

## JUSTICE COMMITTEE

### CHILDREN (SCOTLAND) BILL

#### SUBMISSION FROM THE SCOTTISH COMMISSION FOR LEARNING DISABILITY

The Scottish Commission for Learning Disability (SCLD) welcomes the opportunity to respond to this call for views. SCLD has focused this response on question 1, 6 and 8, with a focus on:

- Ensuring the voice of the child is enabled and heard by the system and staff who serve in it
- Ensuring women with learning disabilities who have experienced gender-based violence have their rights respected, protected and fulfilled
- Providing family support where parents with learning disabilities fail to meet enforcement orders so that the rights of families and of the children meet the minimum standards in human rights law.

This response should be read in conjunction with our response to the Financial Memorandum to The Finance and Constitution Committee (attached). In addition, we suggest that the Justice Committee may be assisted in its deliberations by adapting the work being undertaken by the Scottish Human Rights Commission on Budget Scrutiny.<sup>1</sup>

#### **Responses to Question 1, 6 & 8.**

##### ***Question 1: Voice of the child***

SCLD welcomes the commitment in the Bill to ensure all children have the opportunity to make their views heard in matters relating to contact, residence and in children's hearings, and we welcome the commitment to extend this to children under the age of 12. However, SCLD would ask further attention be given to ensuring the views of children and young people with learning disabilities in these cases are heard. A previous study by Children's Hearing Scotland<sup>2</sup> identified that children who had experience of the children's hearing system found problems in communication and described barriers to inclusion as, information not meeting children and young people's needs, confusion about the process and children and young people struggling to understand professional language.

SCLD is concerned that this type of exclusion from decision making, may be intensified by the experience of disability. Children and young people with learning disabilities are often excluded from opportunities to assert their self-determination, due to being labelled as '*inadequate*'<sup>3</sup>. To ensure this is not the case, SCLD asks that the committee ensures that the bill addresses the following three key areas:

#### **1) Ensuring a positive right to be heard for children and young people with learning disabilities**

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<sup>1</sup>[Scottish Human Rights Commission \(2019\)](#)

<sup>2</sup>[Children's Hearing Scotland \(2013\)](#)

<sup>3</sup>[Potter & Whittaker \*What does the 'Voice of the Child' Mean for Children with Complex Learning and Communication Impairments\* in Jones & Walker \(2011\) \*Children's Rights in Practice\*](#)

- 2) **Addressing the potential unintended consequences of the language of the bill**
- 3) **Addressing the need for training and guidance.**
- 1) **Ensuring a positive right to be heard for children and young people with learning disabilities**

As we move forward towards the incorporation of the UNCRC into Scottish Law, attention must be given to respecting and complying with both Article 12 and Article 23 of the UNCRC. To ensure this is achieved in relation to both contact and residence cases and in children's hearings, SCLD would ask that the committee gives attention to the following general comment regarding a child's capability in forming their own views:

*“State parties shall assure the right to be heard to every child “capable of forming his or her own views”. This phrase should not be a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, states parties should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to prove her or his capacity.”*

(UNCRC, General Comment No. 12, 2009, p.6)<sup>4</sup>

SCLD believes it is the aim of this Bill to ensure the voice of children with protected characteristics is enabled and heard this will include those with a learning disability. Therefore, the Bill requires to be amended to achieve that outcome. For example, in the proposed amendments to both The Children's (Scotland) Act (1995) and the Children's Hearing (Scotland) Act (2011) additional provisions are required to ensure the aforementioned General Comments are reflected. SCLD asks that the Scottish Government brings forward further amendments to Section 1 of the 1995 Act. This should include a section which states that relevant parties have a responsibility to assess the communication needs of a child or young person with learning disabilities and provide suitable communication tools and practice techniques.

To ensure weight is given to the views of children and young people with learning disability, SCLD believes that the Bill should include a stated duty to ensure children and young people with learning disabilities will be supported to have their views heard. SCLD believes that without this there is a risk of acting against the General Comment of the UNCRC Article 12 and critically, children and young people with learning disabilities views being lost in arguments of capacity when a child is deemed to exhibit challenges with communication and engagement. This will have negative impact on those children who use nonverbal communication.

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<sup>4</sup>[UNCRC, General Comment No. 12 \(2009\)](#)

## 2) Addressing unintended consequences

As well as ensuring positive rights for children and young people with learning disabilities attention should be paid to the potential unintended consequences of the language used in the Bill. This includes amending or removing phrases like, ‘*as far as is practicable*’ as proposed in the wording of section 1C. Such wording has potential to undermine the aim of the Bill. For SCLD, there is a particular risk in this wording that both children and young people with learning disabilities whose communication style or lack of engagement in complex legal processes will be perceived as too difficult or challenging to overcome. In these cases this language could be used to dismiss and exclude the views of children and young people with learning disabilities.

SCLD also has concerns regarding the wording of other parts of the Bill. For example, the proposed amendment under 11ZB 2(a) in which the Bill states that the court does not give regard to a child’s views or provide opportunity for them to express their views where the court is satisfied “*The child is not capable of forming a view*”. SCLD asks the committee to refer back to UNCRC General Comment Number 12 and in doing this the statement is either removed or amended to reflect the general comment. Left as is, SCLD believes this statement could create a situation in which children and young people’s views are dismissed due to deficit focused understandings of learning disability. For similar reasons we would ask that ‘*regard*’ in section 1 of the Bill be changed to ‘*due regard*’ throughout. SCLD recognises that this will ensure more than just consideration will be given. Instead, weight and value will be given to the voices and views of children and young people.

## 3) Addressing the need for training and guidance

SCLD notes that in the guide to child welfare reports<sup>5</sup> it states that reporters will have knowledge and understanding of a range of issues including addiction, mental health and domestic abuse. However, no reference is made to a knowledge of learning disability. Therefore, SCLD would welcome ensuring a commitment within the Bill that child welfare reporters should be trained in learning disability awareness and a range of communication techniques. A commitment to supporting guidance for those working to gain the views of children and young people, including child welfare reporters will also be required to achieve the aim of the Bill. These provisions will help to limit the risk of children’s voices being lost. In developing guidance, organisations working with people with children and young people with learning disabilities and profound and multiple learning disabilities (PMLD) should be consulted with; for example [Sense Scotland](#) and [PAMIS Scotland](#).

In addition to this, good practice examples of ensuring the voice of the child is heard in these matters should be drawn from. For example, The Childs Rights Service operating in West Lothian in which children are supported to ensure their voice is heard in matters relating to contact using a range of creative methods could be extended to work with children and young people with learning disabilities.

## Question 6: Vulnerable Witnesses

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<sup>5</sup>[Scottish Government \(2016\)](#)

SCLD welcomes the provisions in the Bill in relation to vulnerable witnesses, in particular, vulnerability understood in terms of criminal offences being conducted against a person and individuals not being able to conduct their own case. However, SCLD would welcome further attention being given to wider reviews and potential changes in existing legislation and how this may impact on decisions in the existing Bill. At present [The Review of Learning Disability and Autism in the Mental Health Act](#) has asked if learning disability, should be classed as a mental disorder in The Mental Health (Care and Treatment) (Scotland) Act 2003<sup>6</sup>. This will have implications for moving forward the [Vulnerable Witnesses \(Scotland\) Act \(2004\)](#) and how we understand and discuss vulnerability with regard to a learning disability. Therefore any amendments within the Children’s (Scotland) Bill should be cognisant of this reviews findings and the overarching mental health review<sup>7</sup>.

Further, SCLD would ask that provisions in the Bill ensure both the safeguarding of women with learning disabilities impacted by domestic abuse and the meaningful participation of these women in these processes regarding contact and residence. From existing evidence, SCLD understands that women with learning disabilities may be at an increased likelihood of experiencing gender-based violence. McCarthy (1998)<sup>8</sup> has highlighted the multiple disadvantages which have been experienced by women with learning disabilities and how this can result in an increased risk of abuse in both institutional and community settings, from men both with and without learning disabilities. More recent reports from Scotland have identified high prevalence rates of domestic abuse and sexual assault among women with disabilities<sup>9</sup>.

This was an issue SCLD raised in our response to [Review of Part 1 of the Children \(Scotland\) Act 1995 and creation of a Family Justice Modernisation Strategy](#). Respondents from our focus group of people with learning disabilities and advocacy staff stated support should be given to women who have experienced domestic abuse who have learning disabilities. The experience of cross-examination by legal professionals left them feeling a combination of “...*flustered and frustrated*” (p.22).<sup>10</sup> Focus group members made suggestions for how they felt women with learning disabilities, who had experienced domestic abuse, should be supported in these processes. This included, but was not limited to, accessible information, having a support worker present and regular breaks.

SCLD would, therefore, ask that attention is given within the Bill to how individuals who have experienced the offences listed and who may have a learning disability are treated and how support is provided in these cases. This would ensure the Bill is in line with the General Recommendation 12 adopted by The Committee on the Elimination of Discrimination Against Women, which outlined State Parties role in “...*protecting women against violence of any other kind occurring within the family, at the workplace or in any other area of social life* “ (1989)<sup>11</sup>.

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<sup>6</sup>[Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#)

<sup>7</sup>[Scottish Government \(2019\)](#)

<sup>8</sup>[McCarthy \(1998\)](#)

<sup>9</sup>[Wise Women \(2015\)](#)

<sup>10</sup>[SCLD \(2018\)](#)

<sup>11</sup>[CEDAW \(1989\) General Recommendation 12](#)

## Question 8: Enforcement of orders

In SCLD's initial response we expressed concerns regarding proposals to make a failure to comply with an enforcement order a criminal offence or something individuals should be sanctioned for. Focus group members stated there needed to be reasonable adjustments made when a person who is subject to an enforcement order has a learning disability. The group said there could be a number of reasons why a person may fail to follow the order including: a person not understanding an order, needing support to arrange contact or not financially able to attend contact. SCLD recognises that any support offered to meet an enforcement order will need to be carefully balanced with the rights of both the child and other parent involved in these cases. This will be particularly pertinent if the case involves gender based violence.

Despite raising these concerns, SCLD does not believe that sufficient attention has been given to the above point in the Children (Scotland) Bill. SCLD is disappointed to see no mention of the provision of family support, where a family has failed to meet an enforcement order, and where a parent has a learning disability, or an identifiable support need. Our best available data suggests that there could be as many as **6,000** parents with learning disabilities in Scotland<sup>12</sup>. Further research from McConnell et al (2000) settles on a rate of child removal from parents with learning disabilities of around **one child in two**, with these parents being significantly over-represented in child protection proceedings, and their children placed out-of-home more often than their peers.

We believe that there is an opportunity within the Children (Scotland) Bill to support Part 12 of The Children and Young People (Scotland) Act (2014)<sup>13</sup> which states that parenting support services should be made available to families where a child is at risk of being removed. While this commitment has been made in legislation a recent report finding from a review by CELCIS on the implementation of Part 12<sup>14</sup> found that there was a lack of clarity around support for parenting as a relevant service. The report stated that of the 138 survey respondents working across Scotland in roles such as social work, family support, service manager, foster carers and those working in residential service only 14% 'knew a lot' about Part 12 of the Children and Young People (Scotland) Act 2014 and 10% indicated that they knew nothing about it.

For SCLD, a commitment to family support in the Children (Scotland) Bill will create legislative consistency with part 12 of the Act and will show Scotland's commitment to the GIRFEC principles and values to ensure, "... *child or young person, and their family is at the centre of decision-making and the support available to them*"<sup>15</sup> and that "*children, young people, parents, and the services they need working together in a coordinated way to meet the specific needs and improve their wellbeing*".<sup>16</sup>

If family support is not included in relation to enforcement orders, we believe there is potential for the legislation to contradict existing equality and human rights legislation.

<sup>12</sup>If we assume that 2% of adults in Scotland have a learning disability, and one in fifteen of those adults will be parents, we can estimate that in Scotland in 2018 around 6,000 people with learning disabilities will be parents. Calculated using [National Records of Scotland 2018 mid-year population](#) estimates.

<sup>13</sup>[The Children and Young People \(Scotland\) Act \(2014\)](#)

<sup>14</sup>[CELCIS \(2019\)](#)

<sup>15</sup>[Scottish Government GIRFEC Values and Principles](#)

<sup>16</sup>[Scottish Government GIRFEC Values and Principles](#)

A failure to provide this type of support to people with learning disabilities could potentially result in individuals with protected characteristics, including learning disability, being subject to indirect discrimination. In particular, we believe that any failure to provide this type of support will directly contravene Article 23 of The UNCRPD and Article 9 of the UNCRC.

As Scotland moves forward as a rights respecting nation, SCLD views it as critical that our legislation is compliant with international conventions (including the UNCRC, the UNCRPD and CEDAW). This should include making sure that we provide people with learning disabilities with the support they require across all parts of their life to ensure their Human Rights are respected, protected and fulfilled to the highest possible standard. SCLD thanks the Justice Committee for the opportunity to respond to this written call for views. SCLD would welcome the opportunity to give oral evidence at a later date.

Scottish Commission on Learning Disability  
15 November 2019