

PE1741/D

Scottish Government submission of 28 October 2019

The Scottish Government want to ensure people with a learning disability live healthier lives, enjoy choice and control over the services they use, and are supported to be independent and active citizens.

A learning disability is significant and lifelong. It starts before adulthood and affects the person's development. This means that a person with a learning disability will be likely to need help to understand information, learn skills and live a fulfilling life. Some people with learning disabilities will also have healthcare needs and require support to communicate. An example of a learning disability is Downs Syndrome. It is different than a learning difficulty; which is more common but the proposed law does make reference to. An example of a learning difficulty is dyslexia or ADHD.

In the Scottish Government consultation for the Keys to Life strategy, in which People First were heavily involved, these issues were raised. The 2019-20 implementation plan of the keys to life was published in March 2019 in partnership with SCLD. Many of the issues within this petition are key priorities in this implementation plan.

As there are several issues within the petition, the Scottish Government response will be laid out under each issue (in bold for ease).

The independent reviews of Learning Disability and Autism and the Mental Health Act are important and interconnected pieces of work which will address issues that are affecting the lives of those with incapacity and mental disorder. As well as the issues raised in the petition including: **the definition of a learning disability, the procedures set out in the criminal justice system and the difference between experiencing mental distress and having a permanent life-long impairment of intellect.**

Scottish mental health and incapacity legislation is based on rights and principles. Our legislation is compliant with the Convention and has never been found, in part or in whole, by the European Court of Human Rights to be incompatible with the Convention.

The reviews of the Mental Health Act and Learning Disability and Autism and the ongoing work on Adults with Incapacity reform are important and interconnected pieces of work which will address issues that are affecting the lives of those with incapacity and mental disorder. It would be inappropriate to consider wider changes to legislation until these key pieces of work have reached conclusions.

We think the best approach at this moment in time is to consider the views, findings and recommendations as they arise from the current work streams. These key pieces of work are evidence led with a heavy focus on stakeholder engagement and will therefore play a major role in helping shape the future of mental health and incapacity legislation.

Allow access to work and earnings

The European Convention on Human Rights and the Human Rights Act do not include a specific right to work however the Equalities Act 2010 protects individuals from discrimination, including work discrimination, in relation to a number of protected characteristics including disability.

Article 27 of the United Nations Convention of the Rights of Persons with Disabilities (UNCRPD) does provide for a right to work and employment. However the UNCRPD is not incorporated into UK law in the same way as the ECHR is. Whilst it would be achievable to give a right to equal access to employment /work it would not be within our gift to give a specific right to work

The Scottish Government believes that those with a learning disability should have equal opportunity to work as everyone else. The Keys to Life strategy has committed to tackle the barriers for people with learning disabilities to enter work to address the disparity in outcomes for work (7% employment rate for people with learning disabilities vs 70% in the general population). This is a key priority and there is ongoing work to change attitudes among employers as well as supporting those with learning disabilities into work.

The Scottish Government has committed in A Fairer Scotland for Disabled People to halve the disability employment gap and we have engaged with stakeholders, including people with learning disabilities on how to achieve this and will continue to do so.

Guarantee the right to relationships and family life

The European Convention on Human Rights and the Human Rights Act 1998 protect various fundamental rights and freedoms and provide the framework for rights in the UK. In particular Article 8 of the Convention contains a right to respect for an individual's private and family life and Article 12 is the right to marry:

These rights apply to everyone (although Human Rights law is complex and can often involve a balancing exercise especially where there are competing rights involved).

The Scottish Government believes that those with a learning disability should have equal opportunity for relationships and family life as everyone else. While family life and relationships cannot be guaranteed, the Keys to Life strategy has committed to enable people with learning disabilities have the same opportunities to create relationships and ensure that they have the same rights as a parent.

Guarantee access to education alongside other non-disabled students

The presumption to provide education in a mainstream setting has been in legislation since 2003 reflecting a move towards a children's rights based approach. Section 15 of the Standards in Scotland's Schools etc. Act 2000 provides that a preschool and school aged child should be educated in a mainstream school unless one of three circumstances set out in section 15 apply. The three exceptions are that it would not be suited to the ability and aptitude of the child; would be incompatible with the provision of efficient education for the children with whom the child would be

educated or would result in unreasonable public expenditure being incurred which would not ordinarily be incurred.

Section 15 provides that it shall be presumed that those circumstances only arise exceptionally and that if one or more of them do arise, that the education authority may still provide education in a mainstream school but that they won't do this without taking into account the views of the child and the child's parents.

A review of the implementation of additional support for learning (ASL) in schools was announced in January 2019. The review is founded on a continued commitment to a presumption to mainstreaming and on the need to ensure that children and young people's additional support needs are met. This will enable them to reach their full potential, with learning provision that best suits their needs. The review will consider current evidence and engage with a range of people and groups to identify good practice and areas for further improvement in the ways that children and young people with additional support needs progress in their learning.

Prohibit the removal of legal capacity and support to exercise legal capacity

Article 12 of the UNCRPD states that States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. States shall also take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

The Scottish Government is actively taking forward measures to ensure that the rationale behind Article 12 is carried out in practice. Aspects of the Adults with Incapacity Act could be considered as substitute decision making, such as guardianships and therefore removing the legal capacity of an adult. We have been engaging with stakeholders on proposals for reform of the Adults with Incapacity Act, to incorporate the UNCRPD. These proposals will be subject to the findings of the Mental Health Review, which will be looking at, amongst other things, how far capacity might be an appropriate and universal threshold for compulsory measures in both mental health and incapacity legislation.

Due to the legislative reviews that are currently being undertaken the Scottish Government does not feel that new legislation would be appropriate at this time while the legislative landscape is still changing. Some of what is suggested in this new law is being covered in the reviews of the Mental Health Act and Learning Disability and Autism and the ongoing work on Adults with Incapacity reform. It would be inappropriate for a law to be introduced before the finding and recommendations of these reviews have been published. We believe everything else in this petition is sufficiently covered in current legislation and policy. The issues that are highlighted in this petition are important (education, relationships, family life and employment) but are issues that have to be addressed in policy and in work to change attitudes rather than in legislation.

The Scottish Government recognise the issues raised and agrees that people with learning disabilities continue to experience poorer outcomes than the general population. There is the need for culture change and systems to change to align with the Keys to Life strategy, however the Scottish Government does not believe that at

this time the suggested legislation would create this change. The Scottish Government will continue to engage with People First on these issues including through the Keys to Life Leadership group, of which People First are members, which is the group formed to take forward the priorities within the Keys to life: implementation framework and priorities 2019-2021.