

Chapter 7: Living in detention
Getting it Right?
Human Rights in Scotland

Contents Page

Theme 7: Living in Detention	3
Introduction	3
Scoping Project Methods Summary	3
Introduction to Living in Detention	3
Conditions in detention	5
General conditions	5
Addiction	8
Access to healthcare & mental health services	9
Suicides/deaths in custody	10
Mental Health Detention	11
Women in Detention	16
Young People in Detention/ Secure Accommodation	17
Asylum seeking children	19
Moving Forward	20
Table 1: Key dates	21
Participation Form	22
Bibliography	24

Theme 7: Living in Detention

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.

The report as a whole presents a summary of some of the key gaps and good practices which have emerged from a scoping project undertaken by the SHRC. This specific section summarises the findings relating to theme of Living in Detention. 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. With this in mind, individuals and organisations are encouraged to consider their views in response to two key questions as they review this thematic section:

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?

Scoping Project Methods Summary¹

The data collection began in 2010 and was divided into two phases - a first phase focussing on collating and analysing a range of secondary data sources² and a second phase where SHRC convened a series of small focus groups and in-depth interviews with a range of communities, groups and individuals in Scottish society.³ 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 project.

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,⁴ 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)”.*⁵

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.⁶ 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.⁷

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,⁸ including equality legislation. The Equality Act 2010, however, does place a duty on the Scottish Government to abide by the public sector equality duty,⁹ which could bring about a more substantive role for Scottish equality duties in the future.¹⁰

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.¹¹

Conditions in detention

General conditions

Article 10 of the UN International Covenant on Civil and Political Rights (ICCPR)¹² 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, 1992).

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, 1992).

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.”¹³

There are a number of UN standards on the treatment of prisoners, including the Standard Minimum Rules for the Treatment of Prisoners,¹⁴ the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,¹⁵ and the Basic Principles for the Treatment of Prisoners.¹⁶

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),¹⁷ the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),¹⁸ the Rules on the Protection of Juveniles Deprived of their Liberty (the Havana Rules),¹⁹ the Guidelines for Action on Children in the Criminal Justice System,²⁰ 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,²¹ 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, 2010). After a small observed decrease from 2009-10 to 2010-11,²² the prison population has increased by four per cent to an annual daily average of 8,178 for 2011-12,²³ which remains very high in relation to design capacity (7,330) (Scottish Government, 2011a).²⁴ 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*²⁵ 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 Hospital²⁶ to bring about a cultural change, discussed the potential benefit of applying similar human rights based approaches to prison settings in Scotland.

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.²⁷ 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.

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.²⁸ In other cases a lack of medical care for a detainee suffering withdrawal symptoms from heroin²⁹ and “*significant defects in the medical care provided to a mentally ill person known to be a suicide risk*”³⁰ 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*”.³¹

HMCIPS has recognised an apparent increase in the number of prisoners with mental health problems in Scotland (HMCIPS, 2007a, HMCIPS, 2011a).³² Approximately 4.5 per cent of Scotland’s prisoners (excluding HMYOI Polmont) are believed to have severe and enduring mental health problems³³, while HMCIPS have reported that “*a very large proportion*” of total prisoners have some form of mental health problem (HMCIPS, 2008). 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, 2011).

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, 2008).

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;³⁴ and improving training of Scottish Prison Service staff in mental health issues, particularly with regard to suicide risk.³⁵ 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, 2011c).

A study carried out by the Mental Welfare Commission (Mental Welfare Commission for Scotland, 2011) 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.

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.³⁶ 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).³⁷ 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.

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.³⁸ 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.³⁹

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),⁴⁰ short-term detention (up to 28 days),⁴¹ and compulsory treatment orders (6 months, extendable).⁴²

It also created the Mental Health Tribunal which replaced the Sheriff Court for hearing cases under the Act.⁴³ 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, 2010a).
- 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, 2008).

- 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, 2010b).
- 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).⁴⁴

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 in this scoping project also raised similar concerns. As explained by one participant:

I think it is important to remember the principle of reciprocation, 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 reciprocation 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 particular⁴⁵ high profile case, a decision was taken at The State Hospital⁴⁶ 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, 2009) 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.

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).⁴⁷

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).⁴⁸ 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).⁴⁹

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.⁵⁰ 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.⁵¹

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 majority⁵² is 18 so all children enjoy the protections of the CRC.⁵³

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.⁵⁴ 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).⁵⁵ 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.⁵⁶

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, 2008) the Scottish Government's has stated a commitment to keeping young people out of prison establishments (Scottish Government, 2009, UK Children's Commissioners', 2008). In 2010 the power to imprison children under 16 was abolished.⁵⁷

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, 17

2012b). 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, 2012b).

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, 2010).

Some children, who meet the criteria for secure accommodation⁵⁸ 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).⁵⁹ 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.⁶⁰

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, 2008). 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.⁶¹

Asylum seeking children

In 2008, the UN Committee on the Rights of the Child expressed concern (UNCRC, 2008, 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.⁶² 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, 2010, 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.⁶³ 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).⁶⁴ 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).

Moving Forward

This section, alongside the other thematic sections and the overarching contextual chapter, has highlighted gaps, and inconsistencies, as well as good practices in the realisation of human rights in practice in Scotland. Addressing these shortfalls 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 FAIR 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 this report, 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 terms of question 1?

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

Table 1: Key Dates

Date	Action
May 2012	The UK Universal Periodic Review at the United Nations begins.
September 2012	The final report and recommendations of the UK's Universal Periodic Review is anticipated
October 2012	Publication of SHRC's Report and launch of a process of participation to shape Scotland's National Action Plan for Human Rights
December 2012	SHRC hosts a National InterAction to address the findings of the scoping exercise 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 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 receive 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: (where appropriate) _____

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 you 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

Bibliography

- BARRY, M. & MCIVOR, G. 2010. Professional decision making and women offenders: Containing the chaos? . *Probation Journal*, 57.
- BIRD, S. 2008. Changes in male suicides in Scottish prisons: 10-year study. *The British Journal of Psychiatry*, 192, 446-449.
- COMMISSION ON SCOTTISH DEVOLUTION 2009. Calman Commission on Scottish Devolution, Serving Scotland Better: Scotland and the United Kingdom in the 21st Century: Final Report
Edinburgh.
- COMMISSION ON WOMEN OFFENDERS 2012. Commission on Women Offenders: Final Report 2012. Glasgow: Commission on Women Offenders.
- COOKE, D., WOZNAK, E. & JOHNSTONE, L. 2008. Casting Light On Prison Violence in Scotland: Evaluating the Impact of Situational Risk Factors. *Criminal Justice and Behavior*, 35, 1065-1078.
- 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.
- CRAIG, G. 2011. Mapping human rights organisations in Scotland. Durham: University of Durham, School of Applied Social Sciences.
- DRIVER, S., LAMB, M. & WILSON, C. 2010. Annotated Bibliography of Published and Grey Non-Legal Literature on Human Rights in Scotland since 2006. London: The Crucible Centre and Social Research Centre, ROEHAMPTON UNIVERSITY.
- EHRC 2010. Triennial Review: How fair is Britain? London: Equality and Human Rights Commission,.
- EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 2005. Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 12 to 23 May 2003. Geneva.
- FLANIGAN, D. 2011. Mapping the Law of Scotland in Relation to Economic, Social & Cultural Rights. Glasgow: Scottish Human Rights Commission.
- HEK, R. 2005. The Experiences and Needs of Refugee and Asylum Seeking Children in the UK: A Literature Review, National Evaluation of the Children's Fund, . Birmingham: University of Birmingham.
- HMCIPS 2005. HM Chief Inspector of Prisons for Scotland Annual Report 2004-2005. Edinburgh: HM Chief Inspector of Prisons for Scotland.
- HMCIPS 2006. HM Chief Inspector of Prisons for Scotland Annual Report 2005-2006. Edinburgh: HM Chief Inspector of Prisons for Scotland.
- HMCIPS 2007a. HM Chief Inspector of Prisons for Scotland Annual Report 2006-7. *In: PRISONS*, H. C. I. O. (ed.). Edinburgh: Scottish Government.
- HMCIPS 2007b. Report on HMYOI Polmont, Inspection 30 April – 4 May 2007. Edinburgh: HM Inspectorate of Prisons, .
- HMCIPS 2008. Out of Sight: Severe & Enduring Mental Health Problems in Scotland's Prisons. Edinburgh: HM Chief Inspector of Prisons.

- HMCIPS 2009a. HM Chief Inspector of Prisons for Scotland Annual Report 2008-2009. Edinburgh: HM Chief Inspector of Prisons for Scotland.
- HMCIPS 2009b. HM Inspectorate of Prisons, Report on Young Offenders in Adult Establishments. Edinburgh: HM Inspectorate of Prisons.
- HMCIPS 2010. HM Chief Inspector of Prisons for Scotland Annual Report 2009-2010. Edinburgh: HM Chief Inspector of Prisons for Scotland.
- HMCIPS 2011a. Her Majesty's Chief Inspector of Prisons for Scotland Annual Report 2010-2011. Edinburgh: HM Chief Inspector of Prisons for Scotland.
- HMCIPS 2011b. HMP & YOI Cornton Vale – Follow-up Inspection 1-4 February 2011. Edinburgh: HM Chief Inspector of Prisons for Scotland.
- HMCIPS 2012. HM Inspectorate Of Prisons Report on HMP & YOI Cornton Vale Follow-up Inspection 30 January - 2 February 2012. Edinburgh: HM Chief Inspector of Prisons for Scotland.
- HOME OFFICE 2010. Detention of children in Dungavel ends. *In*: HOME OFFICE (ed.). London: Home Office,.
- JOINT COMMITTEE ON HUMAN RIGHTS 2004. Third Report of Session 2004-2005: Deaths in Custody. London: Joint Committee on Human Rights.
- KENDRICK, A., WALKER, M., BARCLAY, A., HUNTER, L., MALLOCH, M. & MCIVOR, G. 2008. The outcomes of secure care in Scotland. *Scottish Journal of Residential Childcare*, 7, 1-13.
- LAWSON, A. & MUKHERJEE, A. 2004. 'Stopping out in Scotland: the limits of degradation and respect'. *European Human Rights Law Reports* 6, 645-659.
- LOREK, A., EHNTHOLT, K., NESBITT, A., WEY, E., GITHINJI, C., ROSSOR, E. & WICKRAMASINGHE, R. 2009. The mental and physical health difficulties of children held within a British immigration centre: A pilot study. *Child Abuse and Neglect Journal*, 33, 553-585.
- 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.
- 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.
- MCIVOR, G. & BURMAN, M. 2011. Understanding the Drivers of Female Imprisonment in Scotland. Stirling.
- MENTAL WELFARE COMMISSION FOR SCOTLAND 2000. Report of the Inquiry into the Care and Treatment of Noel Ruddle. Edinburgh.
- MENTAL WELFARE COMMISSION FOR SCOTLAND 2002. Mental Welfare Commission for Scotland, Rights, risks and limits to freedom: Principles and good practice guidance for practitioners considering restraint in residential care settings. Edinburgh: Mental Welfare Commission for Scotland.
- MENTAL WELFARE COMMISSION FOR SCOTLAND 2008. Greater expectations - revisited. Edinburgh: Mental Welfare Commission for Scotland.

- MENTAL WELFARE COMMISSION FOR SCOTLAND 2009a. Report from our visits to young people using in-patient and community mental health services in Scotland 2009. Edinburgh.
- MENTAL WELFARE COMMISSION FOR SCOTLAND 2009b. Rights, Recovery and Restriction report. Edinburgh.
- MENTAL WELFARE COMMISSION FOR SCOTLAND 2010a. Monitoring the care and treatment of individuals receiving care and treatment on short term detention certificates. Edinburgh.
- MENTAL WELFARE COMMISSION FOR SCOTLAND 2010b. Where Do I Go From Here? Edinburgh: Mental Welfare Commission for Scotland.
- MENTAL WELFARE COMMISSION FOR SCOTLAND 2011. Mental Health of Prisoners. Edinburgh: Mental Welfare Commission for Scotland.
- MOJ 2011. Monitoring places of detention: First Annual Report of the United Kingdom's National Preventive Mechanism, 1 April 2009 – 31 March 2010. London.
- NATIONAL AIDS TRUST. 2010. Injecting Drug Users and HIV. Available: http://www.nat.org.uk/Media%20library/Files/Policy/2011/Injecting_drug_users_and_HIV_-_updated_January_2011.pdf [Accessed 02 Feb 2012].
- NHS SCOTLAND 2006. Hepatitis C Action Plan for Scotland. Edinburgh: Healthier 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.
- RARMOUR. 2011. Groups demand action over rising prisoner suicides *Third Force News*, 18 August 2011.
- REED, R. & MURDOCH, J. 2011. *Human Rights Law in Scotland*, Edinburgh, Bloomsbury Professional.
- RIDLEY, J., ROSENGARD, A., HUNTER, S. & LITTLE, S. 2009. Experiences of the early implementation of the Mental Health (Care and Treatment) (Scotland) Act 2003: A cohort study. Edinburgh: University of Central Lancashire, Ann Rosengard Associates, University of Edinburgh, Kinbank.
- ROBERTSON, A. 2011. 'Warning as prison suicides 'quadruple' in three years'. *The Herald*, 15 August 2011.
- SAMH 2011. SAMH RESEARCH BRIEFING: MENTAL HEALTH AND CRIMINAL JUSTICE IN SCOTLAND Glasgow: Scottish Association for Mental Health.
- SCOTTISH GOVERNMENT 2008. Keeping children out of prison. Edinburgh.
- SCOTTISH GOVERNMENT 2009. Towards a more successful Scotland: The Government's Programme for Scotland 2009-10. Edinburgh.
- SCOTTISH GOVERNMENT 2011a. High Level Summary of Statistics Trend - Prison Population. Edinburgh.
- SCOTTISH GOVERNMENT 2011b. Improving outcomes for female offenders. Edinburgh.
- SCOTTISH GOVERNMENT 2011c. NHS Circular: PCA(M)(2011) 15. In: SCOTLAND, N. (ed.). Edinburgh: Scottish Government,.

- SCOTTISH GOVERNMENT 2012a. The Scottish Government Response to the Commission on Women Offenders. Edinburgh: Scottish Government.
- SCOTTISH GOVERNMENT 2012b. Statistical Bulletin Crime and Justice Series: Prison Statistics and Population Projections Scotland: 2011-12, June 2012. Edinburgh: Scottish Government.
- SCOTTISH INSTITUTE FOR RESIDENTIAL CHILDCARE 2009. Securing Our Future: A Way Forward for Scotland's Secure Care Estate, Report of Securing Our Future Initiative. Glasgow.
- SCOTTISH LEGAL AID BOARD 2011. Annual report 2010-2011. Edinburgh: Scottish Legal Aid Board.
- SCOTTISH PRISON COMMISSION 2008. Scotland's Choice: Report of the Scottish Prisons Commissions. Edinburgh.
- SCOTTISH PRISON SERVICE 2005. The Direction of Harm Reduction in the SPS: From chaotic drug use to abstinence. Aberdeen.
- SCOTTISH REFUGEE COUNCIL 2010. A fresh start? The new Government's agenda for reforming the asylum system in the UK
Scottish Refugee Council's Annual Conference 2010. Hampden Park, Glasgow: Scottish Refugee Council.
- SCOTTISH REFUGEE POLICY FORUM 2012. A Fairer Scotland for Asylum Seekers and Refugees in a Time of Austerity? Glasgow: Scottish Refugee Council.
- SHRC 2009. 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.
- SMITH, H. & WHITE, T. 2007. Before and after: Introduction of the Mental Health (Care and Treatment) (Scotland) Act 2003. *Psychiatric Bulletin*, 31, 374-377.
- SMITH, R., TAIT, L., BALES, K., MCCONNELL, L. & RABAN-WILLIAMS, R. 2010. Mapping the Law of Scotland in Relation to International Human Rights Treaties: CAT & CPT. Newcastle: Northumbria Law School.
- SPEOC 2010. Report on post-legislative scrutiny: the Mental Health (Care and Treatment) (Scotland) Act 2003, 4th Report, 2010 (Session 3). In: COMMITTEE, S. P. E. O. (ed.). Edinburgh: Scottish Parliament.
- THE GUARDIAN. 2000. 'Scots threaten revolt on refugees'. *The Guardian*, 4 January 2000.
- THE GUARDIAN. 2003. 'Worlds apart: is it right for asylum-seeking children to be taken out of school and taught in detention centres? *The Guardian*, 7 January 2003.
- THOMSON, D. 2004. 'Napier v The Scottish Ministers – implications for the future management of prisons in Scotland'. *Scots Law Times*, 17, 103-108.
- UK BORDER AGENCY 2010. Review into ending the detention of children for immigration purposes, . London.
- UK BORDER AGENCY. 2012. *Migration Statistics* [Online]. Available: <http://homeoffice.gov.uk/science-research/research-statistics/migration/migration-statistics1/> [Accessed 03 Feb 2012].
- UK CHILDREN'S COMMISSIONERS' 2008. UK Children's Commissioners' Report to the UN Committee on the Rights of the Child,. London.

- UN CAT 2004. UN Committee Against Torture: Conclusions and Recommendations, United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, 10 December 2004. Geneva: UN Committee Against Torture.
- UN CCPR 2008. Concluding Observations: United Kingdom, 30 July 2008, CCPR/C/GBR/CO/6 Geneva: UNHRC.
- 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,.
- UN HUMAN RIGHTS COMMITTEE. 1992. *RE: General Comment No. 21, Replaces General Comment No. 9 concerning Humane Treatment of Persons Deprived of their Liberty (Article 10)*.
- UNCRC 2008. Committee on the Rights of the Child, Concluding Observations: United Kingdom, 20 October 2008, CRC/C/GBR/CO/4,. Geneva: UNHRC.
- WALKER, M., BARCLAY, A., HUNTER, L., KENDRICK, A., MALLOCH, M., HILL, M. & MCIVOR, G. 2006. Secure Accommodation in Scotland: Its Role and Relationship with 'Alternative' Services. University of Stirling, Department of Applied Social Science Research.

Appendix 1: Prioritisation criteria to select Phase 2 issues for further study

Occurrence: Number of Phase 1 sources commenting on a particular issue in relation to the Right being examined.

Devolved competence: Allows scoring 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: Score reflects the nature of the rights at stake:

Category 1. Qualified & limited Rights, Economic, Social & Cultural Rights, the Right to an Effective Remedy, Non-discrimination in the Exercise of Rights

Category 2. The Right to Life, Retrospective Criminal Law and Absolute Rights (Right to be Free from Torture & Inhumane and Degrading Treatment and Prohibition of Slavery).

Imprint: Score reflects the extent to which the issues raised in a particular category would affect a large number of people

Vulnerability/ Marginalisation: Score reflects the extent to which the issues raised affect vulnerable or marginalised groups/communities.

Added value: Scores reflect whether the issue contributes to the human rights culture of Scotland without duplicating research work already being done by other bodies (or within the clear remit of other organisations)?

Opportunity: Scores reflect whether the issue creates/ensures the establishment of positive, supportive interaction and understanding between the SHRC and institutions or individuals where previously this did not exist?

Endnotes

1 Further details on the methods and methodology of this scoping project can be found in the main report which can be accessed at: <http://www.scottishhumanrights.com/actionplan>

2 The data sources collated and analysed in the first phase included:

An annotated bibliography of published and “grey” social research. DRIVER, S., LAMB, M. & WILSON, C. 2010. Annotated Bibliography of Published and Grey Non-Legal Literature on Human Rights in Scotland since 2006. London: The Crucible Centre and Social Research Centre, ROEHAMPTON UNIVERSITY. See also Hosie & Lamb (2013 forthcoming) for further information on the methodology of this aspect of the research <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8685263>

Three legal literature reviews exploring specific Conventions/Acts in relation to the law in Scotland. (Convention against Torture, Inhumane and Degrading Treatment, International [CAT] SMITH, R., TAIT, L., BALES, K., MCCONNELL, L. & RABAN-WILLIAMS, R. 2010. Mapping the Law of Scotland in Relation to International Human Rights Treaties: CAT & CPT. Newcastle: Northumbria Law School, *ibid.*, International Convention of Economic, Social & Cultural Rights [ICESCR] FLANIGAN, D. 2011. Mapping the Law of Scotland in Relation to Economic, Social & Cultural Rights. Glasgow: Scottish Human Rights Commission, *ibid.* and Human Rights Act/ European Convention of Human Rights] 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.

An analysis of all individual enquiries received by SHRC and all general intelligence on systemic human rights issues in Scotland collated by SHRC (2008-2010). Whilst only those inquiries received between 2008 and 2010 were analysed as part of Phase one of this scoping project, the mapping project continued to collate and review inquiries during 2011 as part of Phase two. All responses to SHRC's 2009 national consultation. The original consultation document can be accessed at

<http://www.scottishhumanrights.com/ourwork/publications/article/reportofthenationalconsultation> Initial Scottish data from the development of a “Human Rights Measurement Framework”. 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/>

3 During this process SHRC also developed a Stakeholder Database of third Sector organisations involved to some degree in the promotion of human rights in Scotland. This database provides 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 groups to approach to participate in the primary data collection of this scoping project. This database is available to the public [<http://maps.scottishhumanrights.com/>] For further information on this project see: CRAIG, G. 2011. Mapping human rights organisations in Scotland. Durham: University of Durham, School of Applied Social Sciences.

4 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 the focus groups. 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*⁴ in 2005 and *Greens and MT v United Kingdom*⁴ 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)*⁴, 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>

5 H.L. v UK, application no. 45508/99, 5 October 2004, para. 89.

6 Ibid, paras 91-94.

7 <http://www.scotlawcom.gov.uk/news/discussion-paper-on-adults-with-incapacity/>

88 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.

9 Section 149 of the Act.

10 *"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.*

11 <http://scottishhumanrights.com/news/latestnews/article/prisonvisiting2012>

12 <http://www2.ohchr.org/english/law/ccpr.htm>

13 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; *Madaffer v Australia*, HRC Communication No. 1011/2001, 26 July 2004.

14 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").

15 General Assembly resolution 43/173, annex.

16 General Assembly resolution 45/111, annex.

17 General Assembly resolution 40/33, annex.

18 General Assembly resolution 45/112, annex.

19 General Assembly resolution 45/113, annex.

20 Economic and Social Council resolution 1997/30, annex.

21 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.

22 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.

23 See <http://www.scotland.gov.uk/Publications/2012/06/6972>

24 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>

25 *Napier v The Scottish Ministers* 2004 SLT 555 (OH). The decision was subsequently upheld by the Inner House on appeal: 2005 CSIH 16

26 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.

27 *John Shelley v United Kingdom* (Application No. 00023800/06) 4 January 2008

28 *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.

29 *McLinchey and others v UK*, 2003 V, paras 47-58.

30 *Keenan v UK*, 2001-III, para 116.

31 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.

32 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.

33 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 2008. Out of Sight: Severe & Enduring Mental Health Problems in Scotland's Prisons. Edinburgh: HM Chief Inspector of Prisons.

34 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

35 Letter from Mike Ewart, Chief Executive, Scottish Prison Service, to Cabinet Secretary for Justice, 1 December 2008

36 See, for example, Keenan v UK, 2001-III.

37 There were twelve suicides in Scottish prisons in 2010/11, compared with five the year before, and three the year before that.

38 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".

39 Part 2 of the 2003 Act

40 Part 5 of the 2003 Act

41 Part 6 of the 2003 Act

42 Part 7 of the 2003 Act

43 Part 3 of the 2003 Act

44 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.

45 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.

46 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.

47 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.

48 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.

49 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>

50 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.

51 <http://www.sps.gov.uk/MediaCentre/News-4196.aspx>

52 Age of Majority (Scotland) Act 1969

53 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.

54 International Covenant on Civil and Political Rights, Article 10(3), at <http://www2.ohchr.org/english/law/ccpr.htm>

55 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

56 UN CRC, General Comment no. 10, children's rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 85.

57 Criminal Justice and Licensing (Scotland) Act 2010 section 64, amending section 51 of the Criminal Procedure (Scotland) Act 1995

58 Section 70 of the Children (Scotland) Act 1995 (as amended by Section 135 of the Antisocial Behaviour etc. (Scotland) Act 2004)

59 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>

60 Scottish Government website, Managing High Risk Young People – Secure Accommodation, at <http://www.scotland.gov.uk/Topics/Justice/crimes/youth-justice/Page/accommodation>

61 See <http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright>

62 so as to comply with Article 37(b) of the UN Convention on the Rights of the Child

63 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

64 See also UK Border Agency Migration Statistics, at <http://homeoffice.gov.uk/science-research/research-statistics/migration/migration-statistics1/>