
**CLOSING SUBMISSION ON BEHALF OF DISABLED PEOPLE'S ORGANISATIONS:¹
INCLUSION SCOTLAND & DISABILITY RIGHTS UK**

INTRODUCTION

1. COMPARATIVE GOVERNMENT: Disabled people count for nearly 60% of the Scottish Covid deceased. When figures are adjusted for age, Disabled people had significantly higher rates of virus mortality when compared with non-disabled members of society; up to 3.2 times more likely to die if women and 3 times more likely to die if men.² In so far as being a Disabled person is linked to lower income and geographical deprivation, Disabled people are disproportionately part of the population who live in the more deprived areas of Scotland with a healthy life expectancy of 50 and under and who were 2.2 times more likely to die of Covid than those who live in lesser deprived areas.³ Given these stark statistical inequalities, the opportunity afforded by this Inquiry to compare the four-nation government response to the pandemic is essential.
2. HEALTH INEQUALITY IS NOT EQUAL: The overall figure for Disabled people in the UK is approximately 22%. In Scotland the figure may be as high as 35%.⁴ Going into the pandemic, 42% of households in Scotland had one person who was long-term sick or Disabled.⁵ 51% of adults with household incomes in the bottom quintile (less than £14,300) were disabled compared with 23% of adults with household incomes in the top quintile (£49,400 and above). 15% of adults provided regular assistance for a sick or Disabled person. More who provided care were Disabled people (19%) as opposed to non-disabled people (13%).⁶ Whatever steps the Scottish Government took to mitigate the consequences of austerity, its effects were fundamentally damaging to Disabled people. As Dr Elder-Woodward, the Convenor of Inclusion Scotland ('IS'), described it, pre-pandemic Disabled people were in "*a dire state, ... a crisis situation*".⁷ Once it moves beyond England, the focus that the Inquiry has given to health inequalities inevitably leads

¹ Each of these organisations are run by and for Disabled people ('DPO'). They are to be distinguished from charities that represent Disabled people, however well, rather than enabling them to represent themselves

² CTI Tables [INQ000274150/34] NRS 24.03.2021 [INQ000366002/6] Halliday [T2/166/5-20] Covid-19 Disabled People Scotland Health Social Economic Harms March 2021 [INQ000366003/25-26]

³ PHS 08.04.21 [INQ000228401/3] Bambra and Marmot [INQ000195843/7/7 §12.2]

⁴ CAD (October 2020) [INQ000182780/6]: 35% of adults and 11% of children

⁵ Scottish Household Survey 2016 figures [INQ000147447/8]

⁶ CAD June (2020) [INQ000182794/14] Feeley Review [INQ000280640/33]

⁷ Elder-Woodward [T2/62/2-63/9] DPO M2A Opening 15.01.24 §§2.1-2.2

it to consider the extent to which the spread of inequality itself is not equal across the four nations.⁸

3. COMPARABILITY: To then find that the relative impact on mortality rates for Disabled people in Scotland and England is similar,⁹ and that overall age-standardised mortality rates may have been slightly less for Scotland than elsewhere in the UK, as well as better placed in European state outcomes,¹⁰ would arguably indicate that, whilst no less tragic, Scottish Government has done better to keep its outcomes as such, because the extent of its inequalities, including life expectancy and poverty are greater.¹¹ UK Government allegation of Scottish Government affectation of difference has overlooked that point.¹² However, better is not necessarily good; and hence for Scottish Government to champion the extent to which it protected people during Covid in a way that UK Government did not, understates the extent to which its own conduct was not particularly innovative. Death rates in Scotland at 124.9 per 100,000 people compared to 145.0 in England were not substantially different and are presumably impacted upon by other factors, such as size and density of larger cities. The fact that death rates were broadly similar across both the first and second wave in Scotland at approximately 5,000 also suggests that insufficient lessons were learned.¹³ Like the UK Government, Scotland too had no plan at the outset, lacked an adequate system of disability-inclusive data, did not achieve its desired transformed social contract with civil society, presided over a collapse of its care system, and did not deliver the human rights standards that it wanted to be judged by. There is a puzzle to the Scottish Government Covid response. In terms of the values and aspirations it set itself it was primed to do better; and the important question for both Scotland and the UK is why that was not the case.
4. APPROACH: As is now known to the Inquiry, the approach of the DPO is to consider government response through nine aspects in which governors can fail to duly account for Disabled people. Those areas, detailed in PART A under the rubric of treatment, are (1) SYSTEM, (2) PLANNING, (3) MACHINERY, (4) EXPERTISE, (5) RECOGNITION, (6) ENGAGEMENT, (7) DATA, (8) PROTECTION and (9) REDISTRIBUTION. PART B then reflects on what the treatment of Disabled people during the pandemic tells the Inquiry about the devolved state in Scotland and broader issues for the rights of Disabled people in the United Kingdom.

⁸ Bambra and Marmot [INQ000195843/4 §4; 5 §§ 8-12, 15 §37, 18 §41 and Fig. 1 p. 17 and Fig.3 p. 20]

⁹ NRS 24.03.2021 [INQ000366002/8-9]

¹⁰ Diamond [INQ000271436/14-15 §§44-48] Hale [INQ000257925/30 §56.1]

¹¹ Sturgeon [T11/195/10-19] Thomson [INQ000215495/42 §164] PHS [INQ000300280/107 §9.2.1]

M2 Scottish Ministers Closing [INQ000399548/5 §§13-16]

¹² Cf. Gove [T9/92/20-24]

¹³ CTI Tables [INQ000274150/27] Halliday [T2/163/1-20] Cairney [INQ000274154/42-43 §126]

PART A: TREATMENT

[1]. SYSTEM

5. DISABLED PEOPLE LEFT BEHIND: Whatever their recognition as equal citizens, the protection of Disabled people in Scotland's disaster management system was not solid enough. That failure violates the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD'), which the Scottish Government has bound itself to comply with as a matter of public policy,¹⁴ to a degree that UK Government has refused to do.¹⁵ Article 11 of the UNCRPD requires "*all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of...humanitarian emergencies and the occurrence of natural disasters*". The UNCRPD General Comment No 5 on the protection of the right to independent living consequently requires that "*States parties must take into account in advance the obligation to provide support services to persons with disabilities in all disaster risk management activities (art. 11) and make sure that they are not left behind or forgotten*".¹⁶ Despite Ministers warning otherwise, and DPO wanting otherwise, the notion that "*no one should be left behind*"¹⁷ was effectively thwarted before the crisis started. That situation produced a chain reaction across all aspects of decision-making and government services, because everything that followed was reactive government; not proactive, and despite intentions, not especially collaborative. Three features of the overall system are worthy of note.
6. PUZZLE: First, while health inequalities and their implications for Disabled people were recognised in Scotland through human rights policy and public health doctrine,¹⁸ as Caroline Lamb accepted in Module 1, and as this Module's evidence makes clear, core pandemic planning and emergency systems encompassing health inequalities did not yet exist in 2020.¹⁹ This was a Government that had declared reduction in Scotland's health inequalities to be "*the primary objective of our collaborative action and runs through all of our public health priorities*".²⁰ While it might be said that Covid fatality would have been greater had Scotland not enshrined health inequality as a doctrine from the time of the *Equally Well* report in 2008, it is also the case that the Scottish Government should have known better than not to prepare for pandemics and particularly with regard to the threat posed to its national care sector. Instead the CMO was not consulted at all on pandemic

¹⁴ *A Fairer Scotland for Disabled People* [INQ000249240] M2A DPO Opening Submission 15.01.24 §2.4

¹⁵ M2 DPO Closing Submission 15.01.24 INQ000399541/5 §10] and [36 §56]

¹⁶ UNCRPD Gen. Comment No. 5 (27.10.17) CRPD/C/GC/5 §79

¹⁷ McKelvie [INQ000256762/1] Elder-Woodward [T2/74/4-8]

¹⁸ PHS [INQ000300280/107 §9.1.3] Bamba and Marmot [INQ000195843/33 §§69.4 to 69.6]

¹⁹ Lamb [M1/T14/114/18-115/11] Sturgeon [M1/T12/69/19-71/10] Swinney [M1/T12/98/18-99/13]: see also Cairney [INQ000274154/38 §§113-115]

²⁰ Bamba & Marmot [INQ000195843/33 §§69.6] and CTI M2A Opening [T1/27/17-29/18]

planning,²¹ Operation Silver Swann on pandemic preparedness did not consider health inequalities,²² and the recommendations to update the planning that appeared in draft in 2019 had not yet been acted upon.²³ Despite Scotland's arguably greater exposure than England in the event of a pandemic, Government relied on the scientific analysis of the UK-wide National Risk Assessment when compiling the Scottish equivalent, without taking into account discrete Scottish population factors.²⁴ Like the UK Government, the Scottish Government overlooked the findings of the UNCRPD Committee UK country report, especially as regards consultation, emergency planning and data.²⁵ Like the UK Government, Scottish Government was therefore standing on the edge of a pandemic health disaster without acknowledging it and taking appropriate steps to address it.

7. PRECAUTION: Once the pandemic began in this overall lower income and less clinically robust part of the UK, Scotland knew its health limitations and therefore Government put its fear of people dying from Covid above all other harms. For Ken Thomson as the senior civil servant, the harms calculus could not be otherwise.²⁶ Indeed Professor Smith's position as CMO was that Scottish precaution about Covid health risk was a matter of national cultural concern, as much as clinical concern.²⁷ The DPO do not criticise that. But in the midst of an emergency, it was the concern that trumped all else. It meant that, despite Disabled people already being in a state of crisis pre-pandemic, and Scottish government being aware of that, the impact of the NPIs on Disabled people was not sufficiently mitigated.
8. CAPABILITY: Nicola Sturgeon's most pressing post-pandemic reflection is not so much that Government did not have a plan, but that Scotland did not have the underlying capabilities to discharge a plan.²⁸ She referred to this in her Module 2B evidence as the absence of "*baseline capacity*" that included test and trace but extend to other infrastructure.²⁹ The Inquiry has now studied the scenarios for approaching lockdown differently, especially Professor Woolhouse's argument for "*cocooning*" the clinically vulnerable, rather than universally locking down. What these alternative approaches do not always consider is the lack of infrastructure and services in Scotland and in the whole UK, that prevented the state from acting differently, especially with regard to a fragile and overstretched care sector. Taking Disabled people to test the idea, it was not possible to create cocooned

²¹ Calderwood [M1/T15/6/24-7/14]

²² Bamba and Marmot [INQ000195843/54 §138]

²³ Freeman [M1/T11/135/13-19]

²⁴ Russell [M1/T11/55/25-56/10] [T11/59/15-60/3]

²⁵ Cf. UNCRPD UK Country Report (2017) [INQ000182691 §§10-11, 28-29 and 64-65]

²⁶ Thomson [INQ000215495/42 §164] Lamb [T5/42/20-25]

²⁷ Smith [INQ000273978/126 §506] [T5/163/2-165/15] [T5/165/25-166/8]: see also Freeman [T9/144/13-145/8] [146/5-9] [146/24-147/6]

²⁸ Sturgeon [M1/T12/42/5-18]: see also Freeman [T9/147/18-148/2] [149/1-17]

²⁹ Sturgeon [T11/102/24-103/17]: see also Letwin [M1/6/11/22-24]

super-shielding if the state did not have sufficient data, adequate engagement, or proper support systems for those in care settings to deliver such a strategy. That was especially the case when vulnerability to covid harm arose for Disabled people across all ages and society.³⁰ The bulk of the evidence in relation to Sweden's care settings confirms the same conclusion. Whatever the further debates about the wisdom of cocooning, including its oversight of Long Covid, in the summer of 2020, let alone the first six weeks of 2020, one-size lockdowns were as good as anywhere in the four nations of the UK could get.³¹

[2]. PLANNING

9. SUBSTANCE OVER FORM: What happened once Scotland had to plan and respond to a pandemic from scratch? In that assessment, it finds an important critical friend in Professor Cairney. The virtue of the Four Harms Framework was that it named the competing problems facing Government in its decision making, but it was *just* that - "*a statement of a problem not a solution*".³² The Framework may have enabled discussion of the "*holistic*" impact of NPIs,³³ and acted as a useful aid to take account of "*multiple inter-related, non-linear impacts of decisions and interventions*",³⁴ but it was not a detailed guide to decision making.³⁵ The original Framework was commissioned originally as "*a (reasonably high level) document setting out the principles that will guide our decisions on an exit strategy*" and in a contemporaneous email on 17 April 2020 Ken Thomson described it to his First Minister as "*a handling plan and engaging Comms*".³⁶ Of the Four Harms template and the general requirement to promote human rights and equality in the National Performance Framework, Professor Cairney asked rhetorically, "*who wouldn't want a human rights approach*"? His criticism was that the detail of how government made choices about human rights – to operationalise its aspirational language - was "*less visible*".³⁷
10. THE IMPORTANCE OF ASPIRATION: For Disabled people the answer requires unpacking. Human Rights are part of the moral compass of the so-called Scottish model of government and politics.³⁸ The situation is far more complicated in Westminster where government often expresses itself as ambivalent about human rights issues. Without being clear in its commitment to human rights, the UK Government arguably condemned itself

³⁰ Woolhouse [INQ000369765/46-48 §§268-281]. Cf. Woolhouse [T7/83/9-84/24] Sridhar [T6/101/21-103/7] (on no testing capacity) and Smith [INQ000273978 §§480-482, 509] (on risk across all age ranges/society)

³¹ M2 DPO Closing Submission 15.01.24 [INQ000399541/32 §50]. For fatal consequences in Sweden's care sector, see Sridhar [INQ000339838/19 §121] Woolhouse [INQ000370195/217-220] [INQ000369765/41 §§244] Tegnell [INQ000283502 §§27-28, 76]

³² Cairney [T3/31/16-17]

³³ MacDougall [INQ000346964/14 §42]

³⁴ Thomson [INQ000343888/21 §83]

³⁵ Cairney [INQ000274154/57 §163.1] [T3/31/18-33/7]

³⁶ Thomson [INQ000343888/18 §73] Emails 15.04.20-17.04.20 [INQ000222929/1]

³⁷ Cairney [T3/60/2-18]

³⁸ Cairney [INQ000274154/5 §1] National Performance Framework [INQ000102917]

to social mistrust because the most exposed parts of the population during the pandemic found it difficult to believe that their Government necessarily had their best interests at heart. That was the case for Disabled people across all four nations who felt attacked by the UK Government across the austerity years.³⁹ Unlike Scotland and Wales, the UK Government had not established a delivery plan for UNCRPD implementation.⁴⁰

11. HUMAN RIGHTS PRACTICE: However, beyond the language of valuing human rights, the practice and discipline of human rights is a discrete competency. In that respect Scottish Government did not show itself to be particularly progressive. The opinion of the Scottish Human Rights Commission ('SHRC') is that "*there could have been better mainstreaming or cascading of human rights*" from the Scottish Government across different areas of decision-making and delivery, that on balance its coverage of human rights during the pandemic was "*patchy*" and that there was a failure to provide "*systematic, thorough and coherent equalities and human rights impact assessment*" of decisions.⁴¹ The Feeley Review that reported on adult social care during early 2021 described the Government as having "*good strategies but poor implementation*".⁴² The Scottish state is considerate in its value of human rights, but not yet effective or necessarily skilled in their implementation.
12. PROPORTIONALITY: Perhaps the greatest problem with the Four Harms approach was that it was overly binary despite claim to be non-linear. It did not press the decision maker to consider collateral mitigations that could run in tandem with decisions primarily aimed at preventing Covid ill-health. The human rights tool of proportionality⁴³ is particularly suited to that task because it requires establishment of rational connection between measures and aims, consideration of lesser alternatives, and mitigating actions to balance interference with individual rights against the wider interests of the community. That is a decision making methodology that is designed for pandemic and emergency scenarios, and indeed rationalising of difficult choices, and yet in Scotland and the UK it was an approach that was missed in the way that decisions were made.⁴⁴ Liz Lloyd effectively admits as much, that it was "*often the case that a restriction or NPI was applied on a blanket basis and then exemptions were applied, or adjustments made to meet equalities needs*".⁴⁵ That is not a human rights centred approach.

³⁹ Mallick [INQ000280035/23 §§76-77] Nisbet *The War on Disabled People* [INQ000397354/9]

⁴⁰ Civil Society Shadow Report to UN Committee on the CRPD (2017) [INQ000365996/5]. Cf. *A Fairer Scotland for Disabled People* (2016) [INQ000249240]: for Wales see the *Framework For Action on Independent Living* in 2013, updated in 2019 [INQ000177837] and Hutt [INQ000366148/49 §153]

⁴¹ Savage [INQ000221662/23 §§74 and 76] Robertson [INQ000130437/16 Col. 24]

⁴² Independent Review of Adult Social Care in Scotland (2021) ('Feeley') [INQ000280640/12]

⁴³ *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 [2014] 1 AC 700 §§20 and 74

⁴⁴ Robertson [INQ000130437/16 Col. 24]

⁴⁵ Lloyd [INQ000274006/10 §39]: see also Yousaf [T8/156/2-158/1] on initial failure to consider UNCRC

13. CONSEQUENCES: During the pandemic the Government had its Four Harms framework that conceptualised trade-offs between harms, but it did not create a discrete Covid plan for Disabled people that anticipated and prevented hardship. Following from the combination of clinical and cultural precautionary disposition described by Professor Smith, Lamb acknowledged that it remained “*simpler...to understand the health-related harms than it was to understand the social and economic-related harms.*”⁴⁶ For Disabled people there was no plan to cater for the foreseeable collapse in care and independent living, or to deal with the food and resource scarcity that befell those beyond the Highest Risk list.⁴⁷ Although steps are now being taken, there was no plan to immediately obviate digital exclusion.⁴⁸ To paraphrase Dr Elder-Woodward, Government did not prevent excessive utilitarianism in health care and other social care provision.⁴⁹ Nor did it enrol the DPO as emergency co-responders as part of the plan. The upshot is that Government accrued a range of equality impact reports, but somehow failed to develop and implement a comprehensive, Covid specific equality impact strategy.⁵⁰

[3]. MACHINERY

14. DISENGAGEMENT: Professor Cairney’s critique is that under devolution a new style of politics was promised in Scotland, but a Westminster-style system was ultimately delivered.⁵¹ Certainly, the Scottish machinery of Government that has been self-consciously developed since devolution revealed itself during the pandemic to be considerably more similar to Westminster than it wants to be. For the DPO there is much to be said that, as a result of the lack of anticipatory and preventative planning, policy and infrastructure, Government veered into centralised and top-down behaviour.⁵² This initially led to the relative disengagement from DPO compared to pre-pandemic collaboration.⁵³ It also led to a number of witnesses being unsustainably positive about areas where devolved administration was objectively weak, and certainly not significantly better than the rest of the UK. On this the DPO are critical of the extent to which Ministers regarded themselves as having sufficient data to make decisions, whereas that was not the case generally, and certainly not the case in relation to data concerning Disabled people and other socially vulnerable groups.⁵⁴ Similarly, Professor Leitch took the view that

⁴⁶ Lamb [T5/9/10-16]

⁴⁷ Elder-Woodward [T2/66/2-21]

⁴⁸ CAD (June 2020) [INQ000182794/16] COVID-19 Impact on Equality (17.09.2020) [INQ000182793/89-93] Cf. now SG Response to the Social Renewal Advisory Board’s Report [INQ000366047/15,17]

⁴⁹ Elder-Woodward [T2/74/3-8]

⁵⁰ Draft EIA 01.04.20 [INQ000256754/7] EIR (Nov 2020) [INQ000147447/11-12]: see also CAD (June 2020) [INQ000182794/11-14, 16-18] CAD (October 2020) [INQ000182780/ 4, 6 and 8-13]

⁵¹ Cairney [INQ000274154/5 §1.1]: see also [T3/16/2-17/5]

⁵² Cairney [T3/34/5-35/3]

⁵³ Elder-Woodward [INQ000371664/10 §§48-53] and DPO M2A Opening 15.01.24 §3.2

⁵⁴ See Section [7] on Data §§23 to 25 below

communications with Disabled members of the public were sufficiently inclusive or an “*inexact science*” too complex to secure.⁵⁵ That is notwithstanding that inclusive communication was an ongoing core policy commitment of Scottish Government⁵⁶ and identified as an equality impact risk, if not properly delivered, at the outset of the pandemic.⁵⁷ Adequate engagement with DPO could well have prevented such weaknesses, and would never have allowed for such positive self-assessment in Government.

15. MAINSTREAMING WITHOUT LEADING: For Disabled people it remains unclear how the Scottish directorate system led to their needs being freed from the general governmental tendency to silo and afterthink on minority rights. Scotland, like the UK Government, also churns through Ministers and civil servants, jeopardising institutional knowledge and continuity.⁵⁸ As government does not happen in one place, and personnel are always changing, it is the experience of DPO that relationships with those in different Directorates can differ.⁵⁹ Further, the statement that equality is the duty of everyone in Scottish Government is all well and good,⁶⁰ but especially in an emergency, how does co-ordinated action for marginalised groups get done without it being the function of a particular Minister and lead group of civil servants? While non-health Directorates informed the overarching work of Covid-19 Directorates, notably the Equality, Inclusion and Human Rights Directorate (EIHRD) (including the Equality and Human Rights Division), they did so without having a formal role in 'Covid-19 decision-making'.⁶¹ Rather, in Louisa Macdonald's words, the EIHRD played a contributory role to ensure that the Government “*addressed equality and human rights considerations, including; regular stakeholder engagement, enabling intelligence gathering and analysis of key impacts for equality groups*”.⁶² As a notable example of the mainstreaming ideal, Christina McKelvie, as Minister for Older People and Equalities, could therefore issue a powerful memo to all of government reminding it to comply with human rights and to leave no one behind in Covid decision-making.⁶³ However, there was no machinery to drive through a formal Disability policy to ensure that Covid decision-making was actually governed by Disability rights. *Mainstreaming* as a style of governance could not achieve its end without more organisational substance.

⁵⁵ Leitch [T6/81/7-15]

⁵⁶ Macdonald [INQ000340113/6 §§19-20] *A Fairer Scotland For Disabled People* [INQ000256770/40 §89]

⁵⁷ Draft EIA 01.04.20 [INQ000256754/7]

⁵⁸ Cairney [INQ000274154/103 §292(f)]

⁵⁹ Elder-Woodward [T2/60/17-20]

⁶⁰ Macdonald [INQ000340113/2 §7] Swinney [T10/170/11-172/21] Sturgeon [INQ000235213/4 §15]

⁶¹ Cairney [INQ000274154/50 §§145 and 145.1]

⁶² Macdonald [INQ000215482/6 §20]

⁶³ Note to DGs 09.04.20 [INQ000256762]

16. RESILIENCE: The UK-wide civil contingency system, which Scotland was legally and practically tied into, came unstuck during the pandemic. The foundational theory of UK resilience is based on bottom-up response, so-called ‘subsidiarity’. However, where the emergency was everywhere, and not place specific, then whatever the qualities of the relationship between central and local government in Scotland, and whatever the qualities of individual local authority response, the overall machinery of government was not sufficiently developed to withstand a whole-system emergency. Certainly, no better than England. A number of reports have accepted the disjunction between central government aspiration and the capacity of the locality, including an adequately funded Third Sector, to deliver.⁶⁴ Nicola Dickie, not surprisingly, recognised on behalf of Scottish Local Authorities that partnership with the Third Sector lacked consistent coverage and could be variable.⁶⁵ What is surprising is Dickie’s repeated statements, without any criticism, that most Local Authorities in self-assessments regarded themselves when asked as ready to respond to the needs of vulnerable groups in the pandemic, including Disabled people.⁶⁶ In its Minute of March 2020 the Cabinet was far too sanguine that this would happen when it presupposed that COSLA could coordinate on the care sector in conjunction with organisations like Scottish Care “*to achieve best outcomes*”.⁶⁷ Likewise, Jim Swinney was too optimistic that the Scottish Resilience Partnership would act to coalesce the voluntary sector.⁶⁸ Local government responders cannot be left to self-assess their own readiness in that way; not least because their optimism bias and states of denial can then become the optimism bias and denial of central government.

[4]. EXPERTISE

17. NARROWNESS: The DPO do not take issue with the integrity of the scientific advice or the degree to which a range of pluralist views were shared about how best to suppress the virus.⁶⁹ It was the lack of expert advice on mitigating NPIs that concerns them. The Chief Social Policy Adviser Dr Carol Tannahill, whose role was to lead in Government on the consideration of social harm, thought that the capacity of the expert meetings to fully consider and understand the impacts on different population sub-groups “*was less than ideal*”, and that “*more weight was placed on statistical modelling and biomedical science than on wider human experience and social science*”.⁷⁰ A similar observation is made by

⁶⁴ October 2020 [INQ000130421/38-39] Good Governance Report 28.04.20 [INQ000351044/33] Scottish Community Alliance (‘SCA’) [M2 INQ000075375/1-6] Tannahill [INQ000375323/26 §79]

⁶⁵ Dickie [M1 INQ000147705/9 §4.8]

⁶⁶ Dickie [M1 INQ000147705/21 §4.60] [INQ000273700/8 §§3.14]

⁶⁷ Cabinet Minute 17.03.20 [INQ000078529/3 §12]

⁶⁸ DPO M2A Opening 15.01.24 [§3.3] Swinney [M1/T12/84/16-24] Dickie [INQ000273700/14-15 §§6.1-6.2]

⁶⁹ Morris [T6/223/1-7] Sridhar [INQ000339838/6 §36] [T6/117/24-119/3] Reicher [T7/112/25-113/10]

⁷⁰ Tannahill [INQ000375323/7 §17] McMenamin [INQ000360968/74 §26.4]

the Chief Nursing Officer, Fiona McQueen, who admits “*it was not necessarily clear to me how SG took into account the vulnerability of people who had protected characteristics in creating the response*”.⁷¹ This is a key criticism made by Professor Woolhouse because it inevitably skewed the advice in terms of tunnel focus on virus related harm.⁷² The outcome was that, while Scotland needed “*a Scottish lens to the advice that was coming from SAGE*”⁷³ and did not want to be dependent on SAGE, the advice it procured was heavily weighted to virus suppression and narrow in its scientific understanding of broader harms or the data that could inform analysis of such harms. Given Scottish Government had long term policy recognition of health inequalities, this is an outcome it had the wisdom to avoid in the manner in which it procured its scientific advice.⁷⁴

18. ARBITRARINESS: Without formal and institutionalised mechanisms for the provision of expert advice, there was an arbitrariness in the manner in which Scottish Government Covid Advisory Group (‘SGCAG’) and its associated advice groups were created. SGCAG itself was born in reaction to Scottish Ministers wanting more direct and hands-on advice. It benefitted from the broader social science expertise of Professors Reicher and Sridhar, but it was not multi-disciplinary; and it lacked structured access to lived expertise.⁷⁵ While Reicher played a significant role in crafting a message of collective engagement of all of Scotland’s population, he himself was concerned that considerable parts of society who were socio-economically disadvantaged were not engaged with at all.⁷⁶ Even when it came to creating sub-groups to supplement SGCAG expertise and capacity to advise, sub-groups were made for children and young people in education⁷⁷ with an additional group on ethnicity,⁷⁸ but not for Disabled people. However valid these groups were, their creation echoes the rather random prioritisation seen at Westminster.⁷⁹ The Delivery Plan on the UNCRPD declared that Disabled people are experts in what needs to change.⁸⁰ However, they were not afforded real parity of esteem as experts during the pandemic.

[5]. RECOGNITION

19. PARADOX: Disabled people in Scotland therefore endured a pandemic paradox in that their situation was simultaneously recognised and overlooked by government, and in that respect, the weakness of the ‘Scottish Model’ is revealed. Devolved Government was

⁷¹ McQueen [INQ000273977/7 §19]

⁷² Woolhouse [INQ000369765/5 §§25-26, 25 §153] Caesar [INQ000292482/6 §21]

⁷³ Rowan [T5/211/11-14] [INQ000274006/17 §69]

⁷⁴ Cairney [INQ000274154/117 §347]

⁷⁵ Reicher [INQ000370347/9 §20]

⁷⁶ Reicher [INQ000370347/11 §§23-24]

⁷⁷ Tannahill [INQ000375323/7 §§19-20] Morris [INQ000346264/23 §93]

⁷⁸ Macdonald [INQ000340113/10 §§34-37] [INQ0000215482/9 §29] [20 §§73-75]

⁷⁹ M2 DPO Closing Submission 15.01.24 [INQ000399541/15 §§26-27] Tannahill [INQ000375323/23 §69]

⁸⁰ A Fairer Scotland For Disabled People [INQ000256770/8]

good at speaking of “we” not “I”, at galvanising collective resilience and civic connectedness.⁸¹ It empathised with Disabled people and articulated a social model that ‘disability’ and ‘vulnerability’ are both made and chosen for, not by, Disabled people.⁸² All of that is positive. But there was a gulf between aspiration and deed, and it was all the more experienced by Disabled people because Government’s actual decision-making was focused so highly on a medical orientated model of saving life. It was not particularly inventive or mitigating in its prevention of social harm.

20. REGRESSION: By late April and early May, DPO were imploring Government to integrate their expertise into NPI design, especially as regards inclusive communication and adequate packages to maintain safety in the care sector and to prevent the collapse of independent living.⁸³ The DNACPR issue was particularly calamitous, not because it was ever Government policy or aim, but because the tendency for Disabled people to be asked to sign notices grew so rapidly and unaccountably.⁸⁴ Even once Government started meeting DPO and other representative groups, it was not necessarily joined-up in its recognition of Disabled people. A major Scottish Government study ‘Understanding Inequalities in Wellbeing During the Pandemic’ published in June 2021 found that other than access to support for therapies needed for their disabilities “*it was more difficult to identify unique challenges*” that faced Disabled people “*perhaps...because of the diverse nature of the sub-group*”.⁸⁵ In the midst of crisis it was as if the gains of having the social model of disability recognised as Government policy fell away and the endeavour of Disabled people to gain recognition beyond perennial focus on their individual impairment received a major setback.

[6]. ENGAGEMENT

21. THEORY: There is a consensus in Scotland amongst politicians, civil servants and stakeholders that government engagement with a broad range of social groups is a good thing and that it is incumbent on government to build wide policy communities. One of the major recommendations post-pandemic is to enable more citizen engagement.⁸⁶ Developed collaboration with civil society is regarded as a Scottish political virtue not just to enhance the social contract, but to improve the quality of decision-making.

⁸¹ Reicher [INQ000370347/5 §§12-13] [T7/92/25-94/12] [T7/107/25-110/25]

⁸² DPO M2A Opening 15.01.24 §3.15

⁸³ SILC 17.04.20 [INQ000366026] SILC 21.04.20 [INQ000366025] IS 11.05.20 [INQ000366024]

⁸⁴ Elder-Woodward [INQ000371664/5 §19] Macaskill [INQ000224524/14 §§69-70] Farrell & Froude [INQ000366008/190-201]

⁸⁵ SG: Understanding Inequalities in Wellbeing During the Pandemic 09.06.21 [INQ000131034/34]

⁸⁶ SHRC [INQ000130421/11 §18] Feeley [INQ000280640/6, 22, 73] COSLA [INQ000273690/29]

22. REALITY: The granting of access, of having a meeting and remaining in a conversation is valuable but that is not real co-production and co-design.⁸⁷ The civil service account of the DPO meetings that took place after May 2020 confirms, as DPO evidence suggests, that these were fortnightly encounters with no set agenda, where issues were shared, and some updates were given, before they became monthly and then stopped.⁸⁸ In these encounters DPO were not equal partners in policy making. Whilst there are exceptions, DPO were not generally informed about the consequences of their interventions. There were no feedback loops, agreed methodology or external reviews. As DPO in general do not have secured, long-term funding to do this work they cannot sustain their seat at the table even when it is given. Unlike the Scottish TUC they did not enjoy as settled a place in the policy community and the real depth of their interaction with the Government was not one of partnership.⁸⁹ Engagement in Dr Elder-Woodward's terms is "*started and ended by authority*" of the state.⁹⁰ It is a gift without formal obligation or accountability as opposed to a human right and a means to make delivery of protection more real.

[7]. DATA

23. FOOTHILLS: As in the rest of the UK, there were serious shortcomings of data collection and deployment on behalf of Disabled people in Scotland. Despite recommendations to develop data intelligence in Scotland dating back more than a decade,⁹¹ the data infrastructure was minimal in 2020. Lamb and Macdonald accepted that the quality of data around the whole of the health and social care system was not sufficient.⁹² McKelvie told the Scottish Parliament in June 2020 that the Government did not have clear data on how many people had communication needs and in what respect.⁹³ For Professor Smith, as CMO, overall lack of data was the critical deficit that prevented an integrated "*cross-government-all-society*" approach to health inequalities during the pandemic, including with regard to Disabled people.⁹⁴ Government initiatives that, importantly, only began during 2021 referred to "*significant gaps in Scotland's equality evidence base*".⁹⁵ PHS still call data infrastructure a "*work in progress*".⁹⁶ As a public health data specialist Professor Morris described data collection to the Inquiry as "*still in the foothills*" of where it needs to be and lacks the sufficient capacity to create new insights.⁹⁷

⁸⁷ Cairney [T3/22/15-23/6]: Cf. Cairney [INQ000274154 §§1(3), 10(a) 22(c)]

⁸⁸ Macdonald [INQ000340113/9 §§29-31]: see also Elder-Woodward [INQ000371664/12-15 §§58-70]

⁸⁹ Foyer [INQ000103538/12 §35] [T2/30/19-31/25]

⁹⁰ Elder-Woodward [T2/70/21-71/11]

⁹¹ *Equally Well* (2008) [INQ000228387/61-62] Woolhouse [T7/14/11-22] (on influenza 2009/2010)

⁹² Lamb [T5/24/8-17] Macdonald [INQ000215482/18 §65]: see also Freeman [T9/192/23-193/10]

⁹³ McKelvie [INQ000256755/6 Cols 3-4]

⁹⁴ Smith [T5/193/7-195/11]: see also [INQ000273978/183-185 §§720, 722 and 726]

⁹⁵ CAD (May 2021) [INQ000292566/3] Halliday [INQ000274011/14 §36]

⁹⁶ Heald [T2/115/9-15]

⁹⁷ Morris [T6/182/20-183/3]

24. CONSEQUENCE: During the pandemic that meant that the scientific advice often considered the position of disadvantaged groups, including Disabled people, by way of abstraction rather than on the basis of actual data.⁹⁸ Lamb accepted that because of data gaps at a central level, Government could not appreciate the extent of the two-tier experience between those on the Higher Risk list and those who were not.⁹⁹ Decisions concerning the care sector were made in a state of (pre-pandemic) institutionalised data ignorance,¹⁰⁰ and consequently without sufficient information or modelling when it truly mattered.¹⁰¹ The extent to which data deficiency was the Achilles heel of Covid decision-making was therefore the same for the Scottish Government as it was the UK Government,¹⁰² but the problem was not so particularly emphasised by Scottish Ministers at the time, or indeed in their statements to this Inquiry, because they apparently view the issue narrowly in terms of spread and fatality.¹⁰³ It was a defining feature of residential and domiciliary care during the pandemic how little was known; how much people were not counted and consequently (whatever the Government's aspirations), the uncounted counted for less.
25. SOLUTION: For Disabled people, the problems with data exemplifies what was sorely missed out on by the absence of co-production structures.¹⁰⁴ When ground level community networks, local authorities and central government combine in the collection of data, that not only builds trust but promotes insight. Professor Freeguard refers to this in his Inquiry report conclusion.¹⁰⁵ Several Lessons Learned studies have said the same.¹⁰⁶ It was Inclusion Scotland that produced critical data surveys in the early stage of the pandemic to draw attention to the problems that Disabled people were facing. This was part of a UK wide pattern in which Third Sector groups, anchored in hyper-local communities, sourced core intelligence.¹⁰⁷ However, for the first year of the pandemic Scotland failed to produce national statistics concerning Disabled people, despite the known greater risks of health inequalities that Disabled people faced, and DPO pressing to correct the problem.¹⁰⁸ It is in recognition of the Covid failures on data that the National

⁹⁸ Morris [T6/201/20-203/6] [T6/204/23-205/16] Woolhouse [INQ000369765/13 §§80-83] Tannahill [INQ000375323/7 §17]: see also Swinney [T10/161/25-162/14]

⁹⁹ Lamb [T5/41/12-20]

¹⁰⁰ PHS [INQ000300280/95-96 §§7.9.1-7.9.4] Farrell & Frowde [INQ000366008/43-44]: see also Cairney [INQ000274154/110-111 §§316-323]

¹⁰¹ Halliday [INQ000274011/8 §19] [17 §47] MacDougall [T2/178/20-24] Heald [T2/117/15-120/18] [INQ000286854/5-7 Cols 2-5]

¹⁰² M2 DPO Closing Submission 15.01.24 [INQ000399541/23-25 §§35-37]

¹⁰³ Swinney [T10/214/17-216/1] Freeman [INQ000273984/19 §78] Yousaf [INQ000273956/25 §113]

¹⁰⁴ CAD (May 2021) [INQ000292566/9] on the trust deficit regarding local communities supplying data

¹⁰⁵ Freeguard [INQ000260629/48 §§95, 97] [52 §§113-4]: see also Bell [M1/T20/19/16-22//7] Harries [M2/T28/38/16-39/2] O'Donnell *The Covid Tragedy: following the science or the sciences?*, IFS Annual Lecture [INQ000189722/21-22]

¹⁰⁶ SHRC October 2020 [INQ000130421/8 §§5-7]

¹⁰⁷ IS [INQ000184673] Watson & Shakespeare [INQ000280067/12 §38] SCA [INQ000075375/1-6]

¹⁰⁸ NRS 24.03.21 [INQ000366002] Elder-Woodward [INQ000371664 §§65 and 98-101] [INQ000215606]

Care Service Bill currently before the Scottish Parliament would create statutory duties in relation to care records and national standards for compilation, sharing and compliance.¹⁰⁹ The Covid pandemic has revealed that data is absolutely an issue of human rights and humanity. Finding trustworthy and collaborative ways to know it and use it should become government imperative.

[8]. PROTECTION

26. COLLAPSE: In consequence of all these system weaknesses, levels of protection for Disabled people in Scotland were simply not what they could or should have been. The Inquiry has the personal accounts from those on the impact video. Idrees spoke of how his world “*turned upside down*”. Dr Elder-Woodward used the phrase “*avalanche of issues*” in the emails he wrote with increasing desperation. His personal account, despite all his connections as an academic and public figure in Scotland, is that the weight of change brought about by NPIs caused him to suffer nervous and physical breakdown.¹¹⁰ The survey of 800 Disabled people conducted by Inclusion Scotland across the month of April 2020 showed that 1 in 8 of them broke shielding rules, out of necessity, in order to acquire food or medicine.¹¹¹ The “*previously creaking and fragile system*” of Scottish Care homes was exposed.¹¹² More broadly in the care sector, investigation by the SHRC concluded that the pandemic had produced a “*profound impact on the way in which social care support has been delivered in Scotland, leading to significant gaps in the realisation of rights for people who rely on such support, including unpaid carers*”. As with other UK based surveys, it established that a “*considerable proportion of people who use social care support at home have experienced either a reduction or complete withdrawal of support*” and that “*the withdrawals and reductions seen in the early months of the pandemic happened rapidly, without either adequate communication or assessment of the proportionality of such decisions*”.¹¹³ As with UK Government Ministers, the politicians and bureaucrats of Scotland were blindsided by their lack of knowledge or involvement in the localised, mixed economy, fragmented care system.¹¹⁴ The collapse of that system took place in the Scottish circumstances in which on average 37% of those accessing social care support and services are Disabled people.¹¹⁵

27. FILLING THE ABYSS: Consequently, in October 2020, Inclusion Scotland issued a report *Rights at Risk* where it criticised the Scottish Government for the “*abyss between the*

¹⁰⁹ NCS Bill (2022) [INQ000280641/20-22 Cols 36 and 37] Feeley [INQ000280640/49 and 54 §25]

¹¹⁰ Elder-Woodward [INQ000274175/3 and 6]

¹¹¹ *Rights At Risk Report* [INQ000366004/16]: see also CAD (June 2020) [INQ000182794/13]

¹¹² Feeley [INQ0002806040/76] McQueen [INQ000273977/10 §27]: see also [INQ000087225/296]

¹¹³ SHRC October 2020 [INQ000130421/5 §§1 and 2]

¹¹⁴ Freeman [T9/190/24-191/4] [T9/191/13-21] Lamb [M1/T11/95/15-24]

¹¹⁵ Inclusion Scotland [INQ000184673/1]

rhetoric of national policies and what happens on the ground".¹¹⁶ The report's recommendations reflect various concerns of DPO that arise in this module, but are likely to arise for several Inquiry modules: "(1) Stop stigmatising Disabled people as vulnerable and problematic. (2) Promote, don't diminish, our human rights as Disabled people by ensuring human rights-based approaches to policies and practices are the standard including by taking action to incorporate the UNCRPD into Scots law. (3) Involve us, the experts in our own lives, both now and when we build the 'new normal'. (4) Support our national and local disabled people's organisations so that we can be involved. (5) Communicate with us and inform us in ways that are accessible to us".

[9]. REDISTRIBUTION

28. RECOGNITION IS NOT ENOUGH: Dr Elder-Woodward's final point in evidence was that the resilience of Disabled people during Covid was not possible without social and economic rights.¹¹⁷ Judith Robinson, the Chair of the SHRC, told the Scottish Parliament in February 2021 that "*strengthening people's protections in relation to economic and social rights is absolutely at the core of what [is] at stake in the pandemic.*"¹¹⁸ Recognition of Disabled people as equal citizens will never be enough without redistribution. On this the Scottish Government points to an anomaly of devolution that it is responsible for public health, but due to lack of UK Government funding was unable to fund large structural responses to Covid. This affected not just length of furlough, but paying the care sector workforce a sufficient sum not to work; or substantially raising carer's allowance, including the capacity to pay for temporary carers to step in when voluntary carers caught Covid.¹¹⁹ However, the SHRC has emphasised that Scottish Government can develop its own method of what it calls 'Human Rights Based Budgeting': "*a human rights based approach to future public finances, which considers the impact of financial decisions on the rights of older and disabled people and closely interrogates claims in relation to limited resources*".¹²⁰ Likewise the Feely Review believes that while change does not come without cost, it is not only about costs, and relies on replacing old thinking with new thinking about the value of care as a guiding social principle.¹²¹
29. HUMAN RIGHTS BUDGETING: There is a human rights method to co-produce and co-design the way that budgets are made and spent. At the early stages of Covid, Scottish

¹¹⁶ *Rights At Risk Report* [INQ000366004/3, 31-32] DPO M2A Opening 15.01.24 p12 §3.22

¹¹⁷ Elder-Woodward [T2/73/19-24]

¹¹⁸ Robertson [INQ000130437/12 Col. 16]

¹¹⁹ Sturgeon [INQ000235213/31-32 §§102-104] EIA Test and Protect (March 2021) [INQ000147449/21, 24, 27-28] Reicher [INQ000370347 §§45, 47, 67-68, §131] [T7/124/2-125/23] Woolhouse [INQ000369765 /66 §386] Smith [INQ000273978/157 §622] Foyer [T2/46/5-18]: see also Vallance [INQ000273901/164] Halpern [INQ000391415/2 §§5-8] Heneghan [M2 INQ000280651 /29 §104]

¹²⁰ SHRC (October 2020) [INQ000130421/9 §11, 43 §6]

¹²¹ Feeley [INQ000280640/88 and 98 §§49-53]

Government announced that £350 million would be made available to support depleted local services. Similarly, £100 million was released to Councils to stop social care from being withdrawn or reduced.¹²² Obviously these are important sums. But the money was not accompanied by a sufficiently detailed program of how to channel it to everyone who needed it, and how to transparently audit its effectiveness to support those most impacted by the pandemic in economic and social terms.¹²³ There were complaints of “*mindboggling complexity*”, of “*lack of transparency, accountability and assurance in the system as a whole*” and that money was “*tied up in bureaucracy*” and difficult to access.¹²⁴ Despite the Scottish Government making it clear that emergency funding was dependant on effective local partnership, these schemes were not designed *with and for* DPO and Disabled people who would know how to do that. Its result was not as sufficiently redistributive or effective as it could have been.

PART B: REFLECTION

GOVERNANCE

30. **GOVERNORS**: What does the treatment of Disabled people in Scotland demonstrate about their place under this devolved part of UK government? In marked ways in Scotland these were more experienced governors than their Westminster counterparts. Nicola Sturgeon had served as a Cabinet Secretary of Health. She had been part of the effort to own health inequalities as a central issue for all Scottish Government and had experience of responding to Swine flu.¹²⁵ Jeane Freeman was a respected successor and had worked closely with Disabled people and other socially vulnerable groups. She had, for instance, sponsored the UNCRPD Delivery plan, with Dr Elder-Woodward, in the joint introductory forewords.¹²⁶ He could write directly to her, and she and her colleagues would respond.¹²⁷
31. **BUREAUCRATS**: Key civil servants who served Scottish Government decision makers had backgrounds in social policy, such that bureaucracy in Scotland does not look as divorced from the social dimension of decision making in the way that Helen McNamara believed the Cabinet office in London has become.¹²⁸ If the Inquiry studies the CVs of the Scottish Government researcher, its Social Policy Adviser, and its Director General for Equalities, it will find people who are grounded in social policy.¹²⁹ While questions have been asked

¹²² Campbell [INQ000273995/4 §§21 and 23-28]

¹²³ Elder-Woodward [INQ000371664/19 §§95-96] [T2/72/23-73/5] Robertson [INQ000130437/13 Col. 18] Forbes [T10/58/19-60/6] [T10/71/17-74/25]

¹²⁴ Healthcare Scot 18.08.20 [INQ000366050] and 19.08.20 [INQ000366049]

¹²⁵ Sturgeon [INQ000339033/2 §7] [T11/93/16-95/7]

¹²⁶ *A Fairer Scotland For Disabled People* [INQ000256770/4-6]

¹²⁷ Elder-Woodward [INQ000371664/12 §56] Elder-Woodward-Freeman Email 17.04.20 [INQ000366027]

¹²⁸ MacNamara [INQ000273841/39 §71] [T16/112/15-114/16] M2 DPO Closing [INQ000399541/33 §51]

¹²⁹ MacDougall [INQ000346964 §11] Tannahill [INQ000375323 §§4-5] Macdonald [INQ000215482 §20]

of Professor Smith not having a background in epidemiology, he did have a background as a GP in North Lanarkshire and would have understood health inequalities in a very practical way.¹³⁰

32. GOVERNMENT: Cumulatively this may have been a group of governors and administrators who were part of a more functional working environment and hence better equipped to deal with this crisis. Equally, Scotland might want to hold the Scottish Government to a higher standard than the UK Government, which for various reasons articulated to the Inquiry in Module 2 has become a hostile environment to a range of human rights issues and marginalised groups and was sub-optimum in leadership and ability to govern.¹³¹
33. CANDOUR: However, on the gulf between words and outcomes, there is an asymmetry between Scottish government competence in communications compared to delivery. That may have overly disposed it to focus too much on its reputation; and in consequence, it seriously erred in destroying much of its WhatsApp conversations. A state practice to work around the reputational embarrassment of the Freedom of Information Act is not good governance. The review of the destruction of draft statements after the Hillsborough Disaster characterised this as “*the patronising disposition of unaccountable power*”.¹³² It breaches the public law duty of candour to disclose not just how a decision maker wants to be seen, but *the good, the bad and the ugly* of decision making.¹³³ A UK wide statutory law of candour is required.¹³⁴
34. RENEWAL: Finally, while the Inquiry should rightly assess errors in mitigating social harm, it is also right to reflect that, as regards inequalities, these were Ministers who in the summer of 2020 commissioned the Review of Adult Social Services (reporting in February 2021) and established the Social Renewal Advisory Board (reporting in January 2021). The former has made the most developed case for a National Care Service that the UK has ever seen, and was headed by Derek Feeley (Lamb’s predecessor as Director General) but also involved Dr Elder-Woodward as a panel advisor.¹³⁵ The latter, which has advocated a range of actions which the DPO support, combined Ministers, Civil Servants such as Louisa Macdonald (who has considerable experience in Third sector leadership),¹³⁶ and civil society representatives, including Tressa Burke of the Glasgow

¹³⁰ Sturgeon [INQ000354263/2] Shridhar [INQ000370195/161]

¹³¹ M2 DPO Closing [INQ000399541/29 §§47-49 and 56]

¹³² Rev. James Jones, *The Patronising Disposition of Unaccountable Power – A report to ensure the pain and suffering of the Hillsborough families is not repeated* (Nov 2017 HC 511)

¹³³ R (*Citizens UK*) v SSHD [2018] EWCA Civ 1812 §106, R (Hoareau) v SFCO [2018] EWHC 1508 §§13-23, Re *Brenda Downes* [2006] NIQB 77 §31

¹³⁴ *When Things Go Wrong The response of the justice system A Report by JUSTICE* Chair of the Committee Sir Robert Owen (2020) §§4.39-4.49

¹³⁵ Feeley [INQ000280640/1-2, 29, 108] Lamb [INQ000346089/25 §93]

¹³⁶ Macdonald [INQ000215482/6 §20]

Disability Alliance.¹³⁷ Both reports make powerful cases for the government to live up to the aspirations that it sometimes failed to deliver on during the pandemic.

HUMAN RIGHTS

35. INCORPORATION: Which leads to both the Scottish and UK wide problem, that the range of essential rights relevant to planning, counting and engagement with Disabled people as part of emergency preparedness and response are not enforceable under Scots or UK law, which meant they were subject to the judgment of Government alone and not the rule of law as well. The recommendation of several independent expert reviews, and broadly supported by the Scottish Government, is that incorporation of the UNCRPD should now take place, and if Scotland has to tailor incorporation to exclusively devolved matters, so be it.¹³⁸ It is a common trope against human rights that their incorporation will hinder the democratic separation of powers or undermine legislative sovereignty. The Chair will know – as a matter of human rights law - that courts will be cautious to intervene in government decision-making in times of emergency, including where individual rights are pleaded against government judgment about scarce resources and competing interests in protecting the wider community. Judicial Review of general lockdown measures brought to court during the pandemic underscored this.¹³⁹ The better view of human rights is that decision-makers can become more competent at complying with human rights through the practice of legal duty, discharge of the obligation of candour to courts, and where necessary, the potential for judicial correction. To return to Professor Cairney’s critique, justiciable rights are one of the means that ensure words become deeds.
36. FUNCTION: There is always a risk of seeing more law as an answer to everything, but it remains a fact of the UK Covid experience that the very practical measures that were missing for Disabled people during Government decision-making were rights they enjoyed under international law, but had not been institutionalised into domestic law, politics, or society. One of the ways that can happen is through going to court. During the pandemic in England the Metropolitan police were found not to have been sufficiently rigorous in their consideration of the right to protest.¹⁴⁰ In Scotland, the same occurred in the blanket approach to closing places of worship when less intrusive measures were possible, but not sufficiently considered.¹⁴¹ The function of human rights – exemplified by these cases

¹³⁷ SRAB [INQ000182792/8-9,11, 31-32, 42-44, 48-54, 62-64] Sommerville [INQ000354415 /2 §8] Campbell [INQ000273995/13 §§61-62, 64] Macdonald [INQ000340113/12 §§43-46] CPSMG [INQ000256771/1 §2]

¹³⁸ SHRC [INQ000130421/11 §§22-23] SRAB [INQ000182792/42] SG Response [INQ000366047/17] Cf *Reference by the Advocate General for Scotland – UNCRC (Scotland)* [2021] UKSC 42

¹³⁹ *KLR v Scottish Ministers* [2020] CSOH 98 [INQ000222933] (§§39-41, 46) following *R (Dolan) v SSHSC* [2020] EWCA Civ 1605 both in its approach to domestic public law (§§86-90) and Art. 8 ECHR (§97)

¹⁴⁰ *Leigh v The Commissioner of Police of the Metropolis* [2022] EWHC 527 (Admin)

¹⁴¹ *Rev Dr Phillips JR on the Closure of Places of Worship in Scotland* [2021] CSOH 32 [INQ000222932]

that did reach court - is that they are there to ensure that Executive and parliament reach the best version of themselves, so that future cases need not be brought.

37. HUMANITY: Given the extent to which the evidence in this module has highlighted competing politics between the UK and Scottish Governments, it is important for DPO to emphasise their overriding concern, that humanity is sovereign over state. There is a human rights dimension to this principle of humanity that finds recognition in the common law (of English speaking peoples) as well as international human rights law, that respect for human dignity should be an overriding societal value and thus animate everything that government does.¹⁴² In the UNCRPD “dignity” is referred to three times in the Preamble and in six of the substantive articles.¹⁴³ It is included in the opening Recital (a) recalling “*the inherent dignity and worth and the equal and inalienable rights of all members of the human family*”, in the Treaty’s core purpose in Article 1 “*to promote respect for...inherent dignity*”, and in the first of its General Principles of interpretation in Article 3(a) being “*Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons*”. Article 3(d) requires “*Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity*” (Art. 3(d)). For that reason, the notion of care, as advanced by the Feeley Review, requires a new paradigm. Its aim, as spearheaded by a responsive state, should be “*human rights, wellbeing, independent living and equity, as well as people in communities and society who care for each other*”.¹⁴⁴

CONCLUSION

38. CRITICAL COMPARISON: In the Westminster module to this Inquiry the DPO challenged the extent to which the UK state ignored their rights. In this module they challenge the extent to which the devolved aspect of the state in Scotland has failed to deliver on their rights despite declaring its intention to do so. Proclaiming that government cares about human rights is not enough. The DPO see full incorporation of the UNCRPD as a means to institutionalise their rights more formally, and for government to learn to better respect human rights.
39. MORAL ECONOMY: But what of the suggestion that human rights will never be enough without social and economic rights? That the woes of Covid governance essentially come down to economic determinism and a failure of the dominant free market philosophies in the wealthier western nations to protect the poorer parts of their populations. This Inquiry

¹⁴² *R (A, B, C, X and Y) v E. Sussex CC* [2003] EWHC 167 (Admin) §86, *R (Osborn) v Parole Board* [2013] UKSC 61 §68, *R (A and B) v SSH* [2017] UKSC 41 §93, *Pretty v UK* (2002) 35 EHRR 1 §65, *Bouyid v Belgium* (2016) 62 EHRR 32 §§ 45-47

¹⁴³ Recitals (a), (h) and (y), Arts 1, 3(a), 8(1)(a), 16(4), 25(1)(a) and 25(d)

¹⁴⁴ Feeley [INQ00002806040/20, 23-24 and 26-31] NCS Bill (2022) [INQ000280641 /5 Cl. 1(a)(i) and (e)]

module has taken place in the nation of Adam Smith and one of the birth places of the Enlightenment. Smith may be famous for extolling the virtues of “*the invisible hand*” of the free market in his *Wealth of Nations*. However, his earlier book on morals, the *Theory of Moral Sentiments* (published in 1759) has something to say about the ethics of care as the source of both a good life and good governance. He told his 18th century audience that the secret of happiness was “*to be loved*” and “*to be lovely*”.¹⁴⁵ Broadly translated into modern language that accords with a submission that DPO have already made to the Inquiry.¹⁴⁶ That the principal value of good government should be *to care about caring and being cared for* and that we should favour such politics, economics and systems as sustain that way of relating to one another.

40. JUSTICE: The evidence in this Inquiry lays bare that the pandemic and its counter measures were wretchedly unjust. So as the Chair continues her investigation of Covid decision-making across the Four Nations the DPO ask her to keep thinking about how we all are vulnerable to some degree, at some time. That the capacity to care is at least as fundamental to what it means to be human as the capacity to reason.¹⁴⁷ And so to do justice to the unequal harms of Covid, this Inquiry (along with the public it serves) must find ways to enable the ethics and practice of mutual care to become both more possible and more sustainable.

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23 FEBRUARY 2024

¹⁴⁵ A. Smith, *Theory of Moral Sentiments* 1759, 1790 (Penguin 250th anniversary, 2009) Pt III, Ch. 2 p 136

¹⁴⁶ M2 DPO Closing [INQ000399541/36-38 §§57-60]

¹⁴⁷ DPO M2 Opening 26.09.23 §§1.7-1.10