COVID-19 PUBLIC INQUIRY

Module 2A

SUBMISSIONS ON BEHALF OF DISABLED PEOPLE'S ORGANISATIONS: INCLUSION SCOTLAND AND DISABILITY RIGHTS UK

INTRODUCTION

1.1. OVERVIEW: Disabled people in Scotland faced the same pandemic jeopardies as Disabled people in the rest of the UK. How was their exposure governed differently? Further to the DPO's approach in Module 2, this submission considers the Scottish Government's Covid response through the prism of [A] CONTEXT and [B] GOVERNMENT, with particular focus on nine ways in which government is prone to overlook and fail to act upon issues affecting Disabled people generally, and all the more so during emergency. Those areas are (1) SYSTEM, (2) PLANNING, (3) MACHINERY, (4) EXPERTISE, (5) RECOGNITION, (6) ENGAGEMENT, (7) DATA, (8) PROTECTION and (9) REDISTRIBUTION.

1.2. CONTEXT: On death rate and other adverse impacts of pandemic counter-measures, it is unlikely that the Inquiry could conclude that Scotland overall fared better within the UK. The mortality rates for Disabled people were close to 6 in 10 of all Covid dead. Those with learning disabilities were three times more likely to die of Covid and twice as likely to be hospitalised.[1] However, the context suggests that prior to the pandemic Scotland had greater poverty and ill-health challenges than England, but was more resilient in its recognition of health inequalities and human rights, and with better engagement between government and people than presently valued or provided for by the UK Government in England.

1.3. GOVERNMENT: Scottish Government decision-making and effectiveness was still compromised by the lack of a pre-existing system of whole society disaster management. As in the rest of the UK this created profound threats to Disabled people in terms of recognition, engagement, data awareness and overall protection.

1.4. DEVOLUTION: Covid exposed weaknesses in the present devolved structures in circumstances where the pandemic knew no boundaries; but the health and social threats to different parts of society posed by the pandemic were not the same. One area of Westminster government, above all others, had implications for all its devolved parts. By virtue of its

[1] NRS 24.03.2021 [INQ000366002/6]: Covid-19 Disabled People Scotland Health Social Economic Harms March 2021 [INQ000366003/25-26]: see also CAD October 2020 Presentation [INQ000182780/7]

constitutional integration into the UK economy, Scotland was limited by the choices that the UK Government made, because it was not sufficiently funded to do otherwise. That constraint was particularly significant because health inequalities in Scotland are worse than all other countries in western and central Europe. The outcomes for Disabled people in Scotland consequently suggest that government recognition of human dignity without redistribution of resources will never be enough, which is why a human rights based approach to change must include social and economic change as well as political and civil. That is a lesson for Scotland, but also one that is relevant to all of the UK.

PART [A]: CONTEXT

2.1. DISABLED PEOPLE'S SITUATION IN SCOTLAND: In 2017, the Scottish Health Survey found that 32% of adults and 10% of children were Disabled.[2] As in the rest of the UK, Disabled people in Scotland went into the pandemic facing substantial inequalities.[3] According to the Government's Communities Analysis Division ('CAD') presentation in October 2020, Disabled people in Scotland were more likely to live in a household in poverty, in social rented housing, be paid below the living wage, have poorer mental health and experience child material deprivation. They are less likely to be in employment, view their neighbourhood as a safe place to live, feel safe walking alone after dark and meet physical activity recommendations.[4]

2.2. COMPROMISED RESILIENCE: Going into the pandemic Disabled people's standard of living and overall resilience had been compromised by cuts in benefits and services, occasioned by UK austerity budgeting, and criticised by the UN Committee on the Rights of Persons with Disabilities.[5] The employment gap was at 33.4 percentage points and the pay gap almost 20%.[6] Lower income also has to be understood against the relative higher cost of being Disabled, assessed in Scotland at £641 per month for impairment-related costs.[7] As to housing, 61,000 Disabled people in Scotland needed adaptations to their homes and 10,000 were on waiting lists for suitable housing. Disabled people were experiencing mental health issues living in inaccessible spaces, with some living in one room, unable to cook or

[2] Scotland's Wellbeing: Measuring the National Outcomes for Disabled People (July 2019) p.9 and CAD (October 2020) [INQ000182780/6] putting the statistics at 35% and 11%
[3] DPO M2A PH Submission 14.03.23 §1.2
[4] CAD October 2020 Presentation [INQ000182780/ 4, 6 and 8-13]
[5] Elder-Woodward [INQ000371664/3 §12] Watson and Shakespeare [INQ000280067/3 §2, §12-14]
[6] Elder-Woodward [INQ000371664/3 §13] Watson and Shakespeare [INQ000280067/6 §16] [M2/T5/17/21-21/17]: see also UNCRPD Committee Op. Protocol Report 24.10.17 [INQ000365997/18 §103]
[7] Elder-Woodward [INQ000371664/3 §14] Watson and Shakespeare [INQ000280067/6 §§18-19]

use the bathroom.[8] While Scotland may have taken some steps to try to counter austerity cuts, the consequences were still fundamentally damaging to Disabled people.[9]

2.3. HEALTH INEQUALITIES: Aside from having more Disabled people, England and Scotland are not the same when it comes to health inequalities. Scotland went into the pandemic with the worst health inequalities in western and central Europe and the lowest life expectancy in western Europe.[10] Scotland has an older, sicker, population, that was therefore more susceptible to Covid-19 harm, and especially so for some of its Disabled population, given that the risks of Covid-19 increase with age, learning disabilities, and certain co-morbidities.[11] The fact that Scotland experienced only similar percentage fatalities amongst Disabled people to the rest of the UK may to some extent reflect its greater cross government recognition of health inequalities going into to the pandemic when compared to England.[12]

2.4. HUMAN RIGHTS: In Scotland, compared to England, there is a far more developed discourse of human rights at the centre of politics and social planning. There is a greater commitment to a rights-based approach to Disabled people and the Social Model of disability, that comprehends disability as a social construct as opposed to medical and inherent vulnerability.[13] Intersectional understanding is accepted as a necessary discipline of non-discrimination.[14] Likewise, a high importance is placed on engagement with DPO, with recognition that Disabled people are the primary experts in their own needs. [15] Unlike the UK Government, the Scottish Government has produced a Delivery Plan to achieve better compliance with the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD'). The 2016 document *A Fairer Scotland For Disabled People* declared five ambitions: (1) Support services that meet people's needs, (2) Decent incomes and fairer working lives, (3) Places that are accessible to everyone, (4) Protected rights and (5) Active participation.[16]

2.5. DELIVERY: There is a general critique of the Scottish Government of a gap between aspiration and delivery.[17] While the Scottish Government was manifestly committed to

[8] Elder-Woodward [INQ000371664/3 §15] Watson and Shakespeare [INQ000280067/7 §20]
[9] *A Fairer Scotland for Disabled People* [INQ000249240/4-5, 44] DPO M2A PH Submission 14.03.23 §1.4
[10] PHS [INQ000300280/107 §9.2.1]
[11] Thomson [INQ000215495/42§164] Watson and Shakespeare [INQ000280067/4-5 §7-11] [M2/T5/13/18-19/18]
[12] PHS [INQ000300280/107 §9.1.3] *Cf.* Hancock [M1/T10/99/7-24] Wormald [M1/5/150/5-151/25]
[13] Elder-Woodward [INQ000371664/2 §6] *A Fairer Scotland for Disabled People* [INQ000249240/10] DPO M2A PH Submission 14.03.23 §2.1-2.8
[14] [INQ000249240/10]
[15] [INQ000249240/8-9]
[16] [INQ000249240/13]
[17] Cairney [Final] [8 §10-15 and 48 §141]

human rights and non-discrimination, its compliance with its human rights duties did not always follow through in its pandemic response. First, like the rest of the UK, it had not developed bespoke disaster planning for Disabled people, even though their clinical exposure to a SARS like virus was known, and both Article 11 of the UNCRPD and global governance standards require special planning as Disabled people fare worse in all disaster and emergency situations.[18] Second, while the obligation that Disabled people must be included in law and policy making - to collaborate in their co-design and co-production - is central to the UNCRPD[19] and was unequivocally accepted and often practiced by the Scottish Government prior to the pandemic, its engagement fell short in failing to consult DPOs in any way as part of pandemic planning, and then resorting to far less consultation than was normally practiced in the initial throes of the crisis. Why and with what consequences the deficit between aspiration and delivery occurred is important. It is important to Scotland as its National Performance Framework ('NPF') seeks to be measured by its overarching commitment to human rights, equality and justice.[20] It is also important to the whole of the UK, because future prevention of the disproportionate impact of emergency state practice in the face of whole system disaster depends on a combination of values and delivery. Scotland's equality of outcome may have beat some of the odds against it, but it could and should have done better.

PART [B]: GOVERNMENT

[1]. SYSTEM

3.1. REACTIVE STATE: Despite concern for health inequalities in Scottish politics and service priorities, the Scottish Government, like its UK-English counterpart, did not systematically assess social and economic inequalities in the context of pandemic planning.[21] As a consequence, both plans and capabilities had to be created after the first lock down and not before it.[22] Also, as with the UK as a whole, the Scottish Government did not have sufficiently dedicated national resilience ministerial leadership or civil service focus, which John Swinney (agreeing with Oliver Letwin) has accepted needs to be developed for the

[18] UNCRPD Art. 11 and Sendai Framework for Disaster Risk Reduction 2015-2030 (March 2015) §§7, 19(d), 19(g), 32, 35 and 36(a)(iii): see also DPO M2 Opening Submission 26.09.23 §§2.6 and 2.8: see Fisken [INQ000148409/6 §§19-22] Watson and Shakespeare [INQ000280067/12 §37]
[19] UNCRPD Committee General Comment No. 7 (2018) [INQ000279951/3-4 §§15, 22-23, 78] *Cf*. Elder-Woodward [INQ000371664/10 §47]
[20] National Performance Framework [INQ000102917]
[21] Sturgeon [M1/T12/69/19-71/10] Swinney [M1/T12/98/18-99/13]
[22] Sturgeon [M1/T12/42/5-18]

future.[23] In terms of planning a Covid response essentially from scratch, there would in turn be machinery of government implications (see §§3.10-3.11 below) as in contrast to the UK, the Scottish Government is fully directorate as opposed to departmental based.

3.2. DISENGAGEMENT: The failure of the system to plan was especially damaging for Disabled people, and contrary to the aspiration to engage with and protect marginalised groups as a "*hallmark*" of Scottish governance.[24] Despite the 2017 UNCRPD Committee Report that criticised the UK generally for failing to plan and establish roles for DPO during an emergency, the Scottish Government failed to consult at all with Scottish DPO prior to the pandemic.[25] Moreover, in the immediate decision making of the first months, previous levels of consultation as practiced under the UNCRPD implementation plan, initially diminished.[26]

3.3. RESILIENCE: One explanation for the disengagement is that the Scottish Government relied too heavily on the Scottish Resilience Partnership (SRP), its equivalent under the Civil Contingency Act 2004 ('CCA'), to the Local Resilience Forums (LRFs).[27] The SRP, although a regional organisation, was only a forum for Category 1 responders under the CCA. Like the rest of UK, these mechanisms are meetings, not organisations. Consultation with the voluntary sector is not mandatory and embedded in the system. These arrangements could do no more than provide a limited interface for consultation with the voluntary sector,[28] which proved to be insufficient to comply with either government policy or its human rights duty.[29] More broadly, Professor Cairney raises the issue of whether under pressure, the Scottish Government's emergency response shifted the balance between the "*general and often vague commitment*" to make policy in partnership with stakeholders and citizens, to centralised emergency decision-making based on "*internalisation of rapid choices and high reliance on elite scientific sources*".[30] Under conditions of an unplanned for crisis it reverted to a system of more conventional top-down control.

3.4. DEVOLUTION: In October 2000, the Phillips Inquiry report into BSE made a particular recommendation to ensure that devolution did not compromise a synchronised response to

[23] Swinney [M1/T12/77/7-78/20] Letwin [M1/T6/3/20-4/6] [M1/T6/39/14-40/12]
[24] Swinney [INQ000185352/9 §§26-27] [M1/T12/107/18-21]
[25] Fisken [INQ000148409/2 §§6-8] [5 §§16-17]
[26] Elder-Woodward [INQ000371664/12 §§48-53]
[27] Swinney [INQ000185352/10 §28] and [M1/T12/108/3-22]
[28] Swinney [M1/T12/84/16-24] Dickie [INQ000273700/14-15 §§6.1-6.2]: see also Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005 ('CCR 2005') Reg 23. *Cf.* Alexander and Mann [M1/T3/126/14-20] and Adamson [INQ000182613/10 §§40-49] [M1/T21/118/12-119/10] [M1/T21/125/18-126/20]
[29] Swinney [M1/T12/108/23-110/20]
[30] Cairney [Final] [117 §347]: see, e.g. Sturgeon [INQ000339033/9 §22]

UK wide risk.[31] Despite this, Professor Henderson has noted that there is no mention of managing emergencies or crises in the Memorandum of Understanding for Devolution and Supplementary documents.[32] Professor Cairney highlights that the Civil Contingency system provided for an essentially subordinate Scottish Government role in UK health pandemic planning.[33] In practice this meant following an outdated UK plan that was based on influenza, dependent on UK funding, and complicated by Brexit, all of which duly compromised effectiveness. There were consequential anomalies in the devolution system in an emergency, including lack of knowledge in UK departments as to how devolution worked,[34] no significant role played by the Secretary of State for Scotland,[35] and the degree to which SAGE was not a dedicated Scottish mechanism (see §3.12 below).

3.5. BUDGET: The most significant systemic weakness for Scotland during the Covid crisis was the financial arrangements of devolution. Prior to 2020 they prevented the Scottish Government building up a reserve that it could deploy for eventualities like a pandemic.[36] In the previous decade Scotland used significant funds to offset the consequences of UK austerity policy. Had it not done so its population might have been even less resilient going into the pandemic. During the pandemic the inflexible Barnett formula criteria compromised full Scottish self-determined governance of the crisis, especially when the costs were unpredictable and open ended.[37] It limited Scotland's options to unilaterally maintain NPIs in circumstances where it could not pay for furlough schemes. This is a fundamental matter for evaluating all government of the crisis, given that the health and extent of the Disabled population was markedly different to the rest of the UK.[38] The Scottish Government sought to pursue its own health inequalities agenda before and during the pandemic, but "*policies to reduce health inequalities – including measures to redistribute income and wealth - are not in the full gift of Scottish ministers or health sectors*."[39]

[31] The Inquiry into BSE and variant CJD in the UK Vol. 1 Findings and Conclusions, Ch. 14 §§1280-1282
[32] Henderson [INQ000269372/19-20 §46] [42 §131]: see also Cairney [Final] [33 §§98-100]
[33] Cairney [Final] [27 §§75-78] [39 §116] [35 §101] [40 §122] [51 §147]
[34] Freeman [INQ000273984/10 §40]
[35] Sturgeon [INQ000235213/12 §37]
[36] Swinney [M1/T12/99/24-101/4] [INQ000185352/8 §23]
[37] Forbes [INQ000273982/7-9 §§19-25]
[38] Thomson [INQ000215495/42 §§161-162 and §164] Sturgeon [INQ000235213/2 §4] [31/§102-103] Swinney [INQ000287771/22 §37] Freeman [INQ000273984/13 §53-54] Yousaf [INQ000273956/18 §§81-86}: see also Henderson [INQ000269372/62 §194] [63 §197 R9] and Cairney [Final] [51 §147] [91 §§261-262]
[39] Cairney [Final] [21 §61]

[2]. PLANNING

3.6. ADOPTION OF FRAMEWORK: Having begun the pandemic without strategic planning, the Scottish Government created one in the Covid 19 Framework for Decision Making published on 23 April 2020, which incorporated consideration of the harms posed by the crisis, as (1) direct harm to health, (2) other harm to health and care, (3) social harm and (4) economic harm (this became the 'Four Harms' approach).[40] In doing so, it accepted that the "*harms caused do not impact everyone equally*" and committed to "*protect those most at risk and protect human rights*".[41] It made clear that "*COVID-19 affects everyone but the harms caused by the pandemic are not felt equally. Our response to this pandemic must recognise these unequal impacts. Just as we have sought to shield those most at risk, we must continue to provide additional support for those who need it and seek to advance equality and protect human rights in everything we do*".[42] The Framework for Decision Making was to be read in accordance with the NPF and commitment to "*kindness, dignity, respect for the rule of law, openness and compassion*".[43] The Framework (and later updates) explicitly referenced impacts on human rights in its assessments of harms but also functioned to provide transparency to the public as to how decisions were being made.[44]

3.7. EQUALITY FOCUS: Civil Servants responsible for equality were immediately involved in the key public sector planning meetings. Unlike the absence of Equality Hub officials from the UK Ministerial Implementation meetings until 21 May and then not again until late September 2020, Equality Inclusion and Human Rights Directorate ('EIHRD') officials attended the Communities and Public Services Ministerial Group ('CPSMG') from its inception on 2 April 2020 and both briefed and attended the formal Four Harms meetings.[45]

3.8. MCKELVIE'S NOTE: It was indicative of the focus on Equality that Christina McKelvie, as Minister for Older People and Equalities, issued a formal Note to all Government Ministers and Officials on 9 April 2020 to emphasise "*As we act with pace, we must simultaneously ask ourselves whether the systems and policies we are putting in place to respond to COVID-19 work for all of Scotland's people, in a way that is founded in fairness, delivers equality and safeguards human rights*." In advocating for consideration of

[40] Thomson [INQ000215495/17 §72-75]
[41] *Covid 19 Framework for Decision* (April 2020) [INQ000366023/8]
[42] [INQ000366023/9]
[43] [INQ000366023/6] and [INQ000102917]
[44] *Assessing the Four Harms of the Crisis* (December 2020) [INQ000131028/47]
[45] Macdonald [INQ000215482/10 §§35-38] Smith [INQ000273978/12 §51]

those "*who might be left behind or excluded*" by pandemic decision making, she emphasised both Equality Act duties and broader Human Rights, not just those arising under the Human Rights Act 1998 and the European Convention of Human Rights, but "*the far larger body of economic, social and cultural rights which apply as a matter of international law and are embedded domestically via mechanisms such as the National Performance Framework"*.[46] No equivalent letter emerged from the Equality officers and Ministers of the UK Government during the early days of the crisis or beyond.

3.9. RESPONSIVENESS: As in the rest of the UK, there were inevitable problems in creating an entirely new system to support the clinically shielding and socially at-risk parts of the population. However, there is some evidence to suggest that what the Scottish Government overlooked in crisis planning it was able to self-correct. First, it appears to have identified Non-shielding vulnerable ('NSV') groups, recognised issues around providing support for those who were not formally clinically vulnerable[47], and taken action to mitigate impacts of shielding, earlier than England.[48] Second, having been made aware of comparative disengagement from DPO, a roundtable was set up for DPO to participate in from May 2020, which continued throughout the crisis, in comparison to the UK Government engagement via the DPO forum that was set up later, and petered out sooner.[49] Third, despite its problems, there was apparently a better system of collaboration with local authorities and third sector groups than English Local Government.[50] Fourthly, the Scottish Government enjoyed a more sustained level of support from society than its Westminster counterpart.[51] That success may have arisen from the Scottish Government's responsiveness and better connection to its people, to be contrasted with the culture of Whitehall, which civil servants like Helen MacNamara have criticised as lacking an understanding of the lives of ordinary people.[52] However, not all features of Scottish government worked effectively, and those issues are dealt with below.

[3]. MACHINERY

3.10. SCOTTISH MODEL OF GOVERNMENT: In contrast to the Whitehall Model of Government, the Scottish system (of hubs and multiple spokes) eschews departmental silos. It requires

[46] Note from the Cabinet Secretary for Social Security and Older People and Minister for Older People and Equalities to DGs [INQ000256762/1]
[47] Equality Impact Assessment 01.04.2020 [INQ000256754/7, 9-12]
[48] Deep Dive on Food Supply Meeting - Agenda and Paper 31.03.2020 [INQ000233405/15, 17-22]
[49] Elder-Woodward [INQ000371664/12 §§58-62] [15 §§71-4] Macdonald [INQ000340113/9 §§29-31]
[50] COSLA [INQ000273700/6 §3.6 [INQ000220330/4-5] Report from SCA [INQ000075375/3 §iii].
[51] Thomson [INQ000215495/44 §168] Frazer [INQ000215474/11 §40] Cairney [Final] [75-77 §§213-220]
[52] MacNamara [INQ000273841/18 §32(iv)] [40 §74(vii)] [M2/T16/49/19—50/13]

Ministers to act as Directors in cross-cutting roles aided by directorates.[53] An issue for this Module is how well did that work for Scotland in a whole system emergency, but also what lessons might it have for the government of other parts of the UK?

3.11. MINISTERIAL RESPONSIBILITY: In this model, there was no dedicated Minister for Disabled people, but that responsibility was part of McKelvie's portfolio as Minister for Older People and Equalities. However, she describes herself has having "*no decision making responsibility*" with regard to Covid-19, notwithstanding the role she played in addressing various stakeholders, including DPO, on the consequences of the NPIs.[54] Consequently, like Justin Tomlinson in the UK, she did not attend the CPSMG or the Four Harms Group. Jeane Freeman, as Cabinet Secretary for Health and Sport, who was essentially responsible for health and social care, does not refer to working closely with McKelvie in discharging her role,[55] and neither do the First or Deputy First Ministers.

[4]. EXPERTISE

3.12. SCOTTISH ADVICE: Despite recognising the quality of its work, SAGE was not Scotland focused or Scotland dedicated, and as a result the Scottish Government Covid-19 Advisory Group ('SGCAG') was established.[56] That is said to have generated a more dynamic interaction between Ministers and the full SGCAG membership in a way that did not occur in England, with Professors Whitty and Vallance acting as sole interlocutors with the Prime Minister and his immediate team.[57]

3.13. CONTINUING DEPENDENCY: Despite the role of SCGAG, Scotland was still affected by SAGE advice and/or the significant role played by the UK CMO and CSO. First, it was Professor Whitty's unplanned comments that promulgated an intuitive and unevidenced notion of behavioural fatigue that UK Ministers relied on to delay the first lock down.[58] This concept was not supported by SAGE members of SPI-B, nor by Professor Reicher, also a member of SGCAG.[59] Second, on core issues of clinical vulnerability, Scotland followed England, such that the timing of placing those with Down's syndrome on the CEV

[53] Cairney [Final] [5 §1] [8-9 §§11-13] [13 §30] [18 §§50-51] [58 §165] [103 §293]
[54] McKelvie [INQ000346064/3 §§11, 13-14] [4 §19]
[55] Freeman [INQ000273984/2 §5] [3 §7] [5 §§14-16]
[56] Sturgeon [INQ000235213/23 §71] Freeman [INQ000273984/14 §48] Lamb [INQ000215470/6 §22]: see also Cairney [Final] [52 §148]
[57] Reicher [INQ000370347/3 §8]: see Cairney [Final] [52 §151] Cairney *The UK Government's COVID-19 Policy: What Does "Guided by the Science" Mean in Practice?* (2021) Front. Polit. Sci. 3 pp. 1-2, 5-6 and 11
[58] Johnson [INQ000255836/30 §128 /85 §§321-326] [M2/T31/94/19-95/8] Hancock [INQ000232194/6 §23] [M2/T29/159/8-160/5]
[59] Reicher [INQ000370347/7 §14] [INQ000273800/21 §§59-61 and 159]: see also Rubin [M2/T12/57/17-77/10] Halpern [M2/T16/171/15-174/2] Cummings [M2/T15/185/14-186/23]

list was dependent on the English QCovid initiative and was delayed until November 2020.[60] The implications of that would contribute to those with learning disabilities being three times more likely to die of the Covid.[61] Third, Scotland was dependent on UK economic packages to support NPIs, hence SAGE advice would trump Scottish advice, because Scotland could not afford to fund significant countermeasures that were not part of UK-wide virus suppression decisions (see §3.5 above).

3.14. MEDICAL MODEL: Despite its input from behavioural science, SGCAG, like its SAGE counterpart, remained predominantly bio-medical in expertise and focused on the epidemiological harm posed by the virus and not the other 3 harms.[62] It was not particularly expert in considering broader risks faced by 'vulnerable and at-risk' groups.[63] Dr McMenamin thought that deliberation of those matters was limited.[64] As Scotland's CMO, Professor Smith was not directly involved in engagement with stakeholders in relation to shielding policy and did not have knowledge of what engagement took place or when.[65] Even when it was thought necessary to create SGCAG Sub-groups, the groups dealt with Public Health Threat, Education and Children's Issues, Universities and Colleges and Nosocomial Review, but not Disabled people, despite increasing awareness that they were the most significant category under threat from both the virus and countermeasures.[66] As with SAGE and the Whitehall Disability Unit, what was lacking was a broader scope of expertise to deal with health inequalities, including both practitioners, DPOs and other end user groups that understood the social determinants of Disabled people's vulnerability. That deficit has been accepted by the English leadership of SAGE: the advisers needed the benefit of more practical and lived expertise in order to provide opinions, and government needed the same in order to ask the right questions.[67]

[5]. RECOGNITION

3.15. VALUES: Compared to England, the situation of Disabled people was more recognised in Scotland and this carried through into the pandemic. The Social Model is part of the Government Delivery Plan for Disabled People's rights, which aims "*to remove the*

[60] Smith [INQ000273978/113 §450] Macdonald [INQ000340113/5 §15]: see also Whitty [INQ000248853/99 §6.46] Harries [INQ000273807/167 §11.63]
[61] [INQ000366003/25-26] Watson and Shakespeare [INQ000280067/12 §39]
[62] Woolhouse [INQ000369765/5 §§25-26] Cesar [INQ000292482/6 §21]
[63] Freeman [INQ000273984/17 §69]
[64] McMenamin [INQ000360968/73 §26.4]
[65] Smith [INQ000273978/114 §455]
[66] Yousaf [INQ000273956/20 §95] *Cf*. Morris [INQ000346264/49 §215]: advice provided on ethnic minorities
[67] Vallance [M2/T22/185/16-191/8]: see also Hayward [IN0000267868/9 §4.9] [M2/T10/184/5-186/7] [IN0000267868/10 §4.12] *Cf*. Morris [INQ000346264/31 §130] Reicher [INQ000370347/11 §20]

barriers that isolate, exclude and so disable the individual". The Plan places a premium on language and recognises that "*By using positive and empowering words we can change the way people see disability*".[68] An example of this during the pandemic is in a 6 April 2020 CPSMG Action Note referencing the need to "*Refine use of terminology of "vulnerable" and "high risk"- need to ensure it is appropriate and does not alienate in communications and marketing material*".[69] The uncritical use of the word 'vulnerability' within Covid governance otherwise did damage not only because it was disempowering, but because it shifted responsibility for a person's marginalisation onto their own bodies and mentality, rather than recognising the function of government and society to prevent vulnerabilities occurring in the first instance and correcting them when they do arise.[70]

3.16. PRIORITY REPORTING: Reporting on Disabled people was also prioritised in a way that did not occur in England. A report from Healthcare Improvement Scotland, available to the Scottish Government from 1 April 2020, acknowledged the potential non-clinical impacts of the shielding programme, including the need for accessible information, risk of distress around the timing and manner of deliveries, potential lack of access to phone and internet connection, and complications around access to and preparation of food. Alongside the local resilience partnerships, DPO, and other relevant third sector organisations providing local-level support were recommended as partners in the identification and delivery of information to Disabled people as well as in the collection of intelligence to inform improvements in the programme.[71] By June 2020, CAD had delivered an impact assessment to the Scottish Government, which included sections on how the four harms impacted on Disabled people.[72] Unlike in England where PHE studied disparities and did not report at all on Disabled people, and a further review mechanism under the auspices of the Minister of Equality repeated the oversight,[73] by September 2020 the Scottish Government had published a report on the emerging evidence of Covid-19 impacts on equality across several key domains, including the impact on Disabled people.[74] The report noted higher death rates, degraded access to health care for non-covid issues, disruptions to social care, increased loneliness and social isolation, impact of school closures on

[68] *A Fairer Scotland for Disabled People* (2016) [INQ000249240/10]
[69] CPSMG Action Note 06.04.20 [INQ000256765/1]
[70] Harries [INQ000273807/85 §8.65] Mallick [INQ000280035/25 §85] *Rights at Risk Report* (Oct. 2020) [INQ000142277/31 §1]: see more generally DPO M2 Opening Submission 26.09.23 §§1.9 and 3.6
[71] Equality Impact Assessment COVID-19 (Shielding Programme) 01.04.2020 [INQ000256754/7-11]
[72] CAD (June 2020) [INQ000182794/11-14, 16-18]
[73] Doyle [M2/T17/207/12-208/12] Hancock [M2/T30/81/25-82/5]
[74] COVID-19 Impact on Equality (17.09.2020) [INQ000182793/4, 7 11, 19, 41, 64, 105-6, 114-5]

families with Disabled children, impact on Disabled people's employment and increased likelihood of poverty and loss of social security coordination.

3.17. SHORTFALL: As the principal civil servant on equalities, Macdonald defends an approach in which inequalities were regarded as a factor within each of the four harms, with each individual policy considered for its impact on protected characteristic groups by the policy team, rather than considered in isolation by a distinct team.[75] However, it remains unclear how the Four Harms approach translated into solutions to problems identified, or whether it simply acted as a mechanism whereby harms were identified and 'considered' but actions went ahead in any event. The Four Harms Group itself, which was "*specifically convened as a forum for discussing the various harms and potential responses to inform advice for decision making",* did not hold its first meeting until 24 October 2020.[76] Moreover, the observation of some of SGCAG experts is that little actual recognition was given to social vulnerability as regards the other three harms (see §3.14 above). A question arises whether Scotland's medically precarious population may have made it difficult to look too much beyond Harm (1).

[6]. ENGAGEMENT

3.18. DISENGAGEMENT: Of essential importance to proper Four Harms analysis is that requisite expertise should have extended to the lived experience of Disabled people, for which see the recommendations made to the Inquiry by Professor Marmot and Bambra, best practice global disaster management guidance,[77] and UNCRPD.[78] The fact that it did not meant that the comprehension of harm to Disabled people that informed the Scottish Government policy in its papers of June and September 2020, might have been incorporated as concrete aims and outcomes in the Decision Making Framework as of April 2020. Contrary to established policy and developed practice, engagement between government and DPO faltered both prior to and in the immediate first weeks of lockdown (see §3.2 above). Other Ministers had agreed that this was a critical teething problem of the pandemic response.[79]

3.19. CO-PRODUCTION AND CO-DESIGN: It is a principal lesson learned across the UK that co-production and co-design is an essential feature of both effectiveness and legitimacy during

[75] Macdonald [INQ000340113/2 §7]: see also [INQ000340113/19 §68]
[76] Griffin [INQ000348720/28 §§105-106]
[77] Bambra and Marmot [INQ000195843/83 §199.4] and Sendai Framework 2015-2030 (March 2015) §19(d)
[78] UNCRD Art. 4(3): see Fn. 20 above and UNCRPD UK Country Report (2017) [INQ000182691/4 §§28-29] publicly available at www.ohchr.org/en/documents/concluding-observations/crpdcgbrco1-committee-rights-persons-disabilities-concluding
[79] Sturgeon [INQ000339033/9 §22] Yousaf [INQ000273956/ 23 §§108-109] [27/§123] CPSMG Note 07.05.2020 [INQ000256771/1]

emergency planning and response.[80] Although the Scottish Government co-participated in Roundtables with the DPO from May 2020 onwards, the quality of co-production and co-design can improve. Inclusion Scotland has identified discrete problems including there being no or insufficient feedback loop to enable reconsideration or alternative policy options prior to finalisation.[81] Professor Reicher thought that lack of proper structure to enable rapid input from sections of the community to be a shortcoming within SGCAG's advisory horizons and more broadly in the Scottish Government response.[82]

[7]. DATA

3.20. DEFICIT: Scotland lagged behind England in quantitative evidence on impact of Covid 19 on Disabled people. Mortality rates for Disabled people in Scotland were only compiled once in March 2021.[83] Until then Scotland had to rely on English data, despite its more extensive demographic health inequalities, which impeded expert analysis,[84] but further underscores why engagement with DPOs and other networks of community intelligence gathering were so essential. As in England, there was also a design fault in the failure of health services to gather disability data.[85] Although the Scottish Government supported the Social Model, it was noted as seldom used in the context of survey-based data collection, or statistics, which instead focused on individual impairment alone.[86] The overall situation breached effective data gathering and deployment duties under Article 31 UNCRPD.[87]

3.21. CARE HOMES SECTOR: Access to reliable, timely data was not available to PHS from care homes. What is had from annual Care Home Census was neither complete nor available in real time; and herein lay a key problem to enabling quicker understanding of care home outbreaks, and therefore supporting an effective response.[88]

[8]. PROTECTION

3.22. ABYSS: That the Scottish Government was cognisant of the risk that NPIs would disproportionately impact Disabled people did not in many ways limit the harm that was done by them. DPO surveys found that Disabled people felt 'abandoned' and impacted by isolation, loss of essential social care support, difficulties accessing food and other

[80] Mallick [M2/T5/64/15-65/16] Reicher [IN000273800/16 §47] [67 §198] and Bear et al [INQ000273376] Swinney [INQ000185352/9 §26 and 30] Macdonald [INQ000215482/19 §68]
[81] Elder-Woodward [INQ000371664/117 §§78-84]
[82] Reicher [INQ000370347/11 §§23-24] [76 §155]: see also [INQ000321295]
[83] NRS 24.03.21 [INQ000366002] Elder-Woodward [INQ000371664/20 §§98-101]: see also [INQ000215606]
[84] Smith [INQ000273978/183 §720]
[85] Macdonald [INQ000215482/18 §65]
[86] Covid-19 Disabled People Scotland Health Social Economic Harms, March 2021 [INQ000366003/9]
[87] UNCRPD Art. 31 and UNCRPD Committee UK Country Report [INQ000182691/10 §§64-65]
[88] PHS [INQ000300280/95-96 §§7.9.1-7.9.4]; see also Cairney [Final] [106 §§300-307] [110 §§316-323]

necessities, with fears of being denied treatment if they got the virus due to involuntary DNAR notices. Inclusion Scotland recognise the efforts of its government but equally draws attention to the *"abyss between the rhetoric of national policies and what happens on the ground"*.[89] There was the sudden withdrawal of access to domiciliary social care, with consequential problems with access to food, medication and basic capacity,[90] and mass deaths in residential settings (whether discharge from hospital to care homes was responsible or not). As in England the social care sector, including its users and informal providers, was not involved in any planning exercise for a pandemic and there was a lack of central government understanding and regulation of the sector,[91] compounded by data deficits (see §§3.20-3.21 above). Although documentation of DNAR is woefully limited, experiential accounts show that the issue is drastically lacking in accountability or control.[92] Education for Disabled children was severely compromised.[93] Finally, for a pandemic state that increasingly resorted to government via the internet, Disabled people and others suffered from digital exclusion.[94]

[9]. <u>REDISTRIBUTION</u>

3.23. <u>STATUS QUO</u>: The DPO criticism of UK pandemic economics is that rather than being radical, as presented (and sometimes criticised), it involved a deliberate failure to redistribute to those most in need.[95] For Disabled people furlough payments were focused on those able to work or temporarily unable to work in standard wage sectors and did not reach lower, informal or non-wage earning people. The increase in Universal Credit was small compared to sums spent on business. Likewise, pot funding into local authority or care sector management was difficult to access and not particularly accountable. On this there is some basis to criticise the lump funds that were made available to local authorities.[96] As well developed by SAGE,[97] limited provision of sick pay was known to be relevant to part time and zero-hours workers, already in poverty, continuing to work with fatal consequences.[98] To those observations, Professor Reicher has added detailed

[89] Elder-Woodward [INQ000371664/4 §18] *Rights At Risk Report* (Oct 2020) [INQ000366004/3, 31-32]
[90] Elder-Woodward [INQ000371664/5 §§20-32] *Rights at Risk Report* (Oct. 2020) [INQ000142277/8-10, 16-17 and 27-30] Social Care Briefing (May 2020) [INQ000184673]
[91] Macaskill [INQ000224524/24 §§121-123] [25 §§126-131]
[92] Elder-Woodward [INQ000371664/5 §19]: see also Macaskill [INQ000224524/14 §§69-70]
[93] Elder-Woodward [INQ000371664/8 §§34-37]
[94] Elder-Woodward [INQ000371664/6 §§26, 42, 61, 72] *Covid-19: Impact on Equality* [INQ000182793/89-93]
[95] DPO M2 Closing Oral Statement [M2/T34/96/20-98/14]
[96] Elder-Woodward [INQ000371664/19 §95]
[97] Vallance [INQ000273901/164] Khunti [M2/T7/29/16-20] Smith [INQ000273978/157 §622] Ellis [INQ000343804/17-18 §§62-63] [INQ000343804/29 §109]: see also Bell [INQ000215036/43-49 §147-167]
[98] *Covid-19: Impact on Equality* [INQ000182793/48]

evidence as to how much more could have been done to financially incentivise lower income people to not work, and also shelter, with examples of what was done in New York State.[99] However for reasons developed in §3.5 above England's economic status quo was necessarily Scotland's, because devolution arrangements did not permit otherwise.

CONCLUSION

4.1. CITIZENSHIP: Disabled people in Scotland may have enjoyed comparatively less degradation of their citizenship during the pandemic than in other parts of the UK; however, their rights were nevertheless still disengaged with during the course of the crisis. The Scottish governance of Covid-19 often frustrated and harmed Disabled people despite expressed commitment to the contrary. Blaming UK Government for all shortcomings abdicates the power that Scottish Government enjoys. Generally good policy statements must align with better practice and outcomes, including at the point of local delivery to enable independent living and equal participative citizenship. Otherwise, devolved government will delude itself as to its difference and the inequities of the pandemic and its countermeasures will repeat in future crises.

4.2. FUTURE: As to change pending future pandemics, the report of the Social Renewal Advisory Board contains 20 "Calls to Action", including for the Scottish Government to incorporate key international human rights instruments into Scots Law, take action to realise the human rights of Disabled people, build inclusive communication into all levels of government, and commit to co-designing with civil society how to measure progress towards renewal, incorporating deeper engagement with those people in communities who have first-hand experience of poverty, inequality and restricted life chances.[100] The title of the report, which the DPO commend to this Inquiry in name and content, is *If Not Now, When*?

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[99] Reicher [INQ000370347/20 §§45, 47] [31 §§67-68] [64 §131] and [INQ000370241]
[100] Macdonald [INQ000340113/12 §43] SRAB *If not now, when?* (Jan 2021) [INQ000182792/8-9, 11, 31-32, 42-44, 48-54, 62-63]: see Call to Action 11-13, 16 and 20