010b, Taggart, 2007).

Participants in this scoping project reported a continued failure to recognise Scottish Gypsy/Travellers as a minority ethnic group and consequently that prejudice towards members of those communities are motivated by racial prejudice. As one member of a Scottish Gypsy/Traveller community noted:

... They can take out anti-sectarian laws about singing Orange chants or whatever, they can pass anti-racial hatred legislation, but they can't put this down as a hate crime... why not? Why can it not be a hate crime when someone throws bricks at your windows and calls you "f'ing Tinks" at the same time, why can that not be a hate crime?

Kathleen, Scottish Gypsy/Traveller

3.6.3.5 Sectarianism

Never mind 'show racism the red card', you really have to get down to sectarianism first.

Larissa, Civil servant and third sector volunteer worker

Scotland's enduring problem of sectarianism hit the headlines in 2011, with an increase in football-related incidents of sectarian hatred. These included parcel bombs targeted at Celtic manager Neil Lennon, his lawyer the late Paul McBride QC, and former MSP Trish Godman, as well as bullets sent in the post and a very public assault on Neil Lennon during a match against Heart of Midlothian. Commentators have suggested that the problem of sectarianism is not necessarily more rife than in the past, but "*what is apparent is that the small fringe of extremist fans are rising in prominence*" (Murray, 2011). A Scottish Government poll (TNS BMRB, 2011) is reported to have concluded that more than 90 per cent of Scots support tougher action against sectarianism. Eighty-five per cent of those polled supported sectarianism being made a criminal offence (BBC News, 2011b, TNS BMRB, 2011). There was a strong feeling amongst participants in this scoping project that sectarianism is something that a civilised society should not tolerate and that Scottish people have been tolerant of it for too long. Some participants expressed shame that a proportion of the adult population in Scotland is effectively teaching children about hatred through sectarianism in the football ground, as one participant noted:

We teach our children this kind of hatred. Kids are colour blind and have no concept of religious difference... They are not biased, they learn their behaviours from others, they learn from their families and society. And it stays with them for a long time... you see how much hatred can come out of someone for someone else that they have never met before, it is incredible. Hopefully with the legislation [Football and Threatening Communications (Scotland) Act 2012], given some time, people might start to think about the implications of their behaviour, start to think, I might have to pay for the implications of my act. In the past I did what my father did, but now I look at this and think, this is not something I am meant to do, it is not worth paying this price.

Chiwetel, Survivor of racially motivated hate crime

The Scottish Government responded to the incidents with legislation. The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012⁴⁷⁸ gained Royal Assent on 19 January 2012. The Act⁴⁷⁹ provides for two new criminal offences:

- The offence of “*offensive behaviour at regulated football matches*”⁴⁸⁰ criminalises offensive or threatening behaviour, including sectarian, homophobic, racist, and other offensive chanting, that is likely to incite public disorder at certain football matches. The offence may be committed at or on the way to a match or a place (other than domestic premises) where a match is being televised. It may be committed by way of behaviour of any kind, including things said or communicated in any other way (e.g. with a banner or t-shirt), or things done.
- The offence of “*threatening communications*”⁴⁸¹ deals with the sending of communications which contain threats of serious violence or threats intended to incite religious hatred. It covers offensive postings on the internet, “*photo-shopped*” offensive images and images on clothing. It also includes “*implied threats*”, which covers the posting of bullets and images depicting serious harm. There is a defence that the behaviour was “*reasonable*” in the particular situation.

Several human rights concerns were raised during the passage of the Bill. In its submission SHRC welcomed the policy objectives which underpinned the Bill, but raised a number of concerns related to the lack of clarity in the terms of the Bill (and therefore a potential lack of legal certainty as required by Articles 6 and 7 of the ECHR).⁴⁸² SHRC highlighted ECtHR cases which found:

*“An offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it, what acts and omissions will make him liable.”*⁴⁸³

The Grand Chamber of the ECtHR has found violation of Article 7 where the applicable law was not formulated with sufficient precision.⁴⁸⁴

SHRC also stressed the fundamental importance of the right to freedom of expression and the role of Parliament in ensuring that the restrictions on this right contained in the Bill met the tests of legality, legitimate aim and proportionality.⁴⁸⁵ Others too questioned the Bill’s impact on freedom of expression and freedom of religion (McKenna, 2011). During the Stage 2 proceedings, the Bill was substantially amended, with the insertion of a new clause (now section 7) in an effort to respond to concerns relating to the potential impact on freedom of expression.

Also the stage 2 redrafting allowed the conduct element of the offences to be varied by statutory instrument. In response to this move, Liberty stated that:

“[A]llowing for the modification of criminal conduct by way of Ministerial order is a breath-taking expansion of power”, and suggests that the Bill (now Act) is “*poorly planned and poorly drafted*”.⁴⁸⁶

Strathclyde Police described the Act as a preventative measure, the aim being to discourage abusive singing and behaviour through the conspicuous presence of police officers at matches, rather than having to resort to arrests (Peterkin and McLaughlin, 2011). The new offences have, however, been widely criticised (Peterkin and McLaughlin, 2011, The Scotsman, 2011). Some commentators describe the legislation as a misguided attempt to tackle sectarianism by treating the symptoms, rather than the cause of this important issue (Downie, 2011). Football clubs, including both Rangers and Celtic, have raised concerns that the legislation discriminates against football supporters by creating an offence that would not apply to non-supporters, and argue that the new offences are drafted too widely (Christian Institute, 2011). Some legal experts agree (Christie and McArdle, 2011, Law Society of Scotland, 2011b, Liberty, 2011b), that suggesting that

common law breach of the peace and the Criminal Justice and Licensing (Scotland) Act 2010, which deals with threatening or abusive behaviour, as well as the Criminal Justice (Scotland) Act 2003, which allows for offences to be aggravated by religious prejudice, are sufficient to cover most of the offences committed in connection with football matches.

The Scottish Government insists that the provisions will not stop peaceful preaching or proselytising, and will not restrict freedom of speech, including the right to criticise or comment on religion or non-religious beliefs. The legislation will also not criminalise jokes or satire about religion or non-religious belief (Scottish Government, 2012e).

Nevertheless, the provisions have been described as “*illiberal*”, an “*encroachment of the Big Brother society*”, and “*one of the most draconian pieces of legislation ever drafted*” (Gordon, 2011, Rooney, 2011). There are serious concerns about the lack of clarity regarding which ‘*offensive*’ or ‘*threatening*’ acts are being targeted by the legislation, with suggestions that, in some circumstances, making the sign of the cross or singing the national anthem could constitute an offence (The Scotsman, 2011). Some have argued that it discriminates against poorer sections of society, and query the focus on sectarianism in football, ignoring its existence in other contexts (BBC News, 2011e).

3.6.3.6 Tackling Hate Crime in Scotland

A survey carried out by Lothian & Borders police force in 2010 (McEwen, 2011) reflected the findings that other research (noted above) has revealed about the reporting of hate crime. In this survey 60 per cent of hate crime victims/survivors did not make a report to police, with many believing that nothing would be done; that there was little police could do; or that reporting the incident would make matters worse for the survivor. Remote and third party reporting schemes, as described below, can provide a vital means of overcoming the reluctance of hate crime victims/survivors to report the incidents directly to police.

Highlands and Islands, Northern Constabulary, in partnership with Highland Council, NHS Highland, and Highlands and Islands Enterprise, launched an online reporting system, ‘Hate Free Highland’.⁴⁸⁷ Victims/survivors of hate crimes or incidents, whether or not they constitute a criminal offence, are encouraged to report them via an online form. The incidents may be any form of abuse or harassment on the grounds of the person’s age, religion or belief, gender, disability, sexual orientation, gender identity, race or ethnic origin, or social background. Reports may be made by the survivor, a friend or relative of the survivor, or by a witness to the incident, and may be made anonymously. The information is used both for the investigation of crimes, and for the purpose of understanding trends in hate crime. The service provides a confidential, optionally anonymous, means of reporting a wide range of incidents.

Community Safety Partnerships are local authority led partnerships that bring together representatives from the local authority, police service, and fire and rescue services. Health, education, and other public sector interests are also represented in many partnerships. CSPs work to reduce anti-social behaviour and fear of crime, and to promote safer, more inclusive and healthier communities.

An example of inter-organisation cooperation on disability-related hate crime is the Edinburgh, Lothian and Borders Executive Group (‘ELBEG’), which comprises the Chief Executives of NHS Lothian and NHS Borders and the five local authorities, and the Chief Constable of Lothian and Borders Police (EHRC, 2011e). The partnership was set up in

March 2004 and is designed to provide multi-agency strategic leadership in the area of public protection.

Another example of prejudice incident monitoring and reporting has existed in the North East of Scotland since 2009 run by the Grampian Regional Equality Network. Here a monitoring and reporting form is available to allow individuals to report prejudicially motivated incidents confidentially.⁴⁸⁸

Many participants in this scoping project and those who took part in a joint SHRC and EHRCs' participation event on the Disability Convention felt that public campaigns such as 'Respect Me' [targeting disability harassment] and education in schools for children and young people were critical in tackling hate crime. As one participant in the joint participation event noted:

Bullying can't be eradicated but we need to educate young people about the extent of abuse of people with disabilities. Raise awareness of disability, starting at school. A good example of experiential learning took place in Fife, it started with children having short experiences of sensory impairment. These sorts of programmes are invaluable but it was not continued (EHRC and SHRC, 2011).

Other examples of work in schools include the development of a short film entitled "Them and Us"⁴⁸⁹ which was created by pupils from Bellshill Academy and Cardinal Newman High School in Lanarkshire, and launched in June 2012.⁴⁹⁰ Through the short film, the pupils of these two schools sought to educate their peers about the damaging consequences of sectarianism, bigotry and hate crime. Both schools are now working in collaboration to produce a package of learning and teaching materials to support the use of the video in classrooms across Scotland.

3.6.4 Abuse: prevention, protection and response

The prohibition of torture, inhuman or degrading treatment or punishment (serious ill-treatment) in Article 3 of the European Convention on Human Rights (ECHR) includes positive obligations of prevention, protection and response. These extend to serious ill-treatment wherever it occurs and requires an effective legal and regulatory framework (prevention), that the state acts to protect an individual from a real and immediate risk of serious ill-treatment of which it was or ought to have been aware (protection)⁴⁹¹ and that it ensure access to justice, effective investigations and remedies where serious ill-treatment occurs (response).⁴⁹²

Conduct which has now been found to constitute serious ill-treatment in human rights law includes child abuse,⁴⁹³ rape sexual assaults⁴⁹⁴ and neglect such as denial of food, water, sanitation⁴⁹⁵ as well as inappropriate conditions of people with disabilities. For example keeping a person with disabilities in conditions where she:

"is dangerously cold, risks developing bed sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty is degrading treatment".⁴⁹⁶

Likewise neglecting people in care to live in unsanitary and degrading conditions with soiled mattresses, a lack of nutritious food and a lack of emotional support is considered to be inhuman and degrading treatment.⁴⁹⁷ Children, older people, those with physical and mental disabilities or ill health⁴⁹⁸ are particularly entitled to State protection⁴⁹⁹ and require greater vigilance.⁵⁰⁰

When acting to protect an individual from a risk of serious ill-treatment the State must do so in a way which upholds other human rights. For example the right to respect for private and family life in Article 8 of the ECHR is a right to protection of the individual from *arbitrary* interference by public authorities. Interference with this right can be justified where it pursues a legitimate aim (such as the protection of the health or physical integrity of an adult at risk of harm), is based on the law (such as the Adults With Incapacity or the Adult Support and Protection Act), and is the least intervention necessary to achieve the aim – it must pass the test of proportionality.

The Adult Support and Protection (Scotland) Act 2007 (ASPA) was introduced following investigations by the Mental Welfare Commission for Scotland (MWC) and the Social Work Services Inspectorate into a particularly shocking case of abuse of an adult with learning disabilities in the Borders (Scottish Government, 2004).⁵⁰¹ ASPA introduces several measures aimed to improve protection for adults at risk of “*harm*” (broadly defined to include physical, psychological, financial or self-harm).⁵⁰² ASPA defines adults at risk as those over 16 who:

- (a) Are unable to safeguard their own well-being, property, rights or other interests,
- (b) Are at risk of harm, and
- (c) Because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

The idea behind the definition was to ensure that it was broad enough to cover those with capacity but who were viewed as more vulnerable to abuse (Patrick and Smith, 2009).

However, that the idea of vulnerability is controversial and many people with disabilities object to the use of this terminology, preferring instead, the view that it is not any disability or health difficulty that makes them vulnerable, but rather external situations and attitudes (Patrick and Smith, 2009). The Act’s code of practice, however, does highlight that the existence of a particular condition does not mean that that adult should automatically be considered ‘at risk’, as many people are entirely capable of safeguarding their well-being irrespective of a disability. Moreover, what is stressed is that all three aspects of the definition⁵⁰³ must be met.

“It is the whole of an adult’s particular circumstances which can combine to make them more vulnerable to harm than others” (Scottish Government, 2008a).

ASPA allows local authorities to apply for assessment or removal orders, which may enable it to remove an adult at risk from a potentially abusive situation and to take any necessary steps to protect that person from harm. Other measures under ASPA include banning orders which can be sought against a potential perpetrator of abuse, to keep them from entering a specified place (e.g. the home of an adult at risk). Whilst these orders require the cooperation of the adult concerned, they do remove the onus on the adult to pursue the Court order.

In practice the first biennial reports of Adult Protection Committees indicates that little use has been made of the banning or removal orders. There has been limited use of the protection orders under the Act, as EHRC reports only three were applied for and two granted in 2010/11.⁵⁰⁴

ASPA is founded on human rights principles such as participation, benefit, least restrictive alternative and non-discrimination. It also creates a duty of cooperation between agencies

in investigating suspected or actual abuse. Nevertheless, there have been concerns not only in relation to the notion of vulnerability, but also at the impact of ASPA on autonomy and self-determination.⁵⁰⁵ For example the civil society coalition the Campaign for a Fairer Society Scotland (supported by a range of disabled peoples organisations and organisations working with disabled people)⁵⁰⁶ has stated:

“Disabled people are alarmed by the idea of removing the adult at risk, rather than the person suspected, from their own home, which violates their rights to privacy and to private home and family life. In addition, the exclusion of the suspected adult without the consent of the adult considered at risk may be further violation of these rights, and overall creates a prejudice of limited legal capacity” (Scottish Campaign for a Fair Society, 2011).⁵⁰⁷

As SHRC has pointed out, the effect of section 3 of the Human Rights Act 1998 is that all other primary and secondary legislation (including ASPA) should be read in a manner compatible with the ECHR (SHRC, 2012h). 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.

3.6.5 Human Trafficking

“There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims”

European Court of Human Rights⁵⁰⁸

The UK is party to the Council of Europe Convention on Action against Trafficking in Human Beings and the UN ‘Trafficking Protocol’,⁵⁰⁹ both of which set out measures to be taken by states to combat the trafficking of persons for commercial or sexual purposes. As a member of the European Union the UK is also bound by the EU Trafficking Directive.⁵¹⁰ Trafficking also engages the UK’s obligations under the ECHR. In 2010 the ECtHR found that trafficking in human beings was a violation of Article 4, and found one state (Cyprus) in violation of its obligations by failing to implement an effective legal and administrative framework to prevent trafficking, and that the police had failed to act to protect an individual where there was a credible suspicion that she had been a survivor of trafficking. The ECtHR also found another state (Russia) in violation of Article 4 where it had failed to effectively investigate the individual’s recruitment, including identifying and punishing those involved.⁵¹¹ This case demonstrates that, as with Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment or punishment), Article 4 of the ECHR includes procedural obligations of effective prevention, protection and investigation.

In his 2010 mission report on the UK François Crépeau, the UN Special Rapporteur for Migration, made a number of recommendations related to trafficking. The UK was encouraged to strengthen efforts to: (a) determine the number of victims/survivors of trafficking in persons, including for sexual exploitation and forced labour (b) determine the number of children subject to immigration control and detention (c) record the number of women entering and leaving immigration detention centres (d) make available data on the channels of migration and (e) improve data collection efforts on return migration (UN Human Rights Council, 2010). Immigration is a matter reserved to Westminster, however, Scots law and policy comes into play in relation to the criminal law and prosecution of perpetrators, and the remedies to victims/survivors.

Criminal offences in relation to human trafficking are legislated for in the Criminal Justice (Scotland) Act 2003,⁵¹² the Asylum and Immigration (Treatment of Claimants) Act 2004,⁵¹³ the Antisocial Behaviour etc. (Scotland) Act 2004,⁵¹⁴ the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005,⁵¹⁵ and the Criminal Justice and Licensing (Scotland) Act 2010. However, there has been a conspicuous, and much criticised, lack of prosecutions for trafficking offences in Scotland (Collins, 2010a, Amnesty International Scotland, 2011, EHRC, 2011f, The Herald, 2010, The Herald, 2008). The first convictions under section 22 of the Criminal Justice (Scotland) Act 2003 were secured in September 2011 against a man and a woman for their involvement in a UK-wide prostitution ring.⁵¹⁶ Those two convictions in Scotland compare with a total of 123 convictions for human trafficking in England and Wales from 2003 to 2009, of which 113 were for sexual trafficking. Baroness Kennedy argues in the 2011 EHRC inquiry into human trafficking in Scotland (EHRC, 2011f), that it is “*primarily a criminal and human rights issue*” (see below for further details of this inquiry). She argues that the failure to secure more than one successful prosecution for trafficking in Scotland, despite having 13.5 per cent of the UK trafficking trade, indicates the failure of the Scottish criminal justice system to address this human rights issue (EHRC, 2011f).

Statistically while Scotland might be expected to have approximately ten per cent of the UK crime figures in proportion to the population, the Association of Chief Police Officers Scotland (ACPOS) estimates that it has a disproportionate 13.5 per cent share of the UK trafficking trade (EHRC, 2011f). Targeted police operations have had some success in identifying victims/survivors: during two UK wide operations in 2006 and 2007-8 (“Operation Pentameter” 1 and 2), a total of 81 premises were visited in Scotland, with 47 arrests made and the recovery of 64 women who were confirmed as sex trafficking victims/survivors (Amnesty International Scotland, 2008, Scottish Government, 2011q). Separate research commissioned by the Scottish Government (Lebov, 2009, Lebov, 2010) indicates that, in the period April 2007 to March 2008, 79 individuals believed to be victims/survivors of human trafficking came into contact with agencies in Scotland. The majority of cases involved adult female victims/survivors who had been trafficked for sexual exploitation, the rest being males and females trafficked for exploitation in other industries. In cases of trafficking for sexual exploitation, victims/survivors and suspected victims/survivors were normally located and found in private flats or houses operating as brothels.⁵¹⁷

An Amnesty International UK (AIUK) report indicated that many victims/survivors of human trafficking are missing out on vital support because authorities in Scotland have trouble identifying them as trafficking victims/survivors (AIUK, 2008). In the absence of recognition of their status, they are unable to access appropriate services or help police with their inquiries. Some participants in this scoping project also noted that in Scotland, this lack of recognition often arises because people don’t fit with the ‘picture’ of a trafficked person, as one participant who supported trafficked women noted:

There are classic red flags to show that someone had been trafficked – you are working in a brothel, or you’re on an agricultural farm and you’re not being paid, that’s classic, but of the 550 women I’ve met in the last 11 years most of them have an element of trafficking in their movements, in that many of them did not say, ‘I want to go to the UK’, so whether or not you want to be semantic about it, somebody else spoke for them or made a decision or put up some money. Most of the women I’ve met didn’t even know where the UK was before they were brought here. [Tackling trafficking] is being done in a very theoretical way, they are targeting

certain specific trafficking activities and they are completely ignoring the rest and that may be because there are limited resources and expertise. But it exacerbates me because that is part of Scotland as well.

Claire, Support worker for women seeking asylum

AIUK's report finds a lack of suitable accommodation in Scotland for victims/survivors of trafficking. For example, many of the victims/survivors recovered in Scotland in Operation Pentameter 1 and 2 had to be sent to a Salvation Army project in Durham. As a result, victims/survivors are often detained, displaced or placed in unsuitable and unsafe accommodation. The report identifies difficulties victims/survivors face in accessing legal advice (particularly outside Glasgow) in relation to asylum applications, and notes that support organisations face an on-going battle with prosecutors to prevent trafficking victims/survivors being prosecuted for working illegally; being in possession of false documentation; or participation in criminal activity.⁵¹⁸ There is concern that immigration issues play too large a part in determining whether or not people are designated as victims/survivors of trafficking (Collins, 2010a), and indeed fear of repercussions as a result of irregular immigration status may discourage trafficking victims/survivors from contacting the authorities for help and to report abuse (SCCYP and CRC, 2011). A report of the Anti-Trafficking Monitoring Group of nine leading UK anti-trafficking organisations echoed many of these issues and highlighted a lack of adequate support services such as interpreting and counselling in Scotland (Anti-Trafficking Monitoring Group, 2010). Further, a report by Scotland's Commissioner for Children and Young People with the UHI Centre for Rural Childhood (SCCYP and CRC, 2011) revealed a collective lack of awareness and understanding of the particular issues surrounding child trafficking.

AIUK's recommendations for tackling trafficking in Scotland focus on issues specifically within the competence of the Scottish Government, namely identification of victims/survivors, support and accommodation for victims/survivors, and non-punishment of victims/survivors for crimes they have been coerced into. Its recommendations include: a review of the National Referral Mechanism⁵¹⁹ in Scotland; a multi-agency approach to identification and care of trafficked persons; the extension of support for women trafficked into sexual exploitation to victims/survivors of other forms of trafficking; cooperation between the Scottish Government and Crown Office to ensure that trafficking victims/survivors are not prosecuted for crimes committed as part of their ordeals; and improved support by trained frontline workers, including in particular physical and mental health care, and appropriate accommodation (Amnesty International Scotland, 2008).

Regarding child trafficking, recommendations proposed by the Scottish Commissioner for Children and Young People (SCCYP and CRC, 2011) focus on improved data collection and training, inter-agency cooperation, implementation of a guardianship scheme, and the appointment of a UK, failing which a Scottish, Human Trafficking Rapporteur with specific responsibility for child trafficking. A 30-month pilot guardianship scheme is now in place, established by the Scottish Refugee Council and delivered by the Aberlour Trust; this initiative has been commended by the UK Anti-Trafficking Monitoring Group (Anti-Trafficking Monitoring Group, 2010).

The Equality and Human Rights Commission Scotland undertook an in-depth inquiry into human trafficking in Scotland, with a particular focus on commercial sexual exploitation⁵²⁰ which reported in November 2011 (EHRC, 2011f). The inquiry, led by Baroness Helena Kennedy QC, sought to identify the nature, extent and causes of human trafficking in

Scotland. It assessed the extent to which Scotland is meeting international and domestic human rights obligations to prevent and prohibit trafficking, prosecute traffickers, and protect victims/survivors. There were ten key findings and recommendations from the inquiry:

- The need for a comprehensive strategy in Scotland to tackle human trafficking which would make Scotland a hostile environment for traffickers
- The need for increased awareness amongst the public, first responders and front-line staff about trafficking, especially trafficking indicators
- The introduction by the Scottish Government of a comprehensive Trafficking Bill
- Improved intelligence sharing across the UK
- Improving prosecution, sufficiency of evidence and sentencing
- Better collaboration of law enforcement agencies in Scotland to make Scotland a high-risk, low-return proposition for organised criminals
- Embedding anti-trafficking into regulatory frameworks and practices
- Encouraging the private sector to raise awareness of human trafficking and take steps to prevent the enabling of trafficking
- Reviewing the process of identifying trafficked persons to develop an independent and transparent system with onward referral of victims/survivors to relevant support
- Developing comprehensive end-to-end services for victims/survivors of trafficking.

3.6.5.1 Tackling Human Trafficking in Scotland

The Trafficking Awareness Raising Alliance⁵²¹ ('TARA') is a nationwide project run by Glasgow Community Safety Service (which itself is a joint initiative of Glasgow City Council and Strathclyde Police). TARA was set up in 2005 and supports female adult victims/survivors of trafficking for the purposes of commercial sexual exploitation to access support and accommodation, advocacy, advice and emotional support. It liaises with police, housing departments, health professionals, agencies which work with women in the sex trade, and other voluntary organisations. It is the only non-law enforcement agency in Scotland dealing solely with victims/survivors of trafficking.

AIUK points to Glasgow and Edinburgh City Councils' multi-agency groups and protocols for dealing with women trafficked into prostitution as an example of good practice in the provision of coordinated support to trafficked women (Amnesty International Scotland, 2008). These initiatives include representatives from the police, housing departments, health, immigration, the National Asylum Support Service, social work services and relevant voluntary organisations. They suggest that this model should be extended to victims/survivors of other types of trafficking, not solely sexual exploitation, and should be rolled out across Scotland.

3.6.6 Policing

Responsibility for policing in Scotland is shared between Scottish Ministers, Local Police Authorities/Joint Police Boards and Chief Constables (Police (Scotland) Act 1967).⁵²² Legislation setting out Scottish Government plans for a single Police Service for Scotland has now been approved by the Scottish Parliament (The Police and Fire Reform (Scotland) Act 2012). There are a range of international Conventions and Codes which recognise that the primary purpose of policing includes the protection of human rights, for example:

- Article 2 of the United Nations Code of Conduct for Law Enforcement Officials⁵²³ states that in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.
- The European Code of Police Ethics 2001 states that the main purposes of the police in a democratic society governed by the rule of law includes the requirement to protect and respect the individual's fundamental rights and freedoms as enshrined, in particular, in the European Convention on Human Rights (ECHR).⁵²⁴
- The Human Rights Act 1998 (HRA) requires all public authorities – including the police – to act in a way which is compatible with the individual rights and freedoms contained in the ECHR.⁵²⁵ Article 2 and 3 of the ECHR are particularly relevant in this context.

In relation to police accountability mechanisms, there are also a number of international instruments that recognise the importance of current monitoring and measurement based on human rights indicators against which police policies are assessed, two of which are highlighted below:

- The European Code of Police Ethics, which requires accountability mechanisms, based on communication and mutual understanding between the public and the police, to be promoted.⁵²⁶
- The 2011 Laxenburg Declaration, which reiterates the need to ensure transparency, accessibility, accountability, legitimacy, impartiality and integrity in all systems created for police oversight and specifically promotes respect for the rule of law and human rights through and within all police oversight activities. It also calls for strong civil society participation in police oversight.⁵²⁷

Since the Scottish election in 2011 police reform has been high on the political agenda. Key reforms have included the proposed transfer of the functions of the Police Complaints Commissioner for Scotland (PCCS) to the Scottish Public Services Ombudsman (SPSO),⁵²⁸ and the creation of a single police service for Scotland under the Police and Fire Reform (Scotland) Act 2012.

The PCCS was established under the Police, Public Order and Criminal Justice (Scotland) Act 2006 to review the way in which the police handle complaints. Investigation of complaints against the police in relation to alleged mistreatment engages the procedural obligation under Article 3 of the ECHR. This entails requirements as to independence and transparency. Some concerns were raised at the time that the creation of the new, 'independent' body would in fact have little effect on the status quo, with police still investigating police, and no powers of independent investigation granted to the Police Complaints Commissioner for Scotland (Donnelly, 2006).

SHRC has previously expressed that there are a number of principles that an effective accountability framework must consider. The key principles include: independence, transparency, competence, promptness, public scrutiny and survivor participation.⁵²⁹ SHRC welcomes the establishment of the Police Investigations and Review Commissioner as a new independent investigation mechanism. SHRC considers that it is important in order to satisfy the procedural obligation under Articles 2 and Article 3 of the ECHR that the independence of the Police Investigations and Review Commissioner is strongly guarded and the Commissioner is given adequate investigatory powers of disclosure of all relevant documents and other materials and the attendance of individuals as witnesses.⁵³⁰

In Northern Ireland, the Police Ombudsman has an additional power to make reports to the Chief Constable and the Policing Board on matters concerning police practices and policies which the Ombudsman identifies from investigations.⁵³¹ This power has been used to positive effect by the Ombudsman, providing the opportunity to conduct more general reviews to remedy systemic or repeated failings.⁵³² SHRC notes that this would be a useful additional tool for the Police Investigations and Review Commissioner.

The Scottish Government's proposal in 2010 to transfer its functions to SPSO provoked a range of reactions. Many view the proposal as a regressive step, at odds with the trend elsewhere in Europe and other countries towards specialised police oversight agencies (BBC News, 2011c, McNeill, 2011, Police Complaints Commissioner for Scotland, 2011, Punch, 2011).

A single Police Service for Scotland is planned to commence operations on 1 April 2013. During the passage of the Bill which became the Police and Fire Reform (Scotland) Act 2012, SHRC urged the Scottish Government and Parliament to seize this historic opportunity to embed human rights principles into the new structures of policing from their inception. Drawing from experience in other jurisdictions, notably Northern Ireland, SHRC has called for various measures to strengthen the integration of human rights and accountability in policing.

For example, the former Northern Ireland Police Ombudsman, Dame Nuala O'Loan, reported that adopting human rights based approaches to policing in Northern Ireland made a significant difference, observing that “[w]hen human rights are factored into everyday policing, things change”:

People are now coming forward to help police in a way that has not happened in the past. Complaints of abuse of force, intimidation and harassment by police officers fell over seven years from 52 [per cent] to 36 [per cent] of complaints... People and police officers are safer, and suffer less injury. Part of this can be attributed to wider political events; however much of the improvement is clearly the result of the introduction of human rights-compliant policing in a context of real leadership and of strong accountability mechanisms (O'Loan, 2009).

In its submission, SHRC believed that the development of a single police force and oversight structures in Scotland is a unique opportunity to embed human rights into the new police structure to better ensure that the police comply with their obligations under Section 6 of the Human Rights Act 1998. In particular SHRC focus on the scrutiny and oversight arrangements proposed in the Bill, in particular the overarching ethical framework, the mechanisms for police complaints and investigations and the oversight role of the new Police Authority. SHRC provide six specific recommendations for strengthening the framework of police accountability in Scotland:

- A commitment to upholding human rights should be explicitly included in the policing principles of the Scottish Police Service.
- A new police oath should contain an explicit commitment to upholding and protecting human rights and fundamental freedoms.
- The Bill should include a provision requiring the Scottish Police Authority to issue a code of ethics for the Police Service laying down standards of conduct and practice for police officers based on human rights principles and European Convention of Human Rights obligations.

- The Scottish Police Authority should have the independence to set its own strategic policing priorities.
- The Bill should include a provision requiring the Scottish Police Authority to monitor the performance of the Police Services in complying with the Human Rights Act.
- The Police Investigations and Review Commissioner should be given adequate investigating powers of disclosure and attendance of witnesses (SHRC, 2012a).

There is no statutory requirement for a human rights impact assessment in relation to strategic policing priorities or plans (sections 32-36) and as such the new Act did not in the end require that the police authority monitor performance of police against HRA as is the case in Northern Ireland.

SHRC also stated its belief that a good starting point for new legislation creating a Police Service of Scotland, would be to ensure that human rights are explicitly articulated in the legislation, with a recommendation that:

“A commitment to upholding human rights should be explicitly included in the policing principles of the Scottish Police Service”(SHRC, 2012a)

Changes to the Bill during passage through Parliament included reference to human rights in the “Constable’s Declaration” (or oath) in section 10, which was a particular call of Amnesty International UK,⁵³³ as well as a recommendation of SHRC. However, regrettably that remains the only explicit reference to human rights in the 2012 Act, despite the distinct human rights obligations for the police under the HRA. Moreover, the Scotland Act 1998 makes clear that any decisions by both the Scottish Government and the Scottish Parliament in relation to policing must be in compliance with Convention rights. It is the view of SHRC that Scottish Ministers should only retain the power to set principles and broad overall objectives for policing and the Policing Authority should have the independence and power to set its own strategic policing priorities. The power given to Scottish Ministers in the Bill may pose a significant challenge to the independence of the Police Authority and the integrity of the police accountability framework.

SHRC has welcomed the creation of the Police Investigations and Review Commissioner as a new independent investigation mechanism.⁵³⁴ As it and the new Scottish Police Authority are established there continue to be opportunities to embed human rights, including through establishing a new Code of Ethics which would lay down the standards of conduct for police officers rooted in human rights obligations under the European Convention of Human Rights. In Northern Ireland, for example, the Policing Board has an explicit obligation to monitor the performance of the PSNI in complying with the HRA.

Aside from the structural issue of police complaints oversight, concerns about current policing policy elsewhere in the UK are inevitably echoed in Scotland. Although Scotland has not experienced incidents on the scale of the rioting seen in cities in England in August 2011, it has been suggested that the Scottish Police Service must ensure that it adopts a human rights based approach to policing such incidents, upholding the right to peaceful protest and avoiding techniques such as ‘kettling’ (Lewis, 2009).⁵³⁵

The approach to stop and search in section 44 of the Terrorism Act 2000 has been found by the ECtHR to be too wide, lacking adequate safeguards against abuse, and therefore in violation of Article 8 (the right to private and family life).⁵³⁶ In October 2008, a campaign was mounted by the Scottish Afghan Society and Scotland Against Criminalising Communities against Strathclyde Police for their allegedly ‘discriminatory’ and ‘racist’

targeting of Asian passengers for questioning at Glasgow airport (Fronidigoun et al., 2007, Morning Star, 2008). Recent press reports indicate some improvements in practice.⁵³⁷

Generally, stop and search is reportedly on the rise. Research suggests, for example, that there has been a threefold increase in three years in the number of stop and searches carried out by police in the Edinburgh and Lothians area (Raines, 2011). Statistics indicate that over 457,000 stop and searches were recorded in 2010, of which around 69 per cent were on a non-statutory basis.⁵³⁸ The UN Human Rights Committee (UN CCPR, 2008) and the UN Committee for the Elimination of Racial Discrimination (UN CERD, 2003) have also raised concern about stop and search procedures in the UK. Recommendations have included that the UK ensures that stop and search powers are exercised in a non-discriminatory manner and to that end, that it undertakes a review of stop and search powers under section 44 of the Terrorism Act 2000 (UN CCPR, 2008).

Particular concern in relation to policing and human rights in Scotland have been the use of the stop and search powers and the Strathclyde Police pilot to roll out the use of electro-shock weapons (TASER®) beyond trained firearms officers. Both the UN Human Rights Committee and the UN Committee against Torture have expressed that use of Taser can be legitimate under strictly limited and regulated circumstances (UN CAT Report on USA 2006).⁵³⁹

There are human rights concerns in relation to the extension of Taser weapons outside specific firearms units. This resulted in public and parliamentary debates on the respective responsibilities of police forces, police authorities, Scottish and UK Governments and others in relation to the Strathclyde Police pilot project on electroshock weapons known as Tasers. The scheme, which ran from April to October 2010, saw 30 officers, who were not specialists in handling firearms, issued with the weapons following brief training. The pilot was highly controversial (Collins, 2010b, Hutcheon, 2010, Noursratpour, 2010, Amnesty International Scotland, 2010). Tasers are of potentially lethal force (Starmer and Gordon, 2007), and as such their use engages Article 2 of the ECHR. Tasers should only be used when absolutely necessary to prevent or reduce the likelihood of recourse to lethal weapons or force. As SHRC has stated, this means that Tasers deployment should only be considered once there are clear and precise guidelines on their use and a comprehensive training programme to ensure that their use complies with the requirements of the ECHR and the Human Rights Act 1998.⁵⁴⁰

In view of these concerns, SHRC (SHRC, 2010a) encouraged Strathclyde Police and Authority, the Scottish Government and Parliament, as well as other relevant actors, to develop a Framework of Responsibilities for the roll out and use of electro-shock weapons in Scotland. The Framework, drafted by SHRC, aims to provide clarity on the relevant human rights standards and their practical meaning, as well as guidance on the specific roles and responsibilities of the relevant public bodies. SHRC wrote to a wide range of those public bodies whose responsibilities are engaged, a process which demonstrated different views on responsibilities for the use of such weapons.

This framework aims to answer three fundamental questions:

- what are the human rights standards the UK (and Scotland) is required to meet when arming the police with potentially lethal weapons
- what those standards mean in practice, and

- which public authorities and relevant organisations bear responsibility for implementing those standards effectively.

Although firearms legislation is reserved to Westminster, policing falls within the devolved competence of the Scottish Parliament, and control over firearms policy has been specifically devolved to Scottish Ministers. However, the full development of this framework and SHRC requested several times that Strathclyde Police publishes the public authorities' engagement has been awaiting the publication of the evaluation of the pilot by Strathclyde police since 2011.

The European Court of Human Rights has recently summarised the requirements of Article 2 when applied to potentially lethal force:

- The right to life protects individuals not only where they are at risk of individuals who intentionally set out to kill, but also in situations where the State permits force to be used which may result in the deprivation of life, as an unintended outcome.
- The State has a duty to organise its legal system so as to strictly supervise the action of law enforcement agencies and permit effective control of them.⁵⁴¹
- Any use of force must be no more than is absolutely necessary for the achievements of the purposes recognised in Article 2 of the Convention (for example self-defence, the defence of others and for the purposes of affecting a lawful arrest). This test will be applied strictly and the use of force must be strictly proportionate to the achievement of the relevant aim, taking into account all of the circumstances relevant to its use.⁵⁴²
- Any use of force can only be justified where it is based on an honest belief that the use is necessary and proportionate at the time the force is deployed. This means that if that honest belief subsequently turns out to be mistaken; the right to life is not automatically breached. This includes a recognition that State forces may have to take difficult decisions under pressure in a short time frame.
- Force will not be considered necessary where it is known that a person to be arrested poses no threat to life or limb and is not suspected of committing a violent offence, even if the failure to use force might result in the loss of an opportunity to secure an arrest.
- Article 2 places a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the relevant international standards.⁵⁴³
- In light of the need for strict proportionality, the national legal framework regulating arrest operations must make recourse to firearms dependent on a careful assessment of the surrounding circumstances and in particular on the evaluation of the nature of any offence committed by the subject of the force and of the threat he or she poses.
- Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that as well as being authorised under national law, policing operations must be sufficiently regulated by it, within a framework of a system of adequate and effective safeguards against arbitrariness and abuse of force.⁵⁴⁴
- Law enforcement operations must be planned and controlled so as to minimise to the greatest extent possible recourse to lethal force or incidental loss of life.

- National law regulating policing operations must secure a system of adequate and effective safeguards against arbitrariness, abuse of force and even against avoidable accidents.⁵⁴⁵
- Law enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms, not only on the basis of the letter of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value.⁵⁴⁶ (SHRC, 2010b).

Other international standards on the use of force are also important. For example, Article 2 of the UN Conduct for Law Enforcement Officials sets out that:

“In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.”

The instrument also refers to use of force and the infliction or toleration of cruel or inhuman treatment and the full protection of the health of persons in their custody.

The creation of the new Police Service for Scotland represents an opportunity to ensure a clear and consistent approach to the use of force, in line with ECHR and other human rights law and principles.

3.7 Living in Detention

3.7.1 Introduction to Living in Detention

This thematic section explores the theme of ‘Living in Detention’ in Scotland, which is one of the eight core themes that were drawn from the rights analysis of research reviews. This topic covers a wide variety of issues, a number of which have particular relevance to human rights in contemporary Scotland. Following the prioritisation process,⁵⁴⁷ four areas were selected for further exploration and analysis and are discussed in greater detail in this thematic section, namely: conditions of detention; mental health detention; women in detention; and young people in detention/secure accommodation.

When a State deprives an individual of his or her liberty, whether for the purposes of public safety, criminal sentencing, for risks associated with mental health, or under immigration legislation, the individual is particularly vulnerable to infringement of their rights, in particular under Articles 5 (right to liberty) and 8 (right to respect for private and family life, home and correspondence), as well as in some cases Articles 2 (right to life) and 3 (prohibition on torture and inhuman or degrading treatment or punishment). In determining whether an individual has been deprived of his or her liberty:

*“The starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance (Guzzardi v. Italy judgment of 6 November 1980, Series A no. 39, § 92 and the above-cited Ashingdane judgment, at § 41)”*⁵⁴⁸

This has been extended to individuals who, while not formally deprived of their liberty, would not have been free to leave had they tried to do so. In such circumstances the European Court of Human Rights (ECtHR) has found that the procedural protections, including access to a court, in Article 5, should apply.⁵⁴⁹ The Scottish Law Commission published a discussion paper in July 2012 to possibly consider what changes might be necessary to Scots law as a result of Strasbourg jurisprudence.⁵⁵⁰

During the course of finalising this thematic section, initiatives were being considered to revisit the approach to prison visiting and monitoring. In the course of this debate SHRC has called for the outcomes of the 2005 review of Prison Visiting Committees to be implemented through the establishment of Independent Monitoring Boards, in a manner which complies with the UN Optional Protocol to the Convention against Torture.⁵⁵¹

3.7.2 Conditions in detention

3.7.1.1 General conditions

Article 10 of the UN International Covenant on Civil and Political Rights (ICCPR)⁵⁵² provides:

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

The UN Human Rights Committee has issued two General Comments (authoritative interpretations) on Article 10. It has clarified that Article 10:

“applies to any one deprived of liberty under the laws and authority of the State who is held in prisons, hospitals - particularly psychiatric hospitals - detention camps or correctional institutions or elsewhere. States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held” (UN Human Rights Committee, 1992b).

Thus the obligations on the State to ensure dignified conditions of detention applies to people detained in a broad range of settings whether run by the state or private providers. This same General Comment, as is discussed, clarifies that persons deprived of their liberty continue to benefit from all other rights. As the UN Human Rights Committee states: *“[persons deprived of their liberty should not] be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment” (UN Human Rights Committee, 1992b).*

In its practice of reviewing state reports and individual complaints the UN Human Rights Committee has found violations of Article 10 in situations such as:

“overcrowding, a lack of natural light and ventilation, inadequate or inappropriate food, a shortage of mattresses, no integral sanitation, unhygienic conditions, inadequate medical services (including psychiatric treatment), and a lack of recreation or educational facilities.”⁵⁵³

There are a number of UN standards on the treatment of prisoners, including the Standard Minimum Rules for the Treatment of Prisoners,⁵⁵⁴ the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,⁵⁵⁵ and the Basic Principles for the Treatment of Prisoners.⁵⁵⁶

In addition, Article 37 of the UN Convention on the Rights of the Child limits the use of detention of children:

- No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

The requirements of this Article were clarified in General Comment 10 of the UN Committee on the Rights of the Child, and are discussed further in the relevant section below.

The provisions of Article 37 of the CRC are also contained in a number of UN resolutions including the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules),⁵⁵⁷ the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),⁵⁵⁸ the Rules on the Protection of Juveniles Deprived of their Liberty (the Havana Rules),⁵⁵⁹ the Guidelines for Action on Children in the Criminal Justice System,⁵⁶⁰ and the Principles on Children Deprived of their Liberty.

Every aspect of a prisoner's life is controlled by the state; prisoners are therefore particularly vulnerable to violations of their rights, and the prison service is required to ensure that prisoners are detained in conditions which do not breach their rights under, for example, Articles 2, 3, or 8 of the ECHR,⁵⁶¹ amongst others.

Recent years have seen an increase in the number of court actions, both successful and unsuccessful, brought by prisoners regarding alleged breaches of their rights in respect of prison conditions, and commentators have noted that:

"the significance of the role played by human rights in the development of the legal protection of prisoners in the United Kingdom... cannot be underestimated" (Lawson and Mukherjee, 2004).

However, the Scottish Legal Aid Board notes in their 2010-2011 annual report that they witnessed a marked decline (59 per cent) in reparation cases (money damages) compared to the previous year when cases relating to 'slopping out' peaked (Scottish Legal Aid Board, 2011).

In 2004 the UN Committee against Torture, in reviewing the UK's state report, noted its concern over:

"reports of unsatisfactory conditions in the state's detention facilities including substantial numbers of deaths in custody, inter-prisoner violence, overcrowding and continued use of "slopping out" sanitation facilities" (UN CAT, 2004).

The Scottish prison population has risen consistently throughout the past decade, and by over 30 per cent since 1999. It is now among the highest in Western Europe (EHRC, 2010b). After a small observed decrease from 2009-10 to 2010-11,⁵⁶² the prison population has increased by four per cent to an annual daily average of 8,178 for 2011-12,⁵⁶³ which remains very high in relation to design capacity (7,330) (Scottish Government, 2011b).⁵⁶⁴ HM Chief Inspector of Prisons for Scotland [HMCIPS], Hugh Monro, has consistently raised concerns regarding "sustained overcrowding" (HMCIPS, 2011a). He has concluded that it risks undermining the potential positive benefits to society of incarceration, particularly among the female offender cohort:

"I am fully aware of the challenges faced by the Criminal Justice system as a whole in tackling the problem of crime in our communities. We should be wary, however, of making communities potentially less safe by overcrowding our prisons and thus spreading resources too thinly to make any positive difference to offenders' behaviour in the future. Under such circumstances, there is the potential to have unintended consequences by making offenders worse after their experience of prison rather than better. That is why I urge, as my predecessors have done, that the overcrowding problem is urgently addressed to allow SPS [Scottish Prison Service] staff to concentrate on the job of working with those offenders who present the greatest risk to the safety of our communities. I conclude that overcrowding is a

particularly damaging issue for the female prison population and must be tackled as a matter of priority” (HMCIPS, 2011b).

A participant in this scoping project echoed the view of HMCIPS that overcrowding is impeding the potential for rehabilitation:

While we have those numbers you will never break down the culture – it’s too big to manage. If you get it down to bite sized pieces then you can manage it more effectively and therefore you can start breaking that culture down and once you do that you can change it for the better and you can help to rehabilitate people, you can encourage and show people that actually have potential.

Craig, Ex-offender and support liaison for offenders leaving prison

Overcrowding or generally unsatisfactory conditions, even where they are not necessarily sufficiently severe to engage Article 3, may well contribute to violence in prison, which itself engages the state’s duty to protect both prisoners and prison staff from risks to their physical integrity (Article 8 of the ECHR) and to their lives (Article 2 of the ECHR) (Cooke et al., 2008).

The conditions in Scotland’s prisons were firmly placed in the spotlight by the case of *Napier*⁵⁶⁵ in 2004/5, in which the practice of ‘slopping out’ (prisoners having to use bottles and chamber pots where they had no access to in-cell toilet facilities) at HMP Barlinnie was held to be in breach of Articles 3 and 8. The violation was found on the basis of the ‘triple vices’ of slopping out, overcrowding and a poor regime.

The finding in *Napier* of a breach of Article 3 based on a combination of factors relating to hygiene, overcrowding, ventilation and poor light, has had profound implications for public spending on prisons (Thomson, 2004). Sanitation facilities have been improved in all prisons, with HMCIPS reporting in 2011 that “*Peterhead prison’s sanitation system was the last remaining from the ‘slopping out’ era*” (HMCIPS, 2011a). Peterhead prison is soon to be replaced by HMP Grampian, in the meantime, at the request of HMCIPS, in order to avoid ‘slopping out’ at Peterhead, all prisoners now have access to hall toilets 24 hours a day (HMCIPS, 2011a).

HMCIPS also reports generally “*poor access to activities such as education, employability training, work, PE and programmes*” (HMCIPS, 2011a). This issue was raised by participants in this scoping project. One participant, an ex-offender, talked about the lack of responsibilities in prison, believing that being given the opportunity to learn transferrable skills and develop a work ethic was critical to the prevention of reoffending:

For people we do need to lock up for the safety of society, we need to give them some responsibilities... I mean the jobs you have – there’s the nuts and bolts job. You get a box of nuts and a box of bolts and you sit and put them together and for that you get £6 a week. What does that teach people? It’s soul destroying; it teaches you nothing and it doesn’t give you a transferable skill. We could be training people with skills...

Craig, Ex-offender and support liaison for offenders leaving prison

Concern was also raised by some participants about the damaging impact of a ‘*them and us*’ culture both within the prison setting itself and on release. Some participants, aware of the work undertaken by The State Hospital⁵⁶⁶ to bring about a cultural change, discussed

the potential benefit of applying similar human rights based approaches to prison settings in Scotland.

3.7.1.2 Addiction

One aspect of prison is to reduce re-offending and there is a need to address the underlying issues of offending behavior such as alcohol or drug addiction.

(HMCIPS, 2011a)

Prison statistics show that in the UK, 45 per cent of men and 65 per cent of women prisoners arrive at prison drug dependent (National Aids Trust, 2010). In his 2009-2010 Annual Report, HM Chief Inspector of Prisons expressed his concern:

“about the high rates of positive drug testing that point to the smuggling of illegal drugs into prisons and the abuse of prescribed medication” (HMCIPS, 2010).

Injecting equipment is prohibited in prison so prisoners who inject drugs are highly likely to share injecting equipment, thereby increasing the risk of contracting HIV/AIDS and Hepatitis C. This was an issue of concern raised by some participants. HMCIPS has pointed to inadequacies in current assessment of the numbers of prisoners using illegal drugs, to a lack of consistent encouragement and support for those on methadone to reduce doses and has called for increased access to alcohol reduction programmes (HMCIPS, 2011a).

A range of harm minimization and drug treatment services are in place for injecting drug user (National Aids Trust, 2010, NHS Scotland, 2006), for example, the availability of disinfecting tablets and injecting paraphernalia (other than needles). While there is some strong support for the introduction of needle exchange schemes (National Aids Trust, 2010), including from within the Scottish Prison Service (Scottish Prison Service, 2005), the ECtHR has held that there is no specific legal obligation upon the government to put in place prison needle exchange programmes.⁵⁶⁷ There was, however, criticism from some participants in this scoping project that there is not an equality of access to addiction related medical treatment in prison in comparison to those not in prison.

3.7.1.3 Access to healthcare & mental health services

Every detainee must have access to adequate health care. Failure to ensure this has been found to be a violation of Article 3 of the ECHR, including in cases related to dental care and opticians.⁵⁶⁸ In other cases a lack of medical care for a detainee suffering withdrawal symptoms from heroin⁵⁶⁹ and *“significant defects in the medical care provided to a mentally ill person known to be a suicide risk”*⁵⁷⁰ have both been found to breach Article 3. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has also drawn attention to the importance of access to physical and mental healthcare for individuals in custody (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2005). More broadly, obligations to respect the right to the highest attainable standard of health for everyone (Article 12 of the International Covenant on Economic, Social and Cultural Rights) include: *“refraining from denying or limiting equal access for all persons, including prisoners or detainees”*.⁵⁷¹

HMCIPS has recognised an apparent increase in the number of prisoners with mental health problems in Scotland (HMCIPS, 2007a, HMCIPS, 2011a).⁵⁷² Approximately 4.5 per cent of Scotland’s prisoners (excluding HMYOI Polmont) are believed to have severe and enduring mental health problems⁵⁷³, while HMCIPS have reported that *“a very large*

proportion” of total prisoners have some form of mental health problem (HMCIPS, 2008b). The “*very high levels of self-harm in women’s prisons*” has also been identified as a particular concern regarding mental health care in prisons (Mental Welfare Commission for Scotland, 2011b).

A thematic inspection of mental illness in Scottish prisons concluded in 2008 that:

“[t]he use of imprisonment is inappropriate for people with severe and enduring mental health problems. Their primary need is their mental health and the appropriate place to address this is a hospital” (HMCIPS, 2008b).

It noted that there are a number of gaps in the identification of mental health problems and needs in prisons, but that, once identified, there are a number of treatments, interventions and supports available in prisons for prisoners suffering from severe and enduring mental health problems.

The Scottish Prison Service has adopted the majority of the 2008 report’s recommendations, including: working to mitigate the worst effects of overcrowding on the most vulnerable prisoners, including those with severe and enduring mental health problems; promoting a multi-disciplinary mental health team system in prisons; endeavouring to meet the needs of prisoners with severe and enduring mental health problems who are not eligible for hospital care; minimizing the use of segregation units to house prisoners with severe and enduring mental health problems;⁵⁷⁴ and improving training of Scottish Prison Service staff in mental health issues, particularly with regard to suicide risk.⁵⁷⁵ Responsibility for the provision of healthcare services, including mental health services, to prisoners was transferred from the Scottish Prisons Service to NHS Health Boards on 1 November 2011 (Scottish Government, 2011g).

A study carried out by the Mental Welfare Commission (Mental Welfare Commission for Scotland, 2011b) in preparation for that changeover reported very mixed experiences of prisoners with mental health problems: over half of the prisoners interviewed had some negative comments about support received for their problems while in prison, while others gave very positive feedback and many stated that regular access to a psychiatrist and regular medication in prison had succeeded in controlling their illness. The MWC’s recommendations for improving practice in this area include: increasing the provision of registered mental health nursing staff in prisons; improving access to mental health treatment when a prisoner arrives in custody; improved access to therapeutic activity and psychological interventions in addition to medication; improved advocacy and support services for prisoners with mental health problems; and proactive information exchange between prison and community services upon prisoners’ release.

Participants in this scoping project who had experienced time in prison also highlighted that overcrowding in prisons was leading to a lack of service contact time between staff and prisoners, limiting any support that could be offered. They also believed this to be contributing to delays in diagnosing mental health problems. There was a strong feeling that improvements in practice will most likely come about if the views of those prisoners with mental health problems and prison staff were taken into account during any re-evaluation of service structure, provision and delivery.

3.7.1.4 Suicides/deaths in custody

Article 2 of the ECHR includes positive obligations to protect individuals (in particular those in detention) from a real and immediate risk to life from suicide or from the acts of others.⁵⁷⁶ Amongst others, the Joint Committee on Human Rights (of the Westminster Parliament) has expressed concern at the high suicide rates in prisons across the UK, stating:

Ensuring prisoner safety is a fundamental responsibility of the state under Article 2. It is difficult to see how this is being upheld when the state continues the bad practice of sending such vulnerable people to prison for minor offences. Indeed, this represents a systemic failure to positively promote and enforce the human rights of these people and grave failure by the state to fulfil its positive obligations under the ECHR (Joint Committee on Human Rights, 2004).

Despite indications in 2008 that Scotland was successfully tackling prison suicide rates, especially amongst its youngest prisoners (Bird, 2008), statistics published by the Scottish Prison Service in 2011 indicate that the number of prison suicides has risen again, to its highest level in five years (Robertson, 2011, Rarmour, 2011).⁵⁷⁷ The news has prompted criticisms of, amongst other things, overcrowding in prisons. Campaigners say that the high level of prisoner processing detracts staff attention from individual prisoners' needs, and leads to serious mental health problems in some prisoners being overlooked (Rarmour, 2011). UK-wide research confirms that overcrowding contributes to a failure to manage suicide risks, and that for many acutely vulnerable people, detention in prison is simply inappropriate (Joint Committee on Human Rights, 2004). Recommendations made by the Joint Committee on Human Rights in relation to prison suicides include improved sentencing practice, careful risk assessment on admission to prison, and adequate levels of suitably trained staff.

3.7.3 Mental Health Detention

"The most significant and recurring concern across all types of detention relates to detainees with mental health problems"
(MoJ, 2011).

Persons deprived of their liberty on mental health grounds (under Article 5(1) (e) of the ECHR) must be detained in an appropriate therapeutic environment.⁵⁷⁸ Such a requirement does not apply to those detained under Article 5(1) (a) (those detained upon conviction by a competent court).

The detention of individuals for mental health reasons is governed in Scotland by the Mental Health (Care and Treatment) (Scotland) Act 2003. The Scottish Government has produced a Code of Practice to it and Compliance with the Act is monitored by the Mental Welfare Commission for Scotland.⁵⁷⁹

The Act, which came into force in October 2005, is described as having brought the most fundamental change to mental health law in 40 years (Ridley et al., 2009). The Act created a new framework for the use of compulsory measures and places emphasis on treatment and care in the community, on safeguarding patients' rights and on enabling the participation of patients and carers in treatment and on-going care. Building upon the previous system, it provides for three main types of compulsory powers: emergency

detention (up to 72 hours),⁵⁸⁰ short-term detention (up to 28 days),⁵⁸¹ and compulsory treatment orders (6 months, extendable).⁵⁸²

It also created the Mental Health Tribunal which replaced the Sheriff Court for hearing cases under the Act.⁵⁸³ There are opportunities for a patient to participate at a hearing before the Mental Health Tribunal on an application for a Compulsory Treatment Order and to request that the Tribunal convene to consider an application to vary or revoke various orders. Patients who are detained longer term have the right to a two-yearly review by the Tribunal and patients in high security at the State Hospital have the right to challenge their level of security. Patients who consider themselves unlawfully detained can make an application for an order requiring the hospital managers to cease to detain the person under.

Professionals involved in the mental health sector believe that the Act brought a paradigm shift in the culture of detention, subjecting the decision of when to detain to greater scrutiny (Ridley et al., 2009). Overall, there appears to have been decreasing use of the compulsory powers since the introduction of the 2003 Act (SPEOC, 2010). It has been noted, however, that there is a geographical variation in their use across Scotland (SPEOC, 2010). This may be partly due to varying investment in community care services, or by greater persuasion in some areas for patients to remain in hospital voluntarily. A comparative study by Smith & White (Smith and White, 2007) of adults admitted to psychiatry wards in Murray Royal Hospital, Perth, in the year before and the year after the introduction of the 2003 Act indicated that fewer patients were being detained post-2005 than previously, although they were more likely to progress to longer-term detention. It concluded that there was now increased scrutiny by more experienced practitioners before individuals were admitted and deprived of their liberty in hospital. The length of time that patients spent in hospital had also reduced, in keeping with the principle of the Act to use the least restrictive option for treatment. It was thought that the availability of community-based compulsory treatment orders may have contributed to this.

The Mental Welfare Commission have conducted a number of thematic and monitoring reports, which have produced specific recommendations for improvement of the compulsory powers scheme under the 2003 Act.

- For detention on short term certificates, detained individuals must be given information about their rights; the need for compulsory detention must be kept under review; and where possible, preventative action should be taken instead of resort to emergency detention certificates (Mental Welfare Commission for Scotland, 2010d).
- Facilities providing care and treatment to people with severe and enduring mental illnesses should: improve the privacy allowed to residents; improve the security of residents to prevent them feeling threatened; improve opportunities for activity and recreation, through meaningful, individualised programmes; ensure that placement of individuals in continuing care or rehabilitation wards is according to their needs not service expediency; and ensure that nursing staff are aware of consent issues under the Adults with Incapacity (Scotland) Act 2000 (Mental Welfare Commission for Scotland, 2008a).
- In relation to people receiving care and treatment in low and medium secure mental health wards (usually following a criminal conviction), staff should be fully conversant with the statutory requirements regarding consent to treatment and management of finances; services should ensure that the physical health of patients is given the appropriate priority; and policies in relation to locked doors (internal and external) should be reviewed

to ensure there are no unnecessary restrictions in place (Mental Welfare Commission for Scotland, 2009b).

- With regard to mental health admission wards for older people, locked door policies should be reviewed and only implemented where necessary; individuals' ability to consent to treatment should be kept under review, and appropriate procedures should be put in place to comply with statutory requirements for certificates allowing treatment without consent; access to drinking water should be available at all times; individuals should be informed of their right to advocacy services; and care plans should be reviewed regularly, with the involvement of the individual and his/her family (Mental Welfare Commission for Scotland, 2010f).
- Where young people are admitted to mental health services, clear and accessible information should be provided about the facilities, modes of treatment and care plans; arrangements should be made so as to minimise impact on education; specialist advocacy services may be appropriate; specialist training should be provided to staff; and restraint should only be used as a last resort (Mental Welfare Commission for Scotland, 2009a).
- The Mental Welfare Commission has also produced detailed guidance on the use of restraint in residential care settings (Mental Welfare Commission for Scotland, 2002).

The UK's National Preventive Mechanism under the Optional Protocol to the UN Convention against Torture expressed concern at children who experienced inappropriate placements, such as in adult psychiatric wards, and who encountered difficulties in making the transition from children to adult services. Concerns were also expressed over the use of restraint across different types of detention, particularly:

"Whether restraint is being used safely, only when absolutely necessary and whether appropriate methods are used on children" (MoJ 2011:18).

Some participants in this scoping project with children in receipt of mental health care and treatment felt that further consideration should be given to the needs of young people. In particular they reported that in many areas throughout Scotland there are no specific services for young people who then as a consequence are detained on adult wards.

Health boards have also been criticised for placing individuals in health care facilities which cannot provide for their needs as was the case in *Lothian Health Board v Brian Martin and the Mental Health Tribunal* (2007).⁵⁸⁴

Carers and service users have highlighted problems with compulsory care and treatment where this has been delivered in out of date buildings providing poor living and communal facilities, and inadequate daytime occupation. Boredom is reportedly a common problem for patients in psychiatric hospitals, with a lack of meaningful activities available to mental health patients, particularly as regards skills-based training which would equip patients to find employment on discharge (Ridley et al., 2009). Participants in this scoping project also raised similar concerns. As explained by one participant:

I think it is important to remember the principle of reciprocity, because a key thing about the patients in this unit is they are locked up for periods of time because that's part of their care – but the reciprocity should be that if you lock people up for months or years you should provide things for people to do. That's part of the continuum of care, education, training, possibly employment...

Mary, NHS forensic mental health consultant and member of mental health carer support group

Care and treatment under compulsion has also been reported to be dominated by drug therapies and less focused on non-clinical social, psychological and other support (Ridley et al., 2009).

A further criticism from some participants in this scoping project who provide informal care for those detained within mental health units in Scotland was presented in relation to the right to family life. In particular the difficulties and expense involved for carers in maintaining a family life when loved ones are detained at a distance from their home communities (often for years). The expense becomes more acute when visiting requires overnight stays and often more difficult if visitors are reliant on public transport:

...the expense is considerable and yet the current guidelines from the health department are that no visitors' expenses can be paid and it's up to you to find the money to come and that is going to be an intolerable burden for lots of families, people who are on low incomes or on the pension. If you're in receipt of state benefits then you may get your travel expenses refunded but it's not guaranteed, you have to make an application to see if there is enough money to pay you. To come here there is no assistance but if my son were in The State Hospital then I would automatically qualify for assistance to visit, only at the State Hospital nowhere else.

Trevor, Member of mental health carer support group

... I leave about 9 in the morning and I get there just before midday and I get to see her for 20 minutes before she wants to go out for a cigarette for 20 minutes and then she's back again and you have another 20 minutes and that's it and then I get back to the house about 6, 6.15 in the evening. And I am ok finance wise as I'm just over 65 and so I get my bus pass. But it's a 10 hour day - it takes a lot out of me for 40 minutes.

Iain, Member of mental health carer support group

A number of participants in this scoping project, who provide informal care for family and friends detained within the mental health system, also raised concern about the aftercare available for people on leaving mental health detention. This was also at times linked with feelings of social isolation:

After care for the patient once they re-enter the community is abysmal – it doesn't meet the needs of people who have suffered from mental disorders and require close contact and care. It is at best hit and miss and this impacts very much on family life as the patient often relapses...it's defeatist, because staff do such a good job getting people well and well on the road to recovery and they go out and they can be well for a while, but they need some kind of support because they start going downhill without it. And it makes me so angry because these people have worked so hard and given so much effort and so much of their time and effort and then back into the community and... social work just don't see it as a priority.

Libby, Member of mental health carer support group

Many of these carers also felt that people with mental health problems were, following discharge, often living in accommodation that was not fit for purpose. Furthermore, they were frequently discharged from hospital and sent to accommodation which was inappropriate to support their needs, especially for those with severe mental health problems:

On discharge from hospital there are very limited places for people with long term very severe mental health problems to go. Some people need to have 24hr supported accommodation, some people would only need a type of warden service and others can live independently and be trusted to take their own medication. But there is such a lack of appropriate places that we have a recurring failure for the person to maintain their wellbeing and they end up back in hospital.

Mary, NHS forensic mental health consultant and member of mental health carer support group

In 2002, following a number of problems and one particular⁵⁸⁵ high profile case, a decision was taken at The State Hospital⁵⁸⁶ to use the Human Rights Act as a vehicle for cultural change. The Hospital Board believed that taking human rights based approaches were the best way to put the human rights of everyone – staff, patients, carers and family members – at the heart of its services. In 2009, the Scottish Human Rights Commission undertook an evaluation (SHRC, 2009b) of this approach and found that the adoption of a human rights based approach was successful in supporting a cultural change from an organisation where rights were largely “*left at the door*”, and with a “them and us” culture, towards one with a more positive and constructive atmosphere with mutual respect between staff, patients and carers. The evaluation provided practical and transferable lessons to enable other public authorities and organisations within and beyond healthcare settings to adopt such an approach to their policy and daily practice.

3.7.4 Women in Detention

The women’s prison population in Scotland is rising more quickly than that of men. Female imprisonment has seen an unprecedented increase over the last 15-20 years (207 to 468 since the turn of the century), and has more than doubled (106 per cent) in the last decade (EHRC, 2010, McIvor and Burman, 2011).⁵⁸⁷

There are widespread concerns about the treatment of women offenders in Scotland. Cornton Vale, as Scotland’s only all-women prison, has been the source of significant concern for some time now. HMCIPS, Sir Hugh Monro conducted his first full inspection of Cornton Vale in 2009 and has subsequently made a number of follow up inspections. His conclusions are stark. Describing the “plight” of detainees, he has recommended that the facility’s design capacity be reduced to less than 300 inmates. Between 2010 and 2011 the Scottish Prison Service did reportedly reduce the design capacity from 375 to 309 (HMCIPS, 2011b, HMCIPS, 2011a). However it is reported that in early 2011 it held 385 (HMCIPS, 2011b).⁵⁸⁸ HMCIPS has voiced concern about the detrimental effect overcrowding has on the “*dignity, safety, infection control, mental health and general health issues*” of both prisoners and staff and the lack of improvement in this area from previous inspections (HMCIPS, 2011a). Other areas of concern include a lack of trust in the complaint handling system, a lack of therapeutic and caring approach to mental health, and a “depressing” degree of boredom and lack of purposeful activities (HMCIPS, 2011a). In his follow up inspection report in 2012 HMCIPS notes considerable improvement in many areas, linked to a decrease in prisoner numbers, but considers that this can only be described as a “*work in progress*”. *In essence Cornton Vale is still in an unsatisfactory position*” (HMCIPS, 2012).⁵⁸⁹

The highly critical reports noted above prompted the Government to establish, in June 2011, of a commission to examine how female offenders are dealt with in the criminal justice system. The commission, led by former Lord Advocate Dame Elish Angiolini, was

charged with finding a more effective way of dealing with women offenders, with a view to reducing reoffending and reversing the steady rise in the female prison population (Commission on Women Offenders, 2012). The Commission report made 37 recommendations for change focusing on seven key areas of: service redesign; alternatives to prosecution; alternatives to remand; sentencing; prisons; community reintegration; and leadership, structures and delivery. The Scottish Government has acknowledged agreement with all of the aims of the recommendations, accepted 33 out of the 37, and has given a commitment to considering the remaining four in more detail.⁵⁹⁰ The Cabinet Secretary for Justice has undertaken to report on progress in October 2012 and annually thereafter (Scottish Government, 2012a). Subsequently, from the 16th-28th August 2012, the Scottish Prison Service is running a consultation exercise on the options for the replacement of HMP Cornton Vale.⁵⁹¹

3.7.5 Young People in Detention/ Secure Accommodation

As noted above, Article 37 of the UN Convention on the Rights of the Child addresses the right to liberty of children. This applies to everyone under the age of 18. In Scotland the age of majority⁵⁹² is 18 so all children enjoy the protections of the CRC.⁵⁹³

As noted in the thematic section on access to justice, most children who are accused of offences are dealt with under the Children's Hearings system which takes a welfare approach. As a result, "children are much less likely to be punished or locked up [in Scotland] than in England" (UK Children's Commissioners', 2008). The Scottish system has, however, been criticised with regards to the level of deprivation of the liberty of 16 and 17 year olds, as noted but the UK Children's Commissioners':

"The downside of our earlier autonomy is a cultural expectation that focuses now on the age of 16. After that age, young people are largely classed as adults for the purpose of criminal justice. Scotland locks up too many young people aged 16 and 17" (UK Children's Commissioners', 2008).

Article 10 of the International Covenant on Civil and Political Rights requires that juvenile offenders be held separately from adult offenders and be accorded treatment appropriate to their age and legal status.⁵⁹⁴ Upon ratification the UK lodged a reservation to that provision, which it justifies partly on the basis that, in Scotland, children of 16 and over are detained in Young Offenders' Institutions (YOIs) alongside people up to the age of 21 (although it is explained that wherever possible, those under 18 are held in separate accommodation within the institution).⁵⁹⁵ However the UK withdrew its equivalent reservation to 37(c) of the UN Convention on the Rights of the Child in 2008. As the UN Committee on the Rights of the Child has authoritatively stated in respect of Article 37(c): Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate.⁵⁹⁶

In response to earlier reports of HMCIPS expressing "*shock and anger*" at the number of children under 16 held in prisons and YOIs, and his call for the end to imprisonment of children (HMCIPS, 2005, HMCIPS, 2006, HMCIPS, 2007a, HMCIPS, 2008b) the Scottish Government's has stated a commitment to keeping young people out of prison establishments (Scottish Government, 2009g, UK Children's Commissioners', 2008). In 2010 the power to imprison children under 16 was abolished.⁵⁹⁷

Offenders aged between 16 and 21 are generally held in YOIs. The majority of young male offenders are held in HMYOI Polmont and female young offenders in HMP & YOI Cornton Vale, both facilities are close to capacity. The average daily population in HMYOI Polmont in 2010-11 was 737, with a maximum capacity of 784, while in the Cornton Vale YOI the figures were 44 and 58 respectively (Scottish Government, 2012m).

Consequently some young offenders are held in accommodation within HMP Greenock and HMP Perth (HMCIPS, 2009b). Currently in Scotland, the young offender sentenced population sits at 556 (525 male young offenders and 25 female), which shows a noted eight per cent decline from 2010-11 (Scottish Government, 2012m).

An inspection of Polmont YOI in April/May 2007 (HMCIPS, 2007b) found it to be severely overcrowded (Scottish Government 2009b), with young offenders often spending as much as 20 hours a day locked up; and some remand prisoners were locked up for 23 hours out of 24.

A 2009 report on Young Offenders in Adult Establishments (HMCIPS, 2009b) found that conditions for young offenders in HMP Greenock and HMP Perth were very good, but those for young women at Cornton Vale were extremely unsatisfactory. In Greenock and Perth, young offenders live in a separate part of the establishment, quite apart from adult prisoners. In Cornton Vale, however, nearly every part of the daily life of young offenders was shared with adult prisoners. There was very little for female young offenders to do; their daily life was described as 'completely futile' (HMCIPS, 2009b).

The 2012 follow-up report on Cornton Vale by HMCIPS indicates that there have been improvements in the separation of young offenders, and in activities available to them, and in the block dedicated to young offenders there were reported to be "*major improvements*" in access to toilets and some positive changes in the regime. Nevertheless the living conditions were described as "*claustrophobic*" (HMCIPS, 2012).

Scotland's Chief Inspector of Prisons in his most recent Annual Report (HMCIPS, 2011a) draws attention to the cycle of violence in which young people often find themselves caught. This is reflected in the extremely high re-offending rate amongst young offenders: in 2008-09, it was estimated that over 85 per cent of the population of Polmont YOI had been there before their current sentence (HMCIPS, 2009a). This indicates the importance of the release process for young offenders, with additional support provided to those who need it (HMCIPS, 2011a). There is also a strong correlation between children who have been in care and youth and adult offending. One per cent of Scottish children have been in care, whereas 50 per cent of young Scottish prisoners have been in care – rising to 80 per cent of those convicted of violent offences (EHRC, 2010b).

Some children, who meet the criteria for secure accommodation⁵⁹⁸ in that they are risk to themselves or others, may be managed in the community, for example under Intensive Support and Monitoring (which may involve the wearing of a tag).⁵⁹⁹ For those that do require secure accommodation there are currently 106 secure care places, spread across 7 secure care units. These units deliver a range of educational, health and behavioural programmes for young people, as well as tailored programmes of work to prepare the young people for their transition back into the community.⁶⁰⁰

Unlike Scotland's adult prisons the supply of secure care places outstrips demand, meaning that secure care providers are struggling to remain financially viable. The fact

that an anticipated increase in demand for secure care has not come to pass is seen by the Scottish Institute for Residential Childcare (SIRCC) as a positive development, since its aim is to have fewer people in secure care by managing high-risk young people safely in their communities (Scottish Institute for Residential Childcare, 2009). However, it is vital that secure care places are there for those young people for whom it is the best option at a particular time in their lives. As with other types of offenders, the ideal for dealing with children who end up in secure accommodation is early, effective intervention to address the complex needs of these young people. SIRCC has also suggested that part of the secure care estate might be converted to provide secure mental health facilities for young people (Scottish Institute for Residential Childcare, 2009).

Secure care units can house young people up to the age of 16 and beyond. The Government has indicated a desire to ensure that, beyond their 16th birthday, children in secure care following conviction should remain there rather than being transferred to the prison estate (Scottish Government, 2008e). As with prison, the process of leaving secure accommodation is deemed to be vital to the individual's successful rehabilitation in the community, with a gradual and supported transition providing the best outcomes (Kendrick et al., 2008).

Research has demonstrated that for young people who put themselves and others at risk, a range of secure and open options is needed, so that diverse individual needs can be catered for and met (Walker et al., 2006). This reflects the approach adopted in the Scottish Government's policy on children and young people, entitled *Getting it right for every child*, which seeks to ensure that all children in Scotland have consistent, coordinated support when they need it.⁶⁰¹

3.8.5.1 Asylum seeking children

In 2008, the UN Committee on the Rights of the Child expressed concern (UNCRC, 2008a, UN CCPR, 2008) that asylum-seeking children continued to be detained in the UK (including at Dungavel Immigration Removal Centre in South Lanarkshire), and recommended that the UK ensure that detention of asylum-seeking children be used only as a measure of last resort and for the shortest appropriate period of time.⁶⁰² The detention of children (unaccompanied or with parents) has been the subject of intense criticism by the media and children's rights groups (UK Children's Commissioners', 2008). Concerns have been raised with regard to the impact of detention on the physical and mental health of children, as well as on their educational development (Hek, 2005, Lorek et al., 2009, The Guardian, 2003). Although immigration detention is not a devolved matter, and therefore the Scottish Government has limited control in this area, there have long been calls for Holyrood to take the lead on improving the treatment of asylum seekers, particularly as the issue overlaps with areas of devolved competence, such as health and housing (The Guardian, 2000, Scottish Refugee Council, 2010a, Scottish Refugee Policy Forum, 2012). The 2009 Calman Commission Report recommended that:

"in dealing with the children of asylum seekers, the relevant UK authorities must recognise the statutory responsibilities of Scottish authorities for the well-being of children in Scotland" (Commission on Scottish Devolution, 2009).

In May 2010, the UK Immigration Minister announced that children would no longer be held overnight at Dungavel (Home Office, 2010), a move supported by Scottish Ministers.⁶⁰³ The UK Government has stated its commitment to ending the detention of children for immigration purposes (UK Border Agency, 2010), but acknowledges that it still

detains children 'for short periods' at centres in England (Home Office, 2010). Statistics suggest that in fact the UK Border Agency is still failing in its pledge to end child detention(UK Border Agency, 2012).⁶⁰⁴ In 2010, the UK Government conducted a review of the immigration detention of children (UK Border Agency, 2010, Home Office, 2010), and alternative approaches have been proposed by, for example, the UK's Children's Commissioners and the Scottish Refugee Council (UK Border Agency, 2010, UK Children's Commissioners', 2008).

Theme 8: Access to Justice and the Right to Effective Remedy

3.8.1 Introduction to Access to Justice and the Right to Remedy

This thematic section explores the theme of 'Access to Justice and the Right to Remedy' in Scotland, which is one of the eight core themes that were drawn from the rights analysis. Access to Justice and the Right to Remedy encompasses both civil and criminal justice spheres and overall, this scoping project identified a number of relevant areas where human rights could be engaged. Following the prioritisation process⁶⁰⁵, nine core areas are discussed in further detail in this thematic section, namely: Legal Advice; Cost & Standing; Equality of Arms; Access to Justice for Particular Groups; Appeals; Investigations & Corroboration; Victims/survivors' Rights & the Right to Remedy; Juvenile Justice; and Time Limits. A list of cases referred to in this thematic section can be found at the end of this thematic section.⁶⁰⁶

3.8.2 Legal Advice

The Access to Justice Committee of the Law Society of Scotland identified has identified the importance of legal advice as one of the most pressing issues in Scotland.

"Access to civil or criminal justice in Scotland is a constitutional and human right. We believe that Scotland's legal system is a public service, not a commodity, which should deliver that right in the same way that schools deliver education, or the NHS delivers a health service. The courts must therefore be free at the point of use and should never be used as a means of generating income for the state" (The Journal, 2010).

"Accordingly, we believe that citizens in Scotland are entitled to access the appropriate legal advice, assistance, and representation, whenever their liberty, life, wellbeing, children, home, work, environment, and community are significantly threatened. We hold these principles to be self-evident" (The Journal, 2010).

The right to a fair trial, which applies to any criminal charge as well as to the determination of civil rights and obligations, is fundamental to the rule of law and to democracy itself.

The right to free legal assistance is not an absolute right. Even in criminal matters the right to free legal aid for an accused depends on two circumstances; a) that the accused lacks sufficient means to pay for legal assistance and b) that the provision of legal aid is required by the interests of justice. In relation to the first the level of proof required for an accused that he or she lacks resources should not be set too high. In relation to the second, the Court found that in determining what is required in the interests of justice consideration should be given to a number of factors such as the gravity of the offence, the likely penalty if convicted,⁶⁰⁷ the complexity of the case, the principle of equal treatment of the parties and the personal situation of the accused (e.g. his or her mental health or the existence of a mental disability, linguistic skills, etc.).⁶⁰⁸

The case of *Cadder*⁶⁰⁹ v *HMA*⁶¹⁰ has had a significant impact on Scottish criminal law. The question in this appeal to the Supreme Court of the UK was whether a person who has been detained by the police in Scotland on suspicion of having committed an offence has the right of access to a lawyer prior to being interviewed. Under Scots criminal law at the

time a suspect could be held for up to six hours for the purposes of questioning without the right to legal advice or representation.

In *Her Majesty's Advocate v McLean* [2009] HCJAC 97, the High Court of Justiciary (sitting with seven judges) held that, notwithstanding the decision in *Salduz v Turkey* (2009) 49 E.H.R.R. 19, it was not a violation of Articles 6(1) & 6(3) (c) ECHR for the Crown to rely at trial on admissions made by a detainee while being interviewed without having had access to a solicitor. This was because the guarantees otherwise available in the Scottish legal system and, in particular, the requirement that there be corroborated evidence in order to convict were sufficient to provide for a fair trial.

The Supreme Court allowed the appeal in *Cadder* on the basis that while *McLean* was in line with previous domestic authority, it could not survive in light of the European Court of Human Rights decision of *Salduz* and subsequent cases.⁶¹¹ Properly interpreted, *Salduz* requires the right of a detainee not to incriminate themselves to be protected by providing access to a lawyer from the time of the first interview unless there are compelling reasons, in light of the particular circumstances of the case, to restrict that right. The exception applies only if there are particular circumstances in the individual case and does not allow a systematic departure from the rule such as provided for in Scots Law under the Criminal Procedure (Scotland) Act 1995.

Following the decision in *Cadder* the Scottish Parliament passed emergency legislation they considered necessary to ensure compliance with ECHR. However, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010⁶¹² went further than ensuring legal assistance and representation, which had already been put in place through guidelines issued by the Lord Advocate. It also increased the length of time a person could be detained to 12 hours with a possible extension to 24 hours and introduced a number of unrelated changes to the criminal justice system with very little scrutiny by Parliament.

The legislation is not retrospective and the judgment does not permit the reopening of closed cases, but live appeals, pending and on-going cases are affected. Subsequent cases⁶¹³ have further clarified aspects of the right to access to a lawyer. For example in the Scottish case of *Ambrose v Harris*,⁶¹⁴ the UK Supreme Court took account of ECtHR cases such as *Zaichenko v Russia*⁶¹⁵ and declared that the right to a fair trial under Article 6(1) is not engaged in all situations of police questioning. The test to be applied is whether the suspect's situation would be 'substantially affected'⁶¹⁶ by the investigation. This will normally require being charged with an offence or being taken into custody.⁶¹⁷

The 2010 Act and subsequent cases have provided some clarity on the issue of access to a lawyer, however, the implications of the *Cadder* case continue to be felt. The judgment had no effect on concluded cases but The Crown Office estimated that 867 pending cases were abandoned, including 60 serious cases, nine of which were High Court cases.⁶¹⁸

In response to *Cadder* the Scottish Government commissioned Lord Carloway to review criminal procedure. The Carloway Review⁶¹⁹ covers a wide range of criminal procedure matters in Scotland. The report makes a series of recommendations on various issues including:

- The Sufficiency of Legal Advice
- Periods of Detention

- When Should a Suspect's Right to Legal Assistance Arise?
- Waiver of Rights
- Inference from Silence

3.8.2.1 The Sufficiency of Legal Advice

A key concern raised by the Carloway Review was whether the current system allows for sufficient legal advice to be given to suspects. The review considered whether it was sufficient for advice to be given by telephone rather than through personal attendance by a lawyer. The Law Society of Scotland (Law Society) argued that:

“telephone advice is plainly insufficient in many cases and should not be regarded as the norm” (Law Society of Scotland, 2011a).

SHRC also raised concerns, noting that attendance in person allows a lawyer to ensure the witness is not ‘vulnerable’,⁶²⁰ something which may not be apparent through a phone call. A face to face interview further provides the opportunity to check that the conditions of detention are suitable and there has been no ill-treatment. Personal attendance could also have a bearing on the advice which is given, as it might not be the case that the best advice is always to remain silent (SHRC, 2011f).

In considering this issue, the Carloway Review underlines that the right of access to a lawyer must be *“practical and effective”*⁶²¹ and therefore the sufficiency of advice is very important. The right does not extend to ensuring the provision of a solicitor of the suspect's choice,⁶²² but it does require that a qualified solicitor is contacted to provide assistance (Carloway, 2011).

Despite the concerns outlined during the consultation, Carloway concludes:

“it is ultimately for the suspect to decide whether the advice from the solicitor should be provided by telephone or in person” (Carloway, 2011).

The review (ibid.) does not consider it necessary to define in statute what will constitute effective advice as this will differ from case to case. Importantly, however, the review argues that attendance by a lawyer should be available at least in cases where an offence is likely to be tried in the High Court or where the suspect might be considered ‘vulnerable’ (Carloway, 2011).

3.8.2.2 Periods of Detention

Two key issues were addressed regarding periods of detention. The first being how long a suspect can be held in custody before being brought before a Court. The second whether the twelve hours for which a suspect can currently be held without charge is necessary and justified.

Anyone who is arrested or detained has the right to prompt access to judicial proceedings.⁶²³ In determining the meaning of ‘promptly’ regard must have been given to the circumstances of the case but some cases have shown that somewhere around four days may be considered the maximum period of detention before being brought before Court.⁶²⁴

This may give rise to problems in Scotland when someone is arrested on a Friday night as there will be no opportunity to be brought before Court until the Monday morning. This means that the arrested person will be detained over the weekend and potentially spend three days in a cell. This problem is made worse over Bank Holiday periods when Courts

may be shut on both Friday and Monday. Such periods of detention approach the threshold of being unacceptable under Article 5 of the ECHR and this was identified as a potential problem in the Carloway Review (Carloway, 2011).

Carloway (2011) considered a case study in an urban area during one weekend:

“Of the many persons dealt with in the custody Court on the Monday, one person had been detained from the previous Thursday morning until bailed on the Monday evening. There were six others held from the Thursday night, three from the very early hours of the Friday morning, five from before noon on the Friday and six from mid-afternoon that day who did not appear in Court, and hence were not bailed or committed to prison, until late on the Monday afternoon or early in the evening of that day. These custodies amounted to about 16[per cent] of the total” (Carloway, 2011).

The Review argues that these statistics are not acceptable in a modern judicial system (Carloway, 2011). It therefore recommends that a maximum period of detention should be introduced to ensure that an accused appears in Court on the next Court day after charge. Further, periods of detention should be monitored by the Crown Office and Procurator Fiscal Service (COPFS) and initiatives such as Saturday Courts should be considered if these periods continue to exceed thirty-six hours (Carloway, 2011).

As reflected in the submissions to Carloway, many organisations were also concerned that the emergency legislation allowing detention for twelve hours, rather than six, was unnecessary and unjustified. SHRC argued that a reinstatement of the six-hour rule was advisable and that extensions to this should only be allowed in order to meet Article 6, i.e. to ensure a fair trial. This envisages circumstances where interpreters or support for ‘vulnerable’ suspects is required (SHRC, 2011f).

Although broadly agreeing with this, the Law Society of Scotland did sound a note of caution regarding certain types of offence:

“In serious sexual offences, a 6 or even 12 hour period may be problematic in that the police often embark on interviews with a suspect based on the complainers comment and often little else. The suspect’s response invariably requires further investigation and there is an argument that being unable to realistically interrupt an interview is no benefit to anyone” (Law Society of Scotland, 2011a).

The Law Society also suggested interrupting, rather than extending the detention period in certain cases, therefore allowing further questioning at a later time once more factual knowledge about the case has emerged.

The Carloway Review considered the practical workings of the current system in some detail. It was shown that:

“Since the extended detention periods were introduced, ACPOS [the Association of Chief Police Officers in Scotland] data discloses that the vast majority (83.5[per cent]) of detentions have continued to be concluded within that period, and the average detention period (3 hours 55 minutes) remains well within the six hour period. This still leaves a significant proportion of cases (15.7[per cent]) where the period of detention has exceeded the six hours, but has ended within twelve hours. If this pattern persists, this would relate to more than 5,500 detentions every year”⁶²⁵.

In this period, less than 0.5 per cent of detentions were extended beyond the twelve hour period. Despite this being encouraging Carloway notes that in real terms this means there could be around 350 suspects held for longer than twelve hours (Carloway, 2011).

In response to these statistics and submissions received the Carloway Review recommends something of a compromise: that the maximum period of detention remains twelve hours but with a review after six hours to determine whether continued detention is required. The review would consider whether the suspect's fitness for interview or delays in contacting a solicitor, were being properly addressed and that his/her welfare is being taken into account. Carloway further recommended that the power to detain a suspect for more than twelve hours should only be granted by a judge in exceptional circumstances and the current position allowing for twenty-four hour detention be removed (Carloway, 2011).

In general the Review recommends that detention should be avoided unless absolutely necessary. It recommends a new approach is taken whereby the only general power to take a suspect into custody is that of arrest on "*reasonable suspicion*" (Carloway, 2011). The aim is to maintain a presumption of liberty and ensure that the police consider the proportionality of holding a suspect in custody. It is recommended that, where practical, a suspect can be released on bail and brought back for questioning at a later time. This release period would be for a maximum period of twenty eight days and could have conditions attached to ensure the suspect returns at an appointed time (Carloway, 2011).

3.8.2.3 When Should a Suspect's Right to Legal Assistance Arise?

The Carloway Review does not recommend that the right of access to a lawyer should be extended beyond situations where a suspect has been detained. It does consider, however, that interviews out with a police station will always be subject to the overarching requirements of fairness under Article 6 and stresses that the police should inform anyone being questioned that they have the right to access a lawyer (Carloway, 2011).

This position has been criticised by the Scottish Legal Action Group (SCOLAG) which has argued that:

"The proposal could go further in requiring access to legal advice for those who are to be questioned as suspects but not detained. Whilst we acknowledge the practical difficulties with such a requirement in some circumstances, these should not prove insurmountable. It may well be that developments in the Strasbourg jurisprudence will in the future, require access to such advice to be provided" (SCOLAG, 2011a).

To ensure clarity SHRC has recommend that any suspect, whatever his or her location, who is to be questioned under caution is afforded the right to legal assistance and is advised of that right at the time he or she is first cautioned (SHRC, 2011f).⁶²⁶

3.8.2.4 Waiver of Rights

Although Article 6 of the ECHR protects the right to a fair trial, it does not prevent a suspect from choosing to waive certain aspects of this right. This has been explicitly stated in recent Strasbourg case law, namely:

*"Neither the letter nor the spirit of Article 6 prevents a person from waiving them [ECHR rights] of his own free will, either expressly or tacitly".*⁶²⁷

However, in order to be effective a waiver of rights must be made in an unequivocal manner and there must be adequate safeguards in domestic law.⁶²⁸ The waiver of rights

must be made voluntarily and the suspect must be made fully aware of the consequences of the waiver before making a decision.⁶²⁹

Waiver of the right to legal advice was recently considered in domestic law in the case of *Jude, Hodgson & Birnie v HMA*.⁶³⁰ In that case a suspect was deemed to have waived his right of access to a lawyer although the judgment expressed difficulty in accepting that this waiver had been valid. On reconsideration at the Supreme Court it was found that:

*“...there is no absolute rule that the accused must have been given legal advice on the question of whether or not he should exercise his right of access to a lawyer before he can be held to have waived it”*⁶³¹

It will thus depend on the facts of each particular case as to whether a waiver is valid.

SHRC has highlighted *waiver* as a topic needing further consideration and raised concern that so many suspects appear to waive their right to legal assistance (SHRC, 2011f). Carloway answers this concern directly by noting that approximately 75 per cent of suspects waive their right of access to a lawyer.⁶³²

The Carloway consultation also asked whether a statutory provision on the waiver of rights would be advisable. The organisation JUSTICE argued that without a statutory provision “*the parameters for the police are less clear*”(JUSTICE, 2011b) and whilst guidelines and codes of practice are useful such a provision would be welcome. However, it was stressed that such a statutory provision would have to be very carefully drafted and contain adequate safeguards which take into account the individual characteristics of the suspect.⁶³³

The Carloway Review (2011) recommends a standard wording be put in place to inform suspects of their rights and the opportunity of waiver.⁶³⁴ Carloway further recommends that a right to waive access to a lawyer be expressly stated in legislation for adults who are not ‘vulnerable’ and that such waiver must be express, recorded and limited to situations where the suspect is fully informed of the implications (Carloway, 2011).

3.8.2.5 Inference from Silence

Although not specifically mentioned in Article 6 of the Convention, the ECtHR has held that the right to remain silent under police questioning and the privilege against self-incrimination are at the heart of the notion of a fair procedure under Article 6. The drawing of adverse inferences from silence is not absolutely prohibited by the ECHR, but the circumstances in which such inferences may be drawn will depend on, amongst other things the weight attached to such inferences by Courts and the degree of compulsion. For example an exception is where the evidence against the accused “*calls*” for an explanation, in which case “*common sense inferences*” may be drawn.⁶³⁵ In this situation the accused should have procedural safeguards (such as warnings that an inference may be drawn from silence).⁶³⁶

In Scotland the right to remain silent during questioning is considered to be of great importance and is derived from the fundamental basis of a criminal justice system that an accused is presumed innocent until proven guilty (Carloway, 2011). In considering whether an adverse inference should be drawn from silence, Carloway restated the position in *Adetoro v UK*⁶³⁷ which stated “*the right to silence is not an absolute right.*”⁶³⁸ The Court advised that:

“...particular caution is required before a domestic Court can invoke an accused's silence against him. It would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions. However, it is obvious that the right cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.”⁶³⁹

The Review concluded that introducing an adverse inference from silence would be incompatible with the presumption of innocence, the right to silence and the right not to self-incriminate (Carloway, 2011).

In terms of moving forwards, there is little doubt that The Carloway Review has the potential to bring about striking changes in Scots criminal law and practice. At the time of writing, the Scottish Government has opened a public consultation seeking a range of views on how best to reform Scottish criminal law and practice based on the findings of Lord Carloway's Report. The consultation, which closes on October 5th 2012, seeks views on all aspects of the Review and this is seen as a first step towards implementing the proposals therein, including those detailed above and elsewhere in this thematic section (Scottish Government, 2012g). It will be useful to note, in the fullness of time, what recommendations from Carloway are introduced and which ones are not taken forward.

3.8.3 Cost & Standing

3.8.3.1 Legal Aid

3.8.3.1.1 Access to Legal Aid

Article 6 of the ECHR does not expressly require that a system of legal aid be in place, nevertheless there is a general duty on states to ensure practical and effective access to justice. The means of achieving this are for the state to determine, with legal aid being one such method.⁶⁴⁰ In criminal cases, article 6(3)(c) provides that everyone should have access to legal representation and that if they cannot afford representation it should be given free where required by the interests of justice. In civil cases, *Airey v Ireland*⁶⁴¹ found that the lack of provision of legal aid for a woman who was seeking a judicial separation from her husband meant that her right to a hearing was ineffective. The *Airey* case suggests that legal aid might be required in civil matters when the case is particularly complex or when legal assistance is compulsory under domestic law in order to ensure effective access to a fair trial.

The ECtHR has made clear⁶⁴² that the decision as to whether legal aid should be made available will depend on the individual facts of each particular case. Considerations to be taken into account include the complexity of the law and procedure, public interest and the applicant's ability to represent him or herself effectively.⁶⁴³ Domestically, it has been found⁶⁴⁴ that as Article 6 requires that a person has access to legal representation in cases involving deprivation of liberty, they should also have access to legal aid in such cases where needed. Further, the requirement to provide access to legal aid has been extended to situations such as Children's Hearings and tribunals.⁶⁴⁵

In Scotland, legal aid is administered by the Scottish Legal Aid Board (SLAB).⁶⁴⁶ Eligibility criteria have been summarised as follows:

“Civil legal aid has two broad tests: financial eligibility and in respect of the merits of the application. The financial test for criminal legal aid is exceptional hardship, whereas for civil legal aid there are more detailed rules regarding financial eligibility”(McCartney, 2010b).

Criminal legal aid is granted without the recipient being required to make any financial contributions. Civil legal aid is more complicated in which contributions can be required independent of the particular circumstances of the recipient, whilst having disposable income of £25,000 or more will render an applicant ineligible. In determining particular cases the Board must be satisfied that there are reasonable grounds of success in the case and that it is reasonable to make an award.⁶⁴⁷

Questions of the availability of legal aid also arise in the juvenile justice context, dealt with in the relevant section below.

The majority of participants in SHRC focus groups understood and appreciated the rights principle behind the provision of legal aid to all those accused of a crime who require it. However, most felt that the system as it currently stands is unfair and unequally balanced in favour of those accused of crime. Some participants felt that it was currently too easy for the legal aid system to be abused:

One thing about legal aid is that if you have been charged with a crime you have access to legal aid no matter how spurious the defence is and that was one of my big bug bears ... with legal aid for all criminal cases it denies legal aid for civil cases because if you try and take a civil case the criteria for access to legal aid is very tight. Most often people are denied justice because they just can't afford to take civil cases and that's something that is not quite right. I don't know what the solution is but there is an imbalance again.

Trevor, Member of mental health carer support group

3.8.3.1.2 Financial Contributions in Criminal Legal Aid

The Scottish Government recently opened a consultation on the question of introducing financial contributions in criminal legal aid. The stated rationale was to ensure that *“existing levels of access to justice can be maintained”* yet the consultation report repeatedly notes concerns at the cost of legal aid:

“Costs for this provision are continuing to rise; in 2010-11 there were 153,962 grants of criminal legal assistance. The total cost to the taxpayer in 2010-11 for criminal legal assistance was £104 million” (Scottish Government, 2012b).

The consultation proposal considered whether an applicant's financial eligibility should be based not only on available income but also on available capital.

Some, including the Scottish Independent Advocacy Alliance (SIAA) have argued against financial contributions, expressing concern that this would increase the number of people who choose to represent themselves and create an un-wanted market in legal advice where applicants feel forced into choosing the cheapest option available (SIAA, 2011). The consultation report responded that:

“many respondents thought that a person who claims to be innocent should be able to have high quality legal representation throughout the legal process and that fear of cost should not influence how they choose to plead or whom they choose to represent them” (Scottish Government, 2012b).

Despite such concerns the consultation report recommended that the Government implement the changes. In so recommending, the report emphasises the current economic crisis:

“[d]oing nothing in this respect would also fail deliver the savings required in the current economic climate. The aim of the Scottish Government is to maintain the current broad scope of the legal of the legal aid system in Scotland”(Scottish Government, 2012b).

It can be predicted that such changes will have an impact on the right to a fair trial and SHRC considers that this should be monitored with mitigation measures adopted where necessary.

In response to the proposed Criminal Legal Assistance Bill at the time of writing the justice committee of the Scottish Parliament was receiving evidence from SHRC and others (see: (SHRC, 2012g).

3.8.3.1.3 The Effects of Cost Cutting

In the 2010 report *Transforming Legal Aid* (Kemp, 2010) the effects of cost-cutting in the provision of legal aid are considered in depth. Solicitors were asked to share their experiences of how the system works in practice in order to demonstrate where the problems lie. In general, most respondents echoed the sentiments of one solicitor who said that:

“I accept completely that there was a need for reform but the cutbacks have gone too far” (Kemp, 2010).

The report found that the impact of cost-cutting includes many criminal defence practices either downsizing or folding, and large firms cutting back on their criminal law departments (Kemp, 2010).

The Kemp report also expressed concern at the reduction in time solicitors spent with clients. Particularly in Scotland, with the introduction of fixed fees, many solicitors reported a sizeable reduction in the time they could spend with clients and were concerned about the impact this has on client care and support. One solicitor demonstrated this in stark terms by saying that:

“If somebody who may get the jail, whose life may be ruined deserves half an hour of my time, they’re going to get 3 minutes of my time”(Kemp, 2010).

Whilst underlining that a reduction in client contact is not always detrimental, the report made clear the dangers in involved:

“The likelihood is that because corners are being cut, because the defence do not have the funding available to carry out full and thorough investigation, there may be a greater number of cases in which points are missed which result in advice being given to plead guilty where perhaps the better advice might have been to proceed to trial or that perhaps witnesses are not brought to trial and there is likely to be a number of people convicted who would not otherwise have been convicted” (Kemp, 2010).

The importance of having both the time and the necessary funding is particularly strong in cases involving ‘vulnerable’ clients. The report identifies something of a dilemma for solicitors as whilst ‘vulnerable’ witnesses require more time and attention a fixed fee system will not pay them any more for the extra time and effort that has been shown.

Participants involved in this scoping project who had experienced attempting to seek legal advice and access legal aid, were also less than positive about their experiences. Those living in rural areas highlighted the difficulty in accessing lawyers who would agree to take on human rights cases on legal aid. Most participants felt that access to quality legal advice depended on being able to afford to pay for it. Members of more marginalised communities such as Scottish Gypsy/Travellers also highlighted difficulty in accessing legal advice or lawyers to take their cases:

I actually had an executive director saying to me you can't get a solicitor, when they were putting my rent up £34, to £46 to £58, to £62 to £76 and then up to £84 before they even let us into the chalets and I said no I cannae, but do you see this file here, it is all in order and I am just on my way to put the writ in the Court myself in the next 10 minutes unless I see A. the director of housing, B. the head of housing and C. the convener. I saw all three within ten minutes. You see that's how sure they are – you can't get a solicitor and if not how many people will take them on? Because if you do take a case and you lose it you are liable for all the costs because you cannot apply for legal aid, so that system in itself is a breach of Article 6.1.3 of the ECHR, because you should have access to the legal aid system ... You cannot get access to justice and that is a huge thing because it means they can discriminate against you any way they want.

Kathleen, Scottish Gypsy/ Traveller

In this scoping project, participants described many issues within the area of Access to Justice with which they held concerns. The one with which the majority were least satisfied, was the cost often associated with accessing justice, which many found excessive. For example, the following extract is typical of the views of a number of female participants who were survivors of domestic abuse or stalking:

...[it is] a disgrace that any one should have to pay for protection. Women have to pay for civil protection orders. Many victims are on low or moderate incomes and with the low legal aid threshold they have to meet the heavy costs themselves. Many cannot afford civil protection orders, which cost approximately three thousand pounds. Lawyer's fees are usually in the region of £220-350+ an hour. Low or moderate income earners below the legal aid threshold limit are denied protection where there is no prosecution. I have spoken to many women who have left abusive relationships with little evidence to build a case but nonetheless the abuse continues and they cannot afford the heavy cost of civil protection orders.⁶⁴⁸

Emma, Victim/survivor of crime

3.8.3.1.4 Public Interest & Legal Aid

Public interest litigation concerns an issue that affects not only the individual or organisation involved, but also the wider public. A common example is in relation to environmental matters. Issues related to standing to bring public interest cases before a Court and the costs of bringing such litigation have emerged from the research.

3.8.3.1.4.1 Standing in Public Interest Litigation

Traditionally, in order to bring a case before a Court in Scotland one must have 'title and interest'⁶⁴⁹ to do so. As one leading QC has explained:

"If the question involves the rights or the status of the petitioner, there is interest to sue; but if not, not".⁶⁵⁰

Concerns have been raised that this standard appears to provide limited grounds for acting in the public interest. As the same QC noted,

“Law here has indeed retreated since the nineteenth century, when the Scottish Rights of Way Society established the public right to litigate public rights of way.”⁶⁵¹

The recent case of *Forbes v Aberdeenshire*⁶⁵² was raised by a resident in the area of Aberdeenshire in which Donald Trump wished to develop a golf course. It was claimed that the development would have a significant impact on an area of Special Scientific Interest. However, Mrs Forbes’ claim was denied as she lived a kilometre away from the proposed site.

The UK Supreme Court decision on the legality of the Damages (Asbestos-related Conditions) (Scotland) Act 2009 passed by the Scottish Parliament also addressed the issue of standing in public interest cases. The approach taken by the Supreme Court in the *Axa*⁶⁵³ case appears to move Scots law closer to the English model of public standing rules.

In reaching its decision, the Supreme Court had to consider whether the Scottish system of ‘title and interest’ allowed proper access to justice and concluded that:

“A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.”⁶⁵⁴

It has been suggested⁶⁵⁵ that this decision will enable civil society organisations, individuals and public interest groups much greater access to Court in order to argue cases in the public interest.

Access to environmental justice was considered in the Gill Review (Donnelley, 2009c) which found that the rules on standing and funding for such matters should be examined carefully. It concluded that the current system is “*too restrictive*”, lacking in clarity and has the effect of hindering access to justice in such cases.⁶⁵⁶ Furthermore, the Gill Review acknowledges that the threat of having to pay the opposing party’s costs can present a major hurdle to litigants in public interest cases, acting as a deterrent to accessing legal remedies to environmental problems (Donnelley, 2009d). In response the Review called for a clearer system of operation for Protective Expenses Orders in Scotland (limiting the financial liability of claimants) (McCartney, 2010a).

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁶⁵⁷ provides in Article 9 (4) that procedures in environmental cases must be “*fair, equitable, timely, and not prohibitively expensive*”. A series of findings on the UK by the Aarhus Convention Compliance Committee have found that the allocation of costs is unfair and renders the system as a whole prohibitively expensive. Communications considered by the Compliance Committee related to cost orders which have resulted in claimants being responsible for the full costs of litigation (in at least one case amounting to nearly £40,000).⁶⁵⁸

Although the cases involved procedures in England, similar issues have been raised in Scotland, including in a petition to the Scottish Parliament by Friends of the Earth Scotland and others.⁶⁵⁹

The European Union partly incorporated the Aarhus Convention via the Public Participation Directive. Similarly finding the UK not in compliance in respect of the

prohibitive costs of litigation, the European Commission referred the UK to the European Court of Justice in April 2011.

These developments have led to consultations in all UK jurisdictions on the issue of costs in environmental matters. In Scotland the consultation was limited to matters within the ambit of the European Public Participation Directive (in England and Wales and Northern Ireland the consultations extended to any case falling under the Aarhus Convention). The Scottish Government proposed to introduce specific rules of the Court of Session on Protective Expenses (Costs) Orders, limiting cost orders to £5,000. Some from the Coalition for Access to Justice for the Environment continue to consider that this amount, combined with litigants own fees (which are estimated by the UK Ministry of Justice to be in the region of £30,000) remains prohibitive.⁶⁶⁰

SHRC has similarly expressed concern at the limited nature of the Scottish Government's proposals. In particular it has noted that:

"...environmental inequality is often [linked] with social inequality.⁶⁶¹ There is evidence of a [disproportionate] distribution of industrial pollution sites in deprived areas and near to deprived populations. In particular, waste sites are disproportionately located within deprived communities. So, people in the most deprived areas are far more likely to be living near to pollution sources than people in more affluent areas.⁶⁶² As a consequence, the suggested limit of PEOs (£5,000) [may] still be too high, and [may] remain prohibitively expensive for people living in the most deprived areas of the country" (SHRC, 2012e).

A range of sources have pointed to problems in securing funding to raise public interest litigation. For example, it has been said that regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 makes it extremely difficult for persons who have a joint interest with others to successfully claim legal aid (Adebowale, 2004). To do so, it must be shown that the person making the application would be seriously prejudiced in their own right if legal aid were not granted.⁶⁶³

This requirement may create barriers to accessing legal aid in public interest cases. Further, the guidance notes on this regulation are no more encouraging;

"It may be unreasonable to make legal aid available to a person to litigate, as a private citizen, at public expense, about something that is obviously not exclusive to him or her. Examples could be fluoridation of public water supplies, noise generated by a large social or cultural event, closure of public leisure facilities."⁶⁶⁴

As such, McCartney (2010b) concludes that satisfying all the criteria for legal aid in this area is "virtually impossible".

3.8.4 Equality of Arms

Equality of arms is an important aspect of a fair trial, as protected by Article 6 of the ECHR the essence of which the ECtHR has described as being that one party should not be placed "at a substantial disadvantage vis-à-vis his opponent."⁶⁶⁵ It aims to ensure that both parties in a case are given the same opportunity to present their arguments and thus, for example, can both call witnesses, cross-examine witnesses and have equal access to evidence.

Equality of arms can require that one party in a case discloses information to the other. For example in the case of *Kerojarvi v Finland*⁶⁶⁶ a lack of disclosure of information including a

legal opinion on an important aspect of the case to an unrepresented applicant was seen to render the proceedings unfair.

The duty to disclose information can become problematic when information is held back on the grounds of public interest. Thus disclosure of relevant information is not an absolute right and matters such as national security, protection of witnesses and jeopardising on-going police investigations can restrict disclosure.⁶⁶⁷ In such cases “*only such measures restricting the rights of the defence which are strictly necessary*” are competent (Reed and Murdoch, 2011).

The Criminal Justice and Licensing (Scotland) Act 2010 contains the current disclosure regime for Scotland. The Crown must disclose all material information which would materially weaken the Crown’s case, materially strengthen the accused’s case or would form part of the evidence led by the Crown⁶⁶⁸. Constant review of disclosure must be made as the case proceeds and new information may come to light. An exception exists for “*sensitive information*”⁶⁶⁹ which is defined as information which might cause serious injury or death to a person, interfere with on-going criminal investigations or information which it is not in the public interest to disclose.

In *Holland v HM Advocate*⁶⁷⁰ it was considered that allowing the Crown alone to decide whether or not to disclose previous convictions and outstanding charges of witnesses was not compatible with Article 6, and that the defence is entitled to such information which is material to the proper preparation and presentation of the defence. It remains open to the defence to request disclosure of other material it considers relevant to the proper preparation and presentation of the case and such disclosure will be determined by the Court. Further, in *Sinclair v HM Advocate*⁶⁷¹ it was shown that police statements made by witnesses to be called at trial will always be material evidence and should be disclosed.

Outstanding issues remain on the issue of disclosure. First, the disclosure of previous convictions impacts not only on Article 6 rights to a fair trial but also on Article 8 rights regarding privacy. It has thus been noted that,

“A deeper analysis will now be necessary to establish how the Art 8 privacy rights of witnesses are to be reconciled with the new disclosure regime... It seems unavoidable that detailed guidelines... will need to be negotiated by the Crown Office and the various agencies in the criminal justice system, in particular with the Law Society of Scotland and the Faculty of Advocates” (Raitt and Ferguson, 2006).

The Crown Office guidelines on disclosure attempt to address these concerns. On deciding whether to disclose aspects of previous criminal convictions the Crown must consider if the information is material to the case; any aspects of the criminal history are sensitive; and any public interest reasons for non-disclosure.⁶⁷²

Secondly, the definition of relevant material which has to be disclosed requires consideration. Statements from witnesses may be deemed required whilst the question of disclosure of medical or mental health records in sexual assault cases might be problematic. The process of precognition may result in the Crown becoming aware of further material which it is obliged to disclose. The rule that precognitions are not considered to be statements of the witness means that the information will be disclosed by the Crown in a form which the defence cannot readily utilise in cross-examination. Effective access to justice and the right to a fair trial, demand that the rules on disclosure are carefully drafted and applied.

3.8.5 Access to Justice for Particular Groups⁶⁷³

It is of fundamental importance to access to justice generally, and the requirements of Article 6 in providing a fair trial, that the individual needs of witnesses, suspects and accused persons are taken into account. This is particularly significant where people might be considered 'vulnerable', in the strictly legal definition of the word,⁶⁷⁴ for example, due to mental or physical disability, age or the nature of case they are involved in. Ensuring access to justice for these particular groups is something that needs to be monitored closely.

3.8.5.1 Disabled People

The UN Convention on Rights of Persons with Disabilities (Disability Convention)⁶⁷⁵ exists to promote, protect and ensure the equal enjoyment of human rights by all persons with disabilities and to "*promote respect for their inherent dignity*".⁶⁷⁶ Effective access to justice is guaranteed in Article 13 which provides, amongst other things, that States Parties:

*"...shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages".*⁶⁷⁷

In order to do this training should be provided to those working in the justice system, including police and prison staff.

Capability Scotland and the Justice Disability Steering Group raised a number of concerns in relation to access to justice for disabled people (Justice Disability Steering Group, 2009b). Described below are the five key areas which were discussed by the steering group and consultations across Scotland.

Physical Access

The report noted that people with physical disabilities continue to face real and substantial barriers to access to the premises used by the justice sector. The report further notes that organisations within the justice sector also need to move away from a presumption that people with physical disabilities only equates to people in wheelchairs.

Access to legal advice

Particular concern was raised as to the availability of legal aid for disabled people in cases under the Disability Discrimination Act.⁶⁷⁸ It was recommended that the Government considers "*reviewing Small Claims procedures and the provision of legal aid for Small Claims cases taken under the Disability Discrimination Act*".

Information barriers

The accessibility of information regarding legal advice and the legal process was questioned. The provision of proper advice is important to anyone dealing with the police or the Courts and particularly so if understanding this information may be more difficult. The report gives the following example:

"A woman who had experienced mental ill-health for the first time after the death of a close relative described how a sheriff referred her for the professional mental health support that she needed after she committed a shoplifting offence whilst in mental crisis".

However, despite this it underlined the need for advice to be given in plain language which avoids jargon and complicated legal language insofar as this is possible. Whilst information currently exists from the Government⁶⁷⁹ and independent organisations,⁶⁸⁰ there is always more that can be done to improve this area of access.

Communication barriers

Communication from all aspects of the justice system needs to be clear and readily understandable. The report recommends the involvement of family members in communication in order to aid comprehension. It also shows the need for sign language users and interpreters to be utilised so that people can properly understand legal advice, correspondence and any other communications within the justice system. A positive example of this is provided in the report whereby:

“A woman with a learning difficulty was also full of praise for a solicitor who had supported her to understand Court proceedings having liaised appropriately with her advocacy worker to make sure all her communication needs were met.”

Further recommendations highlighted the need for disability equality training which would include training on avoiding assumptions based on the way that people might look or sound. Participation in a jury was also seen as a difficulty and improvements in communication to aid this were sought.

Attitudinal barriers and rights

In demonstrating the importance of attitudinal changes the report gives the example of a woman who was arrested due to apparent violent behaviour while under the influence of alcohol. In fact she had been trying to communicate using sign language. Assumptions about individuals are at issue here and the report recommends training to ensure improvement in this area, alongside more funding for advocacy services. (Justice Disability Steering Group, 2009a)

The Disability Convention extends to persons with mental disorders and intellectual disabilities. The Mental Welfare Commission report into the treatment of Ms A (Mental Welfare Commission for Scotland, 2008c) provides a strong picture of some of the problems faced in ensuring access to justice for people with intellectual disabilities. Ms A was a 67 year old woman with a learning disability who had been in local authority care since she was eight years old. An MWC investigation began in 2006 after Ms A reported being raped and that a number of similar incidents may have taken place. The initial investigation found that the various services involved in looking after Ms A *“had been unable to protect her from a series of serious sexual assaults”* (Mental Welfare Commission for Scotland, 2008c) and that this failure to prevent and to respond to these incidents amounted to a denial of access to justice.

The problem was exacerbated by the fact that no-one was prosecuted for the offences and Ms A was placed in a protective regime that restricted her movements and, according to the MWC, *“effectively deprive[d] her of much of her liberty”* (Mental Welfare Commission for Scotland, 2008c). Restrictions meant that Ms A could barely leave home without an escort and had implications regarding Article 5 of the ECHR which protects the right to liberty and security of persons. The MWC noted that one of the reasons for its investigation was the belief that cases such as this are not uncommon.

Many of the issues raised in the Justice Disability Steering Group are relevant here. The MWC found that staff in agencies concerned with care were not sufficiently aware of their responsibilities in reporting crimes and had *“varying degrees”* of knowledge of the required

law and procedure. Communication between agencies was found to be lacking and attitudes towards those with learning difficulties were questioned with the report claiming that negative attitudes compromised both the quality of care provided and access to equal protection under the law (Mental Welfare Commission for Scotland, 2008c).

Professional advice given in the course of Ms A's case found that she would not be able to act as a competent and reliable witness, resulting in the Procurator Fiscal deciding not to bring the case to trial. MWC expressed concern with the manner in which prosecution authorities may determine that people with learning disabilities who are victims of crime may not be competent or reliable witnesses (Mental Welfare Commission for Scotland, 2008c). The result:

“can be failed prosecutions (frustrating the positive duties to investigate and prosecute sexual offences) and the subjection of the victim to restrictive protection regimes (significantly limiting her ability to live independently)” (SHRC, 2011c).

The previous competence test for witnesses had been abolished prior to the MWC report. It is now for a judge or jury to determine the reliability and credibility of a witness based on the case as a whole.⁶⁸¹ Despite this legislative change MWC argued that more could be done through proper training and support so that witnesses in the situation of Ms A could competently act as a witness and that the current system continues to deny access to justice to those in Ms A's position (Mental Welfare Commission for Scotland, 2008c). It recommended that the justice system examine its findings and consider additional guidance and amendments to legislation to enhance access to justice for those with learning disabilities. In particular, it asks that the Procurator Fiscal service assesses capacity very carefully and takes steps to try and encourage participation in Court proceedings.

3.8.5.2 Survivors of Domestic Abuse

One area of access to justice for particular groups in Scotland which has been positively received has been the introduction of pilot dedicated domestic abuse Courts. This scheme began in Glasgow with a Courtroom set aside each day for such cases and officiated by experienced staff with knowledge of domestic abuse cases. Some of the key aims of the scheme are to:

- Increase survivors' and witnesses' satisfaction with the criminal justice system.
- Improve the co-ordination of information across the criminal justice system.
- Reduce attrition rates.
- Reduce repeat victimisation and recidivism (Reid Howie Associates, 2007b).

The research reinforced the benefits of the specialised Court noting that 95 per cent of the accused were male and 85 per cent of the survivors were female and that children were present during 24 per cent of incidents of abuse (Reid Howie Associates, 2007b).

The domestic abuse Court makes extensive use of support agencies both as cases are being brought to Court and during the hearings themselves. Support and advocacy groups provide help to survivors of abuse, ensure children are safe and help to ensure that the survivor's evidence and opinion on the way forward can be properly presented in Court. The report found that:

“The speed of processing cases was much faster in the domestic abuse Court than the comparison Courts, with an intermediate diet held within 29 days in 76 per cent of cases (compared to 20 per cent), and nearly three quarters of cases calling

reaching a trial diet in 6 weeks, compared to only 13 per cent in the comparison Courts”(Reid Howie Associates, 2007b).

The use of specialised staff and support agencies were seen as significant factors in this.

3.8.5.3 Asylum Seekers and Immigrants

In relation to immigrants and asylum seekers, the Scottish Government had through its *Access to Justice Agenda*, been committed to providing access to legal advice and representation (PA Consulting 2006) and, through SLAB, provided legal aid to eligible immigrants and asylum seekers needing legal advice and representation. It provided free advice and representation to those individuals not eligible for legal aid, primarily through the Immigration Advisory Service in Glasgow.

Asylum seekers and those who support them who took part in this scoping project reported significant problems in gaining access to legal representation:

Anna has had the other problem of having been here long enough for solicitors to drop her case, they like the quick easy cases. So Anna has been dropped by four solicitors since she's been [here], with big big terrifying gaps in-between. So often they would say oh sure I'll take a case and they [asylum seeker] would go and present their case and they [lawyer] would say no, I'm not taking it. Or worse, I remember a case, where the solicitor took the case and then a month passed and when they heard nothing they called back because the solicitor had taken some of the paperwork, they were told, no sorry I decided not to take the case, and so they had not even informed them. For my women most of them have spent 25-50 per cent of the time they have been in the UK after they had officially claimed asylum without representation. For Anna, if someone had owned her case, they would have done what you or I would do and think outside the box but no one has owned her case she has just been moved on.

Claire, Support worker for asylum seeking women

In response to concerns raised about the availability of and access to legal representation to asylum-seeking children, a new service supported by funds from the Paul Hamlyn Foundation, was established in 2012. This service (The Young Persons' project) provides legal advice to asylum seekers, refugee and migrant children and young people up to the age of 25. This service has been welcomed by children's organisation and has reportedly made a notable impact in terms of capacity and representation for this group of young people (Together, 2012). Together have recommended that the Scottish Government that the Scottish Government:

“take steps to ensure that sufficient high quality specialised legal representation is in place for children seeking asylum and for protecting and representing the victims of child trafficking” (Together, 2012).

3.7.5.4 Questioning 'Vulnerable' Suspects

Anyone charged with a criminal offence or detained by the police for questioning must be able to effectively understand and exercise their rights. The police must, therefore, be aware of how to identify people who will require extra support in order to do this and be aware of how support needs will differ widely in some cases. These issues were considered in the Carloway Review as advised by consultation submissions from a number of organisations (Carloway, 2011).

At present there is no definition of a “vulnerable’ suspect’ although such provision does exist for ‘vulnerable’ witnesses (see below in the next section). In order to ensure Article 6 rights to a fair trial are not compromised Carloway (2011) identified three requirements as regards suspects:

1. Prompt of identification of ‘vulnerable’ suspects
2. That ‘vulnerable’ suspects fully understand their rights
3. That ‘vulnerable’ suspects are able to make informed decisions

This is particularly important during questioning, both in understanding the questions being posed and the implications of the answers which are given. Advice to police in identifying vulnerability is currently given by ACPOS, with a focus on physical and mental impairments (ACPOS, 2011).

In situations where a suspect is defined as ‘vulnerable’ the current system reacts by providing an appropriate adult to support the suspect. Scottish Government guidance describes the role of an appropriate adult as being

*“...to facilitate communication between a mentally disordered person and the police and, as far as is possible, ensure understanding by both parties”.*⁶⁸²

This is achieved by speaking with the suspect and communicating with the police and solicitor in order to ensure the needs of the suspect are met and evidence can be effectively given. An appropriate adult does not provide legal advice but helps ensure the suspect understands advice given by lawyers (Carloway, 2011).

Carloway (2011) does not believe that an exhaustive rule that must be followed by the police in determining vulnerability is required but it is enough that discretion is used. The review recommended that a statutory definition of “vulnerable’ suspect’ is created along the lines of;

“a person who, in the view of the police officer authorising the suspect’s detention, is not able to understand fully the significance of what is said to him/her, of questions posed or of his/her replies because of an apparent (a) mental illness; (b) personality disorder; or (c) learning disability” (Carloway, 2011).

It is thus hoped that with training, a statutory definition and the continued provision of appropriate adults as support the rights of ‘vulnerable’ witnesses during questioning can be assured.

A final aspect regarding questioning is whether an accused is capable of standing trial at all. The Criminal Justice and Licensing Act 2010⁶⁸³ will amend the current law⁶⁸⁴ in relation to pleas which would prevent an accused standing trial. Currently the grounds of ‘insanity’ are used. The amendment will change this to a test of unfitness for trial based on the physical or mental condition of the accused. Unfitness must be shown on the balance of probabilities. Broadening the scope from insanity to incapacity appears to be more in line with the requirements of a fair trial under Article 6.

3.8.5.5 ‘Vulnerable’ Witnesses

ECtHR case law has demonstrated the importance of effective participation in trials. This goes further than mere presence at proceedings but requires that participation in proceedings is provided for insofar as is possible.⁶⁸⁵ In contrast to the situation with ‘vulnerable’ suspects, ‘vulnerable’ witnesses are considered under legislation and a definition exists in Scots Law.⁶⁸⁶ This identifies ‘vulnerable’ witnesses through

consideration of whether the quality of evidence a person could provide would be diminished by either 'mental disorder' or 'fear or distress in connection with giving evidence at the trial'.

Mental disorder is assessed with reference to mental health legislation⁶⁸⁷ and includes mental illness, personality disorder and learning disability. It does not include:

“sexual deviancy, dependence on alcohol or drugs or behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person” (Carloway, 2011).

Fear or distress in giving evidence is more discretionary and could include survivors of particular crimes, such as sexual offence or domestic abuse, or witnesses who feel intimidated.

The legislation provides for a number of measures which can be utilised in Court in order to support the witness in giving evidence. Examples include the use of screens or video links to prevent witnesses appearing in Court, the use of prior statements rather than physical appearance in Court and the provision of supporters during the trial.⁶⁸⁸ In relation to children these measures can allow the Court to sit in a less intimidating setting so as to lessen the feeling of intimidation.

Beyond legal measures, all Courts in Scotland have a Witness Service staffed by specially trained volunteers. Based in the Court building, they can give guidance and support, specific details of the process and procedure of Court and arrange Court visits to reduce apprehension prior to trial. Guidance provided by the Procurator Fiscal services highlights the need to identify 'vulnerable' witnesses and take measures to ensure they are adequately supported. This extends to the type of questioning which is used and encourages participation through ensuring supporters are provided to help people give evidence. There is great stress on not assuming that someone will be incapable of giving evidence but rather doing all that is possible to ensure the evidence can be heard.⁶⁸⁹

3.8.6 Appeals

Effective access to justice not only requires that an individual has the ability to begin proceedings but also that they have the right to appeal the outcome of proceedings. In international law, the right to appeal is enshrined in the International Covenant on Civil and Political Rights which provides that:

“Everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law”⁶⁹⁰.

In terms of the ECHR, the right to a fair trial under Article 6 applies equally to appeals and trials and one of the key aims of this right is the prevention of miscarriages of justice (SHRC, 2011f). The right to an effective remedy under Article 13 of ECHR also requires the right of appeal.⁶⁹¹

3.8.6.1 Current Law

Under current Scots law a person convicted of an offence can appeal against the conviction itself or the sentence imposed as a result on the grounds that there has been a miscarriage of justice.⁶⁹² Examples of miscarriage of justice include: insufficient evidence, misdirection of the jury and the emergence of new evidence. Sentences can be appealed on the grounds of competence or on the grounds that the terms of sentence are excessive.⁶⁹³

A limitation on the right to appeal is the time limit with which an applicant must comply. In cases involving the most serious crimes (solemn cases),⁶⁹⁴ an appeal is started by lodging a Notice of Intention to Appeal within two weeks of the final determination of the case.⁶⁹⁵ Thereafter, there is a period of eight weeks within which to lodge the final grounds of appeal.⁶⁹⁶ Procedure for appeals in summary cases⁶⁹⁷ are more complex, however, similar time limits apply. An applicant can apply for an extension to the time limits at any stage⁶⁹⁸ (even years later) and must specify why they have failed to comply with time limits and state the grounds for the appeal.⁶⁹⁹

Further avenues of appeal also exist. The *nobile officium* is a general provision which provides the High Court or the Court of Session with an equitable jurisdiction to reconsider its own decision in circumstances which are “*extraordinary or unforeseen and where no other remedy is provided for by law*”.⁷⁰⁰ This is an old legal remedy which is still sometimes utilised in relation to both solemn⁷⁰¹ and summary cases.⁷⁰²

More frequently used is the Scottish Criminal Cases Review Commission (SCCRC). The SCCRC reviews and investigates cases where it is alleged that a miscarriage of justice has occurred. This can be in relation to a conviction, the length of a sentence or any situation which it is in interest of justice to consider.⁷⁰³ The test is thus twofold: that there is an arguable miscarriage of justice and that it is in the public interest for the case to be reconsidered. The SCCRC only has the power to investigate cases decided by Scottish Courts. If it is found that there is merit in an allegation then the case will be referred to the High Court and reconsidered.⁷⁰⁴ The SCCRC receives about 110 applications a year and refers around 8 of these to the appeal Court and around two thirds of references result in convictions being quashed (Smith et al., 2010b).

Appeals were considered at length in the Carloway Review (2011) and recommendations made regarding the impact of Article 6. In the case of late appeals it was recognised that the system must strike the correct balance between sensible time periods and access to justice. As such, Carloway (2011) argues that if a Notice of Intention to Appeal is late it should be allowed if specific cause is shown and the appeal has a likelihood of success. In essence, in order to be satisfied that a miscarriage of justice had occurred, the Court must apply a test similar to that employed by the SCCRC.

Carloway recommended that whilst a greater emphasis should be placed on bodies such as the SCCRC the *nobile officium* should also be retained:

“...to deal with circumstances which are truly extraordinary or unforeseen and where there is no other remedy available” (Carloway, 2011).

The test that the SCCRC currently use to decide on the merit of cases was seen as appropriate and useful by the review.

Another issue regarding appeals is the ‘gate-keeping’ role of the High Court which was introduced by the 2010 emergency legislation. Fearing a flood of applications on *Cadder* points to the SCCRC, and therefore subsequent referrals to Court, the High Court was given the power to reject referrals from the SCCRC where it was not in the interest of justice to consider them.⁷⁰⁵ This power has not yet been exercised.

The emergency legislation also required that the SCCRC take finality and certainty into account when determining whether to refer cases to the High Court.⁷⁰⁶ These concerns

are important to survivors' rights (see below) and to what Carloway described as the "public perception" of an efficient justice system. However, SHRC raised concerns during the passage of the emergency legislation that the combination of these provisions aimed at the SCCRC and the High Court may have a "chilling effect" on the review of potential miscarriages of justice.⁷⁰⁷

The Carloway Review found that the SCCRC has a very strong record in only referring appropriate cases and avoiding frivolous or spurious complaints, with no indication from any source that suggested otherwise (Carloway, 2011). In addition, the flood of cases which was predicted post-*Cadder* did not materialise with only 52 being referred to the SCCRC of which none have progressed to Court (Carloway, 2011). As such the Review recommends the repeal of the gate-keeping role of the High Court enacted in the emergency legislation.

3.8.6.2 Role of the UK Supreme Court on review of human rights issues in Scots criminal cases

There has recently been criticism of the role of the UK Supreme Court in reviewing human rights issues arising from Scottish High Court cases. An example of this is the case of *Fraser v Her Majesty's Advocate*.⁷⁰⁸ On first consideration at the High Court it was found that his [Mr Fraser's] trial had not been unfair as regards Article 6. The Supreme Court on the contrary found that failure to disclose evidence to the defence was a violation of Article 6 constituting a miscarriage of justice. The result was that the Supreme Court called on the Court of Appeal in Edinburgh to consider a new prosecution, which it subsequently did.⁷⁰⁹

The case provoked heated debate⁷¹⁰ as to whether this judgment represented the Supreme Court interfering with Scotland's criminal justice system. The Scottish Government launched a review of appeals to the Supreme Court.⁷¹¹ The review concluded that whilst the Supreme Court should continue to have jurisdiction to hear appeals from the High Court in issues pertaining to Convention rights, its role should be clearly defined and limited. Thus the power of the Supreme Court should be limited to declaring whether or not there has been a breach of Convention rights and why. If a breach is found the case should be referred back to the High Court to decide on which course of action to take.

Overall, the SHRC would argue that the Supreme Court is perhaps best placed to provide authoritative interpretation of Convention rights and that its current role as final court of appeal should be maintained. There is a concern that if this situation was to change then constituent parts of the UK would interpret human rights issues in different ways leading to varying levels across the UK regarding human rights protection. A further concern raised by the SHRC is that that the proposed solution (that certification be required for a criminal case to be appealed to the Supreme Court on human rights grounds, and that the Supreme Court be limited to remitting the case to the High Court to determine remedies) would act as a limitation on access to justice and lead to inequality in remedies for human rights violations across the UK.⁷¹²

3.8.7 Investigations & Corroboration

3.8.7.1 Investigations

The duty on States to investigate alleged human rights abuses takes different forms depending on which human rights are at stake.

In terms of Article 2 (the right to life) and Article 3 (prevention of torture, inhuman and degrading treatment) of the ECHR, as the ECtHR stated in the *Asenov*⁷¹³ case:

*“Where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision... requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible”.*⁷¹⁴

The nature of what is required to constitute an effective official investigation varies depending on the gravity of the harm and the identity of the perpetrator. The key requirements however are that: an effective investigation is sufficient to identify any failure of the State to prevent risk to life or of serious ill-treatment, or to protect an individual from a real and immediate threat of which it was or ought to have been aware, to attribute blame and distribute an appropriate punishment.

Criminal investigation is generally thought to satisfy this obligation, but it may not always be required.⁷¹⁵ An effective investigation must be:⁷¹⁶

- Prompt: The investigation must be carried out within a reasonable timescale.⁷¹⁷
- Carried out at the initiative of the State.⁷¹⁸
- Independent: the persons who are responsible for the investigation and to carry it out must be independent from the institutions and persons implicated.⁷¹⁹ This means not only hierarchical but also practical independence.⁷²⁰
- Capable of leading to a determination of the identity of those responsible and to punishment of those persons. As mentioned above, the standard for the State in this regard is “due diligence” i.e. it must take reasonable steps as available to it to secure evidence concerning the incident and determine any pattern of practice which may have brought about the violation.
- Open to public scrutiny: There should be a sufficient element of public scrutiny of the investigation or its results so as to secure accountability in practice as well as in theory. The survivor or next of kin must be involved in the procedure to the extent necessary to safeguard his or his legitimate interests.⁷²¹
- Accessible to the survivor: the complainant must have effective access to the investigatory procedure.⁷²²

In Scotland Fatal Accident Inquiries (FAIs) are a primary method of investigation in cases of sudden, suspicious or unexplained death, or death in circumstances that give rise to serious public concern.⁷²³ Decisions on whether these discretionary inquiries are held are made by the Lord Advocate.⁷²⁴

Lord Cullen (2009) has questioned:

FAIs are held in public, use inquisitorial proceedings take place before a sheriff in the sheriff Court and result in a public hearing of the evidence discovered in prior investigation. An FAI does not, however, result in binding findings and it is debatable whether FAIs therefore, meet the requirements of an effective investigation. Lord Cullen, however, in his review in 2009, declared that FAIs are compatible with the requirements of an effective investigation under Article 2 of the ECHR (Cullen, 2009).

3.8.8 Corroboration

To gain a conviction at present there must be one source of evidence, whether direct or circumstantial, and that evidence must be confirmed, or corroborated, by a second piece of evidence. Therefore,

“each “essential” or “crucial” fact, requiring to be proved, must be corroborated by other direct or circumstantial evidence” (Carloway, 2011).

The Carloway Review recommends abolishing corroboration finding that it is preventing cases from coming to Court due to lack of sufficient evidence. Carloway (2011) states that he is “...in no doubt that the requirement of corroboration should be entirely abolished for all categories of crime” and that it be replaced with a test of sufficiency of evidence.⁷²⁵

Reaction to this recommendation has been particularly divided. For example SCOLAG (2011b) expressed concern that the review does not suggest any additional safeguards to counteract the abolition of corroboration:

“In England these include pre-trial committal proceedings, the close regulation of police investigations by PACE, the ability of judges to exclude prejudicial or unreliable evidence in some circumstances and the size of majority required for conviction” (SCOLAG, 2011b)

In general, SCOLAG echoed the concerns of JUSTICE (2011) that the Carloway Review was insufficient and too limited in its research and scope to recommend such a fundamental change to Scots law. In turn SHRC noted that:

“The recommendation to abolish corroboration for all crimes would be a radical change in Scots Law and therefore it is important to take time properly to consider the implications for those accused of crime, victims and witnesses, the police, and the Courts.”⁷²⁶

Particular concern exists around the prosecution of sexual offences, as noted previously by:

“...further exploration and research may conclude that the requirement of corroboration also acts as a protection to the complainer – in that it provides an independent check on credibility and reliability which would otherwise be absent. Thought should be given as to whether abolishing corroboration may result in a complainer who was the only source of evidence being subject to far greater scrutiny in terms of quality than would otherwise be necessary”(SHRC, 2011f).

Rape Crisis Scotland welcomed Carloway’s recommendation to abolish corroboration, expressing concern at prosecution rates for sexual offences, citing Scottish Government statistics which show that the number of people with a charge proven for rape or attempted rape fell by over 30 per cent in 2010/11.⁷²⁷

The Scottish Government has opened a consultation⁷²⁸ with the aim of further exploring any change to corroboration with Justice Minister Kenny MacAskill describing potential changes as ‘monumental’.⁷²⁹

3.8.9 Juvenile Justice

3.8.9.1 Child Suspects

The ECtHR has found that children who have been charged with criminal offences must be dealt with in a manner which takes full account of their age, level of maturity and intellectual and emotional capacity.⁷³⁰ Steps must be also taken to ensure that children are able to understand and participate in proceedings (SHRC, 2011f). This follows the principles of the United Nations Convention on the Rights of the Child (CRC),⁷³¹ which also stresses that children should be given the opportunity to express their views and that detention of children should be seen as a last resort.

The Scottish Government has produced guidelines on dealing with children taken into custody⁷³² which state that:

“A child who has been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer or one of the child’s parents or, if no parent is available, another person whom the child trusts. The parent or this person may be excluded if suspected of involvement in the criminal behaviour or if engaging in conduct which amounts to an obstruction of justice” (Scottish Executive, 2003a).

Under the CRC a child is defined as anyone below the age of 18, *“unless under the law applicable to the child, majority is attained earlier.”* In Scottish criminal law a child is defined as a person under 16 or a person aged 16 to 17 who are subject to a supervision requirement.⁷³³ However, in situations where a child is placed in detention the definition is a person under 16 years of age.⁷³⁴

As with all cases involving detention, Article 6 of the ECHR requires the right to a fair trial and therefore fair proceedings as a whole. In ensuring fairness, the child must be properly provided with legal assistance⁷³⁵ and must not be intimidated during questioning.⁷³⁶ In *T v UK*⁷³⁷ it was found that the child involved in the case was ‘vulnerable’ and intimidated by procedure, therefore, no matter how much skilled legal advice was provided to the child in subsequent proceedings the trial remained fundamentally unfair. Although possibly difficult to achieve, the whether FAIs meet the requirements of an effective investigation Commission argues that:

“the priority must be providing a system that maximises the opportunity for the child to understand and effectively exercise his rights on his own behalf” (SHRC, 2011f).

The age and vulnerability of a child requires that the issue of waiver of rights must be handled very carefully. The ECtHR has found that;

*“a waiver by [a child on] behalf of an important right under A6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequences of his conduct”.*⁷³⁸

Whilst this does not differ a great deal from the aforementioned requirements for an adult witness to waive his or her rights, the case suggests that particular scrutiny will be placed on the decision of a child to waive his or her rights.

The Carloway Review (2011) considered the issue of child suspects directly and has developed recommendations. It was underlined that whilst not ideal, a police station is probably the best place to interview children due to convenience, the importance of

supervision and ability to record an interview. The current system requires the police to let the child's parent or guardian know of the detention.⁷³⁹ Carloway (2011) further noted that under Article 6 it would be unlikely that any police interview with a child without the presence of a parent or responsible person would be considered fair.

The Review recommends an extension of the definition of child in cases involving detention. Carloway (2011) considers that any person under the age of 18 should be considered a child and the rules of notifying parents and providing support should be extended accordingly. Finally, and in line with the general principles mentioned above, the *“decision to arrest and detain a child suspect should only be taken where there is no reasonable alternative[and]there should be firmer guidance on how to accommodate the needs of child suspects who are to be interviewed”* (Carloway, 2011).

3.8.9.2 Age of Criminal Responsibility

Setting the age of criminal responsibility has important implications regarding how early a child can come into contact with the justice system. In Scotland the age at which a child can be held criminally responsible and prosecuted in adult criminal courts is 12.⁷⁴⁰ However children can still be referred to the Children's Hearing system on offence grounds below that age.⁷⁴¹ When a child is under the age of 16 they will be dealt with by the Children's Hearing system, as discussed below, and can only be prosecuted at the decision of the Lord Advocate.⁷⁴²

The Crown Office and Prosecution Service issued guidelines in 2001 which underlined that discretion remains to refer cases to children's hearings if it is in the public interest to do so. In addition, guidance as to whether a person under 16 should be prosecuted offered examples on where this would be appropriate. These include very serious offences which would normally require a jury trial and serious road traffic offences when committed by children aged 15 (McCallum, 2011).

SHRC, and JUSTICE have expressed concern about the age of criminal responsibility in their submissions to Carloway (SHRC, 2011f, JUSTICE, 2011b). It was argued that the new provision preventing prosecution of children under 12 do not prevent children becoming involved in the children's hearing system (SHRC, 2011f). JUSTICE (2011b) suggests that all persons under the age of eighteen should be considered to be children and that twelve was still a low age at which responsibility should be attached to children. This issue has also repeatedly been raised by Together (formerly the Scottish Alliance for Children's Rights) (Together, 2011b, Together, 2012).

The Beijing Rules⁷⁴³ ask states to ensure that the age of criminal responsibility is not set too low and that emotional, mental and intellectual maturity are taken into account.⁷⁴⁴ The United Nations (UN) Committee on the Rights of the Child, in its authoritative interpretation of Article 40 of the CRC recommends that States:

“increase their lower minimum age of criminal responsibility to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level” .

(UNCRC, 2007, UNCRC, 2008a)

The Committee reiterated this in relation to Scotland in its Concluding Observations on the United Kingdom (UNCRC, 2008a).

This issue was also highlighted during the recent review of all the UK's human rights obligations at the Universal Periodic Review (UPR) in 2012 (UN Human Rights Council, 2012). These UPR recommendations were as follows:

- Consider the possibility of the raising the minimum criminal age (Belarus)
- Consider the possibility if raising the age of criminal responsibility for minors (Chile)

(UN Human Rights Council, 2012).

Children's organisation in Scotland are encouraged by the commitment of the Scottish Government in its Progress Report *Do the Right Thing* (2012), to give "fresh consideration to raising the age of criminal responsibility from 8 to 12" (Donnelly, 2009).

3.8.9.3 Children's Hearings

The Children's Hearing system has been operating in Scotland since 1971 and currently deals with the majority of offenders under the age of 16 and some cases involving 16 and 17 year olds. The system began on the approach articulated in the Kilbrandon Report (1964) which sought:

- a focus on the needs of the child
- the adoption of a preventative and educational approach to children's problems
- an emphasis on the importance of the family in tackling children's problems
- separating the establishment of disputed facts (through the Court system) from decisions on the treatment of children (through a new system of lay panels)

Source: (Kidner, 2010)

The system is now provided for under the Children's Hearings (Scotland) Act 2011 and aims to continue to reflect these guiding principles (Kidner, 2010). This widely-praised system is welfare-based and focuses on the child's best interests (Allison, 2009).

Children are referred to the Children's Hearing system where they are in need or care and protection or they have committed an offence and may require compulsory measures of supervision. To be referred to the system on offence grounds a child must be at least eight at the time of the offence. This age of criminal responsibility is one of the lowest in the world, although recent changes have raise the age at which a child can be prosecuted in the criminal courts to 12.⁷⁴⁵ During 2009-2010 a total of 10,012 children were referred on the grounds of committing an offence, with 90 per cent referred being over the age of 12. Of that number, 1,397 cases proceeded to a hearing and 104 children under the age of 16 were prosecuted in the criminal Courts (Kidner, 2010).

Since the introduction of Anti-Social Behaviour Orders (ASBOs)⁷⁴⁶ Children's Hearings now have the power to implement measures which restrict the movement of a child through electronic tagging. This can be to restrict movement from a particular place or prevent movement to a particular place and can only be utilised as part of a wider package of measures to prevent the child from re-offending. If the conditions of an ASBO are breached then this is treated as a criminal offence. Whilst adults can face prison for breaching an ASBO, children are reported to the procurator fiscal and a decision is made on the appropriate action.

Regarding ASBOs, the UK Parliament's Joint Committee on Human Rights questioned in 2009:

"the degree to which ASBOs hasten children's entry into the criminal justice system, before other strategies have been tried" (Joint Committee on Human Rights, 2009b).

The Joint Committee expressed further concern at:

“... the high number of children from especially ‘vulnerable’ and marginalised groups within the criminal justice system. The Government should review and explain why such a disproportionate number of children who are looked-after, Gypsies and Travellers or have autism, are present within the criminal justice system, and why existing strategies appear to be failing. Such children, who are already likely to have experienced significant disadvantage and even discrimination in their early lives, require specific and targeted measures and support, outside of the criminal justice system” (Joint Committee on Human Rights, 2009b).

The Joint Committee’s report was based on a review of the UN Committee on the Rights of the Child concluding observations on the UK which had recommended an independent review of ASBOs, with a view to abolishing their application to children (DTZ and Heriot-Watt University, 2007).

Carefully monitoring the use of ASBOs is important to ensure that they are not unduly restricting the Article 5 right to liberty and security of person and Article 8 right to private and family life.

3.8.9.4 Legal Aid

The granting of legal aid to participants in cases before the Children’s Hearing system is important in ensuring effective access to justice and a fair trial under Article 6. The Children’s Hearings (Scotland) Act 2011 makes provision for legal aid and states that it shall be available in three circumstances:

1. Hearings after the making of a child protection order
2. Hearings at which secure accommodation is to be discussed
3. Hearings held because a child is apprehended by police.⁷⁴⁷

These provisions came as a result of the *SK v Paterson*⁷⁴⁸ case in which it was made clear that to have effective participation in proceedings the awarding of legal aid is required. In cases involving children before the criminal Courts SLAB will decide on eligibility based on reasonableness, undue hardship requirements and the best interest of the child (Kidner, 2010).

Legal aid is awarded in respect of the child or a ‘relevant person’, or guardian. The test for being a relevant person can prove problematic. The test applied is whether a person has parental responsibilities and parental rights or, more generally, whether a person ordinarily had charge or control over the child.⁷⁴⁹ Difficulties were found in interpreting the general test, particularly with regard to unmarried fathers with contact orders allowing access to their children. Article 8 protects private and family life and domestic cases interpreting the relevant person rules conflicted on how to approach this issue.⁷⁵⁰

The 2011 Act has removed the general test and replaced it with an appealable process whereby people who are not parents can gain relevant person status by proving to the Children’s Hearing Panel that they have “*significant involvement in the upbringing of the child*”.⁷⁵¹ Questions remain as to whether, for example, unmarried fathers, grandparents or foster carers are given sufficient opportunity to take part in proceedings and claim legal aid under these rules.

There have also been concerns about the access that children and relevant persons are given to documents concerning their cases before the children’s hearing system. The right

of parents to receive all relevant reports was clearly shown in the case of *McMichael v UK*.⁷⁵² For children, the question arose in *S v Miller*⁷⁵³ wherein it was found that effective participation required that the child and relevant person be sent the same documents regarding the case as everyone else, i.e. the panel and any lawyers involved in the case. The 2011 Act follows this judgment and provides for this, with the proviso that anything that might cause distress to the child is redacted in the copy presented to them. Children under 12 are only sent documents at the request of their representatives (McCartney, 2010b).

3.8.10 Victims'/Survivors' Rights & the Right to Remedy

3.8.10.1 Victims'/Survivor's Rights

The human rights of everyone involved in the criminal justice system, survivors and witnesses as well as suspects, must be respected, protected and fulfilled. Nevertheless, there is a common perception that human rights law has failed to adequately protect survivors and has placed more emphasis on the rights of the offender. A 2006 report found that:

“three quarters of the public believed that the criminal justice system respected the rights of defendants, whereas only one third believed it met victims’ needs”(Reid Howie Associates, 2006).

Views of participants in this scoping project who had themselves been victims/survivors of crime underlined this perception. For example:

My expectations were that I would be treated fairly and that my rights as a human being would be respected. I would have access to information, the same range of resources and the same standards afforded to that of the man accused of stalking me... My experience of the criminal justice system was one of dismay and horror. If ever a system abused victims and denied ‘vulnerable’ people of their very basic human rights, this was it. The focus of the Criminal Justice System is purely on the accused or offender and the system has been structured for this specific purpose. It had provided a pathway for these people and none for the victims... My stalker’s rights were catered for at all levels. His right to a fair trial, his treatment within the system, his access to services, his human rights being respected and fairness surrounding his sentencing... My experience highlighted that offenders have rights and victims have policies and guidelines.

Emma, Victim/survivor of crime.

A 2006 report considered some of the concerns around survivor’s rights (Reid Howie Associates, 2006). A common complaint, and one which is also considered in the more recent Procurator Fiscal commitments, is that of the time taken for proceedings.⁷⁵⁴ Delays, especially delays which were not adequately (if at all) explained were seen to be a frequent frustration. Moreover, the funding and training of support agencies was stressed as particularly important (Reid Howie Associates, 2006). Support in difficult cases such as rape or child abuse is often the most difficult to provide and properly funded and skilled organisations are an absolute must in providing effective access to justice.

The ECHR and the Human Rights Act 1998, while establishing standards which seek to prevent human rights violations, also provide a strong framework for the rights of survivors of human rights violations which in some circumstances may be crimes. In combination

with UN standards on the rights of survivors of crime,⁷⁵⁵ human rights law and standards provides a strong framework of rights and obligations related to survivors.

The human rights of survivors of crime can help frame the design and implementation of the criminal justice system from the moment of reporting to the prosecution and sentencing, as well as the consideration of effective remedies. Among the relevant Convention rights, in this context, are Articles 2 (right to life) and 3 (right not to be subject to torture, inhuman and degrading treatment) of the European Convention of Human Rights (ECHR) which point to the positive obligation of the State to both prevent violations and carry out an effective investigation of situations involving these rights. Articles 6 (fair trial), 8 (respect for private and family life) and 13 (right to an effective remedy) of the ECHR are also relevant.

Article 34 of the ECHR provides the right for any person who has 'victim status' to bring a claim to the ECtHR. The definition of 'victim' is wider under Convention law than under national law and extends beyond the person directly affected, including where appropriate, the immediate family or dependants of the direct survivor.⁷⁵⁶ Article 13 provides the right to an effective remedy for violations of human rights.

In domestic legislation there is a range of protections which exist to safeguard survivors' interests. The Vulnerable Witnesses (Scotland) Act 2004 provides for special procedures to be used when dealing with witnesses who are 'vulnerable' in a number of ways including age, nature of offence and personal characteristics such as disability. A change was enacted to prevent the accused in a sexual offence case from causing distress to the witness by personally cross-examining him or her in Court. In addition, restrictions on the extent to which the sexual history of the survivor can be used in Court were strengthened.⁷⁵⁷

The 'victim information scheme' provided for by the Criminal Justice (Scotland) Act 2003 allows survivors to opt-in to a system whereby they can receive information about the release or escape of offenders and also be granted the opportunity to make submissions to the parole board regarding the potential parole of individuals. More generally, the Procurator Fiscal has issued guidelines as well as a statement of commitment to survivors and witnesses.⁷⁵⁸ This includes commitments to provide information regarding the procedure of a trial and on financial support available, support for special needs or language barriers and work with support organisations to provide as much help as possible throughout the process. Support organisations, such as Victim Support Scotland, Rape Crisis Scotland, Victim Information and Advice, Scottish Women's Aid, PETAL and the Trafficking Awareness Raising Alliance are hugely influential in affording protection to survivors in Scotland.

In May 2010 David Stewart MSP proposed a Bill to create a Commissioner for Victims and Witnesses in Scotland.⁷⁵⁹ The purpose was to "*to promote and safeguard the interests of victims and witnesses*" (Ross, 2011b). At the heart of this proposal was the hope that a dedicated person "*focussed solely on championing victims' rights*" (Ross, 2011b) would promote good practice and reform amongst all parties who deal with survivors in Scotland. Concerns were raised regarding cost and potential overlap with remit of other Commissions, although the need to place increased emphasis on survivors' rights was broadly welcomed. The Bill was not adopted.

More recently the Scottish Government has opened a consultation on Victims and Witnesses Bill.⁷⁶⁰ The Bill aims to improve public confidence in the justice system and place a real focus on the needs of survivors. Proposals include a 'victim's surcharge' which would require offenders to pay towards the cost of supporting survivors, a duty on public agencies to have clear standards of service for survivors and great opportunities for the views of survivors to be taken into account in matters such as parole decisions. In its response to the consultation SHRC drew on a range of international human rights law and standards to make recommendations related to information, participation, assistance, privacy and process.⁷⁶¹

Survivors' rights also include the right to an effective remedy. A number of participants in this scoping project spoke of the need for improved remedies and reparation for survivors, as this testimony illustrates:

He was held accountable for his crime against the state and he had access to a range of services to rehabilitate and help him 'get back on his feet'. I was left to try to find a way to deal with the compromised situation I was left in. There was no support offered and no help available. He had lost his job because of his conviction, but he received help and support to find new employment. I, too, lost my job but no one offered to help me find employment. During my experience, I was offered help from victim support services. The people I dealt with had no training, knowledge, and understanding of supporting me through this type of crime ... he had access to highly qualified mental health professionals, psychologists, psychiatrists, probation officers, social work departments and other services which were not available to me... The offender receives the message: what you did was wrong. You will be held accountable, you might be locked away, given community service, but you will have access to the services you need to help rehabilitate you and integrate you back into the community. No one said to me what happened to you was wrong and we will help you build your life. I was left to pick up the pieces on my own... I was forced to relocate to gain a sense of safety. My right to living a life without fear or threat was not respected. No one offered to support me, help me relocate, find new accommodation or offered me any financial support. No one helped me change my identity or followed up on my health and well-being. In special cases, some of the most violent offenders are offered new identities and offered relocations to allow them the opportunity to rebuild their lives... Victims should be entitled to the same range and quality of services afforded to the accused or the offender. Services should be provided beyond crisis intervention to address on-going needs. A crime may last only moments, but its impact can be felt for a lifetime.

Emma, Victim/survivor of crime

3.8.10.2 Right to Remedy

The realisation of the right to an effective remedy can take a number of forms from investigation and access to justice, to reparation which includes satisfaction, restitution and rehabilitation, adequate compensation and guarantees of non-repetition. The form in which a remedy should take place will differ from case to case and should be guided by the principles of participation (the wishes of the survivor) and proportionality (to the gravity of the violation). SHRC expands on many of these factors in its legal paper to guide the development of a Human Rights Framework on historic child abuse (SHRC, 2010c).

3.8.8.3 Effective Apologies

One form of reparation is satisfaction which can include important symbolic measures such as an effective apology. According to the Scottish Public Services Ombudsman (SPSO) an effective apology must acknowledge the wrong done, name the offence and name those guilty of that offence. It must also explain why the offence happened and why it was not prevented whilst expressing sincere regret. Finally, an assurance that the offence will not happen again is welcomed (SPSO, 2011).

The situation regarding apologies is complicated where organisations fear the possibility of civil litigation or risk conflicts with insurance companies.⁷⁶² In response, to promote effective apologies and reduce recourse to litigation the Scottish Government commissioned a review of no-fault compensation in the health sector.

This Review by the Scottish Government⁷⁶³ recommended a change in the system which would allow for no-fault compensation. This means that patients could be compensated without going to Court and that apologies could be given without the current legal ramifications. The review identified the benefits of this providing:

- Fair and adequate compensation for harm suffered
- Quicker rehabilitation, which would no longer need to wait until legal action has been completed
- Broader eligibility criteria than the current system
- Greater scope for the NHS to learn from mistakes so that care can be improved
- More efficient use of public time and money
- Wider access to justice for patients, with the removal of the need to pay legal fees.⁷⁶⁴

A patient would still have to prove that the suffering caused was caused by the public body however no claim of negligence would be required. Moreover, no-fault systems such as that suggested is already applied in countries such as Sweden, New Zealand, Finland, Denmark and Norway, and parts of the United States.⁷⁶⁵

has promoted consideration of a so-called Apology Law, as introduced in Canada and Australia. Such legislation can provide that an apology cannot be used as a basis for civil litigation nor to void an insurance contract.⁷⁶⁶ Margaret Mitchell MSP has proposed an Apology Bill before the Scottish Parliament saying she hopes that this change in the law would mean survivors “*could achieve the closure they have been seeking*”.⁷⁶⁷

3.8.11 Time Limits

3.8.11.1 Prescription & Limitation

The right to an effective remedy is not absolute and time limits on raising human rights claims are not prohibited. As the ECtHR has found, time limits serve:

*“several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if Courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time”.*⁷⁶⁸

Nevertheless, limitations should not be “*unduly restrictive*”.⁷⁶⁹ The passage of time will inevitably means that a Court cannot always consider the merits of a particular case, but it

should still be able to consider violations of procedural obligations of prevention, protection and investigation.⁷⁷⁰

In Scotland various time limits exist as to when it is possible to bring a civil suit to Court.⁷⁷¹ Under the Prescription and Limitation (Scotland) Act 1973 the general rule is that the claim must be brought within three years of the injury suffered, however the Act provides that Courts may override some time limits “if it seems equitable” to do so.⁷⁷² This allows for some discretion based on the particular circumstances of each case. However, some have questioned whether in practice this discretion has been exercised in a manner which secures a proper balance between access to justice and the principles of finality and legal certainty.⁷⁷³ A series of cases culminating in a decision of the House of Lords has not exercised this exemption to enable hearings on claims for historic child abuse on the basis of the prejudice to the respondent and loss of evidence.⁷⁷⁴ This issue was addressed by the European Commission on Human Rights in a case from the UK in 1996. Although it was considered then that such limits were not in breach of the ECHR, it was noted that there could be a need to revisit the proportionality of the limitation on the right to access a remedy as the understanding of the enduring impacts of child abuse on victims’ mental integrity develops.⁷⁷⁵

In 2009 the Scottish Government passed the Damages (Asbestos-related Conditions) (Scotland) Act 2009 restoring the right of people with pleural plaques to claim damages for personal injury.⁷⁷⁶ In essence this brought an exception to the usual time limits in relation to these specific conditions. The Act was challenged by several insurance firms however the challenge failed at the level of the UK Supreme Court which found that the Scottish Parliament acted within its powers in passing the Act.⁷⁷⁷

3.8.11.2 Remedies for Historic Child Abuse

In the case of *E and others v UK* the ECtHR found in 2002 that that remedies for historic child abuse in Scotland were inadequate.⁷⁷⁸

In February 2013 SHRC hopes to host a first InterAction with survivors of historic child abuse, institutions, Government and others with an interest or responsibilities to remedy historic child abuse.⁷⁷⁹ The InterAction will be an independently facilitated negotiation to take a negotiate an Action Plan to advance the recommendations in the Human Rights Framework published by in 2010 (SHRC, 2010c).

In that Framework SHRC recommended that the Scottish Government:

- Ensure full and effective participation of survivors and others whose rights are affected in all decisions on the means of realising the rights of effective access to justice, effective remedies and reparation;
- Ensure accountability for human rights violations including through effective official investigations, or a mechanism capable of determining State liability, and prosecutions where appropriate;
- Consider further the role for accountability in the successor(s) to the Pilot Forum, in particular considering the inclusion of investigatory powers sufficient at least to establish a record of the truth, and to identify where reasonable grounds exist for effective official investigations, as well as supporting survivors to identify and access effective remedies and proportionate reparation according to their needs and wishes;

- Ensure effective access to justice through identifying and addressing barriers which survivors of childhood abuse face in practice in exercising this right, making necessary adjustments or developing new mechanisms as required;
- Develop as effective as possible a reparations programme for survivors of historic childhood abuse. This should include restitution, adequate compensation, rehabilitation, satisfaction and guarantees of non-repetition. The reparations for individuals should be appropriate for each individual, and based on the principles of proportionality (according to the nature of the violation and the harm done) and participation (of survivors to identify their needs and wishes);
- Consider the development of legislation to facilitate apologies by institutions;
- Make available each of the elements of effective access to justice, effective remedies and reparation to all survivors of childhood abuse without discrimination;
- Develop a comprehensive communications and outreach strategy to raise awareness of past and present childhood abuse, the human rights of all of those affected and the remedies available;
- Explore with survivors and others, support which would enable them to participate effectively in the Pilot Forum and its successor(s), including advocacy and psychological support, protection and alternative means of testifying, taking reasonable steps to provide necessary support to participation.

4: Discussion & Key Message

4.1 Introduction

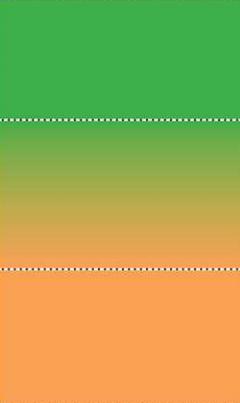
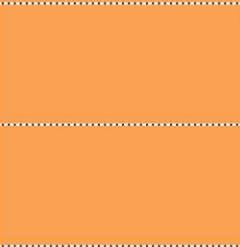
Making rights real for every person in Scotland requires that the correct structures and processes be in place to positively influence outcomes. That means ensuring we have the right laws and institutions (structures) to respect, protect and fulfil the full range of civil and political and economic, social and cultural rights. It means taking effective steps to put those rights into practice (processes), for example through policy and strategy setting and the allocation of resources. Finally, it requires monitoring what happens in practice (outcomes) to ensure our lived reality meets the requirements of international human rights law.

This report has outlined the current human rights context in Scotland and has identified some of the challenges and opportunities for the promotion and protection of human rights that this presents. SHRC's findings have suggested cause for optimism but not complacency, as inconsistencies were noted in several areas. As the table below demonstrates in very broad terms human rights references have been most frequent and explicit in the area of structures i.e. laws and institutions. Very few process steps, i.e. policies and strategies, are explicitly rights based, although there are many more which provide apparent synergies which could be further explored. The greatest human rights risks were uncovered in the area of outcomes; that is in the real results for Scotland's population. Despite some examples of putting rights into practice, SHRC's scoping project suggests inconsistency in a number of areas, even where laws and policies are largely rights based.

The table below also indicates clear areas of progress and of weakness. In essence the scoping project demonstrates that the influence of human rights is felt most strongly on our laws and institutions and its influence decreases the closer to real life we look. This ultimately results in some unacceptable outcomes for individuals, particularly the most marginalised. To address this Scotland needs to increase the influence of human rights laws in areas that matter most to people, where we actually lead our lives: in our homes, neighbourhoods, workplaces, schools and other public service areas.

SHRC believes that a National Action Plan for Human Rights will provide a practical roadmap to move Scotland from assumption to assurance that human rights laws and institutions, strategies and policies are informed by and consistently influence practice. Adopting such a systematic approach would demonstrate a clear commitment to making human rights real for everyone in Scotland.

Table 3: overview of findings on human rights structures, processes and outcomes

Steps to make human rights real	What does the scoping project overview suggest?	Progress <ul style="list-style-type: none"> • largely on track • partially on track • largely off track
Structural steps <i>(laws and institutions)</i>	<p>A range of human rights based laws.</p> <p>National Human Rights Institution with 'A' status</p> <p>Other institutions increasingly taking a rights based approach</p>	
Process steps <i>(strategies and policies)</i>	Some rights based strategies and policies in some thematic areas but no overarching human rights action plan	
Outcomes <i>(practice, results for people affected)</i>	Reports of divergent practice even in areas with human rights based laws and strategies.	

4.2 Structural steps

Structural steps are the legal and institutional steps to protect human rights. They include the ratification of human rights treaties, domestic laws to incorporate those international obligations and establishing institutions to ensure accountability for putting human rights into practice.

The Human Rights Act 1998 (HRA) incorporated ECHR and together with the Scotland Act 1998 it forms a foundation for the legal protection of civil and political rights in Scotland. Building on these foundations the Scottish Parliament has integrated an explicit human rights approach into legislation in such areas as mental health, legal capacity and adult protection. Many of these laws have received international recognition as positive examples.⁷⁸⁰

There are now national human right institutions across the whole of the UK. In Scotland SHRC was established to promote and protect the full range of human rights for everyone in Scotland. The safeguards of its strategic and operational independence, its direct

reporting role to Parliament and its effectiveness have led to SHRC being internationally accredited with the highest status and upheld as a model of best practice (European Union Agency for Fundamental Rights, 2010).

Other public bodies established by the Scottish Parliament or Government have also increasingly integrated human rights in their areas of focus. These include for example bodies with a focus on issues such as mental health and social care and those with broad complaints handling mandates as well as other bodies established explicitly to promote, for example, children's rights.

Scotland, however, does not yet ensure legal protection of all internationally recognised human rights – civil, political, economic, social and cultural. Only the ECHR has been incorporated into domestic law. This includes civil and political rights. Crucially, there is no equivalent legal protection of economic, social and cultural rights in Scotland.

4.3 Process steps

The full realisation of human rights requires the adoption of effective measures or processes such as the development of appropriate strategies and policies and the allocation of sufficient resources. Awareness and capacity building can also be an important vehicle to put rights into practice as can practical approaches such as impact assessment.

A human rights based approach has been explicitly integrated in some strategies and policies in particular areas. The National Dementia Strategy is a clear example. The Strategy, building on the Charter of Rights for People with Dementia and their Carers⁷⁸¹ adopts the UN endorsed human rights based approach which emphasises the five PANEL principles:

- Participation
- Accountability
- Non-discrimination
- Empowerment and
- Legality

There are also steps towards integrating human rights into the National Care Standards and there is a process underway to develop a national best practice approach to equality and human rights impact assessment. In addition SHRC and a range of partner organisations developed and delivered the *Care about Rights* capacity building programme.⁷⁸²

Untapped opportunities exist to advance human rights through other processes which have an underlying human rights ethos. Among these is the process of Public Service Reform stimulated by the Christie Commission (Christie Commission, 2011b), the “*asset based approach*” to health promoted by Scotland’s Chief Medical Officer (NHS Scotland, 2011a), and the policy focus on “*personalisation*” across health and social care (Chetty et al., 2012).

However, despite an increasing international trend, there has never been A National Action Plan for Human Rights in Scotland or elsewhere in the UK. Such a plan would address gaps in the realisation of rights and replicate good practices. International human

rights bodies have repeatedly called on the UK to adopt such a plan. For example the UN Committee on Economic, Social and Cultural Rights recommended that the UK “adopt a national human rights plan of action which includes specific programmes regarding the realization of economic, social, and cultural rights ... [and] consult widely with civil society and national human rights institutions in [its preparation]” (UNCESCR 2009).⁷⁸³

4.4 Outcomes

Assessing human rights outcomes requires evaluating the extent to which lived experience of the population matches up to the requirements of international human rights law. A key tool to do this is human rights indicators. Under a joint project of SHRC with the Equality and Human Rights Commission, the London School of Economics and the British Institute for Human Rights recently published an initial Human Rights Measurement Framework for England, Scotland and Wales (Candler et al., 2011).

The scoping project overview indicates that human rights outcomes appear to vary, even in areas where laws and policies explicitly suggest practice should be rights based. There is also, however, an increasing number of practice examples in Scotland of organisations seeking to introduce a human rights approach in practice.

BOX 1: Evaluating the benefits of a human rights based approach in practice

Evaluating the benefits of a human rights based approach in practice

The experience of The State Hospital (at Carstairs) was independently evaluated by SHRC in 2009, highlighting a series of lessons on how a rights based approach can be put into practice and the benefits of doing so for everyone (SHRC, 2009b). The evaluation found that the adoption of a human rights based approach had resulted in among other things: a reduction in “*blanket*” policies and an increased focus on individual patient’s risks.

reduction in the use of significant interference with rights such as seclusion and restraint;

increased understanding and reduced “*fear*” of human rights among staff; reducing staff stress and helping decision making and increasing understanding of their own human rights. Overall the adoption of a human rights based approach was evaluated as successful in supporting a cultural change from punitive to rights respecting.

Similarly, an independent evaluation of the *Care About Rights* demonstrates tangible benefits for improving person centred and rights respecting care. The training programme, which has reached over one thousand social care workers and managers across Scotland, was designed to highlight the practical applications of human rights in the care sector for older people and to demystify human rights so that decision making and policy making are better informed - empowering people to understand their human rights, and increasing the ability and accountability of those who have the duties to respect, protect and fulfil human rights.¹ The independent evaluation also demonstrates significant success in increasing awareness of human rights and in improving person centred care (GEN et al., 2011).

Alongside positive examples of human rights in practice a body of evidence highlighted areas in which practice should be improved. This included significant attention to quality of health and social care, including a number of extreme cases where people were at risk of abuse or neglect.⁷⁸⁴ It also included a broad range of other concerns including for example women in detention (Commission on Women Offenders, 2012) and conditions of detention more broadly (Scottish Government, 2011p),⁷⁸⁵ access to justice in environmental matters⁷⁸⁶ and for survivors of historic child abuse,⁷⁸⁷ the use of potentially lethal force by the police.⁷⁸⁸ International human rights bodies too have raised a series of concerns related to outcomes such as suicide rates and funding of mental health services (UN CESCR, 2009); disparities in educational performance and dropout rates among minorities (UN CESCR, 2009); health inequalities and access to health care (UNCRC, 2008a, UN CESCR, 2009);⁷⁸⁹ fuel poverty (UN CESCR, 2009); housing shortages and inadequate housing (UN CESCR, 2009); a lack of culturally appropriate accommodation for minorities (Council of Europe, 2012); social security and rights at work (Council of Europe, 2010a, Council of Europe, 2010b); restraint of children (UNCRC, 2002).

Within civil society SHRC has developed a stakeholder map which demonstrates that over 400 organisations and advocacy bodies across a broad range of subject and geographic areas identify connections with human rights. An increasing number of civil society organisations are explicitly adopting a human rights approach, including disabled peoples' organisations, those working on mental health, women's rights, children's rights, older people's advocacy groups and survivors of historic child abuse.

There have, however, been obvious examples where Scotland has missed opportunities to put human rights into practice. One of the most visible was the failure, prior to a decision of the UK Supreme Court, to ensure access to a solicitor for those in police detention.⁷⁹⁰ Less visible examples include apparent inconsistency in the treatment of people considered to lack legal capacity (Care Commission and Mental Welfare Commission for Scotland, 2009).

5: Moving Forward: Developing Scotland's National Action Plan for human rights

5.1 Introduction

Overall the key message SHRC has drawn from this scoping project is that Scotland needs a more systematic approach to assure and not assume the realisation of human rights in practice. Strong rights based legal and policy frameworks must be translated into more consistent positive outcomes to which individuals are entitled. Bearing that in mind, the key solution moving forward is to find the means of increasing the influence of human rights where it matters the most. In other words, where we actually live our lives: in our homes, neighbourhoods, workplaces, schools and hospitals, and so on.

This is why SHRC believes that Scotland needs a National Action Plan. A National Action Plan for Human Rights is evidence based, focussed on all human rights (civil and political and economic, social and cultural), action-oriented, measurable, and independently monitored. It would provide the practical means to an end, delivering the assurance and not resting upon the assumption that law, policy and practice are joining up for the benefit of the public, to ensure that our human rights are consistently realised in practice, in all areas of our lives.

Scotland's National Action Plan for Human Rights will provide a practical roadmap for the realisation of all human rights based on evidence gathered by SHRC and others, as well as recommendations of international human rights bodies. It will include clear commitments to achieve progress, developed through broad participation in a process of interaction with those who have responsibilities. Each agreed action will be accompanied by clear and measurable indicators and agreed time-bound benchmarks for progress. Progress in putting the plan into practice will be monitored against these indicators by an independent monitoring mechanism which includes SHRC.

5.2 Experience of National Human Rights Action Plans

"The World Conference on Human Rights recommends that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights."

Vienna Declaration and Programme of Action, 1993
(UN General Assembly, 1993)

Since global agreement to consider the development of National Action Plans for Human Rights in 1993, these have been adopted in a wide variety of countries. An increase in their development has coincided with the new UN Universal Periodic Review (UPR) procedure whereby every UN member state is reviewed by its peers each four and a half years on the state of realisation of all human rights. Calls to develop National Action Plans are a routine feature of UPR and their adoption is seen as a best practice way of implementation of international human rights recommendations.⁷⁹¹

Global guidance has been produced by the UN Office of the High Commissioner for Human Rights in 2002 (UNOHCHR, 2002), by the Commonwealth Secretariat in 2007 (Commonwealth Secretariat, 2007) and by the Council of Europe Commissioner for Human Rights in 2009 (Hammarberg, 2009). Each recommends that a National Action Plan is:

- Evidence based (research and participation informs priorities for action).
- Inclusive (all stakeholders should be involved in shaping commitments).
- Committed (with high-level and long-term support across the political spectrum and across all bodies with responsibility).
- Action-oriented (for each priority issue specific and achievable commitments for change are made).
- Realistic (resourced, taking account of pragmatic constraints and integrated into the work of public authorities).
- Measurable (each commitment is linked to indicators which can be used to track progress. These should be linked to time-bound benchmarks);
- Supported (with capacity building to put commitments into practice).
- Monitored (progress should be subject to regular independent review).

At least thirty countries, including many Nordic and Commonwealth countries, have developed National Action Plans for Human Rights. These highlight practical lessons such as:

The need for an evidence based plan: Sweden established an inquiry to evaluate its second National Action Plan for Human Rights (2006-2009). It found positive impact of the Plan but recommended that a third plan be developed following a baseline study. The baseline study currently being developed takes as its starting point the recommendations of international human rights bodies.⁷⁹²

The benefits of a participatory process: Australia was the first country to adopt a National Action Plan in 1994 and is currently developing a new version.⁷⁹³ For the first time this is being developed through a highly participatory process with a leading human rights organisation facilitating civil society input.⁷⁹⁴

Lessons from evaluation: New Zealand's first National Action Plan (2005-2010) was developed by the New Zealand Human Rights Commission. It followed an extensive baseline research study and a significant degree of participation. Findings from an evaluation included that the plan had resulted in more human rights consistent approach, for example in relation to restraint with a consequent reduction in its use in mental health settings, and improved systems for the protection of people at risk of abuse.

5.3 What SHRC proposes

Drawing from the outcomes of the Universal Periodic Review of all of the UK's human rights obligations at the UN in 2012 and the findings from this scoping project, SHRC will start a national process to develop Scotland's first National Action Plan for Human Rights. SHRC once again proposes adopting a FAIR approach to this process as set out in Box 2 below.

BOX : A FAIR approach to developing Scotland's National Action Plan for Human Rights²

A FAIR approach to developing Scotland's National Action Plan for Human Rights

A FAIR approach to developing Scotland's National Action Plan for Human Rights
In promoting the development of Scotland's National Action Plan for Human Rights, SHRC has applied a human rights based FAIR approach. This is based on four pillars:

Facts: what are the key gaps and the good practices in the realisation of human rights in Scotland?

Analysis of rights at stake: Which human rights are at stake? Is any restriction on the rights justified? Is the extent of realisation of the right reasonable?¹

SHRC has undertaken a programme of information gathering. The results are currently being analysed through the lens of human rights. The results will be published in October 2012.

Identify responsibilities: what changes are necessary? Who has responsibilities for helping to make the necessary changes?

From May 2012 the UK underwent a Universal Periodic Review of all of its human rights obligations at the UN. This process ended with a final report in September 2012¹.

In 2012 and 2013 SHRC will host a series of human rights InterActions involving a broad range of public and private bodies, civil society and individuals to address the gaps and good practices which have been found, identify who has responsibilities to address them and to pursue commitments over the coming years. This process will enable effective dialogue between those with responsibilities and those whose rights are affected. It will allow steps to address human rights gaps to be agreed in a way which takes into account financial and other resource constraints. These InterActions will seek to agree specific, measureable, achievable, realistic and time-bound commitments. It is hoped that Scotland's National Action Plan for Human Rights can launch in summer 2013.

Recall and review progress: the full realisation of human rights is a process and progress needs to be independently monitored according to agreed indicators.

Scotland's National Action Plan for Human Rights will be independently monitored and progress against agreed indicators periodically reviewed.

In 2014 the UK will undergo a 'mid-point review' of its commitments in the Universal Periodic Review process. A first review of progress on the implementation of Scotland's National Action Plan for Human Rights would represent a best practice contribution to this process.

Table 3: Key Dates

Date	Action
May 2012	The UK Universal Periodic Review at the United Nations began.
September 2012	The final report and recommendations of the UK's Universal Periodic Review was delivered.
October 2012	Publication of SHRC's scoping project and launch of a process of participation to shape Scotland's National Action Plan for Human Rights.
December 2012	A National InterAction to address the findings of the scoping project and facilitate negotiation of commitments to address them.
Aiming for Spring 2013	A draft of Scotland's first National Action Plan for Human Rights is published for comment.
Aiming for Summer 2013	Scotland's National Action Plan for Human Rights will be launched.
June 2014	UK's progress on Universal Periodic Review recommendations is considered in a mid-point review. Progress on Scotland's National Action Plan for Human Rights will be reviewed, to feed into this process.

PARTICIPATION FORM
SCOTLAND'S NATIONAL ACTION PLAN FOR HUMAN RIGHTS

Views are sought from all individuals and organisations who have experience or expertise which can help to shape Scotland's National Action Plan for Human Rights.

The Scottish Human Rights Commission will be collecting and analysing all responses received before the **29 March 2013**. Early responses are encouraged.

Unless respondents request that their views remain confidential or anonymous all responses will appear online with the organisation or individual named as the respondent. Contact details for the respondent will not appear online.

- Please tick this box if you do not wish your response to appear online:
- Please tick this box if you are happy for your response to appear online but not your name or organisation's name to appear:
- Please tick this box if you would prefer we did not link to your website:

Name: _____

Organisation: _____

Website: _____

Email address: _____

Contact telephone number: _____

This form can be returned by post to: Dr. Alison Hosie, Scottish Human Rights Commission, 4 Melville Street, Edinburgh, EH3 7NS, or sent as an electronic or scanned document to actionplan@scottishhumanrights.com

You can also fill out this form online at www.scottishhumanrights.com/actionplan

1. Based on the evidence presented in the report *Getting it right? Human rights in Scotland*, or your own experience, what do you consider to be the most urgent human rights issues which should be addressed in Scotland's National Action Plan for Human Rights?

2. What specific and achievable actions do you consider would best address the concerns you identify in your response to question 1?

Thank you for sharing your experience or expertise and helping to shape Scotland's National Action Plan for Human Rights.

Contact point: Dr Alison Hosie / actionplan@scottishhumanrights.com / 0131 240 2989 / www.scottishhumanrights.com/actionplan / @scothumanrights

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Appendix 1: Research Methods, Analysis and Limitations to the Research

A1.1 Introduction

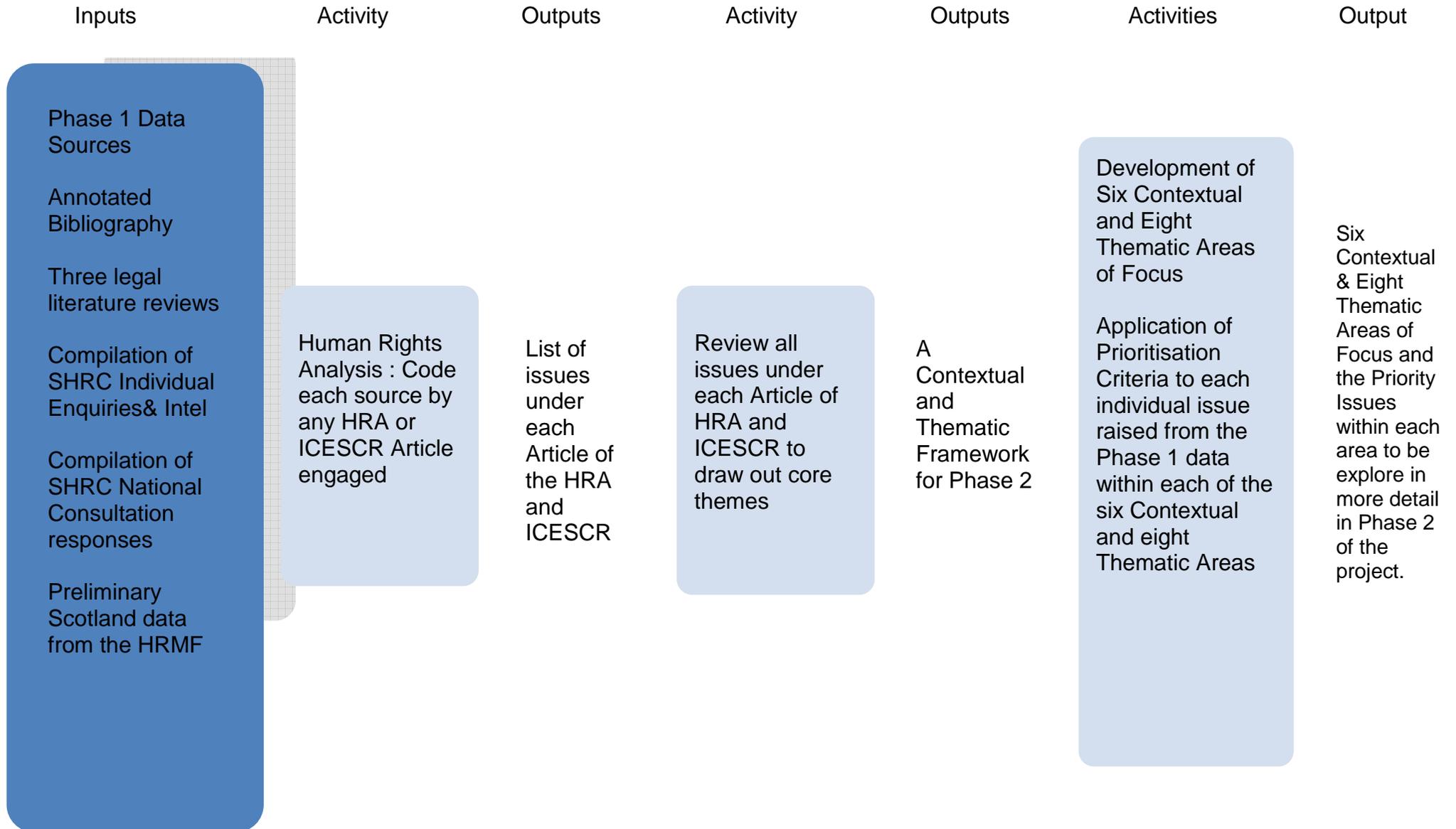
In October 2009, SHRC hosted two expert advisory meetings (in Glasgow and Inverness)⁷⁹⁵ with a range of stakeholders from civil society, public authorities and universities across Scotland to discuss SHRC's plans to undertake this scoping project. SHRC sought advice on what was practical, achievable and necessary to provide an indication on some of the key gaps and good practices on the realisation of human rights in Scotland. From these meetings a programme was developed with the support of SHRC's Research Advisory Group⁷⁹⁶ which involved two key phases – literature reviews and gathering SHRC's operational experience and a series of focus groups and in-depth interviews - followed by a further phase drawing together the various evidence to produce the information presented in this report. What follows in this Appendix is: a fuller explanation of the specific methods employed during each phase; the process by which themes and specific issues were prioritised for inclusion; the methods of analysis for the two phases; the process by which this report itself was developed with the support of research assistants and key stakeholders; and a statement of the acknowledged limitations of the project.

A1.2 Phase 1 Methods of Information Collection and Analysis

Information gathering was divided into two key phases, with Phase 1 running from March 2010 until February 2011. There were two distinct processes within Phase 1. The first involved the creation and development of a Stakeholder Database of 3rd Sector groups and organisations that were involved to some degree in the promotion of human rights in Scotland.⁷⁹⁷ There were two main objectives to the development of this database. First, the need to develop a greater understanding of the range of groups and organisations who saw part of their day-to-day work to be the promotion of human rights in Scotland. This database continues to grow and has since been developed into a public-facing interactive map on SHRC's website.⁷⁹⁸ Second, the need to provide a sampling framework for groups to approach to participate in Phase 2 of the information gathering (see below).

The second process in Phase 1 involved a series of literature reviews and bringing together a range of other sources for analysis, as can be seen in Figure 1 below.

Figure 1: Phase 1 Activities and Outputs Logic Model



Each of the Phase 1 sources was analysed through a human rights lens⁷⁹⁹ in order to: draw out the potential human rights concerns that existed across Scotland; identify which specific rights these issues engaged and to develop a thematic framework through which to view these concerns. From this process, SHRC was able to draw out a wide range of issues of current concern in Scotland, which had the potential to impact on the realisation of civil, political, economic, social and cultural rights. The framework developed to house all of these issues consisted of: six contextual areas of focus, which allow for the presentation of the context within which the people of Scotland live their lives and can realise (or not) their rights on a daily basis, and eight broad thematic areas, as shown in Figure 2 below.

Figure 2: Contextual and Thematic Framework



Not all of the many issues identified within this framework could, however, be explored further in Phase 2. Accordingly, a prioritisation criteria filter was applied (see Figure 3 below) in order to determine which would be explored in the focus groups and in-depth interviews.

Figure 3 Criteria used to select issues for inclusion in phase 2

Occurrence: This was scored according to the number of Phase 1 sources commenting on a particular issue in relation to the right being examined.

Devolved competence: This was scored according to whether an issue is reserved and wholly beyond the powers of devolved government, partly within the powers of devolved government, or fully within the powers of devolved government to address.

Gravity: This was scored according to the nature of the rights at stake:

Category 1. Qualified or limited rights, as well as rights which are to be fully achieved progressively;

Category 2. Absolute rights.

Imprint: This was scored according to the extent to which the issues raised in a particular category would affect a large number of people.

Vulnerability/ Marginalisation: This was scored according to the extent to which the issues raised affect vulnerable or marginalised groups/communities.

Added value: This was scored according to whether the issue avoid duplication of the work of other bodies

Opportunity: This was scored according to whether the issue contributes to the promotion of a human rights culture in Scotland, and is likely to lead to opportunities for constructive application and advancement of human rights in practice.

A1.3 Phase 2 Methods of Data Collection and Analysis

Phase 2 of the scoping project commenced in December 2010 and ran until December 2011. This phase involved the collation of findings from phase 1 and hosting a series of small focus groups and in-depth interviews, the main aim of which was to put a human face on the issues identified in phase 1.

Process

The first stage of Phase 2 involved the collation of all Phase 1 source data for each contextual and thematic area of focus facilitating the development of the various sections of this report. Second, a series of small focus groups and in-depth interviews were undertaken by SHRC in order to draw on the lived experience of an illustrative sample of people across Scotland. In line with SHRC's statutory mandate, particular attention was given to hearing from those who are marginalised and whose voices are less often heard in mainstream debates. In taking this approach, SHRC sought to put a 'human face' on the issues uncovered in Phase 1 of the project.

The focus group and interview schedules were semi-structured to allow for a degree of comparison across all focus groups and interviews, whilst at the same time allowing for discussions to develop in areas of importance to each group/individual. The schedules were developed and validated via a pilot study during May and June 2011, following which each tool was refined.

The proposed approach for Phase 2 of the scoping was also reviewed at various stages by the SHRC members and by SHRC's Research Advisory Group [see Appendix 3 for details].

Samples

Between May and November 2011, 106 people participated in one of 13 focus groups or 11 in-depth interviews across Scotland. The focus groups and interviews were conducted in a range of settings agreed by participants. This included: SHRC's Glasgow Office, Group premises, individual's own homes, public spaces and places of work.

The various groups involved were purposively selected to participate in this project. In order to make this selection, a sampling framework was first created from the SHRC Stakeholder database. All groups within the database were coded by the thematic area/s of focus (see Sections 3 and 4 of the report). The aim was to conduct at least one focus group where participants had a particular experience or expertise in each of the eight thematic areas. Twenty-four groups were selected (three from each thematic area representing a wide geographical spread) from the thematically coded sampling framework and contacted, requesting their participation in this project. In total 17 groups agreed to participate. Some groups contained individuals who preferred to be interviewed on a one-to-one basis than participate in a focus group. A key contact of each group was asked to invite all members to participate. SHRC acknowledges the potential for selection bias of those involved (see Section A1.5 for further discussion of limitations to the project).

Themes

These sessions explored how people, in different geographical areas of Scotland, with different life experiences and different understanding of their rights, felt about human rights issues in Scotland, in their communities and in their day-to-day lives. The sessions explored a number of key questions including a focus on which human rights issues were of most concern to people in the context of their lives, their communities and Scotland as a whole. Focus groups lasted on average two hours and the in-depth interviews averaged an hour and a half. All focus groups and interviews were recorded with the permission of participants and later transcribed by SHRC's Research Officer.

Following participation it became apparent that in addition to the thematic area that the group's work most reflected, many groups in practice had a particular interest or expertise in more than one thematic areas, as highlighted in Table 5 below.

Table 5: Thematic areas of focus of groups (and individuals from groups) involved in the project

Thematic Area	Number of Groups with an interest/expertise in thematic area
Dignity and Care	12
Where We Live	11
Education and Work	7
Health	12
Private and Family Life	10
Safety and Security	6
Living in Detention	6
Access to Justice and the Right to an Effective Remedy	9

Following transcription, all interviews and focus groups were then coded and analysed using the contextual and thematic framework which emerged from Phase 1. This process was facilitated by the use of the qualitative analysis software NVivo,⁸⁰⁰ which allows for thematic coding and the integration of focused inquiry and data analysis. As the Phase 1 data had already been coded into NVivo, the process of combining the analysis of Phase 1 and Phase 2 data was relatively simple.

A1.4 Development of the Report

All sources of information were synthesised for each thematic area from Phase 1. This then formed the basis of each of the eight thematic sections in Chapter 3. The thematic sections were then redrafted, incorporating the Phase 2 analysis and an overview of relevant areas of international human rights law. Each section was then reviewed by members of SHRC’s Research Advisory Group (see Appendix 3 for details) and some external experts (academic and practice).

Prior to the drafting of Section 2 of the report, SHRC hosted a roundtable discussion with five Scottish academics/ practitioners⁸⁰¹ with expertise in the fields explored in Section 2, namely: Legal, Social, Political, Economic, Technological and Environmental. The roundtable was chaired by Professor Alice Brown.⁸⁰² The various inputs from this constructive roundtable, helped SHRC to considered the impact of broader political, economic, social, technological, environmental and legal contexts on the realisation of human rights.

A Briefing Report⁸⁰³ was also published in June 2012 which previewed the publication of the findings presented in this report.

A1.5 Ethics and confidentiality

Prior to the commencement of this project an SHRC Ethics Approval Form was submitted to the Chair of the Research Advisory Group and approval granted. Contact research@scottishhumanrights.com for further information on SHRC’s Research Ethics Framework: Ethical Principles & Values and/or Policy & Process.

In order to maintain the confidentiality which was assured when seeking consent to participate (both prior to the fieldwork and prior to the start of each interview/focus group), the identities of those individuals and groups involved in Phase 2 of this project have been protected and all names have been changed. All groups were informed about the project in writing prior to the focus groups and interviews and key contacts were asked to provide this information to their group members. In order to ensure informed consent, this information was again provided in writing and explained to each member of each focus group and interviewee prior to the focus group or interview commencing. See Appendix 4 for an example of the information sheet and consent form used. Participants were able to withdraw from the focus group or interview at any time without giving a reason. None chose to do so.

A1.6 Limitations of the project

The key limitations to this programme of project are brought about by the constraints of time and resource. At the initial expert advisory meetings in October 2009 where SHRC presented its ideas on what this project could entail, it quickly became apparent that the project as it was presented then was overambitious and unachievable. SHRC has ten staff, of whom one dedicated approximately 60 per cent time to this project over the three years and others dedicated significant periods at moments required. During this time SHRC was also faced with a reducing budget of (19 per cent in real terms) and has devoted the majority of its research budget to this project over the three years.

It was also never the intention (nor possible) for the findings of this project to be representative of the whole population of Scotland, given the scale of resources required for such a project. Rather, the aim of this project was to gain a broad, illustrative understanding of the key human rights issues in Scotland today, providing SHRC with a baseline from which to work.

Therefore, what SHRC proceeded with in terms of methods involved a wider range of secondary data sources combined with the primary data collected via a limited number of focus groups and interviews. This combination was important because self-reported data (i.e. what SHRC was told by members of the focus groups and those who participated in interviews) cannot be independently verified. What is included reflects an accurate record of the views of individuals on their perceptions – SHRC does not take responsibility for, nor claim, the veracity of those views. Indeed, self-reported data is believed to have a number of limitations including, social desirability, selective memory and exaggeration. However, the supposed poor quality of self-reported data is now commonly regarded as an ‘urban myth’ (Chan, 2009) and numerous self report measures in the field of social science (and medicine) have achieved acceptance. Accordingly, in the present study, utilising a number of different types of information and methods of collecting that information, and subjecting them to a process of triangulation, allowed for a degree of validation of the findings. In other words the fact that the same issues of concern were being raised within the different secondary sources, as well as the focus groups and interviews, strengthens our confidence in the accuracy of the findings of this project.

A further limitation to this project could be the sampling method for participants in Phase 2. Relying upon non-probability, purposive sampling, as the most practical method of engaging participants, the extent to which the findings reflect the views of

the wider Scottish population remains uncertain. Nevertheless, those recruited into the study expressed a range of perceptions and attitudes found in different parts of Scottish society that deserve to be acknowledged and listened to.

A final limitation arose as a result of the limitation of the reviews of both the legal and social research literature themselves. In respect of the legal literature review, it was found that there was very limited legal literature on a wide range of issues which have been central to the experience of SHRC since its inception – such as dignity and care – and a relatively large volume of legal literature in respect of a small portion of the human rights spectrum – notably human rights in criminal justice settings. Many human rights researchers and practitioners have been:

“slow to address issues of class, poverty, inequality and social and economic injustice, instead focusing mainly on civil and political rights” (Hosie & Lamb, 2012 forthcoming).

Equally, the reviews of social science research and literature revealed that very little social research had in fact been undertaken or written about from a human rights perspective. Indeed, social scientists historically have been reluctant to engage with human rights. Within the social science research and literature reviewed, there was a strong focus on equality as the principle driver of social progress. However:

“whilst there is a strong relationship between equality and human rights, they are not the same, and their conflation can risk marginalising the importance of other constituent concepts within human rights such as dignity, respect, diversity and autonomy” (Hosie & Lamb, 2012 forthcoming).

Social policy has been criticised for failing to suggest the means by which social problems might be reduced or eliminated, as Dean notes:

“if Social Policy must struggle to understand what’s wrong with society and with existing policies, it must also consider the various ways in which these may be put right” (Dean, 2006:101).

It is worth noting, however that by combining social policy, social science and legal research with human rights standards in this project, in order to better understand the current state of human rights realisation in Scotland, SHRC has taken an innovative step to expand the work of both research sectors. By encouraging both research sectors to take steps beyond their traditional disciplinary boundaries will over time, help to contribute to the promotion and protection of human rights in Scotland.

Appendix 2: SHRC Achievements 2008-2012

Promoting and protecting human dignity in Scotland

- Developed and delivered a significant programme of capacity building and awareness raising on a human rights based approach to social care for older people (Care about Rights).⁸⁰⁴
- Undertook an independent evaluation of a human rights based approach in a healthcare setting.⁸⁰⁵
- Supported the development of a Charter of Rights for People with Dementia and their Carers.⁸⁰⁶
- Developed a human rights framework for acknowledgement and accountability of historic child abuse.⁸⁰⁷
- Undertook a major programme of work to map the state of human rights in Scotland. The findings of which are presented in this report.
- Promoted the use of human rights impact assessments including in the Health Integrated Impact Assessment which is now being rolled out across the NHS in Scotland.⁸⁰⁸
- Worked in partnership with EHRC, London School of Economics and the British Institute for Human Rights to develop a Human Rights Measurement Framework.⁸⁰⁹
- Is working in partnership with EHRC Scotland to develop an equality and human rights impact assessment process to support the integration of human rights into decision making, monitoring and accountability.⁸¹⁰

Addressing emerging human rights issues

- Engaged with a wide variety of emerging human rights issues, significantly influencing the integration of human rights into law and policy. This included in the debate on the future of the Human Rights Act, access to a lawyer during questioning and the Carloway Review of criminal justice and the use of TASER® electro-shock weapons.⁸¹¹

Bringing human rights to life

- Established a corporate identity and communicated SHRC's work in a variety of ways.⁸¹²

- Supported opportunities to promote human rights within communities of culture.⁸¹³
- Raised awareness and participation among disabled people of the UN Disability Convention through direct and online events (in partnership with the EHRC) involving over 300 people.⁸¹⁴

Supporting human rights in the world

- Hosted a successful international meeting of NHRIs resulting in the adoption of the 'Edinburgh Declaration' on Business and Human Rights in October 2010.
- Acted as an expert resource on best practice in the development of NHRIs in Belgium, the Netherlands, Turkey and Uzbekistan and contributed to the European Union Fundamental Rights Agency's Handbook on NHRIs.
- Was elected Chair of the Commonwealth NHRI Forum Working Group on Climate Change and Human Rights.⁸¹⁵
- Promoted active participation by Scottish Government and civil society in the UK's Universal Periodic Review to take place in 2012.⁸¹⁶
- Was elected Chair of the European Group of NHRIs in May 2011.

Appendix 3: Research Advisory Group

Chair: Professor Kay Hampton, Part-time Commissioner Scottish Human Rights Commission,

<http://www.scottishhumanrights.com/about/team/kayhampton>

<http://www.kk-consulting.co.uk/>

Dr. Colin Clark, Associate-Dean Postgraduate Research, Head of Graduate School Faculty of Humanities and Social Sciences, Senior Lecturer in Sociology, University of Strathclyde

<http://www.strath.ac.uk/humanities/courses/sociology/staff/clarkcolindr/>

Dr. John Love, Senior Lecturer in Sociology, Robert Gordon's University

<http://www4.rgu.ac.uk/social/aboutus/page.cfm?pge=6880>

Professor Linda McKie, Professor of Sociology in the School of Applied Social Sciences, University of Durham [member until March 2012]

<http://www.lindamckie.org/>

Dr. Jill Stavert, Lecturer in Law, Napier University

[http://www.napier.ac.uk/business-](http://www.napier.ac.uk/business-school/OurStaff/BusinessSchoolStaff/Pages/JillStavert.aspx)

[school/OurStaff/BusinessSchoolStaff/Pages/JillStavert.aspx](http://www.napier.ac.uk/business-school/OurStaff/BusinessSchoolStaff/Pages/JillStavert.aspx)

Professor Rebecca M. M. Wallace, First tier Tribunal Judge, Director of the Centre for Rural Childhood, University of the Highlands and Islands (UHI), Visiting Professor Robert Gordon University.

<http://www.perth.ac.uk/SPECIALISTCENTRES/RURALCHILD/Pages/Staff.aspx>

Dr. Elaine Webster, Lecturer in Law, Director of the Centre for the Study of Human Rights Law, University of Strathclyde

<http://www.strath.ac.uk/humanities/courses/law/staff/websterelainedr/>

Dr. Jo Ferrie, Lecturer, School of Social & Political Sciences, Glasgow University [member from June 2012]

<http://www.gla.ac.uk/schools/socialpolitical/staff/joannaferrie/>

Dr. Alison Hosie, Research Officer, Scottish Human Rights Commission

<http://www.scottishhumanrights.com/about/team/alisonhosie>

Appendix 4: Participation information sheet and Consent Form

Background information to the programme of research

One of strategic goals of the Scottish Human Rights Commission is to enable everyone in Scotland to understand and to claim their rights. We need to know what factors would have to change to bring the living experience of everyone, particularly the most marginalised people in Scotland, up to standards consistent with the UK's international legal human rights obligations.

The Commission is undertaking research to help answer a range of questions including:

- are all people, everywhere, able to realise their rights?
- what barriers exist to people realising their rights?
- what rights are best and least understood in Scotland?
- what does Scotland do well in protecting rights?
- what could Scotland do better?
- This research will help us to:
- develop a National Action Plan for Human Rights in Scotland – a road map for the fulfilment of rights
- report to, and participate, in UN human rights reviews
- to prioritise our work in the future.

Your involvement

We would be very grateful if you would be willing to feed your views into this research. The analysis from Phase 1 of the research has raised over 300 potential human rights issues affecting the lives of people in Scotland. The Commission would like the opportunity to see, first, what other issues you may have to add to this range of issues and second, to explore in depth some of the key issues raised in Phase 1.

What the Commission would like to get from this session is a better understanding of what human rights issues are most important to you on a personal, community and where relevant, professional level.

What the Commission would like you to get from this session is a chance to tell us what human rights issues matter most to you (and where appropriate those who you work with), where Scotland perhaps already does well in promoting human rights and where it could do better.

Process

I will spend approximately 1 and a half hours conducting a focus group. You will be asked to sign a consent form to show that you understand what the research is about, what will be done with the information you provide and that you are happy to take part.

I would like to record the session in order that I can transcribe an accurate account of what has been said. I will transcribe the session and the recording will be kept in a secure location. If anyone is not happy with the session being recorded then it will not be recorded.

As noted above, the information collected in the process of this research will be used to produce a report on the state of Human Rights in Scotland as well as to provide evidence for the development of Scottish National Action Plan for Human Rights, UN shadow reporting and strategic planning. However, no-one from the focus groups will be made identifiable in anything produced by the Commission.

Groups including yours who do participate will be given a generic title. Any reference to persons present or not, will be not be identified by name. Pseudonyms will be used where necessary.

If you have changed your mind before the focus group starts and no longer want to participate, that is fine. If you decide as the focus group is underway that you no longer want to participate and you would like anything you have said to be removed from the transcript that is also fine. You can pull out at any point, for any reason and you do not have to tell me why.

Managing expectations

Under the mandate of the Commission, we are not allowed to provide any legal advice on issues, which are or may become issues subject to legal proceedings. Therefore, I will not be able to provide any advice to specific questions raised by the group. I will, however, be able to feed any issues raised into this wider exploration of the state of Human Rights in Scotland.

If you have any questions regarding participation in this session, please ask.

If you have any questions following the session please contact me:

alison.hosie@scottishhumanrights.com or 07833402290

SHRC: Mapping Human Rights in Scotland
A study of the gaps and good practices in the promotion and protection of human rights in Scotland

Focus group
CONSENT FORM

Name of Researcher: Dr Alison Hosie, SHRC, 58 Robertson Street, Glasgow, G28DU

Alison.hosie@scottishhumanrights.com

[mobile contact number]

1. I confirm that I have read and understood the information sheet provided for the above study. I have had the opportunity to consider the information, ask questions and have these answered satisfactorily.

please initial box

2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving a reason, without my legal rights being affected.

please initial box

3. I agree to the audio recording of this focus group.

please initial box

4. I agree to take part in the above study.

please initial box

Name of participant

date

Signature

Name of Researcher

date

Signature

If you wish to be kept informed of the outcomes of this study please provide a contact email or postal address here:

Alternatively the report will be available online at www.Scottishhumanrights.com

Endnotes

- 1 The Commission published its Strategic Plan 2012-2016 on 1 April 2012
<http://www.scottishhumanrights.com/news/latestnews/article/sp2news2012>
- 2 The Commission submitted a parallel report on the UK's UPR in November 2011,
<http://www.scottishhumanrights.com/international/uprinternational>
- 3 A fuller explanation of the methods employed in this scoping project, including: the specific methods employed during each phase, the process by which themes and specific issues were prioritised for further study in the second phase; the methods of analysis for the two phases; the process by which this report was itself developed with the support of key stakeholders; and a statement of the acknowledged limitations of the scoping project are outlined in Appendix i.
- 4 Within civil society SHRC has developed a stakeholder map (see: CRAIG, G. 2011. Mapping human rights organisations in Scotland. Durham: University of Durham, School of Applied Social Sciences.) which demonstrates that over 400 organisations and advocacy bodies across a broad range of subject and geographic areas identify connections with human rights. This was developed in part to gain a greater understanding of the range of groups and organisations who saw part of their day-to-day work to be the promotion of human rights in Scotland. This database is now available to the public [<http://maps.scottishhumanrights.com/>] and groups and organisations can continue to join the database.
- 5 See also HOSIE, A. & LAMB, M. 2012 forthcoming. Human Rights and Social Policy: Challenges and Opportunities for Social Research and its Use as Evidence in the Protection and Promotion of Human Rights in Scotland *Journal of Social Policy and Society*.for further information on the methodology of this aspect of the research
<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8685263>.
- 6 Whilst only those enquiries received between 2008 and 2010 were analysed as part of Phase one of this scoping project, the mapping project continued to collate and review enquiries during 2011 as part of Phase two.
- 7 SHRC undertook a national consultation December 2008-March 2009 in order to identify priority areas of work for its first strategic plan. This consultation evidence was re-analysed for the purpose of this scoping project. The original consultation document can be accessed at
<http://www.scottishhumanrights.com/ourwork/publications/article/reportofthenationalconsultation>
- 8 The HRMF is a new tool for evaluating the human rights position of individuals and groups in England, Scotland and Wales. It was developed by the London School of Economics and Political Science, CASE and the British Institute for Human Rights within a partnership project of EHRC and SHRC. More information can be found here: <http://personal.lse.ac.uk/prechr/>
- 9 In order to access more marginalised voices, one of the first part of this scoping project was to create a Stakeholder Database (discussed later in this briefing report) which aimed to collect information on groups and organisations which implicitly or explicitly promoted human rights in Scotland. A specific objective of this project was to collect information on local 'under the radar' groups who represented those who are harder to reach. More information on this project can be found here:
<http://www.scottishhumanrights.com/application/resources/documents/Oct11Mappingresearchbriefing.pdf> Access to those groups has also now been made public here:
<http://maps.scottishhumanrights.com/>
- 10 ratification is the process which legally binds the State. It varies from state to state. In the UK this can be through a Parliamentary process or at times by an act of the executive.
- 11 As the UK does not permit the automatic 'direct applicability' of its international human rights treaty obligations in its domestic legal systems a process of incorporation is required whereby a domestic law is passed containing the provisions of the treaty.
- 12 The Joint Committee on Human Rights of the UK Parliament described the issues thus, "A recurring question in the dialogue between the UK Government and each of the UN treaty bodies is why the UK has not to date incorporated into its domestic law many of the rights guaranteed by the UN human rights instruments. The obligations imposed by the UN treaties bind the UK in international law. But under the dualist doctrine of international law which is followed in the UK, these international legal obligations are not binding in domestic law unless they have been specifically incorporated into that law by way of legislation. Unincorporated guarantees of human rights can however be taken into account by the domestic courts in a number of ways. For example, the courts will assume that

Parliament does not intend to legislate in a manner incompatible with the UK's international legal obligations, including those arising under human rights treaties. They therefore interpret legislation in a manner consistent with those obligations whenever possible, even if there is no obvious ambiguity in the legislation. The dualist approach that prevails in the UK contrasts with the 'monist' approach to international law, characteristic of many civil law jurisdictions, whereby international treaty obligations automatically become part of the domestic legal order.", JOINT COMMITTEE ON HUMAN RIGHTS 2005. Nineteenth Report, 6 April 2005, para 186. London: Joint Committee on Human Rights.

13 On the relationship between domestic equality legislation and international human rights treaties on non-discrimination the Joint Committee on Human Rights of the UK Parliament has stated, "the equality rights in the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of Discrimination Against Women (CEDAW) though they are reflected in a framework of domestic anti-discrimination legislation, have no counterpart as general, overarching guarantees of rights enforceable in UK law."

14 The UK has not made a declaration permitting individual petitions under Article 14 of CERD.

15 As noted above partial implementation of non-discrimination treaties is achieved through the Equality Act 2010 and related national discrimination laws and standards, however as these do not guarantee the full range of rights included in UN non-discrimination treaties it is not generally be considered that these have been incorporated in the UK.

16 The UK has neither signed nor ratified the Optional Protocol to the ICESCR, which was adopted in 2008.

17 The UK has neither signed nor ratified the first Optional Protocol to the ICCPR, which was adopted in 1966.

18 Although many of the rights in the ICCPR find equivalents in the ECHR the former also includes for example a right to political participation, and a freestanding provision on equality.

19 The UK ratified the Optional Protocol to CEDAW in 2004. So far two communications involving the UK have been considered, both were found to be inadmissible – N.S.F. v UK, UN Doc.

CEDAW/C/38/D/10/2005; Constance Ragan Salgado v UK, UN Doc. CEDAW/C/37/D/11/2006.

20 As noted above partial implementation of non-discrimination treaties is achieved through the Equality Act 2010 and related national discrimination laws and standards, however, as these do not guarantee the full range of rights included in UN non-discrimination treaties it is not generally be considered that these have been incorporated in the UK.

21 The UK has not made a declaration under Article 22 of UN CAT which would permit individual petitions.

22 The UK has neither signed nor ratified the Optional Protocol to the CRC on a communications procedure which was adopted in 2011.

23 The UK ratified the Optional Protocol to the UN CRPD in 2009. So far no individual petitions have been filed.

24 The UK accepted the jurisdiction of the European Court of Human Rights to receive individual petitions related to the ECHR in 1953. As of April December 2011 the European Court of Human Rights had issued 462 judgments involving the UK. Of those 279 had found a violation of at least one article of the ECHR. Source: Council of Europe, ECHR Overview 1959-2011, Strasbourg 2012.

25 The Human Rights Act 1998 does not incorporate all articles of the ECHR. Article 1 (obligation to respect and ensure all rights) and Article 13 (the right to an effective remedy) were not incorporated.

26 there is a collective complaints mechanism under the Revised European Social Charter which the UK has not accepted.

27 Section 2. The duty to take account is not the same as a duty to follow. See for example R v Horncastle [2009] UKSC 14; Runa Begum v Tower Hamlets [2002] 2 All ER 668 para 17

28 Section 3, Human Rights Act 1998. As Lord Hope stated in DS v HM Advocate, "the obligation to construe a provision in an act of the Scottish Parliament so far as it is possible to do so in a way that is compatible with the Convention rights is a strong one." 2007 SC(PC) 1 at para 24.

29 Section 6 Human Rights Act 1998.

30 See SHRC's independent evaluation of the human rights based approach adopted at The State Hospital, SHRC 2009b. Human Rights in a Health Care Setting: Making it Work for Everyone. An evaluation of a human rights-based approach at The State Hospital. Glasgow: SHRC. and the independent evaluation of the Commission's Care About Rights? capacity building programme:

<http://www.scottishhumanrights.com/application/resources/documents/CaRfullevaluationfinalOct2011.pdf>

31 See for example: Human Rights and the Commission on a Bill of Rights. Equality and Diversity Forum. 2011, available at <http://www.edf.org.uk/blog/wp->

content/uploads/2011/10/EDF_HRA_briefing2010111.rtf ; Review of the Implementation of the Human Rights Act. Department of Constitutional Affairs. 2006, available at http://www.justice.gov.uk/guidance/docs/full_review.pdf; KLUG, F. & STARMER, K. 2005. Standing back from the Human Rights Act: how effective is it five years on? Public law, Winter, 716-728. For case studies see for example; <http://www.ourhumanrightsstories.org.uk> prepared by the British Institute for Human Rights (BIHR), Liberty and other human rights organizations; also Analysis of the impact of the Human Rights Act produced by the Ministry of Justice and Joint Committee on Human Rights in 2007.

32 Following the case of *YL v Birmingham City Council and others*, [2007] UKHL 27.

33 Section 145, Health and Social Care Act 2008; *R (Weaver) v London & Quadrant Housing Trust*, [2009] EWCA Civ 587.

34 <http://www.scottishhumanrights.com/news/latestnews/article/healthsocialcarebillnews>

35 Section 29(2)(d) of the Scotland Act 1998

36 Section 57(2) of the Scotland Act 1998

37 section 57(2) and Section 29(1) of the Scotland Act 1998. See for example *H.M. Advocate v. R*, 2003 SC (PC).

38 Schedule 6 of the Scotland Act 1998; Section 29(2)(d) of the Scotland Act 1998

39 Schedule 5 para 7 (2) of the Scotland Act 1998

40 New Section 57A of the Scotland Act 1998, introduced by the Scotland Act 2012.

41 See, for example, Mental Health (Care and Treatment) (Scotland) Act 2003; Adults With Incapacity (Scotland) Act 2000; Adult Support and Protection (Scotland) Act 2007.

42 See for example UN Docs. UN CESCR 2009. Concluding Observations of the Committee on Economic, Social and Cultural Rights. UN Doc. E/C.12/GBR/CO/5. Geneva., UNCRC 2002. Concluding observations of the Committee on the Rights of the Child : United Kingdom of Great Britain and Northern Ireland. 10/09/2002. CRC/C/15/Add.188. (Concluding Observations/Comments). Geneva: UNCRC. on laws relating to homelessness and education.

43 Iain Gray, Deputy Minister for Community Care, 29 March 2000, SP OR Vol. 5, col. 1120.

44 Adults with Incapacity (Scotland) Act 2000, s 1(3).

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

46 *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).

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

48 See for example: MENTAL WELFARE COMMISSION FOR SCOTLAND 2007. Older and Wiser. Mental Welfare Commission for Scotland. CARE COMMISSION & MENTAL WELFARE COMMISSION FOR SCOTLAND 2009. Remember, I'm Still Me: Care Commission and Mental Welfare Commission joint report on the quality of care for people with dementia living in care homes in Scotland. Dundee & Edinburgh: Care Commission & Mental Welfare Commission. In relation to mental health law, see Scottish Government, Review of Mental Health Law Consultation Analysis, 2010.

49 Office of the Public Guardian (Scotland), Early Deliberation on Graded Guardianship, paper drafted by Sandra McDonald, Public Guardian, November 2011.

50 See for example Scottish Human Rights Commission, Submission to the Scottish Government on a Mental Health Strategy for Scotland: 2011-2015 a consultation, February 2012, <http://www.scottishhumanrights.com/application/resources/documents/Finalmentalhealthsubmissionfeb2012.doc>

51 NIHRC was established in 1999 by section 68 of the Northern Ireland Act 1998, in compliance with a commitment made by the UK Government in the Belfast (Good Friday) Agreement of 10 April 1998. Its key aims are to promote awareness of the importance of human rights in Northern Ireland, to review existing law and practice and to advise government on what steps need to be taken to fully protect human rights in Northern Ireland. NIHRC has a number of key functions including: providing advice to the Secretary of State on a Bill of Rights for Northern Ireland; conducting investigations; enter places of detention, and to compel individuals and agencies to give oral testimony or to produce documents, through the Justice and Security Act 2007. The Commission can also: provide assistance to individuals when they are bringing court proceedings; intervene in proceedings; bring court proceedings itself; and provide training and information on human rights. For more information see <http://www.nihrc.org/>

52 The EHRC was launched in 2007 and works across England, Scotland and Wales with a statutory remit to promote and monitor human rights; and to protect, enforce and promote equality across the nine 'protected' grounds - age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment.

53 The Scottish Human Rights Commission was established by an Act of the Scottish Parliament in 2006 and started work in 2008. Under the Act the Commission has general functions, including promoting human rights in Scotland, in particular to: encourage best practice; monitor law, policies and practices; conduct inquiries into the policies and practices of Scottish public authorities; intervene in civil proceedings and providing guidance, information and education. The Commission also has the authority to enter any place of detention unannounced for the purpose of inspection or interview in the process of an inquiry. The Commission is also currently the Chair of the European Group of NHRIs, a representative of Scotland on the Advisory Panel to the Commission on a Bill of Rights, part of the National Preventative Mechanism (NPM) under the Optional Protocol to the Convention Against Torture (OPCAT) and forms part of the independent monitoring mechanisms under the UN Disability Convention. Other members of the NPM are (in England and Wales): Independent Custody Visiting Association, HM Inspectorate of Constabulary, Care Quality Commission, Healthcare Inspectorate Wales, Children's Commissioner for England, Care and Social Services Inspectorate Wales, Office for Standards in Education; (in Scotland): HM Inspectorate of Prisons for Scotland, HM Inspectorate of Constabulary for Scotland, Mental Welfare Commission for Scotland, Scottish Commission for the Regulation of Care; (in Northern Ireland): Independent Monitoring Boards (Northern Ireland), Criminal Justice Inspection Northern Ireland, Regulation and Quality Improvement Authority, Northern Ireland Policing Board Independent Custody Visiting Scheme. Other independent mechanisms under CRPD are the Equality and Human Rights Commission, the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission.

54 When establishing a National human Rights Institution, a state is expected to comply with the United Nations (UN) Principles Relating to the Status of National Institutions, known as the Paris Principles. These are a series of recommendations on the role, status and functions of NHRIs which were developed in Paris in 1991 and adopted by the UN General Assembly in 1993. They provide that national human rights institutions should: Be established in the Constitution or by a law that clearly sets out its role and powers; Be given the power to promote and protect human rights and have as broad a mandate as possible; Be pluralist and co-operate with nongovernmental organisations (NGOs), judicial institutions, professional bodies and government departments; Have an infrastructure that allows them to carry out their functions; Have adequate funding to allow the institution "to be independent of the government and not be subject to financial control which might affect this independence"; Have stable mandates for the members of the institution provided for by law. They also provide that NHRIs shall have duties and powers including: Making recommendations and proposals to Government, Parliament or other competent bodies, on existing and proposed laws, administrative process, or changes to the organisation of the judiciary which will impact on human rights, human rights violations, and the general situation of human rights or specific issues it decides to take up; Promoting harmonisation of national law, policy and practice with international human rights law and standards; Contributing to international human rights reviews of the state; Cooperating with the United Nations and other bodies dedicated to promoting and protecting human rights; Promoting teaching and research on human rights and organising public awareness and education programmes; To publicise human rights and efforts to combat discrimination by increasing public awareness, especially through information and education and by making use of media channels. The Northern Irish Commission was the first in the UK to gain full A status accreditation in 2007. This was followed by both the EHRC and the SHRC in 2009.

55 In real terms.

56 For more information see: <http://www.equalityhumanrights.com/>

57 See:

<http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120424/halltext/120424h0002.htm#1204244600001>

58 Key Paris principles state that an NHRI must be independent of government and not be subject to financial control that might affect its independence. The commission must also have adequate funding to conduct its activities

59 Section 4, Human Rights Act 1998.

60 For a short overview of the debates see for example, WAGNER, A. 2011. Prisoner votes and the democratic deficit. UK Human Rights Blog, <<http://ukhumanrightsblog.com/2011/09/20/prisoner-votes-and-the-democratic-deficit/>>.

61 AXA General Insurance v. Lord Advocate [2011] 3 WLR 871, UKSC, Lord Hope at para 49 “The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate. While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are ignored or despised by the majority, the elected members of a legislature of this kind are best placed to judge what is in the country’s best interests as a whole... This suggests that the judges should intervene, if at all, only in the most exceptional circumstances.”

62 See SHRC 2011i. Submission to the Scotland Bill Committee. Edinburgh: Scottish Human Rights Commission. More broadly, in its review the Calman Commission noted that the Scottish Parliament Committees worked well, but that their workload limited the time available for legislative scrutiny. Serving Scotland Better: Scotland and the United Kingdom in the 21st Century, final report, 29 June 2009, Commission on Scottish Devolution, para 6.22. It also noted that, despite a focus early on in the Scottish Parliamentary process on consultation and evidence, new provisions are often introduced in later amending stages which are often rushed, lacking opportunity for external involvement (para 6.44).

63 section 31 of the Scotland Act 1998 and Standing Orders rules 9.3.3 and 9.3.1. The Scotland Act 2012 will extend this regime to all Bills.

64 See <http://www.scottishhumanrights.com/news/latestnews>

65 A v Scottish Ministers, 2002 SC(PC) 63.

66 Some Parliaments, such as the UK Parliament at Westminster, have specific human rights committees with broad mandates to consider human rights. A standing or thematic committee on human rights could be empowered to review draft legislation to consider how it could better contribute to the realisation of human rights, undertake inquiries into areas of concern and it could become a forum for constructive accountability of the Parliament and Government’s efforts to put human rights into practice. For an overview of the work of the UK Parliament Joint Committee on Human Rights see <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/>

67 Joint Committee on Human Rights, Legislative Scrutiny: Welfare Reform Bill, summary, December 2011.

68 Prior to the Scottish Parliamentary election in 2011 for example Amnesty International UK succeeded in photographing then leaders of all major parties holding the banner “Scotland Stands for Human Rights”, <http://www.amnesty.org.uk/content.asp?CategoryID=10828>

69 Cadder v HMA [2010] UKSC 43.

⁷⁰ The term victim/survivor is used in this report. It is, however, acknowledged that some other terms are preferred by others.

71 The Commission’s full submission to the Carloway Review is available here: SHRC 2011f. Submission to The Carloway Review Consultation Document. Edinburgh: SHRC. <http://scottishhumanrights.com/news/latestnews/article/carlowaynewsjune2011>

⁷² <http://herald.vlex.co.uk/vid/rising-bill-for-settling-slopping-out-335000066>

73 Including sending an open letter to all Members of the Scottish Parliament <http://scottishhumanrights.com/news/latestnews/article/oct11openlettermsps>

74 There has been a six per cent year on year decrease in the budget of the Scottish Government, Financial Scrutiny Unit Briefing, Simon Wakefield and Nicola Hudson, 22 November 2010, table 4. Public spending is not anticipated to return to 2010 levels for 16 years, CHRISTIE COMMISSION 2011a. The Commission on the Future Delivery of Public Services. Edinburgh: APS Group Scotland. p viii.

75 See for example the written evidence provided to the Joint Committee on Human Rights, Inquiry on the implementation of the right of disabled people to independent living, http://www.parliament.uk/documents/joint-committees/human-rights/Independent_Living_Written_Evidence_4.pdf

76 The Scottish Government launched the Commission to Consider the Future of Public Services following its November 2010 spending review with a remit to provide “recommendations about how public services must change to meet the medium and long term financial challenges and the expectations of the people of Scotland”.

77 Many specific issues related to the social context will be addressed in individual thematic sections in the full report, including those on ‘where we live’, ‘education and employment’, ‘dignity and care’ and health.

78 The current population figure sits within a context of relative stability over the last 50 years which peaked at 5.24 million in 1974.

79 At present almost 40 per cent of the population is not of working age (i.e. below 16 or over 60+ for women and 65+ for men). Since the mid-1980s rural authorities account for 2.7 per cent of the population increase compared to 1.4 per cent for the rest of Scotland, but when this is explored by age group this figure is even more stark. In rural areas those over pensionable age rose by 17.4 per cent compared to only 5.8 per cent in the rest of Scotland.

80 This rise does not take into account any future impact of government policies e.g. immigration policies or other factors.

81 But not exclusively. Research also suggests immigration from Eastern Europe contributing to an increase in younger people. See MACPHERSON, S. & BOND, S. 2009. Equality issues in Scotland: a review of research, 2000–08. Employment Research Institute, Edinburgh Napier University.

82 Future projections in population structure show that the proportion of older people, especially the 'very old' (aged 85+) and older men will increase considerably. From 2006 to 2016 the population over 65 is expected to rise by 21 per cent; by 2031 it will have risen by 62 per cent and by 2031 the 85+ age group will have risen by 144 per cent. See <http://kt-equal.org.uk/uploads/BuiltHS%20Old%20Themes%20New%20Issues%20KT%20EQUAL%20Edinburgh%2019%20March%202010.pdf>

<http://www.holyrood.com/articles/2011/01/05/making-it-right-2/>

and http://www.vhscotland.org.uk/library/misc/ippr_older_people_and_wellbeing.pdf

83 Approximately 58,000 to 65,000 people were thought to suffer from dementia in 2007. This is expected to increase to around 102,000 to 114,000 by 2031 a 75 per cent increase (Alzheimer Scotland: See: <http://www.alzscot.org/pages/policy/dementiaepidemic.htm>).

84 Jacquie Roberts, then CEO of the Care Commission, raised concerns that by 2020 approximately 40 per cent of young people leaving school will need to enter the sector in order to cope with the projected increase in demand for services. She stated that if population projections are correct and services continue at their current level of provision without an increase in resources, then by 2031 approximately 175,000 people who are currently in receipt of services would not receive anything. She also stated that with a care sector that is unable to cope with the level of need, there may be an increased need to institutionalise older people which could increase the risk of human rights abuses ADAMS, L. 2009. Scotland's Secret Scandal - abuse of the elderly. The Herald, 12th October 2009.

85 The central aim of which is to improve the quality and consistency of care for older people; end 'cost-shunting' between the NHS and local authorities and move to a culture of 'doing with' rather than 'doing to' that will enable the individual to experience a better quality of life.

See <http://www.scotland.gov.uk/News/Releases/2011/12/12111418>. The better integration of adult health and social care has been publicly supported by amongst others, COSLA, the Expert Group on Future Options for Social Care, Scotland's Chief Medical Officer, the Association of Directors of Social Work and number of NHS Boards, see

<http://www.scotland.gov.uk/Resource/Doc/924/0123935.pdf>

86 Jacquie Roberts, then CEO of the Care Commission has noted that the equivalent of a new 50 bed care home built every two weeks for the next 20 years would be required to cope with future housing and care demands (Adams). ADAMS, L. 2009. Scotland's Secret Scandal - abuse of the elderly. The Herald, 12th October 2009.)

87 Social exclusion is used to describe where people are prevented from fully participating in society resulting from the denial of civil, political, social, economic and cultural rights OPPENHEIM, C. & HARKER, L. 1996. Poverty: The Facts. 3rd Revised edition ed. London: Child Poverty Action Group.

88 <http://www.povertytruthcommission.org/>

89 for a human rights analysis of the Bill see JOINT COMMITTEE ON HUMAN RIGHTS 2009a. Legislative Scrutiny: Child Poverty Bill. London: UK Parliament.

<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/183/18305.htm>

90 Targets were to reduce child poverty by 2010 and eradicate it by 2020.

91 See <http://www.scotland.gov.uk/Topics/People/tacklingpoverty/ChildPoverty>

92 That is men over the age of 65 and women over the age of 60.

93 Half of adults of working age who are living in poverty in the UK as a whole, live in households with work (52 per cent). See MCKENDRICK, J., MOONEY, G., DICKIE, J. & KELLY, P. (eds.) 2011b.

Poverty in Scotland 2011: Towards a more equal Scotland?, London: Child Poverty Action Group in association with the Scottish Poverty Information Unit, the Open University and the Poverty Alliance.

Variations can also be seen between men and women, with more women than men living in poverty, this is most marked for those of pensionable age. Lone parents are also more than twice as likely than couples with children to be living in poverty MCKENDRICK, J. 2011b. Who lives in poverty? In: MCKENDRICK, J., MOONEY, G., DICKIE, J. & KELLY, P. (eds.) Poverty in Scotland 2011: Towards

a more equal Scotland? London: Child Poverty Action Group in association with the Scottish Poverty Information Unit, the Open University and the Poverty Alliance. Ethnic minority communities in Scotland most often experience poverty as a result of prejudice in gaining employment (discussed further in Chapter 3.3) (BEMIS 2009; de Lima et al. 2011) and loss of traditional livelihoods, pressures to lead settled lives, prejudice and low literacy levels have been shown to have increased Gypsy/Travellers' risk of poverty (De Lima et al. 2011).

94 Research in the Scottish context has shown that for many in low paid jobs, even 45 hours a week of employment at the minimum wage is not enough to lift a family income out of poverty (Example based on the net disposable income for a couple plus two children before housing costs, with one parent in work earning minimum wage) BRADSHAW, J. 2011a. More than numbers: understanding poverty today - Poverty Trends: Child Poverty. *2nd SCOTTISH ASSEMBLY FOR TACKLING POVERTY 2011: Aspirations and Inspirations: Meeting the Challenge of Poverty in Difficult Times*. Glasgow: Poverty Alliance.

95 Gauging poverty in rural areas is made difficult by the fact that poverty is measured by 'concentrated deprivation' which doesn't work in rural areas. Moreover, communities often don't want to declare themselves as poor. An estimated one in every seven people living in rural Scotland is living in poverty and whilst the causes of poverty are similar throughout Scotland, there are particularities of rural living which are believed to exacerbate the problems of living in rural Scotland including: Higher costs of living; Higher levels of consumption (fuel to heat homes and travel greater distances); Fewer opportunities to earn an adequate income; Dispersed invisible deprivation; Culture of independence and self-reliance; Low pay and gender pay issues; and Access to services, education and work MCKENDRICK, J. 2011a. Rural Poverty. In: MCKENDRICK, J., MOONEY, G., DICKIE, J. & KELLY, P. (eds.) *Poverty in Scotland 2011: Towards a more equal Scotland?* London: Child Poverty Action Group in association with the Scottish Poverty Information Unit, the Open University and the Poverty Alliance.

96 See http://www.cafamily.org.uk/media/381221/counting_the_costs_2012_full_report.pdf

97 For example in relation to education and work, research has highlighted that there is growing evidence of both gender equality in certain areas (e.g. educational performance) and of persistent gender inequalities in others (e.g. employment). The experiences of children (in education) and adults (in employment) from minority ethnic groups are also varied, with some minority ethnic groups out performing all children in education and considerable variance in participation rates of men and women between minority ethnic groups in employment. Persistent inequalities of access to (and outcomes in) education and work remain, however for Scottish Gypsy Travellers. People over 50 (although this is increasing) and people with disabilities also are also over represented amongst those who are economically inactive. See MACPHERSON, S. & BOND, S. 2009. *Equality issues in Scotland: a review of research, 2000–08*. Employment Research Institute, Edinburgh Napier University. Macpherson and Bond (2009) provide a valuable review of research (from 2000 to 2008) on equalities issues in Scotland. Next to the US, the UK suffers some of the worst levels of inequality in the world. The Institute of Economic Affairs data shows that in Scotland levels of inequality are at their worst since 1961, when comparable records began SCOTLAND'S FUTURES FORUM. *Poverty and inequalities in Scotland: ten years of devolution*. Poverty and inequalities in Scotland: ten years of devolution, 2009 Glasgow. Scottish Poverty Information Unit.

98 A girl born in Scotland today can expect to live 80.1 years and a boy 75.3 years. This compares to 81.4 and 77.1 in Wales and 82.1 and 78 in England. A study of life expectancy across the UK revealed that of the bottom ten geographical areas, eight are Scottish authorities, the top four of which are all on the west coast. None of the top 10 areas for male life expectancy are in Scotland ONS. 2010. *Interim Life Tables* [Online]. London: Office for National Statistics. Available: www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-61850 [Accessed 3 October 2011]. Within Scotland the gap between the lowest and highest life expectancy is also marked, with the difference being 5.6 years for women and 7 years for men. There is also a noted difference between east and west with a life expectancy of 78.3 (men) and 83.1 (women) in Edinburgh, compared to 71.1 (men) and 77.5 (women) in Glasgow (ibid.) Overall, people in Scotland die younger than in any other EU country EHRC 2010b. *Triennial Review: How fair is Britain?* London: Equality and Human Rights Commission,.. For up to date information on health outcomes in Scotland see <http://www.scotland.gov.uk/Resource/0038/00387520.pdf>

99 See <http://www.scotland.gov.uk/Resource/Doc/337715/0110884.pdf>. Though this rests on a number of assumptions, including economic projections.

100 For example, comparable attitude surveys show that the attitude of Scots to those in poverty and those in receipt of welfare benefits, actually differs little from the rest of the UK ORMSTON, R. &

CURTICE, J. 2011. Is Scotland more left-wing than England? British Social Attitudes: Special Edition. Edinburgh: ScotCen..

101 Attitudes in particular towards gay men and lesbians had notably improved since 2006 by 61 per cent agreeing that gay and lesbian couples should be allowed to marry. This change in attitudes towards the LGB community is further supported by the evidence from EHRC Triennial Review EHRC 2010b. Triennial Review: How fair is Britain? London: Equality and Human Rights Commission.,

102 See also:

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6647&mode=html>;

<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/independent-living-report/>; http://www.article12.org/pdf/Out_of_Site.pdf

103 Jack Doyle, "Human rights laws are a charter for criminals, say 75% of Britons", 16 April 2012, Daily Mail. Poll by YouGov commissioned by right of centre think tank Policy Exchange. Among Scottish respondents 44% Strongly Agree, and 27% Tend to Agree.

104 The Climate Change (Scotland) Act 2009, which contained ambitious emissions reductions targets interim 42 per cent reduction target for 2020, with the power for this to be varied based on expert advice, and an 80 per cent reduction target for 2050. To help ensure the delivery of these targets, this part of the Act also requires that the Scottish Ministers set annual targets, in secondary legislation, for Scottish emissions from 2010 to 2050.

105 Including by Mary Robinson and Al Gore. Scotland has also presented its ambitions to be a global leader in combating climate change and in developing renewable energy technology at COP15.

106 See www.scottishhumanrights.com/ourwork/environment

107 <http://www.scottishhumanrights.com/ourwork/environment/environmentourwork>

108 Findings and recommendations with regard to communication ACCC/C/2008/27 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, UN Economic Commission for Europe, UN Doc. ECE/MP.PP/C.1/2010/6/Add.2, paras 44-45.

109 See for example Scottish Government consultation on Legal Challenges to Decisions by Public Authorities Under the Public Participation Directive 2003/35/EC, April 2012; SHRC 2011d.

Submission paper for The Public Petitions Committee PE No. 1372 Environmental Rights. Edinburgh: Scottish Human Rights Commission.

110 The Ofcom Communications Market survey in 2011 found that 61 per cent of adults in Scotland had a broadband connection at home, compared to a UK average of 74 per cent. The most common reasons given for low participation rates are a lack of need or desire or a lack of knowledge. Cost of computer equipment and broadband accounted for a much smaller proportion. See

<http://www.scotland.gov.uk/Resource/Doc/366093/0124633.pdf>

111 See also: <http://www.scotland.gov.uk/Publications/2011/03/18085554/6>;

<http://www.eveningtimes.co.uk/cctv-plan-for-1000-glasgow-taxis-1.982469>;

<http://www.theglaswegian.co.uk/glasgow-news/news/2012/02/08/glasgow-taxis-the-city-s-fourth-emergency-service-102692-23741160/>;

http://www.cabdirect.com/taxi_trade_news/news.cfm/642;

<http://www.thescottishsun.co.uk/scotsol/homepage/news/2677993/Shocking-rise-in-the-use-of-CCTV-cameras-in-Scotland.html>; <http://www.abouthumanrights.co.uk/human-rights-cctv.html>

112 See also: <http://www.liberty-human-rights.org.uk/campaigns/for-their-eyes-only/for-their-eyes-only.php>; <https://www.eff.org/deeplinks/2012/04/uk-government-proposes-law-monitoring-every-email-phone-call-and-text-message>

113 See also: <http://www.liberty-human-rights.org.uk/human-rights/privacy/dna-retention/index.php>

<http://www.equalityhumanrights.com/news/2010/january/governments-proposals-incompatible-with-the-european-convention-on-human-rights/>;

<http://www.scotland.gov.uk/Resource/Doc/254429/0110269.pdf>;

<http://www.scotland.gov.uk/Resource/Doc/77843/0018252.pdf>;

<http://www.hatnews.org/2010/08/26/government-challenged-on-asylum-seeker-dna-tests/>

114 See: <http://www.cjscotland.co.uk/2012/04/strathclyde-police-taser-pilot-human-rights-and-legality-concerns-immunity-claim-challenged/>

http://www.amnesty.org.uk/news_details.asp?NewsID=17176

http://www.amnesty.org.uk/news_details.asp?NewsID=17547

<http://www.scotsman.com/the-scotsman/opinion/comment/shabnum-mustapha-taser-ruling-sparks-a-new-controversy-1-2245386>

<http://scottishhumanrights.com/ourwork/publications/article/tasers>

115 see Appendix i for details of the method by which these themes were prioritised

116 Since 1999 the way the United Kingdom is run has been transformed by devolution - a process designed to decentralise government. Devolution essentially means the transfer of powers from the

UK parliament in London to the Scottish Parliament and the Scottish Executive (officially referred to as the Scottish Government since August 2007) in Edinburgh. The Scottish Parliament is a legislation-making body, passing bills in various areas of its many devolved responsibilities. The Scottish Parliament also has the power to raise or lower income tax (as changed by the Scotland Act 2012). Devolved areas of legislative competence to the Scottish Parliament include agriculture, forestry & fishing, education, environment, health, housing, justice, policing and courts, local government, fire service, economic development, some transport responsibilities and human rights. The UK government is responsible for national policy on other powers which have not been devolved - these are known as "reserved powers". These include the constitution, defence and national security, foreign policy, energy, immigration and nationality, social security and some transport responsibilities. Many themes in this scoping project engage equality legislation in relation to combating discrimination. Equal opportunities is a reserved matter (under Schedule 5 of the Scotland Act 1998 (Reservation - L2)), however, the reservation incorporates an exception in so far as the Scottish Government and the Scottish Parliament can impose certain duties which allows for scope for positive steps to be taken in relation to equality despite limitations on the powers available to the devolved administration.

117 Section 149 of the Act.

118 *"The public sector equality duty requires equality to be considered in all the functions of public authorities, including decision-making, in the design of internal and external policies and in the delivery of services, and for these issues to be kept under review. The public sector equality duty is set out in sections 149-157 and schedules 18 and 19 of the Equality Act. The general equality duty covers all public authorities named or described in Schedule 19 – Part 3 of the Equality Act 2010 together with those listed in the Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2010. The specific duties were created by secondary legislation in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. These specific duties came into force on 27 May 2012. Under the specific duties each listed authority is required to assess and review policies and practices i.e. impact assess".* See <http://www.equalityhumanrights.com/scotland/public-sector-equality-duty/non-statutory-guidance-for-scottish-public-authorities/> for further details.

¹¹⁹ Not all of the many issues identified within this framework could, however, be explored further in Phase 2. Accordingly, a prioritisation criteria filter was applied (see Appendix 1) in order to determine which would be explored in more focused detail.

¹²⁰ The Care Commission was set up under the Regulation of Care (Scotland) Act 2001 ("the 2001 Act") in order to raise the standards of care by involving people who are cared for and working with people providing care. On 1st April the Care Commission's functions passed to a new body; Social Care and Social Work Improvement Scotland (SCSWIS) under the Public Services Reform (Scotland) Act 2010 and on 16th September 2011 Nicola Sturgeon, Cabinet Secretary for Health and Wellbeing, announced that SCSWIS would be re-named the Care Inspectorate and that regulations would be introduced to specify that all care homes would have a minimum of one unannounced annual inspection (BBC, 16/09/2011).

¹²¹ S. 45 of the 2001 Act

¹²² See thematic section 2 on Health for further details of healthcare standards.

¹²³ See: <http://www.scotland.gov.uk/Publications/2012/05/6469>

¹²⁴ ADAMS, L. 2009. Scotland's Secret Scandal - abuse of the elderly. The Herald, 12th October 2009.

125 The Scottish Government commissioned a module of questions on the August Wave of the Ipsos MORI Scottish Public Opinion Monitor (cited in (2011 Scottish Government Social Research) a quarterly telephone survey carried out among a representative sample of c.1,000 adults (18+) in Scotland.

¹²⁶ Jacquie Roberts, then CEO of the Care Commission, raised concerns that by 2020 approximately 40 per cent of young people leaving school will need to enter the sector in order to cope with the projected increase in demand for services. She is quoted as stating that if population projections are correct and services continue at their current level of provision without an increase in resources, then by 2031 approximately 175000 people who are currently in receipt of services would not receive anything. She also stated that with a care sector that is unable to cope with the level of need, there may be an increased need to institutionalise older people which could increase the risk of human rights abuses ADAMS, L. 2009. Scotland's Secret Scandal - abuse of the elderly. The Herald, 12th October 2009.

¹²⁷ See: <http://www.scottishhumanrights.com/careaboutrights>

¹²⁸ <http://www.scottishhumanrights.com/careaboutrights/evaluation>

¹²⁹ Powell v United Kingdom (2000) 30 EHRR CD 362 and Calvelli and Ciglio v. Italy [2002] Grand Chamber, application no. 32967/96, 17 January 2002.

¹³⁰ Silih v Slovenia, Grand Chamber, 9 April 2009, application no. 71463/01, para. 192.

¹³¹ Silih v Slovenia, Grand Chamber, 9 April 2009, application no. 71463/01, para. 196.

¹³² such as denial of food, water, sanitation See e.g. KALASHNIKOV v. RUSSIA, (*Application no. 47095/99*), JUDGMENT of 15 July 2002

CASE OF DOUGOZ v. GREECE, (Application no. 40907/98), JUDGMENT of 6 March 2001

CASE OF PEERS v. GREECE, (Application no. 28524/95), JUDGMENT of 19 April 2001

CASE OF PRICE v. THE UNITED KINGDOM, (Application no. 33394/96), JUDGMENT of 10 July 2001

133 CASE OF PRICE v. THE UNITED KINGDOM, (Application no. 33394/96), JUDGMENT of 10 July 2001

¹³⁴ For a more complete overview of the relevant human rights in social care see SHRC, Care about Rights? <http://www.scottishhumanrights.com/careaboutrights/>

¹³⁵ <http://scottishhumanrights.com/news/latestnews/article/olderpeopleun>

¹³⁶ This could be care homes, at home or in other care settings such as hospital.

¹³⁷ Similarly in England, Panorama's documentary investigating systematic abuse at Winterbourne View Care Home in June 2011 highlighted allegations of serious abuse of care home residents BBC NEWS. 2011d. Government condemns shocking Winterbourne View abuse. *BBC News* [Online]. [Accessed 19th September 2012].

¹³⁸ This figure may well be higher as this is an issue likely to be under-reported.

¹³⁹ Details of how participants' views were captured in this scoping project can be found in Appendix 1.

140 Although there were several individuals whose contact with some family members was restricted or supervised and these were authorised by guardianship powers.

¹⁴¹ <http://dementiascotland.org/news/files/MEDIA-RELEASE-comment-on-Jeanette-Maitland-May2012.pdf>

142 The Care about Rights training programme can be accessed here:

<http://www.scottishhumanrights.com/careaboutrights/welcomepage>

Evaluation of the Care about Rights training can be accessed here:

<http://www.scottishhumanrights.com/application/resources/documents/CaRfullevaluationfinalOct2011.pdf>

143 In these circumstances the local authority retains a duty to provide aftercare support to a child who is looked after beyond school age until the 19th birthday or up until the 21st birthday if welfare requires it (See sections 17 and 29 of the 1995 Act). The Children (Leaving Care) Act 2000 provided for the transfer of financial support for young people aged 16 and 17 from the Department for Work and Pensions to local authorities. This was implemented in Scotland in April 2004.

144 Previously the Scottish Alliance for Children's Rights.

145 Autism spectrum disorder can cause a wide range of symptoms, which include difficulties in three forms of interaction:

problems and difficulties with social interaction – including lack of understanding and awareness of other people's emotions and feelings;

impaired language and communication skills – including delayed language development and an

inability to start conversations or take part in them properly and unusual patterns of thought; and

physical behaviour – including making repetitive physical movements, such as hand tapping or

twisting (the individual develops set routines of behaviour and can get upset if the routines are

broken)

Source: <http://www.nhs.uk/conditions/autistic-spectrum-disorder/Pages/Introduction.aspx> (accessed on March 22nd 2012).

¹⁴⁶ <http://www.autism.org.uk/get-involved/campaign-for-change/our-campaigns/we-exist-campaign-for-a-scottish-autism-bill.aspx>

¹⁴⁷ <http://www.autism.org.uk/get-involved/campaign-for-change/our-campaigns/we-exist-campaign-for-a-scottish-autism-bill.aspx>

¹⁴⁸ Often individuals with autism spectrum disorders (ASDs) can have problems relating to eating and difficulties surrounding their diet, arising from both over and under eating. Literature and research on this issue is limited, but what limited work has been done shows that dieticians can help children (and others with ASD) to better manage their diet and avert resulting health problems.

<http://www.autism.org.uk/living-with-autism/understanding-behaviour/dietary-management-for-children-and-adolescents/dietary-management-over-eating.aspx>

149 MENTAL WELFARE COMMISSION FOR SCOTLAND 2009c. Summary of investigation into the care and treatment of Mr Q. Mental Welfare Commission for Scotland.

¹⁵⁰ This information is drawn from testimony provided to the Commission by Autism Rights in March 2011.

¹⁵¹ The Bill was introduced to Parliament on 26th May 2010 by Hugh O'Donnell, MSP and fell on 12th January 2011 when Parliament did not approve its general principles. Amongst its aims was to create a duty on Scottish Ministers to introduce an autism strategy.

¹⁵² <http://www.scotland.gov.uk/Publications/2010/03/29164308/1>

¹⁵³ Independent Living in Scotland, a policy scoping study, prepared for the Disability Rights Commission by Reid Howie Associates, 2007, p 125 et seq; ILiS, Ready for Action, 2009, p 3.

¹⁵⁴ The Independent Living Fund is an executive, non-departmental public body of the DWP, governed by a board of trustees.

¹⁵⁵ The UN Convention on the Rights of Persons with Disabilities in Scotland, report of the joint information and consultation event in Glasgow, 22 January 2010, Scottish Human Rights Commission, Equality and Human Rights Commission, Office for Disability Issues, Scottish Government; EHRC & SHRC 2011. Being part of Scotland's story under the disability convention: The report of the joint Commissions' participation event with disabled people in Scotland about the United Nations Convention on the Rights of Persons with Disabilities. Glasgow: Equalities and Human Rights Commission and Scottish Human Rights Commission.

¹⁵⁶ ILiS' definition of independent living demonstrates clearly the indivisibility and interdependence of all human rights and encompasses elements which are relevant to, among others Article 4 (general obligations), Article 8 (awareness raising), Article 9 (accessibility), Article 12 (legal capacity), Article 13 (access to justice), Article 18 (liberty of movement), Article 19 (independent living), Article 20 (personal mobility), Article 24 (education), Article 25 (health), Article 27 (work and employment), Article 28 (adequate standard of living and social protection), Article 29 (participation in political and public life), Article 30 (participation in cultural life, recreation and sport). See ILiS response to UK Joint Committee for Human Rights: Inquiry into the implementation of the Right of Disabled People to Independent Living, April 2011, paras 1.4-1.5.

¹⁵⁷ 91 of whom were within forensic learning disability services.

¹⁵⁸ In relation to the funding of community care services, between 2007 and 2011 there has been an increase in net expenditure of 19.2 per cent (over £330 million) with the majority of expenditure relating to older people's services (between 62 and 63 per cent) PAYNE, J. 2011. SPICe Briefing: Adult Community Care- key issues. Edinburgh: Scottish Parliament.. As of March 2010, 66,222 people in Scotland, all of whom would be considered to be disabled people under the definition used in the Equality Act 2010, access home care and support in Scotland and 3,678 people in Scotland (again all of whom would be considered disabled people) access direct payments.

¹⁵⁹ For more information see:

http://www.ldascotland.org/index.php?option=com_content&view=Article&id=301:direct-payments-fall-in-glasgow-rise-in-edinburgh&catid=38:personalisation&Itemid=54 accessed on March 23rd 2012.

¹⁶⁰ Scottish Government, Home care statistical return: a national statistics publication for Scotland, 2010.

¹⁶¹ This survey included the whole of the UK: 87 Councils in England; 12 in Wales, 9 in Scotland and 3 Health and Social Care Trusts in Northern Ireland. See

<http://www.ukhca.co.uk/pdfs/UKHCACommissioningSurvey2011.pdf>

¹⁶² Iain Gray, Deputy Minister for Community Care, 29 March 2000, SP OR Vol. 5, col. 1120.

¹⁶³ Adults with Incapacity (Scotland) Act 2000, s 1(3). Any person authorising an intervention under the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"), must first be satisfied in relation to the principles of the Act set out in S.1 which include; that there is benefit to the adult, that the benefit cannot reasonably be achieved without the intervention and that the intervention must be the least restrictive option in relation to the freedom of the adult.

¹⁶⁴ Shtukaturv v Russia, (application no. 44009/05), judgment of 27 March 2008.

¹⁶⁵ 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).

¹⁶⁶ Alajos Kiss v Hungary, (application no. 38832/06), decision of 20 May 2010.

¹⁶⁷ See for example for example: MENTAL WELFARE COMMISSION FOR SCOTLAND 2007. Older and Wiser. Mental Welfare Commission for Scotland.; CARE COMMISSION & MENTAL WELFARE COMMISSION FOR SCOTLAND 2009. Remember, I'm Still Me: Care Commission and Mental Welfare Commission joint report on the quality of care for people with dementia living in care homes

in Scotland. Dundee & Edinburgh: Care Commission & Mental Welfare Commission. In relation to mental health law, see SCOTTISH GOVERNMENT 2009f. Review of Mental Health Law Consultation Analysis. The Scottish Government.

¹⁶⁸ Sections 275-276.

¹⁶⁹ Section 259.

¹⁷⁰ Limited Review of the Mental Health (Care and Treatment) (Scotland) Act 2003: report as presented to Scottish Ministers, March 2009, The Scottish Government, p 9.

¹⁷¹ [2002] 35 EHRR 1

¹⁷² *Pretty v UK* 66 BLMR 147 (2002) at p163.

¹⁷³ [2009] UKHL45

¹⁷⁴ *The Queen (on the application of Tony Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin). See <http://ukhumanrightsblog.com/2012/08/16/locked-in-sufferers-challenge-to-ban-on-voluntary-euthanasia-fails-in-the-high-court/>

¹⁷⁵ SHRC, End of Life Assistance (Scotland) Bill, 14 May 2010, p7,

<http://archive.scottish.parliament.uk/s3/committees/endLifeAsstBill/evidence/ELA474.pdf>

¹⁷⁶ <http://www.journalonline.co.uk/News/1010740.aspx>

<http://www.bbc.co.uk/news/uk-scotland-16692686>

¹⁷⁷ Prof Alan Miller, SHRC, Brian Taylor's Big Debate, broadcast 21 June 2012, web

link: <http://www.bbc.co.uk/programmes/b00mk70p>

¹⁷⁸ See for example NHS Health Scotland and SHRC, Health Inequality Impact Assessment – Human Rights Case Studies, forthcoming, Edinburgh, 2012.

¹⁷⁹ A carer is defined as someone who provides substantial amounts of care on a regular basis for either an adult or a child in terms of the Social Work (Scotland) Act 1968 (S.12 AA) or the Children (Scotland) Act 1995 (S. 24). An unpaid carer is defined in the 2001 Census in slightly different terms as “looking after, giving help or support to family members, friends, neighbours or others because of long term physical or mental ill health or disability or problems relating to old age, excluding any care provided as part of any paid employment.” PAYNE, J. 2011. SPICe Briefing: Adult Community Care-key issues. Edinburgh: Scottish Parliament.

¹⁸⁰ section 12AA

¹⁸¹ Section 24

¹⁸² In total the Scottish Government has pledged to invest at least £8 million during 2011-12 in supporting carers through short break provision and the funding of NHS Board Carer Information Strategies.

¹⁸³ COMMUNITY CARE AND HEALTH (SCOTLAND) ACT 2002 NEW STATUTORY RIGHTS FOR CARERS: Accessed at http://www.sehd.scot.nhs.uk/publications/CC2002_10.PDF

¹⁸⁴ See <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/49020.aspx> for further details. The Committee has also launched another inquiry into where Gypsy/ Travellers live.

¹⁸⁵ Accessible at http://www.scottish.parliament.uk/S4_EqualOpportunitiesCommittee/Reports/eor-12-03w-rev.pdf last accessed on 1st October 2012.

¹⁸⁶ See <http://www.sccyp.org.uk/news/in-the-news/research-demonstrates-stark-differences-in-lives-of-young-carers> for further information.

¹⁸⁷ See <http://www.sccyp.org.uk/news/in-the-news/research-demonstrates-stark-differences-in-lives-of-young-carers> for further information.

¹⁸⁸ Not all of the many issues identified within this framework could, however, be explored further in Phase 2. Accordingly, a prioritisation criteria filter was applied (see Appendix 1) in order to determine which would be explored in more focused detail. A number of other issues related to health such as quality of care within healthcare settings are presented within the thematic section entitled Dignity and Care.

¹⁸⁹ With the exception of reserved matters in terms of Schedule 5 of the Scotland Act 1998. These include abortion, xenotransplantation, embryology, surrogacy and genetics, medicines, medical supplies and poisons, and welfare foods alongside regulation of the health professions (head G) and health and safety (head H).

¹⁹⁰ The Chief Medical Officer for Scotland is the Scottish Government's principal medical adviser and Head of the Scottish Medical Civil Service. The Scottish Government Health Directorate provides central management of the NHS with a Management Executive that oversees the work of the fourteen area NHS boards which in turn plan and deliver health services for people in their area and is responsible both for NHS Scotland and for the development and implementation of health and community care policy. The NHS in Scotland has around 132,000 staff, including more than 63,000 nurses, midwives and health visitors and over 8,500 doctors (www.show.scot.nhs.uk). Scotland's

eight special health boards are: NHS National Services Scotland which provides specialist services such as the blood transfusion service and surveillance of communicable diseases, the Scottish Ambulance Service, NHS 24 (24 hour telephone access to advice from clinical professionals), The State Hospital at Carstairs which provides care for around 100 patients requiring care in high security, NHS Health Scotland which promotes and encourages healthy lifestyles and NHS Healthcare Improvement Scotland which sets and monitors clinical standards, [NHS Education for Scotland](#)- the training organisation of NHS Scotland and [National Waiting Times Centre Board \(The Golden Jubilee National Hospital\)](#) -a dedicated elective facility in key specialties for patients throughout Scotland to assist in reducing waiting times.

¹⁹¹ According to recent NHS statistics, one in three people in Scotland will be diagnosed with cancer at some stage in their lives and the current figure of 27,000 annual diagnoses will continue to rise as Scotland's population ages CHIEF MEDICAL OFFICER OF SCOTLAND 2010. Health in Scotland 2009: Time for Change. Edinburgh: Scottish Government, MONK, S., TANG, C. & WHITEHEAD, C. 2010. What does the literature tell us about the social and economic impact of housing? Report to the Scottish Government: Communities Analytical Services. Edinburgh: Cambridge Centre for Housing and Planning Research, University of Cambridge, ISD SCOTLAND. 2010. *Cancer Statistics* [Online]. Edinburgh: Scottish Government. Available: <http://www.isdscotland.org/Health-Topics/Cancer/Cancer-Statistics/All-Types-of-Cancer/#all-cancer-types> [Accessed 29th March 2012], BBC NEWS 2011c. Figures warn one in three Scots will get cancer. Glasgow: BBC News.

¹⁹² In 2009 there were 1,282 Alcohol Related Deaths in Scotland NHS NATIONAL SERVICES SCOTLAND 2011. Alcohol Statistics Scotland 2011. Edinburgh: Information Services Division. Smoking is still the biggest cause of premature death in Scotland. There are numerous other serious health concerns facing Scotland including high rates of alcohol and drug-related deaths, suicide, violence, cardiovascular disease and strokes SCOTTISH GOVERNMENT 2007a. Better Health, Better Care: A discussion document. Edinburgh.

¹⁹³ ONS. 2010. *Interim Life Tables* [Online]. London: Office for National Statistics. Available: www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-61850 [Accessed 3 October 2011]. The "Glasgow Effect" is noted here with men and women in Edinburgh having 6.2 (83.1 vs 78.3) and 5.6 (77.5 vs 71.1) more years life expectancy than their counterparts in the City of Glasgow *ibid*.

¹⁹⁴ Chief Medical Officer for Scotland, *Annual Report 2010*, Scottish Government.

¹⁹⁵ *Ibid*.

¹⁹⁶ Chief Medical Officer for Scotland, *Annual Report 2010*, Scottish Government.

¹⁹⁷ *Ibid*.

¹⁹⁸ *Powell v United Kingdom* (2000) 30 EHRR CD 362 and *Calvelli and Ciglio v. Italy* [2002] Grand Chamber, application no. 32967/96, 17 January 2002.

¹⁹⁹ *Silih v Slovenia*, Grand Chamber, 9 April 2009, application no. 71463/01, para. 192.

²⁰⁰ *Ibid*, para 196.

²⁰¹ *Savage (Respondent) v South Essex Partnership NHS Foundation Trust* [2010] EWHC 865. NB. This is an English case but the relevant element is its interpretation of Article 2, ECHR in the Human Rights Act 1998.

²⁰² *Rabone and another (Appellants) v Pennine Care NHS Trust*, [2012] UKSC 2.

²⁰³ such as denial of food, water, sanitation See e.g. *KALASHNIKOV v. RUSSIA*, (*Application no. 47095/99*), JUDGMENT of 15 July 2002

CASE OF DOUGOZ v. GREECE, (*Application no. 40907/98*), JUDGMENT of 6 March 2001

CASE OF PEERS v. GREECE, (*Application no. 28524/95*), JUDGMENT of 19 April 2001

CASE OF PRICE v. THE UNITED KINGDOM, (*Application no. 33394/96*), JUDGMENT of 10 July

2001. Thus far this has generally been considered in detention settings, however it is important to recognise the broad definition of detention which the Council of Europe Committee for the Prevention of Torture uses to include places where people are *de facto* detained (including e.g. care homes with entry codes which they may not remember). This will certainly apply to secure wards and may also apply to others where older or vulnerable patients are held. Potential also e.g. infectious disease wards.

²⁰⁴ *CASE OF PRICE v. THE UNITED KINGDOM*

²⁰⁵ *Case of Jehovah's Witnesses of Moscow and others v Russia*, (*application no. 302/02*), judgment of 10 June 2010, paras 135-6.

²⁰⁶ Both Article 8 of the ECHR and the Convention on the Rights of Persons with Disabilities contains several protections of the right to participate in decisions. Regarding the ECHR see for example *Glass v UK*, (*application no. 61827/00*), judgment of 9 March 2004.

²⁰⁷ Information is referenced in the Act in section 3(2) (d) as a commitment that “health care is to...(d) have regard to the importance of providing such information and support as is necessary to enable the patient to participate...” and taking all reasonable steps to *ensure* that “information and support is in a form that is appropriate to the patient’s needs”

208 See for example Demir and Baykara v. Turkey (2009) 48 EHRR 54 at paras 76, 78, 80, 82-4.

209 For example Article 10, ECHR; Article 21 Convention on the Rights of Persons with Disabilities, which includes a specific requirement to take appropriate measures such as: “Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost”.

210 Article 9(2)(f)

²¹¹ Ibid, para 4.

²¹² <http://www.healthscotland.com/equalities/eqia/health-inequalities.aspx>

213 A total of 766, around 100 less than the total applications for legal advice and assistance for medical negligence in the same period, as set out above

²¹⁴ <http://www.scotland.gov.uk/News/Releases/2012/08/inpatientsurvey28082012>

215 As set out in the Smoking, Health and Social Care (Scotland) Act 2005.

216 In reaching these conclusions, the report considers the existing mechanisms for pursuing compensation by delict. Information was obtained from the Scottish Legal Aid Board in relation to applications which demonstrated that in 2008-09 710 applications for Legal Advice and Assistance were made to investigate whether or not evidence exists to support a claim. There were 862 applications for an increase in authorised expenditure (some of which related to applications made in previous years) and of these 770 were granted for the full amount and 33 for a lesser amount. During the same period 65 of the LAA applications resulted in a claim upon the fund. The report suggested that a settlement is more likely where a specialist medical negligence firm of solicitors were instructed.

217 The report also identified one of the key characteristics of the Welsh redress scheme as being that consideration should be given to the combination of different investigation roles, risk management, complaints and claims into a “joined-up” process strongly linked to learning lessons and improving safety.

²¹⁸ Scottish Government, *Consultation on Recommendations for No Fault Compensation in Scotland for Injuries Resulting from Clinical Treatment*, 19 August 2012, <http://www.scotland.gov.uk/Publications/2012/08/4456>

219 Older people (over 65) were more likely to answer ‘don’t know’ to the first statement (12 per cent, compared with 1 per cent of those aged 45-54).

²²⁰ See for example <http://www.scotland.gov.uk/Publications/2012/04/6273/6>

²²¹ Davies highlights that different professional groups can have very different views on what constitutes quality or a good outcome of health care. Powell et al note that healthcare users are equally problematic in their varied definitions of quality in health care, whether as patients or relatives, carers or taxpayers. See: POWELL, A. E., RUSHMER, R. K. & DAVIES, H. T. O. 2008. A systematic narrative review of quality improvement models in health care (in support of NHS Quality Improvement Scotland). Dundee, St. Andrews: Social Dimensions of Health Institute at The Universities of Dundee and St Andrews. DAVIES, H. 2005. Measuring and reporting the quality of health care: issues and evidence from the international research literature. Edinburgh: NHS Quality Improvement Scotland.

²²² In England and Wales the detail of NHS reform is being established through the Health and Social Care Bill (Department of Health 2012). In Northern Ireland a review of health and social care has identified twelve major principles for change (Department of Health, Social Services and Public Safety 2011).

²²³ <http://www.scottishhumanrights.com/careaboutrights>

²²⁴ This independent evaluation study was carried out by Ekosgen, the social research organisation supported by The University of Bedfordshire and Queen Margaret University. The full report can be accessed here- <http://www.scottishhumanrights.com/news/latestnews/article/carevaluationnews>. The evaluation surveys were carried out in two phases. The first, to establish baseline before participants complete Care About Rights training. Analysis in the Phase 2 report is based on responses of 799 participants (as at June 2011). A follow up survey of training participants was carried out in July 2011 asking respondents about the contribution of Care About Rights to their knowledge, understanding and practice. The online follow up survey generated 82 responses (as at July 2011).

²²⁵ <http://www.thecourier.co.uk/News/Dundee/article/14454c2/consultant-claims-poor-standard-of-care-at-ninewells-was-not-an-isolated-incident.html>

²²⁶ <http://www.scotland.gov.uk/News/Releases/2012/07/HAI-figures04072012>

227 Among the initiatives which have been introduced to tackle healthcare associated infections are:

- independent, unannounced inspections from the Healthcare Environment Inspectorate
- public reporting of hospital by hospital performance on key indicators such as MRSA and Clostridium difficile, hand hygiene and cleaning with a single website to give access to national and local information

- tripling funding to tackle Healthcare Associated Infections - to over £50 million over three years - to support a new and more comprehensive HAI Delivery Plan
- providing hundreds of additional cleaning staff across NHS Scotland funded by an extra £5 million a year

- introducing a new staff uniform and dress code

- zero tolerance approach to non-compliance with hand hygiene policies across the NHS.

See <http://www.scotland.gov.uk/News/Releases/2012/07/HAI-figures04072012>

²²⁸ <http://www.scotland.gov.uk/News/Releases/2012/07/HAI-figures04072012>

²²⁹ For an overview of policy responses and initiative to tackle delayed discharge in Scotland see: HUBBARD, G., HUBY, G., WYKE, S. & THEMESL-HUBER, M. 2004. Research Review on Tackling Delayed Discharge. Edinburgh: Scottish Executive.

²³⁰ <http://www.isdscotlandarchive.scot.nhs.uk/isd/1323.html>

²³¹ Assessments and treatment places were also to be reduced to specified levels.

²³² See thematic section on safety & security which explores other aspects of care of older people in relation to abuse.

²³³ Witnesses told the Committee of older people: Having no choice on discharge; Being put into placements that do not meet their needs; Having no chance to come to terms with a momentous life changing event (i.e. the possible move for the first time from independent living to residential care); Being discharged to care homes instead of receiving rehabilitation or returning to their homes with community support; Being discharged to care that is miles away from friends and family and Being discharged without adequate care in place or when they are still unwell, JOINT COMMITTEE ON HUMAN RIGHTS 2007. The Human Rights of Older People in Healthcare: 18th Report of Session 2006-7. London: UK Parliament.

234 *Pretty v UK*, (application no. 2346/02), judgment 29 April 2002, para 62.

²³⁵ Article 8(2), ECHR.

²³⁶ Article 5, UN CRC.

237 For example the prevalence of limiting long-term conditions in women was higher in Scotland (28 per cent) than in England (25 per cent). The prevalence of any cardio vascular condition or diabetes among women in Scotland (15.5 per cent) was higher than the comparable rates for women in England (13.0 per cent) or Northern Ireland (12.8 per cent). Ischemic Heart Disease was also slightly higher among women in Scotland (6.2 per cent) than in England (4.0 per cent), as was the rate of IHD or stroke combined. However incidence of possible psychiatric disorder was broadly similar throughout the UK but having a GHQ12 score of zero (indicating psychological wellbeing) was significantly more likely in Scotland (64 per cent of men and 58 per cent of women) than in Northern Ireland (60 per cent of men and 51 per cent of women) BROMLEY, C. & SHELTON, S. 2010. The Scottish Health Survey, UK comparisons 2010. Edinburgh: Scottish Government.

238 This has involved employing of a number of different strategies including: media campaigns; tobacco education in schools; smoking cessation services; and Scotland's first National Action Plan on Tobacco: A breath of Fresh Air SCOTTISH EXECUTIVE 2004a. A Breath of Fresh Air For Scotland – Improving Scotland's Health: The Challenge – Tobacco Control Action Plan. Edinburgh Scottish Executive.

239 Smoking, Health and Social Care (Scotland) Act 2005. The Act created offences for a person in charge of no-smoking premises to knowingly permit others to smoke there, and for a person to smoke in no-smoking premises. 239 No-smoking premises are now extensive, as prescribed by the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006.

²⁴⁰ In 2007 the Scottish Government brought in legislation to amend the Children and Young Persons (Scotland) Act 1937 so that it became unlawful to sell tobacco to under eighteens.

²⁴¹ [The Tobacco and Primary Medical Services \(Scotland\) Act 2010](#).

242 Among young people (aged 12-15), regular smoking among 15 year olds had decreased from 30 per cent in 1996 to 19 per cent in 2004 with the improvement rate among boys (14 per cent) much greater than among girls (24 per cent). Among women who smoke during pregnancy, rates have reduced from 29 per cent in 2003 to 22.7 per cent by 2005 (35.8 per cent in the most deprived areas

in 2003). Among adults (aged 16-64), smoking has fallen to 26 per cent by 2005 among both men and women (42 per cent in the most deprived areas) WIMBUSH, E., YOUNG, I. & ROBERTSON, G. 2007. Developing effective policy and practice for health promotion in Scotland. *Promotion & Education*, 14, 228-232.

243 With 40 per cent smoking and almost 30 per cent smoking heavily.

244 Warner argues that there is evidence to suggest that the effects of sudden and enforced tobacco withdrawal might be physiologically harmful for patients who smoke, particularly in terms of the possible effects on psychotic symptoms and/or the absorption of antipsychotic medication.

245 This included: three hospital wide consultations and different stages of the journey; a phasing out of tobacco products available at the hospital; the offer of Patient Nicotine Replacement Therapy for all 73 patients that smoked; supporting the 'Cut Down To Quit' (CDTQ) method; the removal of visual smoking cues (e.g. ashtrays and lighters); the provision of a smoking resource pack (provided to all patients in a variety of formats (including 'easy read' for patients with a learning disability) essential information on how to stop smoking, healthy eating, weight management, medication and other useful materials); engagement of smoking Cessation staff with every patient that smoked; an easy-read leaflet for patients on clozapine medication to support their understanding of the interactions smoking had on this medication; no smoking days to raise awareness; and a phased approach including a partial smoke-free ban (allowing smoking to continue within the grounds of the hospital) building up to the comprehensive smoke-free ban

246 The Scottish Government's plans to introduce minimum pricing for alcohol sales in the Alcohol Bill were defeated in September 2010 on the basis that a blanket policy would also affect responsible drinkers BARNES, E. 2011. SNP eyes tougher law on alcohol pricing. *The Scotsman*, 4th September 2011. The SNP victory in May 2011 provided a majority government, which has allowed the issue to be reintroduced as part of the Government's new legislative programme and the issue of minimum pricing has been raised once again.

²⁴⁷ See <http://www.healthscotland.com/topics/health/alcohol/MinimumPricing.aspx>

²⁴⁸ <http://www.scotch-whisky.org.uk/what-we-do/policy.-parliament-promotion/minimum-pricing/>

²⁴⁹ Evaluating *Scottish Diet Action Plan (SDAP)* from 1996 SCOTTISH OFFICE. 1996. Eating for Health: a Diet Action Plan for Scotland. Available:

<http://www.scotland.gov.uk/Topics/Health/health/Health/ActionPlan#a2> [Accessed 29th March 2012].

WIMBUSH, E., YOUNG, I. & ROBERTSON, G. 2007. Developing effective policy and practice for health promotion in Scotland. *Promotion & Education*, 14, 228-232. found that "*The direction, intensity and duration of action required to achieve the level of change defined by the dietary targets was underestimated; resources and initiatives were allocated too thinly across a broad range of actions rather than focusing on achieving population level impact within a few priority areas. The broad range of actions recommended were not transparently or consistently linked to the narrow range of food and nutrient targets identified*".

250 See <http://www.scotland.gov.uk/News/Releases/2002/05/1674> for further details.

251 See www.scotland.gov.uk for further details.

252 This survey had a response rate of 81 per cent. However, it is worth acknowledging the limitations of this research, in that only mothers were surveyed. This portrays an assumption that the responsibility for encouraging a good diet lies with the mother alone and that a father's input has no impact on their child's dietary habits.

253 This was to be done by stopping visitors from bringing in food parcels, no longer allowing patients to order food from outside sources, with the exception of one takeaway per month and adjusting the pricing in the hospital shop to make purchases of low fat and low sugar foodstuffs and drinks a more financially attractive option than the full fat, high sugar versions.

254 Clifford Lyons v The Board of the State Hospital, [2011] CSOH 21. In her judgment Lady Dorrian stated that the right of a person to choose what they eat or drink is a matter in respect of which the right to private and family life (Article 8, ECHR) is engaged but that the promotion of the health of patients by reference to dietary needs, especially patients likely to be in The State Hospital for a long period, may be a sufficiently important objective to justify interference with that right. The possibility of an increase in obesity/diabetes in the context of a prison population or that of a secure hospital gives rise to operational considerations for the institution as a whole and the responsibility of the respondent for the care of those within the institution. However she based her decision on failings in the consultation and involvement process leading to the new food and drink policy. She found that the consultation did not enable patients to effectively consider the option eventually selected, of an outright ban.

255 Everyone lawfully within the UK (i.e. including those on appropriate visas or refugees or asylum seekers) has a right to be registered with a GP. NHS registration is based primarily on residence:

<http://www.psd.scot.nhs.uk/doctors/registration-with-a-practice.html> There are approximately 16.7 million GP consultations and 7.5 million practice nurse consultations in Scotland every year. Some services provided by other practitioners such as dentists and opticians are chargeable although check-ups were made free in 2006 ROBSON, K. 2011. The National Health Service in Scotland: SPICe briefing. Edinburgh: Scottish Parliament Information Centre. Nicola Sturgeon has described prescription charges as “a tax on ill health that Scotland’s poorest families can ill afford” SCOTTISH GOVERNMENT 2010j. Prescription charge axe: press release. Edinburgh: Scottish Government. and prescription charges were abolished for all as of April 2011 [National Health Services (free prescriptions and charges for drugs and appliances) (Scotland) Regulations 2011]. Asylum seekers, refugees and failed asylum seekers are still entitled to health care in Scotland and any course of treatment commenced will continue until completion or until the person leaves the country NHS SCOTLAND 2011b. Health Care for asylum seekers and refugees in Scotland. Edinburgh: Health Rights Information Scotland..

²⁵⁶ Despite improvements across a range of inequality indicators in comparison with the rest of the UK over the last decade PALMER, G. 2010. The impact of devolution: Indicators of poverty and social exclusion. York: Joseph Rowntree Foundation. Moreover for communities such as Scottish Gypsy/ Traveller, it has been estimated that life expectancy is on average ten years lower than the national average for Traveller men EHRC 2009a. Gypsies and Travellers: Simple solutions for living together London: Equality and Human Rights Commission. and can be as low as 55 MECOPP 2012. Hidden Carers, Unheard Voices: Informal caring within the Gypsy/ Traveller community in Scotland. Edinburgh: Minority Ethnic Carers of People Project, LAMBIE, J. 2010. Report of Keep Well Gypsy and Traveller Outreach Service. Edinburgh: NHS Lothian. Gypsy and Traveller mothers are also 20 times more likely than the rest of the population to have experienced the death of a child EHRC 2009a. Gypsies and Travellers: Simple solutions for living together London: Equality and Human Rights Commission.

257 These conclusions arose from a study of 92 relevant interviews investigating delivery of responsive and culturally appropriate care in light of barriers such as discrimination at an individual and institutional level and the high risk of inadequate care provision to the most vulnerable with poor English language skills and no family advocate.

258 11 – 20 per cent in Asian Indians, 15 per cent in Afro-Caribbeans and 1-5 per cent in white Caucasians. Type 2 diabetes is four times more common in British South Asians than within the indigenous white population (Baradaran et al. 2006).

259 Further issues of concern raised by this research include a lack of available statistics on a range of issues, namely: only 55 per cent of Local Health Care Cooperatives have access to interpreters; 55 per cent do not record cultural/religious requirements; 24 per cent have no culturally appropriate dietetic counselling; and 33 per cent have no appropriate health information materials available (Baradaran et al. 2006).

260 National Health Service Quality Improvement Scotland is now part of Healthcare Improvement Scotland: http://www.healthcareimprovementscotland.org/welcome_to_healthcare_improvem.aspx

261 Following extensive networking with organizations supporting people with intellectual disabilities, only four people came forward to talk to the researchers.

262 Women Thinking Trans Issues, A Report on Findings of Participatory Action Research on the Inequality of Access to NHS Services by Trans Women, Engender, 2011.

²⁶³ These Health Boards are now encompassed within NHS Greater Glasgow & Clyde and NHS Highland.

264 HUG is the Highland User Group, which is a collective advocacy group, which represents the interests of users of mental health services across the Highlands. Their key aims include: improve the way people with mental health problems are treated and challenge stigma and discrimination through their Communication Project, of whom the current target focus are school children.

²⁶⁵ <http://www.healthscotland.com/equalities/eqia/health-inequalities.aspx>

²⁶⁶ SAMH RESPONSE TO CALL FOR COMMENTS ON DRAFT UN REPORT ON DISABILITY, 2011; citing Mental Welfare Commission for Scotland, Our Annual Report 2007-2008.

²⁶⁷ SCOTTISH GOVERNMENT 2012d. Mental Health Strategy 2012-2015. Edinburgh: Scottish Government.p28: “No other country in the world has set such a wide ranging and comprehensive target within a publicly funded healthcare system.”

²⁶⁸ For more information on CBT see:

http://www.mind.org.uk/help/medical_and_alternative_care/making_sense_of_cognitive_behaviour_therapy

²⁶⁹ <http://www.voxscotland.org.uk/news/psychological-therapies-heat-access-target-newsletter>

²⁷⁰ *Aerts v Belgium* (1998) 29 EHRR 50 para 46. “In principle, the “detention” of a person as a mental health patient will only be “lawful” for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution”.

²⁷¹ <http://www.samh.org.uk/our-work/policy-campaigns/mental-health-law>

²⁷² Limited Review of the Mental Health (Care and Treatment) (Scotland) Act 2003: report, as presented to Scottish Ministers March 2009

²⁷³ The MHCTSA introduced advance statements as a means of improve patient participation, in accordance with the Millan principles, which form the backbone of the Act. According to the independent review of the Act completed in 2009, *Limited Review of the Mental Health (Care and Treatment) (Scotland) Act 2003*: report, as presented to Scottish Ministers March 2009, pp 8-9.

²⁷⁴ <http://www.scotland.gov.uk/Topics/Health/health/mental-health/mhlaw/mhareview>

²⁷⁵ See www.scottishhumanrights.com/careaboutrights

²⁷⁶ <http://www.scotland.gov.uk/Publications/2010/09/10151751/17>

²⁷⁷ www.dementiarights.org

²⁷⁸ Where such interventions do not reach the threshold of inhuman or degrading treatment or punishment, they should be considered as interferences with Article 8 of the ECHR and HRA and must therefore be considered using the three stage tests of legality, necessity and proportionality. However, in certain circumstances they may amount to ill-treatment prohibited under Article 3 ECHR and HRA, which can never be justified. Consideration of human rights must then take into account all relevant circumstances in the particular case. See e.g. the English case of *R (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 WLR 419.

²⁷⁹ *Herzcegfalvy v. Austria*, Judgment of 24 September 1993, 244 Eur. Ct. H.R. (ser. A), ¶ 82, 15 E.H.R.R. 437

(1993). The Court observed that, “[t]he position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with.”

²⁸⁰ *Price v. United Kingdom*, Application No. 3394/96, 10 July 2001

²⁸¹ The UN Human Rights Committee specifically mentions “*prolonged solitary confinement*” as a practice that may amount to a violation of Article 7 of the ICCPR, General Comment 20, 1992, para 6.

²⁸² In response to the Scottish Parliament’s Health and Sport Committee Inquiry into the Regulation of Social Care for Older people the Scottish Government committed in January 2012 that “*The Care Inspectorate will support the Scottish Government in reviewing and updating the National Care Standards*”

http://www.scottish.parliament.uk/S4_HealthandSportCommittee/Inquiries/20120120_Scot_Govt_Care_Inquiry_resp.pdf

²⁸³ Limited Review of the Mental Health (Care and Treatment) (Scotland) Act 2003: report, as presented to Scottish Ministers March 2009, p 74, “*we recommend that there is a review of this important and complex area of care and treatment before considering whether any legislative changes are required. Such a review could also address the very limited guidance available for Scottish mental health and learning disability hospitals on the use of force in hospital settings.*”

²⁸⁴ In 2000, a critical report by the Mental Welfare Commission into the treatment and care of a particular patient, allied with The State Hospital Board’s drive to build on the changing culture throughout the 90s, prompted The State Hospital to conduct a fundamental examination of its human rights practice. A decision was taken to use the Human Rights Act as a vehicle for cultural change, to put the human rights of everyone – staff, patients, carers and family members – at the heart of The State Hospital’s services SHRC 2009b. Human Rights in a Health Care Setting: Making it Work for Everyone. An evaluation of a human rights-based approach at The State Hospital. Glasgow: SHRC..

²⁸⁵ *Ibid*, pp63-66.

²⁸⁶ Under these circumstances certain treatment such as neurosurgery and electroconvulsive therapy cannot be provided but drug treatment for more than two months, medication to reduce sex drive and artificial nutrition can be provided with the written opinion of a Designated Medical Practitioner and medication within the first two months can be given without consent where the Responsible Medical Officer provides written reasons as to why it is in the patient’s best interests that such treatment proceeds.

²⁸⁷ Medication being used as a method of as restraint is described by the Mental Welfare Commission (2006) as the use of tranquilising or sedating drugs for purely symptomatic treatment of restlessness or other behaviour. Drug treatments for medical or psychiatric conditions which underlie the disturbance are not included.

²⁸⁸ This report details what was found on visits to 30 care homes and to individual people with dementia who lived in them.

289 For example see: http://www.spsso.org.uk/webfm_send/2822;
<http://www.spsso.org.uk/investigation-reports/2010/september/grampian-nhs-board>;
http://www.spsso.org.uk/webfm_send/2663;http://www.spsso.org.uk/webfm_send/2472;
http://www.spsso.org.uk/webfm_send/3449

290 Not all of the many issues identified within this framework could, however, be explored further in Phase 2. Accordingly, a prioritisation criteria filter was applied (see Appendix 1) in order to determine which would be explored in more focused detail. Two further issues that were identified as priority issues are covered in other chapters, Namely:

Social Isolation & Integration needs, is explored in the chapter examining Dignity & Care.

Health impact of where we live, is explored within the chapter on Health.

²⁹¹ Terminology of the original author.

292 <http://www.scotland.gov.uk/Topics/Built-Environment/Housing/investment/innovationfund/innovation/IIF20112012QandA>

293 <http://www.scotland.gov.uk/Topics/Built-Environment/Housing/16342/shqs>

294 <http://housingcharter.scotland.gov.uk/>

²⁹⁵ Taking human rights based approaches (HRBA) is about providing the means to empowering people to know, understand and claim their rights as well as to increase the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling rights. This means giving people greater opportunities to participate in shaping the decisions that impact on their human rights. It also means increasing the ability of those with responsibility for fulfilling rights to recognise and respect human rights (for example in the NHS, local authorities, housing authorities or care providers). Using a HRBA which is integrated into policy-making, as well as the day to day running of organisations, ensures that standards and duties are met for everyone.

296 See <http://www.scotland.gov.uk/Resource/Doc/285372/0086940.pdf>

²⁹⁷ Concern in particular was raised regarding the lack of housing for people with disabilities in Scotland and it was noted that 230,000 additional properties were needed and required adaptation to the needs of persons with disabilities, to meet demand.

http://www.wilpinternational.org/PDF/humanrights/CESCR/42_ISHR_UK.pdf

²⁹⁸ The Scottish Government has invested £1.7 billion between 2008-2011 in affordable housing and approved 21,500 new or improved affordable homes. £100 million was also allocated to reverse the decades of reducing council housing stock and has supported the construction of almost 4,000 new council homes in Scotland. In total the Scottish Government has pledged to deliver 30,000 affordable homes over the lifetime of this parliament which includes 5,000 new council homes over the next five years SCOTTISH GOVERNMENT 2011j. Renewing Scotland, The Government's Programme for Scotland 2011-2012. Edinburgh..

299 Accessed at <http://www.bbc.co.uk/news/uk-scotland-17027130>, on 15th February 2012.

300 Section 89 of the Housing (Scotland) Act 2001. Local housing strategies are still required to prepare a strategy that assess these needs and the guidance for these is

at: <http://www.scotland.gov.uk/Topics/Built-Environment/Housing/supply-demand/lhs>

Local homelessness strategies are now generally incorporated into the local housing strategies.

Strategies were due in by April 2012 for review by a 'Peer Review Panel'.

³⁰¹ Domestic abuse affects at least one in five women in Scotland SCOTTISH GOVERNMENT 2010a. DOMESTIC ABUSE RECORDED BY THE POLICE IN SCOTLAND, 2009-10. Statistical Bulletin: Crime and Justice Series - A National Statistics Publication for Scotland. Edinburgh: Office of the Chief Statistician. and whilst the proportions of men affected as survivors of domestic abuse is lower, abuse against men in Scotland accounts for almost 1 in every 6 cases of domestic abuse AMIS 2011b. Domestic Abuse Incidents Recorded by Scottish Police 2008/9 and 2010/11. Dunfermline: AMIS. For further information on domestic abuse in Scotland please see Chapter 5 on Private and Family life.

³⁰² This is an extremely complex area of policy. It is also possible that people could be accepted as homeless but be unable to claim Housing Benefit if they were re-housed. The matter is well reviewed in Chapter 12 of ANDERSON, I. & SIM, D. 2011. Housing and Inequality, Totton, Chartered Institute of Housing.

³⁰³ A human rights perspective adds value to an impact assessment process which otherwise considers differential or discriminatory impacts in relation to equality impacts. This can help to develop specific recommendations that inform policy making, resulting in a fairer allocation of resources. Human rights provide a starting point for analysis that 'All human beings are born free and equal in

dignity and in rights.’ (Universal Declaration of Human Rights). The universality of rights and the equal enjoyment of rights by all persons provide a different perspective on some of the policy areas considered in this scoping project. Human rights prompt consideration of how a policy might drive up standards of services and enhance positive impacts for all people, not only those defined by particular characteristics. The analysis also flags up where an impact might reach thresholds which could amount to a violation of rights, including those impacts already identified by an equality analysis. As well as filling any gaps left by an equality analysis, a human rights-based approach requires consideration of the proportionality of impacts and of policy responses. This means giving consideration to whether policy responses are at all times the least restrictive of human rights. This can lead to an analysis which takes a holistic view of the policy, its interrelationship with other policy areas, and how improvements might be made to enhance positive impacts for people and mitigate or where necessary remove negative ones.

³⁰⁴ ‘Participation’ is a key component of a PANEL Human Rights Based Approach to policy and practice that has been promoted by SHRC since the Commission began its work in late 2008. See Chapter 3 Section 3.4 of the main report for further description of PANEL. Also see <http://www.scottishhumanrights.com/promotinghrba> for further details.

³⁰⁵ Problems also exist for those who are entitled to benefits. Whilst outcomes may be less extreme, a much larger pool of people would potentially be affected.

306 Social security is reserved under the Scotland Act (Reservation F.1).

307 <http://www.cas.org.uk/news/2012+news/February/Netmums+survey+shows+the+human+reality+f+the+recession><http://www.netmums.com/home/netmums-campaigns/families-in-crisis> Accessed on 16th February 2012

308A further 15 per cent said they were ‘desperate’ with debts piling up. And one in 33 said they felt ‘suicidal’ and ‘unable to cope’ with the pressure and unable to see how their finances will improve.

³⁰⁹ An interesting question for further exploration would be how well the ‘tolerable’ standard of living described here would match up to the standard of habitability contained within the right to an adequate standard of living.

310 The Tolerable Standard was redefined in the Housing (Scotland) Act 2006 and applies to all houses in Scotland.

311 Data is, however, collected and reported for all accommodations which allow for comparison across the housing stock.

312 Of all household types, the elderly were most at risk of fuel poverty. Fifty-five per cent of single pensioners and 40 per cent of older smaller households were at risk of fuel poverty in 2010. See MÁTÉ, I., CAIRNS, P., CORMACK, D., WALKER, S., HAWKINS, L. & ROBERTSON, J. 2011. Scottish House Condition Survey: Key findings 2010. In: SCOTTISH HOUSE CONDITION SURVEY TEAM, HOUSING, REGENERATION, DIRECTORATE, C. A. T. C. G., SERVICES, C. A. & GOVERNMENT, S. (eds.). Edinburgh: Scottish Government.

³¹³ UN CESCR, General Comment no. 20, non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, 2 July 2009, para 28.

³¹⁴ UN CESCR, General Comment no. 14, the right to the highest attainable standard of physical and mental health, UN Doc. E/C.12/2000/4, 11 August 2000, para 12 (b)(ii).

³¹⁵ UN CESCR, General Comment no. 4, the right to adequate housing, UN Doc. E/1992/23, 1991, para 8(f).

316 For example see BERTOLINI, P., MONTANARI, M. & PERAGINE, V. 2008. Poverty and social Exclusion in Rural Areas: final report/annex 1 - country studies. European Commission, BEVAN, M. & CROUCHER, K. 2008. Housing Issues for Older People in Rural Areas. Centre for Housing Policy, University of York, BLACKSTOCK, K., INNES, A., COX, S. J., MASON, A. & SMITH, A. 2006. Living with dementia in rural and remote Scotland: Diverse experiences of people with dementia and their carers *Journal of Rural Studies*, 22, 161 - 176, CHILDREN IN SCOTLAND 2007. Arts for all? Developing cultural entitlements for young children in rural Scotland. Children in Scotland, CURRIE, M. 2009. Assessing bus support policies for their accessibility benefits in rural areas *Institute for Rural Research, Department of Geography and Environment*. University of Aberdeen, CURRIE, M., FARMER, J. & NIMEGEER, A. 2008. Physician Assistants in Scotland: The answer to healthcare delivery in rural areas? . *Sixth International Symposium - PHARE*. Saskatoon, Canada, , CURRIE, M. & HEANEY, D. 2008. Setting the scene: new roles in Scottish rural healthcare *Who will be the future rural workforce?* Centre for Rural Health, Inverness, DAWSON, J., MARSHALL, D., TAYLOR, M., CUMMINS, S., SPARKS, L. & ANDERSON, A. 2008. Accessing healthy food: availability and price of a healthy food basket in Scotland. *Journal of Marketing Management*, 24, 893-913, DE LIMA, P. 2008. Rural minority ethnic experiences: housing and health: Better Housing Briefing 7. *Better*

Housing Briefing. Race Equality Foundation, DICKIE, J. 2011. Child Poverty. In: MCKENDRICK, J., MOONEY, G., DICKIE, J. & KELLY, P. (eds.) *Poverty in Scotland 2011: Towards a more equal Scotland?* London: Child Poverty Action Group in association with the Scottish Poverty Information Unit, the Open University and the Poverty Alliance, EKOS LTD 2009. The Experience of Rural Poverty In Scotland: Qualitative Research with Organisations Working with People Experiencing Poverty in Rural Areas, FARMER, J. 2009. A roadmap for improving remote and rural health care. . *SNP meetings*,. Inverary, FARMER, J. 2008b. Measuring rural policy outcomes. . *Inaugural Rural and Remote Health Scientific Symposium*. Brisbane, FARMER, J. 2008a. Delivering for remote and rural healthcare. . *Shifting the balance: new roles and models of care*. NHS Highland, Aviemore, GODDEN, D. 2007. Sustainable Rural Health: A Challenge and an Opportunity *UHI Sustainable Highlands and Islands Seminar Series*. Inverness, HOPWOOD ROAD, F. 2006. Out of Pocket Citizens Advice, INNES, A., COX, S., SMITH, A. & MASON, A. 2006. Service provision for people with dementia in rural Scotland: Difficulties and innovations. *Dementia*, 5, 249-270, JAMIESON, L., BRADSHAW, P. & ORMSTON, R. 2008. Growing Up in Scotland: Growing Up in Rural Scotland. The Scottish Government, KING, G. & J., F. 2009. What older people want: evidence from a study of remote Scottish communities *Rural and Remote Health*, 9, 1166, LAW, J., MCCANN, D., O'MAY, F., SMART, C. & BUCHAN, J. 2009. Service Provision for Children and Young People with Complex Needs in a Community Setting from the Perspectives of Nursing and Allied Health Professionals. Queen Margaret University, Edinburgh, MCKENDRICK, J., MOONEY, G., DICKIE, J. & KELLY, P. (eds.) 2011b. *Poverty in Scotland 2011: Towards a more equal Scotland?*, London: Child Poverty Action Group in association with the Scottish Poverty Information Unit, the Open University and the Poverty Alliance, NEWHAVEN RESEARCH LIMITED 2008. Review of the Highland Housing Alliance and the Highland Revolving Landbank Fund. Newhaven Research Limited, NHS SCOTLAND 2007. Delivering Remote and Rural Health Services - The Remote and Rural Workstream Report, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 2008. Policy Brief: The OECD Review of Scottish Rural Policy. *PolicyWeb, policy briefs*. The UHI Policy Research Institute for Remote and Rural Regions, PEREZ, I. A., WILSON, C. W. L., KING, C. & PAGNIER, C. 2006. Translating, Interpreting and Communication Support: A Review of Provision in Public Services in Scotland. Centre for Translation and Interpreting Studies in Scotland, Heriot-Watt University, PRIOR, M. 2008. The social, economic, human and institutional contribution of primary health services to rural communities *Shifting the balance: new roles and models of care*. NHS Highland, Aviemore, REDWOOD, M. 2009. Capacity Development Funding in Rural Scotland: Interim report to the EHRC. Inverness: Scottish Rural Equality Network, SATSANGI, M. & CRAWFORD, J. 2009. Investigation of Occupancy Controls in Rural Housing. Department of Applied Social Science, University of Stirling, SCOTTISH GOVERNMENT 2009d. Food Affordability, Access and Security: Their Implications for Scotland's Food Policy - A Report by Work Stream 5 of the Scottish Government's Food Forum The Scottish Government, STARK, C., HOPKINS, P., GIBBS, D., BELBIN, A. & HAY, A. 2007. Population density and suicide in Scotland *Rural and Remote Health*, 7, STRAUSS, K. & KELLY, P. 2011. In-work poverty. In: MCKENDRICK, J., MOONEY, G., DICKIE, J. & KELLY, P. (eds.) *Poverty in Scotland 2011: Towards a more equal Scotland?* London: Child Poverty Action Group in association with the Scottish Poverty Information Unit, the Open University and the Poverty Alliance, TOOKEY, A., WHALLEY, J. & HOWICK, S. 2006. Broadband diffusion in remote and rural Scotland. *Telecommunications Policy*, 30, 481-495, UHI POLICY WEB 2006b. Policy Brief: Thriving Rural Communities: Outcomes, Indicators and Service Standards. *PolicyWeb, policy briefs*. University of the Highlands and Islands, WEBSTER, S. 2006. The Survey of Needs for Adults with ASD and their Carers.

³¹⁷ Potentially via resources such as the Highland & Islands Equality Forum run by SCVO: <http://www.scvo.org.uk/about/scvo-equalities-human-rights/highlands-and-islands-equality-forum-hief/> or the National Rural Network: <https://www.ruralgateway.org.uk/>.

³¹⁸ Whilst human rights law does not dictate the means that must be used to ensure access services, it does require that means used are effective ones. Therefore, if these methods of delivery were effective then that would satisfy a human rights based approach to service delivery in this case.

³¹⁹ The idea of 'rural proofing' may assist in ensuring the delivery of social policy which gives due regard to the human rights principle of non-discrimination on the ground of where we live.

320Section 43.

321The Chapter on Dignity and Care discusses in more detail a range of accessibility challenges faced by children and young in health care, including: access to services for children with autistic spectrum disorder (ASD) including Asperger's syndrome; and through-care for children and young people leaving care.

³²² The North of Scotland Planning Group is a collaboration between NHS Grampian, NHS Highland, NHS Orkney, NHS Shetland, NHS Tayside and NHS Western Isles.

³²³ On 10th November 2011 EMRS won the 'Technology for Healthy Outcomes' award for the innovative iPhone app developed by Dr. Dave McKean. The app allows the EMRS team access to logistic information whilst involved in the retrieval of critically ill patients from remote and rural areas of Scotland: <http://www.emrs.scot.nhs.uk/>

³²⁴ SHRC acknowledges that prior to 2007/8 the Scottish Government was referred to as the Scottish Executive. For consistency the terminology of Scottish Government is used throughout.

³²⁵<http://www.poverty.org.uk/s75/index.shtml>

³²⁶ Due to a lack of photographic identification.

³²⁷ See <http://www.northlinkferries.co.uk/faqs-id.html>

³²⁸ 1186 residents of Orkney and Shetland responded to this survey in March/April 2008. See

<http://www.theheddles.co.uk/business/council/SurveyAnalysisAllApps.pdf>

³²⁹ The Road Equivalent Tariff (RET) scheme involves setting ferry fares on the basis of the cost of travelling an equivalent distance by road, with the intention of reducing the economic disadvantage suffered by remote communities and hence enable island communities to make a larger contribution to the economy of Scotland.

An evaluation of the RET pilot on the Western Isles revealed an increase in tourism by 31 per cent, and the Scottish Government took the decision to make RET permanent for passengers and cars, small commercial vehicles and coaches, while hauliers will receive enhanced discounts. Coll and Tiree and other West coast and Clyde islands are also to have permanent RET. SCOTTISH GOVERNMENT 2011a. Assessment of the Impacts of the Road Equivalent Tariff Pilot Final Report. Edinburgh Halcrow Group Limited. RET TAYLOR, L. 2011. SPICe Briefing Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Bill: Stage 3. Edinburgh: SPICe..

³³⁰ The Scotland-wide Free Bus Travel for Older and Disabled People started on 1 April 2006 and allows an individual to travel free on both local registered services and long distance bus services within Scotland. Someone is eligible for this bus pass if they are: over 60 years of age; receive the higher rate of the mobility component of Disability Living Allowance; receive the higher/middle rate of the care component of Disability Living Allowance; receive Attendance Allowance; live in a care or residential home or hospital and require 24 hour supervision; hold a Disabled Persons Parking Badge (Blue Badge); are profoundly or severely deaf; have been told not to drive on medical grounds; suffer from a mental illness, learning disability or personality disorder; are terminally ill; suffer from a progressively degenerative disorder; have suffered a loss of limbs; are visually impaired or are a seriously injured veteran with mobility problems.

³³¹ "Rising cost of free bus pass scheme for the elderly", The Herald, 7 October 2010,

<http://www.heraldscotland.com/news/transport-environment/rising-cost-of-free-bus-scheme-for-the-elderly-1.1059838>

³³² An individual will qualify for the companion entitlement if they receive the higher or middle rate of the care component of Disability Living Allowance; or if they receive Attendance Allowance; are registered blind; live in a care or residential home and are eligible to receive the higher or middle rate of the care component Disability Living Allowance or Attendance Allowance.

³³³ An individual is eligible to join the Scheme where it is considered that the accompaniment of a carer will have significant positive outcomes for the individual through improving their uptake of social, cultural, educational, leisure, and/or sports opportunities.

³³⁴ Application no. 66746/01, judgment of 27 May 2004.

³³⁵ Ibid, para 84.

³³⁶ This point could be challenged, however, for those children who live with year-round as well as seasonally nomadic parents/extended family, as constant evictions can greatly disturb consistent and high quality educational provision.

³³⁷ COE Doc. ACFC/OP/III(2011)006

³³⁸ Ibid.

³³⁹ They must assess how the housing needs of Gypsies and Travellers are addressed in their local housing strategies, and identify suitable locations for sites for Gypsies/Travellers in their development plans and involve them in decisions about sites for their use.

³⁴⁰ UN Doc. CERD/C/GBR/CO/18-20, para 27.

³⁴¹ UN CESCR 2009. Concluding Observations of the Committee on Economic, Social and Cultural Rights. UN Doc. E/C.12/GBR/CO/5. Geneva. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/429/21/PDF/G0942921.pdf?OpenElement>

³⁴² See http://www.scottishaffairs.org/onlinepub/sa/clark_sa54_winter06.html for further details.

343 Employment tribunal of Kenneth MacLennan v Gypsy Traveller Education and Information Project (GTEIP).

³⁴⁴ See <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/49020.aspx> for further details. The Committee has also launched another inquiry into where Gypsy/ Travellers live. The inquiry into where Gypsy/ Travellers live has received submissions from 36 separate organisations/ individuals including SHRC, all submissions can be found here:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/49174.aspx>

345 Not all of the many issues identified within this framework could, however, be explored further in Phase 2. Accordingly, a prioritisation criteria filter was applied (see Appendix 1) in order to determine which would be explored in more focused detail. Other issues that arose from the scoping project that did not reach the threshold for prioritisation were:

Young people's rights to sex education in school, (See NEWALL, E. & LEWIS, R. 2007. It's my body: calls to ChildLine Scotland about sexual health and wellbeing University of Edinburgh Centre for Research on Families and Relationships.; SIMKHADA, P., VAN TEIJLINGEN, E., YAKUBU, B., MANDAVA, L., BHATTACHARYA, S., EBOH, W. & PITCHFORTH, E. 2006. Systematic review of sexual health interventions with young people from black and minority ethnic communities. Department of Public Health, University of Aberdeen, Dugald Baird Centre for Research on Women's Health, University of Aberdeen, School of Nursing and Midwifery, The Robert Gordon University, Aberdeen, Department of Health Sciences, University of Leicester.; BACKETT-MILBURN, K. & OGILVIE-WHYTE, S. 2006. Children's and young people's concerns about their sexual health and wellbeing The Scottish Executive, NORMAND, A. & WEBSTER, E. 2010. Mapping the Law of Scotland in relation to International Human Rights Treaties – Civil and Political Rights. Glasgow: University of Strathclyde, BARNES, L.-A. 2001. The right to education in Scotland. Journal of the Law Society of Scotland, 46, 23-26, HARRIS, N. & 2009 2009. Playing catch-up in the schoolyard? Children and young people's 'voice' and education rights in the UK. International Journal of Law, Policy and the Family, 23, 331-336.);

Rural living and access to work (which is an issue discussed with Chapter 2 on Where We Live) (See UHI POLICY WEB 2006b. Policy Brief: Thriving Rural Communities: Outcomes, Indicators and Service Standards. *PolicyWeb, policy briefs*. University of the Highlands and Islands, BERTOLINI, P., MONTANARI, M. & PERAGINE, V. 2008. Poverty and social Exclusion in Rural Areas: final report/annex 1 - country studies. European Commission, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 2008. Policy Brief: The OECD Review of Scottish Rural Policy. *PolicyWeb, policy briefs*. The UHI Policy Research Institute for Remote and Rural Regions.); role of migration work in Scotland (see DE LIMA, P., CHAUDHRY, M., WHELTON, R. & ARSHAD, R. 2007. Study of Migrant Workers in Grampian.)

safe working conditions (see EADIE, D., MACASKILL, S., HEIM, D. & HASTINGS, G. 2010.

Responding to change: how did bar workers adapt to the smoke-free legislation in Scotland?

International Journal of Environmental Health Research, 20, 13-26.; FLANIGAN, D. 2011. Mapping the Law of Scotland in Relation to Economic, Social & Cultural Rights. Glasgow: Scottish Human Rights Commission.; MCCARTHY, F. 2010. Personal injury: employers' liability - foreseeability (Case Comment). J.P.I. Law, 4, C171-174.; TOMKIN, N. 2010. Work equipment and duties on employers. J.P.I. Law, 1, 1-9.; SWANSON, I. 2006. Prison officers set to sue for supervising slopping out.

Evening News February 22, 2006, Wednesday , KANE, P. 2008. Now families of Nimrod victims launch £20m fight for compensation. Mail on Sunday September 28, 2008 Sunday

Erosion of facility time for trade union reps: An issue that was not raised with the research reviews but was raised by some participants involved in this scoping project was the issue of the erosion of facility time for trade union reps within the work place. A number of employment rights are dependent on good representation. Good representation requires that a representation has sufficient time to: prepare to represent an individual; to interview them before their grievance or disciplinary that they are representing them in or regarding issue that is coming up. Trade Union reps also require time to research what has happened else where, to look for alternatives, for example, when there are budgetary cut in terms of protecting key groups. Participants who were trade union reps believed that trade union facility time is one of the areas where cuts are being taken forward without recognising the implications of that in terms of insuring that people are properly represented.

³⁴⁶ Article 24.

³⁴⁷ Article 28 and 29.

³⁴⁸ Schedule 3.

³⁴⁹ Buchan v West Lothian Council, 2001 SLT 1452.

³⁵⁰ R(R) v Leeds City Council, [2005] EWHC 2495.

³⁵¹ E.g. article 13(1), ICESCR, article 29(1) CRC, article 24(1) CRPD, Article 10(c) CEDAW. See also UN CRC, General Comment no. 1, the aims of education, UN Doc. CRC/GC/2001/1, 17 April 2001.

³⁵² Article 28(2) CRC.

³⁵³ E.g. the Education (Standards in Scotland's Schools, etc.) (Scotland) Act 2000 and the Education (Additional Support for Learning) (Scotland) Act 2009.

³⁵⁴ E.g., Gypsy/ Traveller children and the children of drug users etc.

³⁵⁵ For further information see:

http://www.equalityhumanrights.com/uploaded_files/a_guide_for_parents_scotland_part_4_of_the_disability_discrimination_act_1995.pdf

³⁵⁶ See for example *Connors v UK*, application no. 66746/01, judgment of 27 May 2004, Para 85.

"The seriousness of what was at stake for the applicant is not in doubt. The applicant and his family were evicted from the site where they had lived, with a short absence, for some fourteen to fifteen years, with consequent difficulties in ...ensuring continuation in the children's education."

³⁵⁷ This issue is being challenged on the bases of equality; however, the position of the Scottish Government is that students are being charged fees on the basis of where they ordinarily live not on the basis of their nationality. Had a student of English, Welsh or Northern Irish nationality, been living in Scotland for 3 years or more, they too would be entitled to free tuition at Scottish university. Similarly if a student of Scottish nationality had been resident in England, Wales or Northern Ireland, they would be expected to pay the same tuition fees as other students coming from that country.

³⁵⁸ Public Interest Lawyers, "Sixth Formers Force Vince Cable MP to Defend Tuition Fees Rise in The High Court", http://www.publicinterestlawyers.co.uk/news_details.php?id=94

³⁵⁹ See for example Matthew Kelly, "Does Scotland's university fees system breach human rights laws?", *The Guardian*, 24 August 2011; Amelia Hill, "Scotland's university fees 'discriminatory', says lawyer", *The Guardian*, 21 August 2011.

³⁶⁰ Article 24(2)(a)

³⁶¹ Article 24(2)(b)

³⁶² See for example CRPD Independent Mechanism for Northern Ireland, Making the Disability Convention rights a

Reality in Northern Ireland Have your say, a platform event, December 2010,

<http://www.equalityni.org/archive/pdf/ReportonCRPDPlatformEvent1DecF.pdf>, p 34.

³⁶³ See for example CRPD Independent Mechanism for Northern Ireland, Making the Disability Convention rights a

Reality in Northern Ireland Have your say, a platform event, December 2010,

<http://www.equalityni.org/archive/pdf/ReportonCRPDPlatformEvent1DecF.pdf>, p 34.

³⁶⁴ For a fuller, authoritative, interpretation of the requirements of article 6, ICESCR see UN CESCR, General Comment no. 18 Article 6 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/18, 6 February 2006.

³⁶⁵ *Ibid.*

³⁶⁶ For example Article 27 of the International Convention on the Rights of Disabled People; Article 5, paragraph (e) (i), of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 11, paragraph 1 (a), of the Convention on the Elimination of All Forms of Discrimination against Women; Article 32 of the Convention on the Rights of the Child; and Articles 11, 25, 26, 40, 52 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

³⁶⁷ Article 2.

³⁶⁸ The subject areas of Employment and Social Security are reserved matters under the Scotland Act 1998, as is Equality of Opportunity. The reservation under equality contains an exemption allowing the Scottish Ministers to encourage compliance with equal opportunity requirements. Regulations made under the Equality Act specific to Scotland are currently under consultation.

³⁶⁹ See Chapter 4 on Health for more information on the 'See Me' campaign.

³⁷⁰ See also <http://www.scotland.gov.uk/Topics/People/Equality/disability>

³⁷¹ The duty to make reasonable adjustments, sections 20 – 22 of the 2010 Equality Act

³⁷² The issue of employers unwilling to take risks with the long-term unemployed irrespective of disability was a further issue which raised concern amongst many participants.

³⁷³ Section 26(1)(c)

³⁷⁴ Migrants' Rights Scotland, Migrants' rights – more than just talk!, STUC Glasgow 30 March 2011, summary report, p11.

http://migrantsrightsscotland.org.uk/mrs_files/Migrants'%20Rights%20Scotland%20-%20Event%20Report%202011.pdf

³⁷⁵ UNISON Scotland, Minimum Standards Charter, A Voluntary Code of Practice on Employing Migrant and European Workers. <http://www.unison-scotland.org.uk/activists/migrantworkerscharter.pdf>

³⁷⁶ Under Schedule 5 of the Scotland Act.

³⁷⁷ Tekle v. Secretary of State for the Home Department [2008] EWHC 3064 (Admin).

³⁷⁸ European Council Directive 2003/9/EC (the Reception Directive)

³⁷⁹ R (on the application of ZO (Somalia) and others) (Respondents) v Secretary of State for the Home Department (Appellant) [2010] UKSC 36.

³⁸⁰ Anufrijeva v Southwark London Borough Council, 2004 QB 1124; R (on the application of Limbuela) v Secretary of State for the Home Department (2005) UKHL 66, (2006) 1 AC 396.

³⁸¹ For an overview of these and the legal and political issues, see Melanie Gower, Asylum seekers and the right to work, House of Commons Library Standard Note SN/HA/1908, 4 November 2011.

³⁸² Including CEDAW, article 11(1)(d) "The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work"

³⁸³ Including European Council Directive on Equal Pay for Men and Women (75/117/ECC); Resolution on Equal Pay for Work of Equal Value (2000/2312(INI))

³⁸⁴ Available at

<http://www.cas.org.uk/news/employers-exploiting-workers-and-breaking-law-minimum-wage>

³⁸⁵ Not all of the many issues identified within this framework could, however, be explored further in Phase 2. Accordingly, a prioritisation criteria filter was applied (see Appendix 1) in order to determine which would be explored in more focused detail. Other issues that arose from the scoping project that did not reach the threshold for prioritisation were:

Familial abuse, including abuse of the elderly and chastisement of children (although the issue of abuse of the elderly within care is covered in the thematic section on Dignity & Care): for example see BIGGS, S., TINKER, A. & MCCREADIE, C. 2007. Elder Abuse. London: Comic Relief and the Department of Health CHRISTIE, L. 2007. SCOTLAND 'LEADING WAY' IN SUPPORTING ABUSED WOMEN. Scottish Press Association, November 28, 2007 ; THE HERALD. 2006. Perceptions of the elderly are at the root of abuse. *The Herald*, June 16, 2006, EHRC 2011a. Close to home: An inquiry into older people and human rights in home care. London: EHRC.; AGE CONCERN 2003. Elder Abuse and the Law in Scotland Edinburgh: Age Concern, THE HERALD. 2009. Age-old problem. 12 OCTOBER 2009, STV NEWS. 2009. Shocking figures show rise in complaints for care of the elderly. 12 October 2009. AGE SCOTLAND 2012. At home with Scotland's older people: Facts and Figures 2011-12. Edinburgh: Age Scotland.; NORMAND, A. & WEBSTER, E. 2010. Mapping the Law of Scotland in relation to International Human Rights Treaties – Civil and Political Rights. Glasgow: University of Strathclyde, SMITH, R., TAIT, L., BALES, K., MCCONNELL, L. & RABAN-WILLIAMS, R. 2010b. Mapping the Law of Scotland in Relation to International Human Rights Treaties: CAT & CPT. Newcastle: Northumbria Law School.; CARVEL, J. 2008. Dossier prepared for UN details grim plight of many young people in Britain: Widespread flouting of human rights, says report: Youth justice and attitudes to young 'have got worse'. *The Guardian*, June 9, 2008 Together 2012, Committee on the Rights of the Child (2008). Concluding Observations: United Kingdom of Great Britain and Northern Ireland (CRC/C/GBR/CO/4). No 42a, b. 70 United Nation Human Rights Council (2012) Report of the Working Group on the Universal Periodic Review United Kingdom of Great Britain and Northern Ireland

Right to family life – Asylum and family separation, for example see: UNISON & BRITISH ASSOCIATION OF SOCIAL WORKERS. 2006. Asylum in Scotland - child's welfare paramount? A guide for members from BASW and UNISON Scotland. Available: <http://www.unison-scotland.org.uk/socialwork/asylumbooklet/asylumbooklet.pdf>.; SCOTTISH REFUGEE COUNCIL. 2010b. Maintaining Family Unity throughout the Asylum Support System in Policy and Practice. Available:

http://www.scottishrefugeecouncil.org.uk/news_and_events/latest_news/748_new_report_reveals_cat_ch_22_for_families. Relevant cases include: Other relevant cases from the last few years include Beoku-Betts [2008] UKHL 38, Chikwamba [2008] UKHL 40, and EB (Kosovo) [2008] UKHL 41; ZH (Tanzania) (FC) v Secretary of State for the Home Department [2011] UKSC 4; (MH (AP) v the Secretary of State for the Home Department 2011).

The impact of family separation on grandparents and the rights of grandparents: for example see GRANDPARENTS ASSOCIATION 2009. Beyond the Nuclear: Including the Wider Family Harlow: Grandparents Association ; GRANDPARENTS PLUS 2009. Rethinking Family Life: exploring the role

of grandparents and the wider family. London. SCOTTISH EXECUTIVE 2006b. Family Matters: Charter for Grandchildren. Edinburgh: Scottish Executive .

Fit to parent? BUCHANAN, J. & CORBY, B. 2005. Problem drug use and safeguarding children: a multi agency approach. In: CARNWELL, R. & BUCHANAN, J. (eds.) Effective Practice in Health and Social Care: A Partnership Approach. Maidenhead: Open University Press. BARNARD, M. 2003. Between a rock and a hard place: the role of relatives in protecting children from the effects of parental drug problems. *Child and Family Social Work*, 8, 291–9. BANCROFT, A., WILSON, S., CUNNINGHAM-BURLEY, S., BACKETT-MILBURN, K. & MASTERS, H. 2004. Parental Drug and Alcohol Misuse: Resilience and Transition Among Young People. York: Joseph Rowntree Foundation.

made to a number of BUCHANAN, J. & YOUNG, L. 2000. The war on drugs - a war on drug users. *Drugs: Education, Prevention Policy*, 7, 409-22, SCOTTISH EXECUTIVE 2006d. Good Practice Guidance for working with Children and Families affected by Substance Misuse: Getting our priorities right. Edinburgh: Scottish Executive.

³⁸⁶ This report refers to domestic abuse in recognition of the fact that not all domestic abuse is violent. Where the term violence is used this was the language used by the original authors. Within the pre-existing literature the term domestic violence is often used instead of domestic abuse, however the term domestic abuse is more than and does not always involve, physical violence. Domestic abuse can also encompass alone or in combination: emotional, financial and psychological abuse. Where the terms domestic violence and violence against women (which also excludes men as potential victims) are used, this is the terminology used by the original authors.

³⁸⁷ For a detailed discussion of the definition of domestic abuse/violence, see HEARN, J. & MCKIE, L. 2010. Gendered and Social Hierarchies in Problem Representation and Policy Processes: "Domestic Violence" in Finland and Scotland. *Violence Against Women*, 16, 136-158.

³⁸⁸ It is worth noting that more recently police initiatives such as the creation of the Strathclyde Police Domestic Abuse Task Force have sought to focus explicitly on all aspects of abuse including physical, sexual and emotional abuse and neglect. See http://www.strathclyde.police.uk/about_us/force-overview/priorities/public_protection/

For further information.

³⁸⁹ *Bevacqua and S. v. Bulgaria*, (Application no. 71127/01), 12 June 2008, para 83.

³⁹⁰ *Kontrovà v. Slovakia*, (Application no. 7510/04), 31 May 2007. See also *Opuz v. Turkey*, (Application no. 33401/02), 9 June 2009 and *Branko Tomašić and Others v. Croatia*, (Application no. 46598/06), 15 January 2009.

³⁹¹ *Opuz v. Turkey* (Appl.no. 33401/02)

³⁹² Alongside the specialist court, the support services (Association of Service Solutions in Scotland - ASSIST) are available to support people before, during and after cases go to court. To ensure consistency dedicated judges (sheriffs) and public prosecutors (procurators fiscal) deal with all cases of domestic abuse.

³⁹³ More information on the requirements of the Convention is available here: http://www.coe.int/t/dghl/standardsetting/convention-violence/default_en.asp

³⁹⁴ The Equalities and Human Rights Commission published guidance that emphasised the importance of addressing 'violence against women' to complying with the Gender Duty .

³⁹⁵ Relevant statutes include the Domestic Abuse (Scotland) Act 2011, Matrimonial Homes (Family Protection)(Scotland) Act 1981, the Protection from Harassment Act 1997, the Protection from Abuse (Scotland) Act 2001, the Housing (Scotland) Acts 1987 and 2001, the Children (Scotland) Act 1995 and the Legal Aid (Scotland) Act 1986.

³⁹⁶ Kenneth Norrie, "Families in Fear", *The Journal*, 18 July 2011.

³⁹⁷ *Ibid.*

³⁹⁸ In 2000, the Scottish Partnership on Domestic Abuse produced the National Strategy to Address Domestic Abuse to ensure that women, children and young people who had experienced domestic abuse received a consistent service throughout Scotland. A National Group to Address Domestic Abuse was subsequently established to oversee the implementation of this strategy. In 2003, the group's remit was extended to include all forms of violence against women. The National Group subsequently established an expert group to look at developing an approach to tackling violence against women. The report of this group and the subsequent consultations led to the later development of DONNELLEY, R. 2009b. *Safer Lives: Changed Lives A Shared Approach to Tackling Violence Against Women in Scotland*. Edinburgh: Scottish Government. In addition, the National Domestic Abuse Delivery Group for Children and Young People was established in 2006 to specifically review policy and practice in relation to children and young people affected by domestic abuse in Scotland and to report to Ministers.

399 Domestic abuse in Scotland has been the subject of a government-led communications campaign since 1998. The main objective of the campaign is to reinforce public opposition to, and condemnation of, domestic abuse as totally unacceptable behaviour. Research to monitor the awareness and effectiveness of the campaign has been conducted annually since the inception of the campaign, see SCOTTISH GOVERNMENT 2009c. DOMESTIC ABUSE 2008/09: POST CAMPAIGN EVALUATION REPORT Edinburgh: Scottish Government.. This style of campaign has been criticised, however, for not presenting a gender-fair view of domestic abuse AMIS 2011a. Annual Report: 2010-2011. Dunfermline: Abused Men In Scotland. This issue is explored in more detail later in this section.

400 The Domestic Abuse Court in Glasgow was established in October 2004. A 2007 review of the pilot exercise found overwhelming support for a specialist court approach to domestic abuse and that the court had had a positive impact upon almost all of its original aims. It was found that the pilot domestic abuse court was more expensive than a 'traditional' sheriff summary court but that, as domestic abuse has a high cost for victims and society, the extra level of cost may be justifiable. The review did not reach a conclusion in relation to recidivism. REID HOWIE ASSOCIATES 2007b. Evaluation of The Pilot Domestic Abuse Court. Edinburgh: Reid Howie Associates.

401 SCOTTISH GOVERNMENT 2008g. National Domestic Abuse Delivery Plan for Children and Young People. Edinburgh: Scottish government. (Scottish Government 2008a)

402 DONNELLEY, R. 2009b. Safer Lives: Changed Lives A Shared Approach to Tackling Violence Against Women in Scotland. Edinburgh: Scottish Government.

403 SCOTTISH EXECUTIVE 2004b. Domestic Abuse: A National Training Strategy. Edinburgh: Scottish Executive.: A National Training Strategy

404 Scottish Women's Aid for example provides a high degree of scrutiny of government policy (both local and central) on the issue of domestic abuse, undertaking analyses of Local Authority Gender Equality Schemes and Single Outcome Agreements (See SCOTTISH WOMEN'S AID 2010. Analysis of Local Authority Gender Equality Schemes. Scottish Women's Aid, SCOTTISH WOMEN'S AID 2009. Analysis of Single Outcome Agreements 2009. Scottish Women's Aid.) Scottish Women's Aid is also a commissioning body in relation to research into domestic abuse (see, for example, STAFFORD, A., VINCENT, S., SMITH, C. & GRIMES, M. 2009. Evaluation of the Scottish Government Children's Services Women's Aid Fund: Main Report. The University of Edinburgh/NSPCC Centre for UK-Wide Learning in Child Protection.), which examined the experiences of young people forced to move house as a result of domestic abuse) and as such has an influential role in shaping government policy and practice.

⁴⁰⁵ For further information see: http://www.strathclyde.police.uk/about_us/force-overview/priorities/public_protection/

406 This study was commissioned in response to rising incidents of domestic abuse reported to the police in North Ayrshire in the period 2002/03 to 2007/08 (a trend replicated in every local authority area in Scotland). In 2007/08, North Ayrshire Police recorded a higher rate of domestic abuse incidents than the Scottish average and only three other local authorities in Strathclyde Police area reported a higher rate (West Dunbartonshire, Glasgow and Inverclyde).

⁴⁰⁷ See SCOTT, M. 2008. Older women and domestic violence in Scotland - update 2008 *In*: MORTON, S. (ed.). University of Edinburgh Centre for Research on Families and Relationships.

408 For example see WISE WOMEN 2010. Violence Against Disabled Women Survey. Wise Women. This research found that all of the 62 women surveyed had a direct experience of violence and abuse with 73 per cent experiencing domestic abuse. See also SCOTTISH GOVERNMENT 2012i. The Scottish Social Housing Charter. *In*: GOVERNMENT, S. (ed.). Edinburgh: Scottish Government.

409 While there is less evidence available in relation to the experiences of minorities, it has been reported that women who are members of ethnic minorities tend to suffer domestic abuse for a longer period before reporting it. Estimates show that it may take a minority ethnic woman ten years to leave a violent partner DONNELLEY, R. 2009b. Safer Lives: Changed Lives A Shared Approach to Tackling Violence Against Women in Scotland. Edinburgh: Scottish Government.

410 See ZIMMERMAN, C., HOSSAIN, M., KISS, L., HOEY, J., WENEDEN, K., WATTS, C., BHATTI, S., CHRISTIE, G. & BAILLOT, H. 2009. Asylum-Seeking Women, Violence & Health: Results from a Pilot Study in Scotland and Belgium. London School of Hygiene and Tropical Medicine, Scottish Refugee Council. A survey of 46 women seeking asylum in Scotland found that 70 per cent had experienced physical and/or sexual violence in their lifetime.

411 A Scottish Women's Aid report No Recourse to Public Funds refers to a finding by Amnesty International that highlighted the plight of women with no recourse to public funds (women who, because of their insecure immigration status, are not entitled to welfare benefits or temporary or

permanent local authority housing). The Scottish Women's Aid survey found that 176 women with no recourse to public funds requested support from Women's Aid groups in Scotland between 1 April 2007 and 31 March 2008. Most of those seeking refuge were not accommodated because the groups could not access funding. Some local authorities were able to accommodate the child but not the mother, contrary, in the view of Scottish Women's Aid, to the best interests of the child and the principles of the Children (Scotland) Act 1995. SCOTTISH WOMEN'S AID 2008. No Recourse to Public Funds Survey Report Scottish Women's Aid.

412 The particular needs of young people affected by domestic abuse have been intrinsic to government policy on domestic abuse and are themselves the subject of a considerable volume of specific literature. A useful summary of the preceding research on domestic abuse commissioned in the Scottish context and key UK research on children and domestic abuse specifically can be found here: STAFFORD, A., STEAD, J. & GRIMES, M. 2007. Support Needs of Children and Young People who have to move because of Domestic Abuse The University of Edinburgh, NSPCC Centre for UK-wide Learning in Child Protection (CLiCP). *ibid*, WEAVER, L. 2006. Mapping service responses to children and young people affected by domestic abuse and other gender based violence in Glasgow. Keeping Children & Young People Safe Group, Glasgow Community Safety Partnership, Glasgow Violence Against Women Partnership, Glasgow City Council.

413 See for example: There are a range of comprehensive literature reviews on the subject, including, for example, within SCOTTISH GOVERNMENT 2008g. National Domestic Abuse Delivery Plan for Children and Young People. Edinburgh: Scottish government. Also see BRUNNER, R. 2010. A Baseline Study of Domestic Abuse Prevention Activities in Seven Local Authorities in Scotland. University of Strathclyde, National Children and Young People's Prevention Network, HURLEY, N., KENNEDY, K., WILSON, L. & HENDERSON, S. 2007. Mapping of Education and Training Addressing Violence Against Women. Blake Stevenson Ltd, REID HOWIE ASSOCIATES 2007b. Evaluation of The Pilot Domestic Abuse Court. Edinburgh: Reid Howie Associates, SCOTTISH EXECUTIVE 2004b. Domestic Abuse: A National Training Strategy. Edinburgh: Scottish Executive, SCOTTISH GOVERNMENT 2009c. DOMESTIC ABUSE 2008/09: POST CAMPAIGN EVALUATION REPORT Edinburgh: Scottish Government, SCOTTISH WOMEN'S AID 2009. Analysis of Single Outcome Agreements 2009. Scottish Women's Aid, TNS SYSTEM THREE 2006. Domestic Abuse Post-Advertising Research, Wave 9 – 2006., TNS System Three, UHI POLICY WEB 2006a. Policy Brief: Developing Gender Research in Rural Scotland. *PolicyWeb, policy brief*,. University of the Highlands and Islands.

414 "In Scotland, the terms transgender people and trans people are used as equivalent inclusive umbrella terms encompassing a diverse range of people who find their gender identity does not fully correspond with the sex they were assigned at birth" (ROCH, A., MORTON, J. & RITCHIE, G. 2010. Out of sight, out of mind? Transgender People's Experiences of Domestic Abuse. Edinburgh: LGBT Youth Scotland & Equality Network."

415 45 per cent had experienced physically abusive behaviour; 47 per cent had experienced some form of sexual abuse; 37 per cent said that someone had forced, or tried to force them to have sex when they were under the age of 16; 46 per cent said that someone had forced, or tried to force them to engage in some other form of sexual activity when under the age of 16 and ten per cent stated that someone had forced, or tried to force them to engage in sexual activity for money.

416 Similarly, Dempsey refers to the "hostility of some elements of the feminist and Women's Aid movements towards trans people" (Dempsey 2010, page 209).

⁴¹⁷ BBC News, "Domestic abuse against men rises in Scotland", 6 October 2011.

<http://www.bbc.co.uk/news/uk-scotland-15189695>

418 Currently there are approximately 7,500 dedicated spaces in refuges in England and Wales for women fleeing domestic abuse, with 23 dedicated spaces for men. In Scotland and Northern Ireland there are no dedicated spaces in refuges or safe houses that exist specifically for male victims MAYS, J. 2010. Domestic Violence: The Male Perspective. Ascot: Parity.

⁴¹⁹ See <http://www.abusedmeninScotland.org/>

⁴²⁰ This was based on research involving 33 children and young people whose mothers (no fathers) had suffered domestic abuse. A group of these young people continues to work with the Equality Unit and have a website and produced a DVD for young people. Neither the website nor the DVD mentions male victims or female abusers (Voice Against Violence).

421 The Cedar Project originated in Canada and provides a therapeutic 12 week, group-work programme for children and young people who have experienced domestic abuse (involving their mother). This runs alongside a concurrent group work programme for their mothers.

⁴²² UN Doc. CEDAW/C/UK/CO/6.

423 See <http://www.scotland.gov.uk/Resource/0039/00394135.doc> for details of projects being funded.

424 Universal Declaration of Human Rights, 1948, Article 16, UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, article 1, The Right to Marry: article 12 of the European Convention on Human Rights; article 9 of the European Union Charter on Fundamental Rights.

⁴²⁵ Cheall v United Kingdom (1985) 42 DR 178, at 185.

⁴²⁶ Liberty, Liberty's Briefing: Forced Marriage (Civil Protection) Bill, January 2007.

427 Previously, up to around 10 per cent of the cases dealt with by the Forced Marriages Unit involved victims from Scotland TAYLOR, L. 2010. SPICe Briefing Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Bill. Edinburgh: SPICe.

⁴²⁸ "'Force" in this context is wider than the use of coercion, and includes knowingly taking advantage of a person's incapacity to consent or to understand the nature of marriage (s 1(6))." Norrie, "Families in Fear", The Journal, 18 July 2011.

⁴²⁹ Ss 3-4.

⁴³⁰ S 2(1).

431 Ministry of Justice, 2009 cited in TAYLOR, L. 2010. SPICe Briefing Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Bill. Edinburgh: SPICe.

⁴³² Seven EU countries have recognised in law the equal right of same sex couples to marry. These are Belgium, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden.

⁴³³ Schalk and Kopf v Austria [2010] 30141/04

⁴³⁴ Schalk and Kopf v Austria [2010] 30141/04

⁴³⁵ Schalk and Kopf v Austria [2010] 30141/04

⁴³⁶ See for example, The Church of Scientology Moscow v Russia [2007] ECHR 258

⁴³⁷ The term learning disabilities is used in this report. It is, however, acknowledged that some other terms are preferred by others. For example, the UN Disability Convention refers to 'intellectual disabilities' and the disabled people's organisation People First (Scotland) prefers 'learning difficulties'.
438 In 2008 the Scottish Consortium for Learning Disability eSAY team began collecting national data of people with learning disabilities for the Scottish Government. In 2010, 32 local authorities provided data on 27,391 adults across Scotland ESAY 2010. Statistics Release: Adults with learning disabilities - implementation of 'The same as you?' Scotland 2010. Glasgow: Scottish Consortium for Learning Disability.

⁴³⁹ Scottish Government, Adults with Incapacity (Scotland) Act 2000: a short guide to the Act, 2008.

⁴⁴⁰ Ibid.

⁴⁴¹ Shtukaturv v Russia (application no. 44009/05) decision of 27 March 2008.

⁴⁴² Including testimony provided to the Commission by Autism Rights in March 2011.

⁴⁴³ This includes: ALTRUM, Alzheimer Scotland, Coalition of Care and Support Providers in Scotland (CCPS), Down's Syndrome Scotland, ENABLE Scotland, Inclusion Scotland, In Control Scotland, Independent Living in Scotland, Learning Disability Alliance Scotland, Long Term Conditions Alliance Scotland (LTCAS), People First (Scotland), Sense Scotland, Values Into Action Scotland (VIAS).

⁴⁴⁴ Campaign for a Fair Society, Coalition Stakeholder Submission, Universal Periodic Review 2012, para 4.2.1.

⁴⁴⁵ SHRC, Submission to the Scottish Government on a Mental Health Strategy for Scotland 2011-2015, February 2012.

446 Under the 2009 Act, a "mental disorder" has the same meaning as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (i.e. any mental illness, personality disorder or learning disability).

⁴⁴⁷ SHRC and EHRC, Being Part of Scotland's Story under the Disability Convention, April 2011, p36.

448 The research is based on the New Zealand rather than the Scottish experience.

449 SCLD is a charity that is made up of [12 Partner Organisations](#) (with funding from the Scottish Government) who work together to help people make the changes set out in 'The same as you? [SCOTTISH GOVERNMENT 2000. The Same as You? A review of services for people with learning disabilities. Edinburgh: Scottish Government]. The Same as you? was the product of collaborative work with people with learning disabilities, their family carers as well as people who plan and provide services and support. It contains 29 recommendations to improve the lived experience of people with learning disabilities.

450 Under the SHARE programme <http://www.sphsu.mrc.ac.uk/research-programmes/sh/ev/share.html>

451 One Parent Families Scotland, a charitable organization that works to ensure that all families, particularly those headed by a lone parent, have the support, information and confidence needed to play a full part in Scotland's economic and social life, has produced a short guide for lone fathers (both those with care and non-resident parents) (OPFS 2010).

452 Section 11(7) (a).

453 Section 11(7) (b).

454 United Kingdom Supreme Court 2010. Accessible at http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0128_Judgment.pdf, accessed on 14th March 2012.

⁴⁵⁵ *Principal Reporter v K* [2010] UKSC 56, para 53.

⁴⁵⁶ (1995) 20 EHRR 205

457 <http://www.legislation.gov.uk/asp/2006/8/contents>

458 See <http://www.fnf.org.uk/>

459 See the thematic section entitled Living in Detention for further information about women in prison.

460 Children may also feel relief at the imprisonment of an abusive, threatening or criminal parent or may, where the imprisoned parent played no part in the child's life, be unaffected.

⁴⁶¹ Among a great many sources on these issues the following provide a starting point: LIBERTY 2011a. From 'War' to Law: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010. London: Liberty, LIBERTY 2010b. Liberty's Second Reading briefing on the Terrorist Asset-Freezing etc. Bill in the House of Lords. London: Liberty, LIBERTY 2010a. Liberty's Briefing on the Motion to approve the Statutory Instrument to renew 28 days pre-charge detention in the House of Commons. London: Liberty, LIBERTY. 2012. Countering Terrorism, <http://www.liberty-human-rights.org.uk/human-rights/terrorism/index.php> [Online]. London: Liberty. Available: <http://www.liberty-human-rights.org.uk/human-rights/terrorism/index.php> [Accessed 06/09/12 2012].

JUSTICE 2010. Home Office Review of Counter-Terrorism and Security Powers: Written submissions of JUSTICE. London: JUSTICE, JUSTICE 2011e. Terrorism Prevention and Investigation Measures Bill Briefing for House of Lords Report Stage: November 2011. London: JUSTICE, JUSTICE 2011d. Terrorism Prevention and Investigation Measures Bill Briefing for House of Lords Committee Stage: October 2011. London: JUSTICE, JUSTICE 2011c. Terrorism Prevention and Investigation Measures Bill Briefing for House of Commons Second Reading: June 2011. London: JUSTICE, JUSTICE 2011a. Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills: Written evidence of JUSTICE. London: JUSTICE.

EHRC 2011d. EHRC submission to CAT on list of issues on the UK 5th periodic report. London: Equality and Human Rights Commission, EHRC. 2011c. *Commission statement on counter-terror review* [Online]. London: Equality and Human Rights Commission. Available: <http://www.equalityhumanrights.com/news/2011/january/commission-statement-on-counter-terror-review/> [Accessed 6/9/12 2012].

CARLILE, L. 2011. Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005. London: The Stationary Office.

462 Among the various other issues that arose from the scoping project that did not reach the threshold for prioritisation were:

Rendition: The call by campaigners in 2007 for the Scottish Government to launch an investigation into the alleged use of Scottish airfields for refuelling of US 'rendition' flights (See Paul Kelbie, 'Call for outlawing of 'rendition' flights: Human rights groups urge Scottish Executive to probe transport of terror suspects for torture', *The Observer*, 28 October 2007; David Robinson, 'Call for powers to end 'legal kidnapping'', *The Scotsman*, 24 August 2007; Peter Macmahon and Michael Howie, 'CIA torturers passed through Scotland on rendition flights, says rights group', *The Scotsman*, 23 August 2007; 'Britain - Activists call for rendition investigation', *Morning Star*, 15 June 2007; 'Rendition row continues after inquiry 'whitewash'', *Irish News*, 11 June 2007; Scott Macnab, 'Police Chief Quizzed about Rendition Flight Probe', *PA Newswire: Scotland*, 29 February 2008).

Mosquito alarms: There was also some discussion of the use of 'mosquito alarms' as a deterrent to young people congregating in groups outside shops, and the implications this may have for their health as well as their right to freedom of assembly under Article 10 (See Graham Grant, 'Ned alarm 'is breach of young Scots' rights'', *Daily Mail*, 19 December 2007; Brian Currie, 'Teenagers fear loss of rights: Commission boss hears plea from city pupils', *Evening times Glasgow*, 10 December 2008; 'Anti-ned alarms stir din', *Daily Star*, 12 July 2010). This issue has also been repeatedly raised by Together, see TOGETHER 2012. State of Children's Rights in Scotland, 2012. Edinburgh: Together - Scottish Alliance for Children's Rights.

Two specific areas of adult protection were raised, however these are explored in more depth in relation to the thematic sections on Access to Justice & the Right to Remedy and Dignity and Care. Reducing re-offending and alternatives to detention: While the Scottish Government is not usually legally responsible for the criminal actions of individuals, it does have an obligation to put in place laws and policies that aim to deal appropriately with criminal behaviour and control the factors that lead to re-offending. Recent trends in criminal justice and sentencing indicate a growing emphasis in Scotland on offender rehabilitation and social inclusion (more so than the rest of the UK). This is evidenced, for example, in the development of community sentences and specific measures tackling drug-related crime, see MCIVOR, G. 2009. Therapeutic jurisprudence and procedural justice in Scottish Drug Courts. *Journal of Criminology and Criminal Justice*, 9, 29-49. There has been an increased focus in recent years on alternatives to custodial sentences reflects a need both to reduce Scotland's high prison population (SCOTTISH GOVERNMENT 2011b. High Level Summary of Statistics Trend - Prison Population. Edinburgh.) and an acknowledgment that short-term custodial sentences for minor crimes are ineffective in reducing re-offending. However concerns have been raised about the impact on an individual's rights where failure to comply with a Drug Treatment & Testing Order may result in a lengthier sentence than would have originally been handed down. Some of these issues are explored in part within the thematic section on Living in Detention.

⁴⁶³ See Refugee Convention, articles 12-30.

464 This issue was also raised more generally in some focus groups, in relation to migrant workers and is explored in more detail in the thematic section on Education and Work.

465 All were women based in Glasgow & Lochwinnoch which are now home to more asylum seekers (approximately 2000 in total) than any other place in the UK.

⁴⁶⁶ Indeed follow-up discussions with this project leader revealed that some of the participants involved had now failed in seeking asylum and were now destitute. Others were relying entirely on the charity of volunteers. The mental health of most had deteriorated rapidly which Claire (project leader) attributed to their destitution.

467 The need for this particular type of care being most acute when individuals are seeking asylum as a direct result of very traumatic circumstances of torture and abuse, that often results in a rapid decline in both the physical and mental health of individuals.

⁴⁶⁸ *Nachova and others v Bulgaria*, 6 July 2005, applications no. 43577/98 and 43579/98, paras 160-161.

⁴⁶⁹ *DORĐEVIĆ v. CROATIA*, (Application no. 41526/10), 24 July 2012, Para 148.

⁴⁷⁰ *Ibid*, para 153.

471 The figures do not include the 42 charges reported to the Crown which are linked to the new law on religious sectarian hate crime at football matches, which came into force on 1 March 2012.

472 Section 96(2)

473 Section 74(2)

474 Sections 1(2) and 2(2). This new legislation is in line with Council of Europe's recommendation in July 2009 (Report on Human Rights & Gender Identity) that States "enact hate crime legislation which affords specific protection for transgender persons against Transphobic crimes and incidents".

475 Legislation on this issue was introduced in England and Wales in 2003, while in Scotland it was not until 2009.

476 Lesbian, Gay, Bisexual and Transgender.

⁴⁷⁷ *Nachova and others v Bulgaria*, 6 July 2005, applications no. 43577/98 and 43579/98.

478 Available at

http://www.scottish.parliament.uk/S4_Bills/Offensive%20Behaviour%20at%20Football%20and%20Threatening%20Communications%20%28Scotland%29%20Bill/b1bs4-aspassed.pdf See also *Offensive Behaviour at Football and Threatening Communications (Scotland) Bill Revised Explanatory Notes*, SP Bill 1A-EN, Session 4 (2011), at

http://www.scottish.parliament.uk/S4_Bills/Offensive%20Behaviour%20at%20Football%20and%20Threatening%20Communications%20%28Scotland%29%20Bill/b1as4-stage2-en-rev.pdf; and SPICe Briefing, *Offensive Behaviour at Football and Threatening Communications (Scotland) Bill*, 20 June 2011, 11/48, at <http://www.scottish.parliament.uk/business/research/briefings-11/SB11-48.pdf>

⁴⁷⁹ The *Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012* was positively motivated as the Scottish Government's response to calls from Scotland's police and prosecutors to provide them with extra tools to help them to crack down on sectarian songs; abuse at and around football matches; and threats posted on the internet or through the mail. The central objective of the offences provided for in the Act is to tackle sectarian hatred and other threatening and

offensive behaviour related to football matches; as well as to prevent the use and communication of threatening materials, especially where it incites racial hatred.

480 Set out in Section 1 of the Act

481 Set out in Section 6 of the Act

⁴⁸² SHRC, SUBMISSION TO THE SCOTTISH PARLIAMENT JUSTICE COMMITTEE ON THE OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL, August 2011, pp 3-4.

⁴⁸³ *Kokkinakis v Greece*, Judgment of 25 May 1993, Ser. A. no. 260-A, p 22, para 52.

⁴⁸⁴ *Kafkaris v Cyprus*, Judgment of 12 February 2008, para 139.

⁴⁸⁵ SHRC, SUBMISSION TO THE SCOTTISH PARLIAMENT JUSTICE COMMITTEE ON THE OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL, August 2011, pp 2-3.

⁴⁸⁶ <https://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-stage-3-briefing-offensive-behaviour-at-football-scotland-bill-dec.pdf>

⁴⁸⁷ <https://www.hatefreehighland.org/contents/view/home>

⁴⁸⁸ <https://sites.google.com/site/grecweb/services/prejudice-incidents-monitoring--reporting>

⁴⁸⁹ http://www.youtube.com/watch?v=oc4fYIASpa8&feature=player_embedded

490 In June 2012, The First Minister and the Lord Advocate attended the premier of this film. The project was jointly funded by the Crown Office and Procurator Fiscal Service (COPFS) and North Lanarkshire Council. Strathclyde Police, the Scottish Court Service and the Scottish Prison Service also provided props and locations for the film and advice was provided by Education Scotland.

⁴⁹¹ *A v UK* (1999) 27 E.H.R.R.611; *Z v UK* (29392/952001), judgement of 10 May 2001.

⁴⁹² For an overview of international human rights law in this area see KEMP, S. & SHRC 2010. A Review of International Human Rights Law Relevant to the Proposed Acknowledgement & Accountability Forum for Adult Survivors of Childhood Abuse Glasgow: SHRC.

<http://www.scottishhumanrights.com/content/resources/documents/SHRClegalpaperforAAF.pdf>

⁴⁹³ *A v UK* (1999) 27 E.H.R.R.611; *Z v UK* (29392/952001), judgement of 10 May 2001.

⁴⁹⁴ *M.C. v Bulgaria* (application no. 39272/98), 2003.

⁴⁹⁵ See e.g. *Fedetov v Russia* (5140/02)(2007) 44 E.H.R.R. 26 ECHR, *Dougoz v Greece* (40907/98)(2002) 34

E.H.R.R. 61, *Peers v Greece* (28524/95)(2001) 33 E.H.R.R. 51, *Kalashnikov v Russia*

(47095/99)(2003) 36

E.H.R.R. 34 ECHR. Thus far this has generally been considered in detention settings, while there is a general trend towards recognising that similar standards should apply between individuals, it is important to recognise already the broad definition of detention which the Council of Europe Committee for the Prevention of Torture uses to include places where people are *de facto* detained (including e.g. care homes with entry codes which they may not remember).

⁴⁹⁶ *Price v UK* (2001) 34 EHRR 128 at para 30.

⁴⁹⁷ *Z v UK*, (29392/952001), judgment of 10 May 2001.

⁴⁹⁸ *Ireland v United Kingdom* (1978) ECHR (Series A) No 25, at 162. See e.g. due to age in *Costello-Roberts v UK*, (application no. 13134/87), judgment of 25 March 1993, due to mental health in *Kudla v Poland*, (application no. 30210/96) judgment of 16 October 2000.

⁴⁹⁹ *A v UK* (1999) 27 E.H.R.R.611

⁵⁰⁰ *Herczegfalvy v Austria*, (A/242)(1993) 15 E.H.R.R. 437 ECHR.

⁵⁰¹ See also EHRC 2011e. Hidden in plain sight: Inquiry into disability-related harassment. Glasgow.pp 26-29.

⁵⁰² The Act itself defines harm as being any harmful conduct, but in particular, that which: causes physical harm; causes psychological harm (e.g. by causing fear, alarm or distress); is unlawful and takes/seizes or adversely affects property, rights or interests (for example: theft, fraud, embezzlement or extortion), or causes self-harm. Further guidance in the code of practice states that the definition is not exhaustive and a category cannot be excluded because it is not explicitly listed in the Act. If an act or behavior is deemed to cause physical (including neglect), emotional, financial or sexual harm, or a combination of these, then it constitutes 'harm' SCOTTISH GOVERNMENT 2008a. Adult Support and Protection (Scotland) Act 2007: Code of Practice. Edinburgh: Scottish Government.

⁵⁰³ That is: over sixteen; unable to safeguard their own well-being, property rights or other interests; at risk of harm and because they are affected by disability, mental disorder, illness or physical or mental infirmity.

⁵⁰⁴ EHRC 2011e. Hidden in plain sight: Inquiry into disability-related harassment. Glasgow. p135.

⁵⁰⁵ Including testimony provided to the Commission by Autism Rights in March 2011.

⁵⁰⁶ This includes: ALTRUM, Alzheimer Scotland, Coalition of Care and Support Providers in Scotland (CCPS), Down's Syndrome Scotland, ENABLE Scotland, Inclusion Scotland, In Control Scotland, Independent Living in Scotland, Learning Disability Alliance Scotland, Long Term Conditions Alliance Scotland (LTCAS), People First (Scotland), Sense Scotland, Values Into Action Scotland (VIAS).

⁵⁰⁷ Campaign for a Fair Society, Coalition Stakeholder Submission, Universal Periodic Review 2012, para 4.2.1.

⁵⁰⁸ *Rantsev v. Cyprus and Russia*, (application no. 25965/04), para 282.

⁵⁰⁹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; protocol to the Convention against Transnational Organised Crime

⁵¹⁰ For an overview of obligations under these treaties and their relevance to Scotland, EHRC 2011f. Inquiry into Human Trafficking in Scotland. Glasgow: EHRC Scotland.pp19-21.

⁵¹¹ *Rantsev v. Cyprus and Russia*, (application no. 25965/04).

512Section 22

513Sections 4 and 5

514Section 26

515Sections 10 to 12

516'Pair admit sex trafficking offences', *The Times*, 10 September 2011. The couple pleaded guilty to moving 14 men and women to various addresses in cities throughout the UK, in order to sell sex. The ring was smashed by a joint police operation led by Strathclyde Police, along with colleagues from Northern Ireland and other UK forces, along with the Border Agency, Crown Office, charities and local authorities. Proceedings under the Proceeds of Crime Act 2002 are to follow.

517In March 2011, the issue was brought sharply into the public eye when an Eastern European woman turned up at a sexual health clinic in Edinburgh, stating that she had been trafficked for sex and begging staff for help: see Shan Ross, 'Victim of sex trafficking could just be the tip of the iceberg'. *The Scotsman*, 29 March 2011, p.13; and Alan McEwen, 'Enforced prostitution claims spark probe into trafficking', *Edinburgh Evening News*, 28 March 2011, p.5.

518See also THE HERALD. 2008. Human trafficking; Authorities failing victims in Scotland. *The Herald*.

⁵¹⁹The National Referral Mechanism (NRM) is a process for identifying and supporting victims of human trafficking. For further details on how this mechanism works please go to:

http://www.nspcc.org.uk/Inform/resourcesforprofessionals/childtrafficking/national_referral_mechanism_wda84858.html

520For information on the inquiry, see <http://www.equalityhumanrights.com/scotland/human-rights-in-scotland/inquiry-into-human-trafficking-in-scotland/>. See also Lucy Adams, 'Scotland-wide inquiry into sex trafficking', *The Herald*, 9 February 2010

521<http://www.saferglasgow.com/services/reducing-violence-against-women/tara.aspx>

⁵²² SCOTTISH GOVERNMENT 2007b. GUIDANCE FOR MEMBERS OF POLICE AUTHORITIES AND JOINT POLICE BOARDS, ISSUED BY THE SCOTTISH GOVERNMENT, June 2007. Edinburgh: Scottish Government.

⁵²³ Adopted by General Assembly resolution 34/169 of 17 December 1979.

⁵²⁴ Appendix to Recommendation Rec (2001)10 on the European Code of Police Ethics adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies (the European Code of Police Ethics).

⁵²⁵ Human Rights Act 1998, s.6.

⁵²⁶ Recommendation Rec (2001)10 adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies.

⁵²⁷ Adopted by the key representatives of the national Police Oversight Bodies and national Anti-Corruption Authorities of the Member States of the Council of Europe and the European Union at the Eleventh Annual Professional Conference of the European Partners Against Corruption, including the EU's Anti-Corruption Contact-point Network, in Laxenburg, Austria, 22 to 25 November 2011.

528See Scottish Government website at <http://www.scotland.gov.uk/Topics/Justice/public-safety/Police/19354/FutureofPoliceComplaints>

⁵²⁹ Letter to Cabinet Secretary for Justice, 31 October 2011.

⁵³⁰ The Scottish Ministers may by regulations make provisions regarding the investigations by the Commissioner.

⁵³¹ Police (Northern Ireland) Act 2000 s. 63.

⁵³² See, for example, the Police Ombudsman's report, *Police Identification in Northern Ireland: A Report under section 60A of the Police (Northern Ireland) Act 2000*, March 2006. The Report made a number of recommendations related to improving police identification.

⁵³³ Amnesty International UK, “Amnesty International welcomes strong reference to Human Rights in Justice Committees report on Police and Fire Reform (Scotland) Bill”, 2 May 2012
http://www.amnesty.org.uk/news_details.asp?NewsID=20099

534 SHRC considers that it is important in order to satisfy the procedural obligation under Articles 2 and Article 3 of the ECHR that the independence of the Police Investigations and Review Commissioner is strongly guarded and is given adequate investigatory powers of disclosure of all relevant documents and other materials and the attendance of individuals as witnesses (SHRC 2012a. Consultation Submission to the Police and Fire Reform (Scotland) Bill Edinburgh: Scottish Human Rights Commission.)

535 In a recent decision by the European Court of Human Rights (2012) kettling was ruled to be lawful if it is done in a way that is proportionate and is enforced for no longer than reasonably necessary and if it's being undertaken to avoid personal injury and damage to property.

536 Gillan and Quinton v UK, Application No. 4158/05, 12 January 2010. See also Equality and Human Rights Commission, Stop and think: A critical review of the use of stop and search powers in England and Wales, March 2010.

⁵³⁷ For example see THE HERALD. 2012. Airport visit eases concerns on stop and search powers. *The Herald*, 7 February 2012.

<http://www.heraldscotland.com/politics/political-news/airport-visit-eases-concerns-on-stop-and-search-powers.1328584000>

⁵³⁸ Kath Murray, PhD Background, University of Edinburgh,
<http://www.law.ed.ac.uk/research/students/169.aspx>

⁵³⁹ See also Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) following its visit to the United Kingdom from 18 November to 1 December 2008, November 2009

⁵⁴⁰ <http://www.scottishhumanrights.com/ourwork/publications/article/tasers>

⁵⁴¹ McCann and Others v. the United Kingdom (1995)

⁵⁴² Ibid see also Şimşek and Others v. Turkey (2005)

⁵⁴³ Makaratzis v Greece (2004)

⁵⁴⁴ Ibid at para 58

⁵⁴⁵ Ibid

⁵⁴⁶ *Wasilewska and Kalucka v Poland*, 23 February 2010, paras 41 – 47.

547 Not all of the many issues identified within this framework could, however, be explored further in Phase 2. Accordingly, a prioritisation criteria filter was applied (see Appendix 1) in order to determine which would be explored in more focused detail. Other issues that arose from the scoping project that did not reach the threshold for prioritisation three issues of note included the following:

An issue which is currently being considered by the Scottish Law Commission is informal detention; that is, de facto detention in health or social care institutions out with the safeguards set out in mental health legislation. In the 2005 case of *HL v United Kingdom* ((Application no. 45508/99) [2005] ECHR 471, 5 October 2004), the European Court of Human Rights held that the practice of informal detention of compliant but incapacitated adults was ‘not in accordance with a procedure described by law’ and thus breached Article 5.

An issue that has raised a considerable amount of press coverage is the detention of asylum seekers and refugees. The detention of asylum seekers, in particular families with young children, raises numerous issues regarding human rights protection. It is a controversial topic much discussed by the media (see Fiona Russell, ‘A family scarred by Dungavel’, *The Sunday Times*, October 22, 2006, ; Tom Martin, ‘Northern Irish asylum seekers secretly ferried into Dungavel’, *Sunday Express*, July 16, 2006; Jame Kirkup and Louise Gray, ‘Dawn raids on asylum seekers may be scrapped’, *The Scotsman*, January 26, 2007; Neil Mackay, ‘UN attacks government over new asylum tactics; New detention policy condemned for ‘riding roughshod’ over the rights of children’, *The Sunday Herald*, January 21, 2007). Asylum and immigration matters, including detention, are reserved to Westminster, but the conditions of detention, and the services provided to those in immigration detention, are matters within the control of the Scottish Government. Issues arising in relation to the conditions of asylum detention are therefore discussed below within the four aforementioned topics. As a matter of good practice with regard to the UK Government’s policy of asylum detention, attention should be drawn to the pilot scheme run in Glasgow and Wales by the YMCA, which involves the provision of hostel accommodation and services instead of detention:

<http://www.ymcascotland.org/page/accommodation-and-support-services>.

A further issue to have attracted a huge amount of publicity is the recent series of court cases raised by prisoners in an attempt to challenge the blanket ban on voting in elections (see, for example,

Alison Kesby, 'Prisoner voting rights and the effect of *Hirst v United Kingdom (No.2)* on national law', *Cambridge Law Journal* 2007, 66(2), 258-260; Hector MacQueen, 'Prisoners' right to vote: declaration of incompatibility', *Edinburgh Law Review* 2007, 145-146; 'It's criminal not to give prisoners the vote', Kevin McKenna, *The Observer*, 3 April 2011; Alan Travis, Afua Hirsch, 'Prisoner voting rights must not be ignored, warns rights tsar', *The Guardian*, 4 February 2011; Steve Doughty, Alan Roden, 'Prison Vote Vultures: No-win, no-fee lawyers line up thousands of convicts to claim compensation for being denied their polling rights', *Daily Mail*, 3 February 2011; James Slack, 'Rapist's bid to get inmates the vote by May', *Daily Mail*, 23 February 2011; Mike Wade, 'Prisoners 'will sue' if denied vote at Holyrood election', *The Times*, London, 2 February, 2011; Tim Pauling, 'Holyrood elections to go ahead despite ruling on prisoner votes', *Aberdeen Press and Journal*, 25 January 2007) Since this is predominantly a matter reserved to Westminster, it will not be discussed in any detail in this chapter. Violations of the Convention were found against the UK by Strasbourg in *Hirst v United Kingdom*⁵⁴⁷ in 2005 and *Greens and MT v United Kingdom*⁵⁴⁷ in 2010, in respect of the blanket ban on prisoners voting. The deadline for compliance by the UK Government with the judgment in *Greens* has now been extended to await the decision of the Grand Chamber in *Scoppola v Italy (No.3)*⁵⁴⁷, in which a hearing took place in November 2011. The Scottish Human Rights Commission has stated the following on this issue: We are past the point of debating whether prisoners should get the vote – the UK is required to change the law in that regard. The Westminster Parliament now has a short window to consider how we as a society decide which offences are so grave they require not just the loss of liberty but also the loss of the vote. "The framing of the debate is disappointing when it is clear that the question needing to be posed is how, not if, the blanket ban is to be removed. "The judgment from the Court does not create an overnight change which automatically gives every prisoner in the UK the vote. It actually provides guidance to the UK on how it can meet its legal obligations, and by doing so avoid paying compensation claims. To be compliant with the ruling the UK Government has to show that exclusion from voting is objective, reasonable and proportionate – i.e. not the blanket ban which is in place today. "MP's should use this time to discuss which restrictions could be put in place, for example which categories of offences are considered sufficiently serious to invite the courts to consider removing the right to vote. Judges will then need to consider the individual's right to vote as they come before them for sentencing. "The overdue removal of a blanket ban on convicted prisoners does no more than to bring us into line with Canada, Australia, France, Denmark, Germany, the Netherlands and many other countries."

<http://www.scottishhumanrights.com/news/latestnews/article/prisonervoting>

⁵⁴⁸ H.L. v UK, application no. 45508/99, 5 October 2004, para. 89.

⁵⁴⁹ *Ibid*, paras 91-94.

⁵⁵⁰ <http://www.scotlawcom.gov.uk/news/discussion-paper-on-adults-with-incapacity/>

⁵⁵¹ <http://scottishhumanrights.com/news/latestnews/article/prisonvisiting2012>

⁵⁵² <http://www2.ohchr.org/english/law/ccpr.htm>

⁵⁵³ Association for the Prevention of Torture and Centre for Justice and International Law, *Torture in International Law, a guide to jurisprudence*, Geneva/Washington D.C., 2008 (hereinafter APT and CEJIL), citing *Mika Miha v Equatorial Guinea*, HRC Communication No. 414/1990, 8 July 1994; *Griffin v Spain*, HRC Communication No. 493/1992, 4 April 1995; *Yasseen and Thomas v Guyana*, HRC Communication No. 676/1996, 30 March 1998; *M'Boissona v the Central African Republic*, HRC Communication No. 428/1990, 7 April 1994; *Freemantle v Jamaica* (2000); *Sextus v Trinidad and Tobago*, HRC Communication No. 818/1998, 16 July 2001; *Lantsova v the Russian Federation*, HRC Communication No. 763/1997, 26 March 2002; *Madafferi v Australia*, HRC Communication No. 1011/2001, 26 July 2004.

⁵⁵⁴ First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August-3 September 1955: report prepared by the Secretariat (United Nations publication,

Sales No. 1956.IV.4), annex I.A; amended by the Economic and Social Council in its resolution 2076 (LXII) (addition of section E, entitled "Persons arrested or imprisoned without charge").

⁵⁵⁵ General Assembly resolution 43/173, annex.

⁵⁵⁶ General Assembly resolution 45/111, annex.

⁵⁵⁷ General Assembly resolution 40/33, annex.

⁵⁵⁸ General Assembly resolution 45/112, annex.

⁵⁵⁹ General Assembly resolution 45/113, annex.

⁵⁶⁰ Economic and Social Council resolution 1997/30, annex.

⁵⁶¹ Article 2 – The Right to Life; Article 3 – The Right to be free from inhumane and degrading treatment; and Article 8 – The Right to Private and Family Life.

562 This decrease is primarily due to a noted decline in the number of young offenders on remand (14 per cent drop) and serving sentences (17 per cent drop)
<http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/TrendPris> accessed on January 31st 2011.

563 See <http://www.scotland.gov.uk/Publications/2012/06/6972>

564 The average daily population increased by 8 per cent to 468 for women, 4 per cent to 7,710 for men. Whilst, the young offender sentenced population showed a marked drop of 8 per cent to 556.
See:

<http://www.scotland.gov.uk/Publications/2012/06/6972>

565 Napier v The Scottish Ministers 2004 SLT 555 (OH). The decision was subsequently upheld by the Inner House on appeal: 2005 CSIH 16

566 See Section on Mental Health Detention later in this chapter. The experiences of The State Hospital's adoption of a human rights based approach are also further discussed in Chapter 1 in relation to Dignity and Care.

567 John Shelley v United Kingdom (Application No. 00023800/06) 4 January 2008

⁵⁶⁸ VD v Romania, 16 February 2010, paras 92-99; Slyusarev v Russia, 20 April 2010, application no. 60333/00 (cited in REED, R. & MURDOCH, J. 2011. Human Rights Law in Scotland, Edinburgh, Bloomsbury Professional.

⁵⁶⁹ McLinchey and others v UK, 2003 V, paras 47-58.

⁵⁷⁰ Keenan v UK, 2001-III, para 116.

⁵⁷¹ UN CESCR, General Comment no. 14, the right to the highest attainable standard of physical and mental health, 11 August 2000, UN Doc. E/C.12/2000/4, para. 34.

572 SAMH revealed that figures obtained from parliamentary questions showed there were 219 cases of self-harm in Scottish jails in 2010, an increase of 140% from 91 cases in 2004 SAMH 2011. SAMH RESEARCH BRIEFING: MENTAL HEALTH AND CRIMINAL JUSTICE IN SCOTLAND Glasgow: Scottish Association for Mental Health.

⁵⁷³ Defined as "Mental health problems exist on a spectrum from mild to severe, and from common to less common. In terms of the identification of "severe and enduring mental health problems", "common" mental health problems include anxiety, depression, phobias, obsessive compulsive and panic disorders, while "severe and enduring" mental health problems include those such as psychotic disorders (including schizophrenia) and bi-polar affective disorder (manic depression). "Personality disorder" is also identified as a mental disorder under the Mental Health (Care and Treatment) (Scotland) Act 2003. This has been defined as "an enduring pattern of inner experience and behaviours that deviates markedly from the expectation of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time and leads to distress or impairment". HMCIPS 2008b. Out of Sight: Severe & Enduring Mental Health Problems in Scotland's Prisons. In: PRISONS, H. C. I. O. (ed.). Edinburgh: Scottish Government.

574 This issue is also picked up in Monitoring places of detention: First Annual Report of the United Kingdom's National Preventive Mechanism, 1 April 2009 – 31 March 2010, Ministry of Justice, February 2011, at http://www.justice.gov.uk/downloads/guidance/inspection-monitoring/National_Preventive_Mechanism_Annual_report_2009-2010%28web%29.pdf

575 Letter from Mike Ewart, Chief Executive, Scottish Prison Service, to Cabinet Secretary for Justice, 1 December 2008

⁵⁷⁶ See, for example, Keenan v UK, 2001-III.

577 There were twelve suicides in Scottish prisons in 2010/11, compared with five the year before, and three the year before that.

⁵⁷⁸ Aerts v Belgium (1998) 29 EHRR 50 para 46. "In principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution".

579 Part 2 of the 2003 Act

580 Part 5 of the 2003 Act

581 Part 6 of the 2003 Act

582 Part 7 of the 2003 Act

583 Part 3 of the 2003 Act

584 The Health Board appealed against a determination of the Mental Health Tribunal that a patient was being detained in conditions of excessive security at the State Hospital in Carstairs. The Tribunal accepted the evidence that there was no appropriate facility in Scotland or possibly the UK for the detention of patients with acquired brain injury, which resulted in challenging behaviour, but nonetheless determined that he did not require the environmental, procedural or relational security

which is provided in Carstairs and as such he was considered to be “entrapped.” The unsuccessful submissions of the applicants were that such an order is meaningless as the applicants could not discharge their obligations under it. The result, in effect was that the applicants were being ordered to build a suitable unit.

585 A MWC inquiry began in August 1999 following a request by the then Scottish Minister for Health and Community Care and concluded that many improvements should be made to the general treatment and care provided to patients at The State Hospital. The impact of this inquiry was not limited to The State Hospital and was instrumental in bringing about the changes to legislation that were to come in 2003 with the introduction of the Mental Health (Care and Treatment) (Scotland) Act 2003 MENTAL WELFARE COMMISSION FOR SCOTLAND 2000. Report of the Inquiry into the Care and Treatment of Noel Ruddle. Edinburgh. The first recommendation in the report was that “the human rights of individual patients must be recognised” (MWC 2000:8.1). Other recommendations highlighted a number of systematic problems which existed within the working culture of The State Hospital at the time.

586 The State Hospital is a Special NHS Health Board in Scotland, one of four high security forensic mental health hospitals in the UK and the only such hospital for Scotland and Northern Ireland. Currently around 740 staff provide psychiatric care in conditions of high security to 140 male patients with mental illness who are compulsorily detained under mental health or criminal law. Patients are generally admitted from and discharged to other NHS hospitals, prisons or the courts. One third of patients in The State Hospital have not committed an offence, but have been admitted due to the risk they pose to themselves or others. Patients at The State Hospital are more likely to have complex needs, including treatment resistant psychosis, and more than one substance abuse problem, compared with the patient population of general adult mental health services. They are also more likely to be living with the consequences of previous institutional care. Patients spend on average around seven years in The State Hospital, ranging from around four weeks to over 40 years.

587 See: also SCOTTISH GOVERNMENT 2012b. Statistical Bulletin Crime and Justice Series: Prison Statistics and Population Projections Scotland: 2011-12, June 2012. Edinburgh: Scottish Government. <http://www.scotland.gov.uk/Publications/2012/06/6972> for latest statistics.

Concerns have also been raised regarding the related issue of a rise in criminality and sentencing of women. The Scottish Government has acknowledged that: “*Many of these women are repeatedly committing lower-level offences. They have a variety of complex needs and underlying issues, and are trapped in a damaging cycle of deprivation, alcohol and drug abuse, and crime. In many cases they are themselves victims of severe and repeated physical and sexual abuse and suffer from mental illnesses*” SCOTTISH GOVERNMENT 2012a. The Scottish Government Response to the Commission on Women Offenders. Edinburgh: Scottish Government.. This reflects a general increase in the number of women in custody across the UK, which has been noted by the UN Committee on the Elimination of all forms of Discrimination against Women UN CEDAW 2007. United Nations Convention on the Elimination of all forms of Discrimination Against Women 6th Periodic Report of the United Kingdom of Great Britain and Northern Ireland. Geneva: UN Committee on the Elimination of Discrimination Against Women,.. The Committee also called for the UK to intensify its efforts to reduce the number of women in conflict with the law, including through targeted prevention programmes aimed at addressing the causes of women’s criminality; to ensure that young female offenders are not held in adult prisons; to take further measures to increase and enhance educational, rehabilitative and resettlement programmes for women in prison; and, to ensure the provision of adequate health facilities and services, including mental health services, for women in prison.

The precise reasons for the increase are unclear, but data analysis suggests that in Scotland it is primarily a result of sentencers’ increasing tendency to impose custodial sentences for specific categories of crime, particularly in relation to crimes against public justice (e.g. perjury, resisting arrest, and bail offences) MCIVOR, G. & BURMAN, M. 2011. Understanding the Drivers of Female Imprisonment in Scotland. Stirling.. Some commentators, however, believe that the treatment that women offenders receive in the criminal justice system may be harsh and disproportionate both in relation to their offending and in comparison to the treatment of men BARRY, M. & MCIVOR, G. 2010. Professional decision making and women offenders: Containing the chaos? . *Probation Journal*, 57..

In a study conducted in 2008 into the characteristics and experiences of female offenders, the vast majority of policy makers and practitioners consulted felt that sheriffs, when sentencing women, did not always make decisions that were based on women’s needs as identified in Social Enquiry Reports *ibid*.. There was a majority view amongst professionals that women were more likely than men to be ‘up-tariffed’ by being given harsher sentences that were disproportionate to the offence. Several professional respondents felt that sheriffs may consider prison to be a safer option for some

women, from the point of view of public as well as personal protection, and that prison would allow women to access drug addiction services which might not be available to them in the community MCIVOR, G. & BURMAN, M. 2011. *Understanding the Drivers of Female Imprisonment in Scotland*. Stirling.. However, studies of women in the criminal justice system have indicated that the fundamental differences between male and female offenders mean that a different and distinct approach is needed for women CORTSON, J. 2007. Report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system, . Home Office ed. London..

The Scottish Prisons Commission considered that the current use of imprisonment uses the penal system to tackle social problems, as a result of which *"we end up with prisons over-flowing with the needy, the troubled and the troubling"* SCOTTISH PRISON COMMISSION 2008. *Scotland's Choice: Report of the Scottish Prisons Commissions*. Edinburgh.. This, it says, is particularly the case when it comes to the imprisonment of women offenders.

HMCIPS has also called for a National Strategy to address the rising numbers of female prisoners. The Corston Report CORTSON, J. 2007. Report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system, . Home Office ed. London. called for a radical change in the treatment of women throughout the whole of the criminal justice system, including both those who offend and those at risk of offending. Most women tend to be in custody for relatively short periods of time, with limited opportunities to receive constructive help; it is likely, therefore, that their circumstances will be even more disadvantaged when they are released. It has been argued that interventions with women need to be initiated earlier in their cycle of offending and at an earlier stage in the criminal justice process, with greater emphasis placed on the development of multi-faceted welfare services that can better address female offenders' needs *ibid.*. Initiatives like the 218 Centre in Glasgow constitute an example of good practice in this respect, by allowing women 'time out' of their chaotic lives as an alternative to custody, and tackling the issues that drive offending, such as drugs, alcohol, abuse and poverty LOUCKS, N., MALLOCH, M., MCIVOR, G. & GELSTHORPE, L. 2006. Evaluation of the 218 Centre, MALLOCH, M., MCIVOR, G. & LOUCKS, N. 2008. 'Time out' for women: innovation in Scotland in a context of change. *Howard Journal of Criminal Justice*, 47, 383-399..

The 'Routes out of Prison' project run by the Wise Group and funded by The Big Lottery also provides life coaches [many of whom have offending backgrounds] to help support ex-offenders to turn their lives around. They work with prisoners prior to release to prepare them for life outside of prison and continue to support them on release. Only about seven per cent of clients, however, are women. One of the life coaches suggested that this was the case for two key reasons. Firstly, most of the women they saw had suffered very abusive pasts and many continued to use drugs and alcohol as a means of escape from that abuse. Second, for those who were ready to be helped, issues such as childcare often made working difficult. The project would however engage with women and help to try and build stability to help them to engage with services.

The Scottish Government is also supporting a multi-agency pilot in Glasgow by the Community Justice Authority and local partners, focusing on diversion and alternatives to custody for women. The Government explains that the pilot: "will provide the opportunity for multi-agency partners such as social work, police, the Procurator Fiscal, health, housing, the voluntary sector and addictions services to use their collective knowledge to deliver a holistic and targeted approach that helps each woman address their underlying issues and offending behaviour" SCOTTISH GOVERNMENT 2011b. *Improving outcomes for female offenders*. Edinburgh.

588 Other sources put the capacity in 2011 at times as high as 450: 'Rough justice', Ross Reid, *Holyrood Magazine*, 5 September 2011, at <http://www.holyrood.com/articles/2011/09/05/scotlands-female-prison-population-soars/>. There are also places for a small number of women prisoners at Inverness, Greenock, Dumfries and Aberdeen prisons.

⁵⁸⁹ HMIP, Report on HMP & YOI Cornton Vale - Follow-up Inspection - 30 January-2 February 2012, <http://www.scotland.gov.uk/Publications/2012/04/2166/2>

⁵⁹⁰ The government has agreed to consider further the following four recommendations: (i) a proposal for two new sentencing options, which the Scottish Government will examine in more detail with criminal justice partners, in the context of the on-going development of existing community sentencing options, (ii) a call for a review of services for women with borderline personality disorders (BPD), where the Scottish Government will prioritise work to implement the other recommendations made by the Commission on Women Offenders regarding BPD and other mental health provision, and (iii) two proposals to reform the leadership and delivery of adult offender services in the community, in response to which the Scottish Government will undertake a detailed consultation to consider what the optimal structures would be.

See SCOTTISH GOVERNMENT 2012a. The Scottish Government Response to the Commission on Women Offenders. Edinburgh: Scottish Government.

⁵⁹¹ <http://www.sps.gov.uk/MediaCentre/News-4196.aspx>

⁵⁹² Age of Majority (Scotland) Act 1969

⁵⁹³ This should not be confused with the age of legal capacity (16), the minimum age for prosecution (12), or the age of criminal responsibility (8). MARSHALL, K. 2009. The History and Philosophy of Children's Rights in Scotland' in Cleland and Sutherland's 'Children's Rights in Scotland, Edinburgh, Green.

⁵⁹⁴ International Covenant on Civil and Political Rights, Article 10(3), at

<http://www2.ohchr.org/english/law/ccpr.htm>

⁵⁹⁵ See UN Human Rights Committee List of Issues (CCPR/C/GBR/Q/6, 13 November 2007) para 2, and UK Government response (CCPR/C/GBR/Q/6/Add.1, 18 June 2008) para 8

⁵⁹⁶ UN CRC, General Comment no. 10, children's rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 85.

⁵⁹⁷ Criminal Justice and Licensing (Scotland) Act 2010 section 64, amending section 51 of the Criminal Procedure (Scotland) Act 1995

⁵⁹⁸ Section 70 of the Children (Scotland) Act 1995 (as amended by Section 135 of the Antisocial Behaviour etc. (Scotland) Act 2004)

⁵⁹⁹ The Intensive Support and Monitoring Service (ISMS) was introduced under the Anti-social Behaviour (Scotland) Act 2004. See also information provided by the Scottish Government, at

<http://www.scotland.gov.uk/Topics/Justice/crimes/youth-justice/Page/service>

⁶⁰⁰ Scottish Government website, Managing High Risk Young People – Secure Accommodation, at

<http://www.scotland.gov.uk/Topics/Justice/crimes/youth-justice/Page/accommodation>

⁶⁰¹ See <http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright>

⁶⁰² so as to comply with Article 37(b) of the UN Convention on the Rights of the Child

⁶⁰³ See 'Child detention to end at Dungavel removal centre', BBC news, 19 May 2010, at

http://news.bbc.co.uk/1/hi/scotland/glasgow_and_west/8691081.stm; 'Minister announces end to

Dungavel child detention', The Scotsman, 18 May 2010, at

http://www.scotsman.com/news/minister_announces_end_to_dungavel_child_detention_1_804775

⁶⁰⁴ See also UK Border Agency Migration Statistics, at <http://homeoffice.gov.uk/science-research/research-statistics/migration/migration-statistics1/>

⁶⁰⁵ Not all of the many issues identified within this framework could, however, be explored further in Phase 2. Accordingly, a prioritisation criteria filter was applied (see Appendix 1) in order to determine which would be explored in more focused detail. One other issues that arose from the scoping project that did not reach the threshold for prioritisation were:
Child Justice issues: pilot youth Courts, The Council of Europe Commissioner for Human Rights has also expressed concerns about the prosecution of children in adult Courts, and the need for the creation of designated youth Courts. See also BARNSDALE, L., MACRAE, R., MCIVOR, G., BROWN, A., ELEY, S., MALLOCH, M., MURRAY, C., POPHAM, F., PIACENTINI, L. & WALTERS, R. 2006. Evaluation of the Airdrie Sheriff Youth Court Pilot. Department of Applied Social Science, University of Stirling.

⁶⁰⁶ Domestic Case Law

Allan, Petnr (1993) SCCR 686

Ambrose v Harris [2011] UKSC 43

Anderson v HM Advocate (1974) SLT 239

Authority Reporter v. S (2010) SLT 765

AXA General Insurance Limited and others v The Lord Advocate and others [2011] UKSC 46

Bowden and Whitton v Poor Sisters of Nazareth and Others (Scotland) [2008] UKHL 32

Cadder v HMA [2010] UKSC 43 (4326 October 2010)

Campbell v Vannet (1998) SCCR 207

Clark v McLean (1995) SLT 235

D & J Nicol v Dundee Harbour Trustees (1915) SC (HL) 7

Donaldson v HM Advocate (1983) SCCR 216

Forbes v Aberdeenshire 2010 CSOH 1

Fraser v Her Majesty's Advocate [2011] UKSC 24

Hoekstra v HM Advocate (No 2) (2000) JC 387

Holland v HMA UKPC D1: 2005 S.L.T. 563

Jude, Hodgson & Birnie v HMA (2011) SCCR 300

McGinty v Scottish Ministers [2010] CSOH5

Principal Reporter v. K (2010) UKSC 56
R (On the Application Of) v Secretary of State for Environment, Food And Rural Affairs [2003] EWCA Civ 1546
S v Millier 2001 SLT 531
Sinclair v HM Advocate [2005] SLT 552
SK v Paterson [2009] CSIH 76
Wilson v IBA (1979) SC 351

ECHR Case Law

Adetoro v UK (2010) Application No. 46834/06
Airey v Ireland (1979) Application No. 6289/73
Aksoy v Turkey (1996) Application No. 21987/93
Andronicou and Constantinou v Cyprus (1997) Application No. 25052/94
Asenov v Bulgaria (1998) Application No. 24760/94
BarbuAnghelescu v Romania (2004) Application No. 46430/99
Belgian Linguistics Case (No 2) (1968) 1 EHRR 252
Bonisch v Austria (1985) Application No. 8658/79
Brogan & Others v UK Application No. 11209/84
E & Others v UK (2002) Application No. 33218/96
Funke v France (1993) 16 ECHR 297
John Murray v UK 1996 Application No. 18731/91
Kerojarvi v Finland (1995) Application No.17506/90
Kelly and Others v UK (2001) Application No. 30054/96
Kopecký v Slovakia (2008) Application No. 44912/98
Ismail Abdurahman v UK Application No 40351/09
Martinez Sala and Others v Spain (2004) Application No. 58438/00
McCann v United Kingdom (A/324) (1996) 21EHRR97
McMichael v UK (1995) 20 EHRR 205
Munro v UK (1987) Application No. 10594/83
Osman v UK (1999) Application No. 23452/94
Panovits v Cyprus (2008) Application No. 4268/04
Pishchalnikov v Russia (2009) Application No. 7025/04
Rowe & Davis v UK (2000) Application No. 28901/95
Salduz v Turkey 2007 Application No. 36391/02
Salman v Turkey (2011) App. No. 35292/05
Scoppola v Italy (No.2) (2010) 51 EHRR 12
Shanaghan v UK (2001) Application No. 37715/97
Stanford v UK (1994) Application No. 16757/90
Steel and Morris v UK (1998) Application No. 68416/01
Stubbings and others v United Kingdom (1996) Application No. 22083/93
T v UK (1999) Application No. 24724/94
TalatTunç v. Turkey, no. 32432/96
Tas v Turkey (2001) 33 EHRR 15
Z and others v UK (2001) Application No. 29392/95
Zaichenko v Russia (2010) Application No. 39660/02

⁶⁰⁷ Lloyd and others v United Kingdom, 1 March 2005, para 134, “where deprivation of liberty is at stake, the interests of justice in principle call for legal representation.”

⁶⁰⁸ Benham v United Kingdom, (19380/92) 23 January 1995

⁶⁰⁹Mr Cadder was arrested by the police in connection with a serious assault and declined to have a solicitor present at his interview. After a tape recorded interview lasting thirty minutes Mr Cadder was charged with assault. Despite having no complaints of unfair treatment Mr Cadder argued that the lack of access to a lawyer was a violation of his right to a fair trial guaranteed in article 6 of the ECHR. 610[2010] UKSC 43 (4326 October 2010)

⁶¹¹Lord Hope stated that; “as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right”. (para 35)

⁶¹²<http://www.legislation.gov.uk/ukxi/2011/1739/contents/made>

⁶¹³ Also: HMA v M [2011] UKSC 43 (SC) – questioning in the accused home.
HMA v G [2011] UKSC 43 (SC) – questioning while handcuffed in the home.

[HM Advocate v P \[2011\] UKSC 44 \(SC\)](#) – evidence discovered following questioning.
[Jude \(Raymond\) v HM Advocate \[2011\] UKSC 55 \(SC\)](#); [McGowan \(Procurator Fiscal\) v B \[2011\] UKSC 54 \(SC\)](#) – waiver of right to a lawyer.

614[2011] UKSC 43

615(2010) Application no. 39660/02

616Ambrose paragraph 64

617The case of Ismail Abdurahman v UK(Application no 40351/09) currently pending before the European Court is likely to further clarify the reach of article 6(1).

618<http://www.copfs.gov.uk/News/Releases/2011/02/Crown-review-cases-after-Cadder-V-HMA>

619The Carloway Review 2012, available at

<http://www.scotland.gov.uk/About/Review/CarlowayReview>

⁶²⁰ SHRC is aware that this term has been controversially discussed in Scotland. For example during the passing of the Adult Support and Protection Act 2007. However, it is used for the sake of convenience. Elsewhere, SHRC has suggested that consideration be given as to whether this term should be used in Scots law and policy.

621Belgian Linguistics Case (No 2) (1968) 1 EHRR 252

622Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 reg 3, see generally *Croissant v Germany* (1993) 16 EHRR 135, at para 29 – From Carloway p155

623Under Article 5, paragraph 3 of the Convention:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

624Brogan & Others v UK Application no. 11209/84, *Tas v Turkey* (2001) 33 EHRR 15 at para 86

625ACPOS Solicitor Access Data Report, 23 June 2011 cited in CARLOWAY, L. 2011. The Carloway Review Report and Recommendations. Edinburgh: Scottish Government.

626 The Commission point to the example of a police officer at the roadside offering a suspect the opportunity to phone his lawyer (and even offering him a mobile phone to do so) before starting questioning. A similar practice is identified in New Zealand (s 23(1)(b) New Zealand Bill of Rights Act 1990; *MOT v Noort, Police v Curran* [1992] 3 NZLR 260).

627Scoppola v Italy (No.2) (2010) 51 EHRR 12 at para 135

628Pishchalnikov v Russia Application No, 7025/04 at para 77

629See *TalatTunç v. Turkey*, no. 32432/96

6302011 SCCR 300

631Jude, Hodgson& Birnie v HMA [2010] UKSC 43 para 28

632ACPOS Solicitor Access Data Report at p 7, from Carloway

633To illustrate this, the Commission submission gives an example where “the ECtHR has held that where the detainee was illiterate and a non-native speaker of the Turkish language, the right to legal assistance was not sufficiently safeguarded by accepting a pro-forma waiver in Turkish marked by the accused’s fingerprint in signature”. (*Salman v Turkey* App. No. 35292/05, Judgement 5 April 2011)

634This should be in the form suggested by the ACPOS Manual of Guidance on Solicitor Access and provided both orally and in hard copy

635John Murray v UK 1996 Application no. 18731/91

636Ibid.

63720 April 2010 (no 46834/06) at para 47 - 49

638(Ibid).

639Ibid

640Andronicou and Constantinou v Cyprus (1997) Application No. 25052/94

641Application No. 6289/73)

642In *Steel and Morris v UK* ((1998) Application No. 68416/01, from Reed & Murdoch p448

643A good example of this principle was seen in the case of *Munro v UK* (1987) Application No. 10594/83 where it was decided that a case of defamation did not require legal aid as the matter of reputation was not sufficiently serious. This contrasts to the situation in *Steel and Morris v UK* where the litigation was extremely complicated and lengthy and the applicants were in an unequal position as regards the opponents, a multi-national corporation (Reed & Murdoch p448). As such, the state need not ‘ensure total equality of arms... as long as each side is afforded a reasonable opportunity to present his or her case’ (*Steel and Morris v UK*).

644*S v Miller* (No 1) (2001 SC 977)

645The Convention Rights (Compliance) (Scotland) Act 2001

646Set up under the Legal Aid (Scotland) Act 1986
647s 14 of the Legal Aid (Scotland) Act 1986
648 As with all quotes in this scoping project, this reflects the views and perceptions of those with whom SHRC spoke, however, SHRC takes no responsibility for the content or views express.
649Concept expressed in D & J Nicol v Dundee Harbour Trustees (1915) SC (HL) 7
650http://www.jonathanmitchell.info/2010/06/13/standing-in-public-law-cases/#footnote_1_9328
651http://www.jonathanmitchell.info/2010/06/13/standing-in-public-law-cases/#footnote_1_9328
6522010 CSOH 1
653Axa General Insurance v Lord Advocate [2011] UKSC 46
654Ibid para 63
655 <http://www.foe-scotland.org.uk/news121011>
656See AXA General Insurance Limited and others v The Lord Advocate and others [2011] UKSC 46
657The UK has been a party to the Aarhus Convention since 1998.
658See in general UN Economic Commission for Europe, Decision IV/9i on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, UN Doc. ECE/MP.PP/2011/2/Add.1. Relevant communications include: ACCC/C/2008/27, UN. Doc. ECE/MP.PP/C.1/2010/6/Add.2, and ACCC/C/2008/33.
659Scottish Parliament, Petition PE1372, Access to Justice in Environmental Matters, <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx>
660See letter from the Coalition for Access to Justice for the Environment to the Compliance Committee, 19 June 2012, http://www.unecce.org/fileadmin/DAM/env/pp/compliance/MoP4decisions/United_Kingdom/frCAJE_Response_19062012.pdf
661Fairburn J, Walker G, Mitchell G & Smith G (2005) [Investigating Environmental Justice In Scotland: Links Between Measures Of Environmental Quality And Social Deprivation](#), Scottish and Northern Ireland Forum for Environmental Research (Scottish Executive, Scottish Environmental Protection Agency, Forestry Commission and Scottish Natural Heritage).
662Walker et al (2005) Industrial pollution and social deprivation: Evidence and complexity in evaluating and responding to environmental inequality. *The International Journal of Justice and Sustainability* (10)4; See also, Szasz, A. and Meuser, M. (1997) Environmental inequalities: literature review and proposals for new directions in research and theory, *Current Sociology*, 45(3) pp.100-120.
663Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002
664Civil Legal Aid (Scotland) Regulations 2002 Guidance Notes
665Bonisch v Austria (1985) Application No. 8658/79 paras 29-35
6661995 Application no.17506/90
667Rowe & Davis v UK (2000) Application no. 28901/95 para 62
668The Criminal Justice and Licensing (Scotland) Act 2010 s.121(3) 2010 Act
669Ibid s.122(4)
670UKPC D1: 2005 S.L.T. 563
671Sinclair v HM Advocate [2005] SLT 552
672Crown Office Disclosure Manual para 19.1.10
673This section is heavily weighted towards the rights of those with disabilities in comparison to other protected groups, as that is what came out of the various data sources utilised in this scoping project.
674 Once again please note SHRC is aware that this term has been controversially discussed in Scotland. For example during the passing of the Adult Support and Protection Act 2007. However, it is used for the sake of convenience. Elsewhere, SHRC has suggested that consideration be given as to whether this term should be used in Scots law and policy.
675Ratified by the UK in 2009.
676UN Convention on Rights of People with a Disability Article 1
677Ibid 13(1)
678 See also GOODING, C. 2000. Disability Discrimination Act: from statute to practice. *Critical Social Policy* 20, 533-549. and ROULSTONE, A. 2003. The Legal Road to Rights? Disabling Premises, Obiter Dicta and the Disability Discrimination Act 1995. *Disability & Society*, 18, 117-131.
679<http://www.scotland.gov.uk/Publications/2006/04/26124648/0>
680http://www.witnessesinscotland.com/wis/CCC_FirstPage.jsp
681Vulnerable Witnesses (Scotland) Act 2004 s.24
682<http://www.scotland.gov.uk/Topics/Justice/law/victims-witnesses/Appropriate-Adult>
683Criminal Justice and Licensing Act 2010 s.53F

684Criminal Procedure (S) Act 1995 s.54
685Stanford v UK (1994) Application no. 16757/90
686s.271 of the Criminal Procedure (Scotland) Act 1995 (inserted by the Vulnerable Witnesses (Scotland) Act 2004)
687Mental Health (Care and Treatment)(Scotland) Act 2003 s 328
688Vulnerable Witnesses (Scotland) Act 2004
689<http://www.copfs.gov.uk/news/releases/2010/10/our-commitments-victims-and-prosecution-witnesses>
690Covenant on Civil and Political Rights Article 14(5)
691See for example Silver & Others v UK (1983) and <http://ijrl.oxfordjournals.org/content/2/3/361.short>
692(1995 Act s 106(3) and s 175(5))
693Donaldson v HM Advocate (1983) SCCR 216, LJ-C (Wheatley) at 218.
694Solemn cases are those which must go before a jury.
6951995 Act s 109
6961995 Act s 110(1)
697Those which do not go before a jury
6981995 Act s.111
6992010 Act s 5 (2) inserting s 111(2A) into the 1995 Act, Carloway 8.1.14
700Anderson v HM Advocate (1974) SLT 239, LJG (Emslie) at 240, Carloway (8.1.20)
701Hoekstra v HM Advocate (No 2) (2000) JC 387
702Allan, Petnr (1993) SCCR 686, dealing with an admittedly incompetent sentence imposed by the High Court on appeal
7031995 Act s 194C
704[www. sccrc.org.uk/](http://www.sccrc.org.uk/)
7052010 Act s 7(4) introducing 1995 Act s 194DA
706section 194 C(2) of the 1995 Act (as inserted by Section 7(3) of the 2010 Act)
707<http://www.scottishhumanrights.com/news/latestnews/article/cadderlegislationcomment>
708[2011] UKSC 24
709 http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0192_Judgment.pdf
710<http://www.cjscotland.co.uk/2012/04/devolution-issues-human-rights-and-criminal-appeals-to-the-uk-supreme-court/>
711<http://www.scotland.gov.uk/Resource/Doc/254431/0120938.pdf>
712See among others, Submission to the Advocate General for Scotland, Devolution issues and acts of the Lord Advocate, <http://www.scottishhumanrights.com/news/latestnews/article/AGnews>; Open Letter to MSPs – integrity of Scots Law, 26 October 2011, <http://www.scottishhumanrights.com/news/latestnews/article/oct11openlettermmps>.
713(1998) 24760/94
714ibid para 102
715McCann v United Kingdom (A/324) (1996) 21EHRR97
716Whilst the list is not exhaustive these criteria give a good impression of the factors to be considered when analysing effective investigations.
717Halimi-Nedzibi v Austria the Committee against Torture stated that a delay of 15 months before initiating an investigation of allegations of torture was unreasonably long. Communication No. 8/1991: Austria. 30/11/93. UN Doc. CAT/C/11/D/8/1991, para. 13.5.
718Shanaghan v UK, unreported, Application No. 37715/97 judgment of 4th May 2001, para 88.
719BarbuAnghelescu v Romania, no. 46430/99, judgement of 5 October 2004, para. 66.
720Kelly and Others v UK, no. 30054/96, ECHR 2001-III, judgement of 4 May 2001, para. 114.
721These requirements originated in the procedural obligation under the Right to Life in Article 2 of the ECHR but are now applied to Article 3 investigations (originating Article 2 Case Law, McCann v United Kingdom (A/324) (1996) 21 E.H.R.R.97)
722Aksoy v Turkey (1996) Application No. 21987/93 para 98
723Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976
724<http://www.scotland.gov.uk/Topics/Justice/law/fatalaccidentinquiries>
725In illustrating this point, the review considered a sample of cases which were abandoned due to lack of evidence in the 2009-2010 period. 458 cases were marked as ‘no further proceedings due to insufficient evidence’ whilst 141 cases of sexual offences were halted due to lack of evidence. The review analysed these cases by considering whether there would have been sufficient evidence without corroboration and whether the cases would have proceeded under the English system of

'reasonable prospect of conviction'. The results are described as 'striking' and show that in the first case 268 of the 458 cases considered (58.5 per cent) would have been prosecuted and in the second 95 of the 141 cases examined (67 per cent) would have been prosecuted. Added to these findings the review could find no evidence that the requirement of corroboration prevented miscarriages of justice. Indeed the opposite was argued in that miscarriages of justice may be creating in certain situations with one example is cases involving only one witness. In such cases Carloway considers that the single witness should be allowed to argue his case and be judged on the sufficiency of his testimony.

726SHRC, "Response to the Carloway Review", 17 November 2011, <http://www.scottishhumanrights.com/news/latestnews/article/carlowaynewsnov11>

727Written Submission from Rape Crisis Scotland, Justice Committee, The Carloway Review, http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/Rape_Crisis_Scotland_written_submission.pdf; citing Scottish Government, Statistical Bulletin: Crime and Justice Series, criminal proceedings in Scotland 2010-2011, <http://www.scotland.gov.uk/Publications/2011/12/12131605/2>

728<http://www.scotland.gov.uk/Publications/2012/07/4794>

729<http://www.bbc.co.uk/news/uk-scotland-scotland-politics-18686886>

⁷³⁰http://www.echr.coe.int/NR/rdonlyres/8987C3BA-4F29-4D62-9C01-29FCC45B5A63/0/FICHES_Protection_enfance_EN.pdf

731Articles 3, 12 and 37 See also the UN Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules" 1985) and the UN Rules for the Protection of Juveniles Deprived of their Liberty (the "Havana Rules" 1990).

732Guidance On Interviewing Child Witnesses in Scotland, Scottish Executive (2003)

733Children (Scotland) Act 1995

734Children's Hearings (Scotland) Act 2011 (s 199) and the Vulnerable Witnesses (Scotland) Act 2004 (s 1 inserting s 27 in the 1995 Act)

735Salduz v Turkey (cited above)

736T v UK (1999) Application no. 24724/94

7371999 Application no. 24724/94

738Panovits v Cyprus (2008) Application No. 4268/04

739s.15(4) 95 act

7401995 Act s 41

741section 41A inserted by section 52 of the Criminal Justice and Licensing (Scotland) Act 2011

7421995 Act s.42)

743The Beijing Rules, adopted by the United Nations in 1985, provide guidance to States for the protection of children's rights and respect for their needs in the development of separate and specialised systems of juvenile justice. Limited provisions concerning juvenile justice may be located in regional human rights treaties and in the International Covenant on Civil and Political Rights 1966. Similarly, the United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted in 1955, set out certain basic requirements for all prisoners but do not address specific issues in relation to young offenders.

744Beijing Rules, Beijing Rule 4

⁷⁴⁵ Section 52 Criminal Justice and Licensing (Scotland) Act 2010

746via the Antisocial Behaviour etc (Scotland) Act 2004

747The Children's Hearings (Scotland) Act 2011 s.191

748[2009] CSIH 76

749Section 93(2) – 95 Act

750See Authority Reporter v. S (2010) SLT 765 and Principal Reporter v. K (2010) UKSC 56

751The Children's Hearings (Scotland) Act 2011 s.93(2)

752(1995) 20 EHRR 205

7532001 SLT 531

⁷⁵⁴ <http://www.scotcourts.gov.uk/opinions/BURTON.html>

755UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), adopted by the General Assembly resolution 40/34

756Paragraph 1 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985). The Declaration defines the notion of victim of crime and abuse of power and specifies victims' rights of access to justice and fair treatment, restitution, compensation and assistance. See also, Brudnicka and Others v Poland No 54723/00, paragraphs 26 and Nolkenbockhoff v Germany, Judgement of 25 August 1987, Series A No 123, paragraph 33, both related to breaches of Articles 6(1).

757The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002

758 <http://www.copfs.gov.uk/news/releases/2010/10/our-commitments-victims-and-prosecution-witnesses>

759 The Commissioner for Victims and Witnesses (Scotland) Bill

760 <http://www.scotland.gov.uk/Publications/2012/05/8645>

761 SHRC, Consultation submission to Victims and Witnesses Bill, July 2012, <http://www.scottishhumanrights.com/ourwork/publications/article/victimsbill2012>

762 See for example oral evidence provided by the Commission to the Public Petitions Committee of the Scottish Parliament, 29 November 2012, <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6659&mode=pdf>

763 No-Fault Compensation Review Group - headed by law and medical ethics expert Professor Sheila McLean. See <http://www.scotland.gov.uk/News/Releases/2011/02/18132915> for further details.

764 *Ibid.*

765 *Ibid.*

766 See for example, SHRC and Susan Kemp, Review of International Human Rights Law Relevant to the Proposed Acknowledgment and Accountability Forum for Childhood Abuse, 2010, p105-108

767 *Ibid.*

768 *Stubbings and others v United Kingdom*, (1996) Application No. 22083/93, para 51.

769 UN Basic Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Van Boven Principles), IV, para. 7.

770 *Martinez Sala and Others v Spain* (2004) Application No. 58438/00

771 Prescription and Limitation (Scotland) Act 1973

772 Prescription and Limitation (Scotland) Act 1973 s.19A

773 See for example ZachariDuncalf et al, Time for Justice, Care Leavers' Association and Scottish Institute for Residential Child Care, 2009.

774 *Bowden and Whitton v Poor Sisters of Nazareth and Others* (Scotland) [2008] UKHL 32

775 *Stubbings and others v United Kingdom*, (1996) Application No. 22083/93, para 52.

776 <http://www.journalonline.co.uk/Magazine/56-11/1010433.aspx>

777 *AXA General Insurance Limited and others v The Lord Advocate and others* [2011] UKSC 46

778 (2002) Application No. 33218/96

779 See www.shrcinteraction.org

780 see further below on "legal context".

781 See: <http://www.scotland.gov.uk/Topics/Health/health/mental-health/servicespolicy/Dementia>
<http://www.dementiarights.org/charter-of-rights/and>
<http://www.scotland.gov.uk/Resource/Doc/324377/0104420.pdf>

782 Since September 2010 around 1,000 care staff and managers and around 80 older people and older people's advocates across Scotland have taken part in training for Care about Rights.

783 See also: UN CESCR 2002. Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland. . UN Doc. E/C.12/1/Add.79. . Geneva. UN CEDAW 2009. Information provided by the Government of the United Kingdom of Great Britain and Northern Ireland under the follow-up procedure to the concluding observations of the Committee*. New York: UN CEDAW.

784 For example see: TRIGGLE, N. 2012. Home care for elderly branded 'shocking and disgraceful'. *BBC News Health*, 16th March 2012, BBC NEWS. 2011h. Tougher care home inspection announced. *BBC News* [Online]. [Accessed 19th September 2012], BBC NEWS. 2011d. Government condemns shocking Winterbourne View abuse. *BBC News* [Online]. [Accessed 19th September 2012], BBC NEWS. 2011g. Second death probed at Elsie Inglis nursing home. *BBC News* [Online]. [Accessed 19th September 2012], BBC NEWS. 2006. Care home residents get £23,000. 27/10/2006, BIGGS, S., TINKER, A. & MCCREADIE, C. 2007. Elder Abuse. London: Comic Relief and the Department of Health ;O'KEEFFE, M., HILLS, A., DOYLE, M., MCCREADIE, C., SCHOLE, S., CONSTANTINE, R., TINKER, A., MANTHORPE, J., BIGGS, S. & ERENS, B. 2007. UK Study of Abuse and Neglect of Older People: Prevalence Survey Report. National Centre for Social Research and King's College London. MOWLAM, A., TENNANT, R., DIXON, J. & MCCREADIE, C. 2007. UK Study of Abuse and Neglect of Older People: Qualitative Findings. National Centre for Social Research and King's College London. EHRC 2011a. Close to home: An inquiry into older people and human rights in home care. London: EHRC. TRIGGLE, N. 2012. Home care for elderly branded 'shocking and disgraceful'. *BBC News Health*, 16th March 2012, TRIGGLE, N. 2011. Basic home care help 'breaching human rights'. *BBC News Health*, 23rd November 2011, CARE COMMISSION & MENTAL WELFARE

COMMISSION FOR SCOTLAND 2009. Remember, I'm Still Me: Care Commission and Mental Welfare Commission joint report on the quality of care for people with dementia living in care homes in Scotland. Dundee & Edinburgh: Care Commission & Mental Welfare Commission, AGE SCOTLAND 2012. At home with Scotland's older people: Facts and Figures 2011-12. Edinburgh: Age Scotland. MENTAL WELFARE COMMISSION FOR SCOTLAND 2008b. A Hospital or a Home? : Mental Welfare Commission for Scotland, MENTAL WELFARE COMMISSION FOR SCOTLAND 2010a. Consent to Treatment? Edinburgh: Mental Welfare Commission for Scotland, MENTAL WELFARE COMMISSION FOR SCOTLAND 2011d. Not properly authorised. Edinburgh, MENTAL WELFARE COMMISSION FOR SCOTLAND 2011f. Starved of Care – investigation into the care and treatment of Mrs V. Edinburgh.

785 The daily average prison population in Scotland in 2010-11 was 7,853 whereas design capacity for Scotland's prisons is 7,330. Despite a drop in the overall prison population of 1% in 2010-11 the longer term projections are for a rise.

786 <http://www.scottish.parliament.uk/business/petitions/pdfs/PE1372.pdf> SHRC submitted evidence in relation to the petition:

<http://scottishhumanrights.com/application/resources/documents/EnvironmenthumanrightsPE1372.pdf>

787 <http://www.scottish.parliament.uk/business/petitions/pdfs/PE1372.pdf>

SHRC submitted evidence in relation to the petition:

<http://scottishhumanrights.com/application/resources/documents/EnvironmenthumanrightsPE1372.pdf>

788 Amnesty International UK, "Stop Tasers being given to ordinary police officers",

<http://www.amnesty.org.uk/content.asp?CategoryID=11111>

789 For example: health inequalities among various social classes in the UK have widened by 4 per cent among men and 11 per cent among women and there continues to be a widening gap in infant mortality between the most and the least well-off groups.

790 For more information on the Cadder case and the failure to recognise the issue despite advanced notice of at least sixteen years see Chapter 4.8.

791 Every four and a half years the UK's human rights record is considered by the other countries which are members of the United Nations Human Rights Council in a process called Universal Periodic Review (UPR). UPR is based on the UN Charter, the Universal Declaration of Human Rights and all UN human rights conventions to which the UK is party. The UK was last reviewed in 2008 and reports from this review can be found on the UN Website. The government (State) is required to submit a full report and other interested stakeholders are invited. The Commission's submission to this process can be found here:

<http://www.scottishhumanrights.com/application/resources/documents/UPRsubmissionshrc15nov2011.doc>

The next review of the state of human rights across the UK will take place on 24 May 2012.

For further details see: <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/GBSession1.aspx>

792

http://www.humanrights.gov.se/extra/pod/?id=15&module_instance=2&action=pod_show&navid=15

793

<http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/NationalHumanRightsActionPlan.aspx>

794 www.humanrightsaactionplan.org.au

795 Meetings were held in these two locations to enable the Commission to bring together experts from the central belt and the Highlands & Islands.

796 Details of the Commission's Research Advisory Group can be found in Appendix ii. Members of this group were asked to join the RAG following their participation at the expert advisory meetings.

797 More information on this project can be found here:

<http://www.scottishhumanrights.com/application/resources/documents/Oct11Mappingresearchbriefing.pdf>

798 Access to those groups has also now been made public here:

<http://maps.scottishhumanrights.com/>

799 The framework for this stage of analysis was developed by Pamela Gordon, SHRC Intern October –December 2010.

⁸⁰⁰ Unlike some qualitative packages, which merely allow you to code and retrieve data, NVivo supports flexible and complex analysis of data combined with theory evolution and development (see

<http://www.qsrinternational.com/> for further details on NVivo).

801 Dr. Abbe Brown, School of Law, University of Aberdeen; Patrick Layden QC TD, Scottish Law Commission; Prof. Janet Webb, Institute of Governance, School of Social & Political Science, University of Edinburgh; Dr. Esther Breitenbach, School of History, Classics and Archaeology,

University of Edinburgh; and Prof. David McCrone, Institute of Governance, School of Social & Political Science, University of Edinburgh

802 Prof Alice Brown CBE, is highly respected for her contributions to social justice and education. She was the first Scottish Public Services Ombudsman (2002-2009) and has published widely on women and politics, equal opportunities, Scottish Politics, Constitutional change and economic and labour market policy.

803 <http://www.scottishhumanrights.com/actionplan/briefingreport>

804 Independent evaluation of this project demonstrated extremely positive impacts in awareness raising and understanding of human rights and projected improvements in person-centred service delivery. For more information see <http://www.scottishhumanrights.com/careaboutrights>

805 The evaluation produced compelling evidence of the benefits of a human rights based approach for everyone and included many lessons for other public authorities. For more information see <http://www.scottishhumanrights.com/ourwork/care/health>

806 Development of this Charter led the Scottish Government to adopt a human rights based approach in the National Dementia Strategy. For more information see www.dementiarights.org

807 In December 2011 Scottish Ministers agreed to enter a facilitated negotiation with all of those affected as to how the Commission's recommendations can be advanced. For more information see <http://www.scottishhumanrights.com/ourwork/care/adultprotection>

808 For more information see <http://www.healthscotland.com/equalities/eqia/resources.aspx>

809 The HRMF is based on the conceptual development of human rights indicators by OHCHR, treaty bodies and others. UN Office of the High Commissioner for Human Rights, see e.g. UN Doc. E/2011/90, 26 April 2011. For more information see <http://personal.lse.ac.uk/prechr/>

810 This is based on international best practice as reviewed in UNOHCHR 2002. Handbook on National Human Rights Plans of Action New York and Geneva United Nations.

811 For more information see <http://www.scottishhumanrights.com/ourwork/emergingissues>

812 For example the Commission regularly publishes documents, holds or participates in events, takes up speaking invitations, responds to and works proactively with national, local, and stakeholder media, and maintains relationships with a wide range of stakeholders. The Commission launched a successful website in 2009 [www.Scottishhumanrights.com] which incorporates extensive information and resources on human rights, and maintains an active social media presence.

813 For example by supporting a human rights documentary film festival and the annual Festival of Politics.

814 For more information see <http://www.scottishhumanrights.com/ourwork/crpd/crpdparticipation>

815 For more information see

<http://www.scottishhumanrights.com/ourwork/environment/environmentbackground>

816 The Commission submitted a report and held a capacity building event with representatives of a range of Scottish civil society organisations on UPR of whom nearly all submitted parallel reports. For more information see <http://www.scottishhumanrights.com/international/uprinternational>