



Consultation Response

Protecting Children: Review of Section 12 of the Children and Young Persons (Scotland) Act 1937 and Section 42 of the Sexual Offences (Scotland) Act 2009

The Scottish Commission for
Learning Disability
November 2018



The Scottish Commission for Learning Disability (SCLD) welcomes the opportunity to respond to this important consultation. SCLD is an independent charitable organisation and strategic partner to the Scottish Government in the delivery of Scotland's learning disability strategy, The keys to life¹. The strategy defines a learning disability as a significant, lifelong, condition that starts before adulthood, which affects development and means individuals need help to understand information, learn skills, and cope independently. SCLD is committed to finding new and better ways to improve the lives of people with learning disabilities and is focused on sharing innovation and good practice so that those providing services and interventions can learn from each other. SCLD also aims to be a knowledge hub and to build an evidence base, sharing how policy is being implemented and building on an understanding of what really works.

The aim of this response is to support the Scottish Government in the development and delivery of policy through sharing knowledge and providing practical solutions to policy based challenges in line with SCLD's strategic plan 2017-21.

In responding to this consultation, SCLD:

- Drew from existing research regarding the experiences of parents with learning disabilities
- Reflected on wider available research regarding neglect and the child protection system
- Took part in a roundtable discussion held by The Children's and Young People's Commissioner for Scotland with policy officers from a range of key organisations
- Took comments regarding the consultation from People First (Scotland) Parents Group.

¹ [The keys to life \(2013\)](#)

At this time SCLD has chosen to not respond to questions in the consultation regarding, The Review of Section 42 of The Sexual Offences (Scotland) Act (2009). An explanation is provided in Appendix One page 28.

The Review of Section 12 of the Children and Young Persons (Scotland) Act 1937 is of particular significance to parents who have learning disabilities. This is a result of the real barriers they face in raising their children and challenges in negotiating family law procedures. This is discussed by Tarleton (2006)² who drew on existing research from Emmerson et al (2005)³ and McConnell et al (2002)⁴ which estimated that between 40% to 60% of parents with learning disabilities worldwide have their children removed from their care. The keys to life (2013)⁵ stated that evidence pointed to disproportionate numbers of children being removed from parents with learning disabilities and recommended that by 2014, parents with learning disabilities should have access to supported parenting services based on the Refreshed Good Practice Guidelines for Supporting Parents with Learning Disabilities (2015)⁶.

However, Stewart et al's (2016)⁷ research on behalf of the Scottish Government identified that access to supported parenting services operating on the principles of the guidelines on a national level, was at best patchy. The limited supported parenting provision across Scotland and suggested level of child removal from parents with learning disabilities has led to learning disability advocacy organisations expressing strong concerns about the proposed changes to Section 12 of the Act.

² [Tarleton, Ward, & Howarth \(2006\)](#)

³ Emerson, Malam, Davies, & Spencer (2005) Adults with Learning Difficulties in England 2003/4

⁴ [McConell , Llewellyn, & Ferronato \(2002\)](#)

⁵ [The keys to Life \(2013\)](#)

⁶ [SCLD \(2015\)](#)

⁷ [Stewart, MacIntyre, & McGregor \(2016\)](#)

In the summer of this year, People First (Scotland)⁸ submitted their concerns regarding the review of Section 12 to the Minister for Children and Families, Maree Todd. It read,

“Social work departments are still not geared up to provide long-term family support and as a result around 40-60% of parents with learning disabilities have their children removed... This is usually claimed to be because of ‘lack of parental care’ or ‘neglect’...

If we have a loving bond with our children, can put their needs first, are asking for support and willingness to work with supporters - but don't get the support we need, is this neglect? Who is responsible if our children then don't get their needs met – the parents or the local authority? Not providing the right support and then removing our children is discrimination and a breach of our human rights and the human rights of our children...

We do not think it is fair to make the crime of neglect wider until the Scottish Government and local authorities can guarantee that we will be offered the right sort of ongoing support as set out in the law, policies, and guidance...”

(People First (Scotland),2018)

These concerns were echoed in a policy roundtable discussion with organisations including The Children’s and Young People’s Commissioner for Scotland, Scottish Women’s Aid, Scottish NSPCC, Aberlour and CELCIS. The general consensus from these conversations is that Section 12 of The Children and Young Persons (Scotland) Act 1937 is a piece of legislation which uses archaic language in relation to children’s needs and discriminates against vulnerable parents including parents with learning disabilities.

SCLD acknowledges the work undertaken by the Child Protection Improvement Programme in examining the formal elements of the Child Protection System. SCLD

⁸ [People First \(Scotland\) \(2018\)](#)

understands the proposed need to modernise the 1937 Act as stated in The Child Protection Improvement Programme March 2017⁹:

“An Improvement Programme has been started in response to Neglect as it is the primary maltreatment issue faced by Scotland’s children and there are known weaknesses in the current assessment of, and response to, the problem. The improvement programme has been complemented by work to update research on the current state of neglect in Scotland and what works well in tackling it. As part of this work, we have examined the current legislative protection that exists in relation to child neglect. The existing offence relating to child neglect dates back to 1937 and inevitably the understanding of childhood neglect has evolved over the intervening time. We have therefore concluded that there would be benefit in amending section 12 of the Children and Young Persons (Scotland) Act 1937 (the child cruelty provision).”

(Scottish Government; 2014. P.4)

While acknowledging the development of understanding about neglect and a need to move away from historic legislation which does not reflect current thinking, SCLD would ask for caution in any review of modernisation and review of this legislation.

SCLD understands the challenges modernising this act could present were outlined as part of table discussions during a meeting of The Child Protection Improvement Programme External Advisory Group Meeting (10/11/16)¹⁰. Given the wide acknowledgement of difficulties in reviewing this legislation, SCLD believes that consideration should be given to the impact of legal changes in England as a result of the Child Cruelty Offence, in the Serious Crime Act (2015)¹¹ as part of this review.

⁹ [The Scottish Government \(2017\)](#)

¹⁰ [CPIP External Advisory Group \(2016\)](#)

¹¹ [Serious Crime Act \(2015\)](#)

SCLD's call for caution is based on three central critiques of the existing 1937 Act and the proposed changes in the review. SCLD's comments will focus on critical elements which raise particular concern for parents with learning disabilities. These areas are:

- 1) The discrimination of people with learning disabilities with regard to reproductive rights and the right to a family life (Question 18)**
- 2) The Multiple Disadvantage experienced by People with Learning Disabilities: Poverty and Domestic Abuse (Question 7,16 & 17)**
- 3) The equality challenge of legal understandings of both 'wilful', 'reasonable person/ parent' and 'emotional abuse' (Question 9,11 & 5)**

Following an outline of these concerns, SCLD makes several recommendations on how the Child Protection Improvement Programme could potentially address these concerns (See page 26-27).

1. The discrimination of people with learning disabilities with regard to reproductive rights and the right to a family life

Question 18

The consultation document correctly outlines the challenge this legislation presents for parents with learning disabilities (2018, p.30)¹². However, SCLD believes further in-depth attention is required to ensure parents with learning disabilities are not unduly criminalised. Full consideration should be given to the barriers people with learning disabilities experience with regard to sexual autonomy, reproductive rights and support to enact their right to a family life. These significant barriers are discussed below.

¹² [The Scottish Government \(2018\)](#)

Sexual Autonomy and Reproductive Rights

For people with learning disabilities, considerable barriers are faced to enacting a private and family life in line with Article 8 and Article 12 of The Human Rights Act 1998¹³. This is most starkly demonstrated in the historic discrimination and control exerted over people with learning disabilities with regards to sexual autonomy. This control and a lack of autonomy is often based on protectionism and is a direct result of people with learning disabilities being viewed either as eternal children or as sexually deviant. The restrictions on the autonomy of people with learning disabilities are highlighted by Hollomotz (2008)¹⁴ in their participatory research study with people who have learning disabilities living in residential group settings. In this study, people with learning disabilities spoke about their experience of not being allowed to have privacy to explore relationships with their partners. This included not being allowed to be alone with a partner in their bedroom, being subject to a number of checks from staff or having the locks removed from their bedroom doors.

Autonomy has not only been restricted in residential settings. With regard to sexual health and reproductive rights, people with learning disabilities have had their choices removed through forced sterilization. Engender (2018) stated that the prevalence of this at present is not known. However, they draw from a previous study by Tiley et al (2012)¹⁵ which cites Bambrick and Roberts (1991)¹⁶ survey of families. This survey found that over half of the 274 families surveyed would have considered having their child with a learning disability sterilized.

¹³ [The Human Rights Act \(1998\)](#)

¹⁴ [Hollomotz \(2008\)](#)

¹⁵ [Tilley, Walmsey, Earle, & Atkinson \(2012\)](#)

¹⁶ [Bambrick & Roberts \(2012\)](#)

In understanding the challenges people with learning disabilities face in having autonomy around relationships and sexuality, it is unsurprising that these restrictions have extended to having and raising a family.

The Right to Family Life

Research from the early 2000s onwards has pointed to considerable barriers faced by parents with learning disabilities in having and raising a family. This has included research regarding:

- Discrimination of parents with learning disabilities as a result of time restrictions from child protection systems. For example moving to permanence for a child before parents have a chance to develop parenting skills¹⁷
- Over-representation of parents with learning disabilities in child care proceedings¹⁸
- Lack of appropriate support provision for parents with learning disabilities¹⁹
- Examples of good practice in supported parenting in parts of Scotland but inconsistent support provision nationwide²⁰
- Negative attitudes about parents with learning disabilities held by professionals²¹.

Yet despite these significant bodies of research, limited support provision continues and potentially discriminatory policies and procedures are retained.

¹⁷ [Booth, McConnell, & Booth \(2006\)](#)

¹⁸ [Booth, Booth, & McConnell \(2005\)](#)

¹⁹ [Tarleton, Ward, & Howarth \(2006\)](#)

²⁰ [Stewart, MacIntyre, & McGregor \(2016\)](#)

²¹ [Tarleton, Ward, & Howarth \(2006\)](#)

For example, The National Guidance for Child Protection in Scotland (2014)²² states that,

“Disabled parents/ carers/ siblings may have additional support needs relating to physical or sensory impairments, mental illness, learning disabilities, serious or terminal illness or degenerative conditions. These may impact on the safety and wellbeing of their children, affecting their education, physical and emotional development.”

(Scottish Government, 2014, p.119)

The suggestion in this statement that a parent's impairment can impact a child safety and wellbeing is troubling. This can potentially lead to a misunderstanding among social work professionals, that disability equals danger. This is particularly concerning when we consider the patchy level of support provision for parents with learning disabilities in Scotland identified by Stewart et al (2016)²³.

Legislation passed in 2014, was an important step in moving towards early family support and away from risk adverse practices. Part 12 of The Children and Young People (Scotland) Act 2014²⁴ states that a family is entitled to 'relevant services' when a child is at risk of being removed. This includes Parenting Support Services and Family Group Decision Making Services. In addition, The National Guidance for Part 12 of The Children and Young People Scotland Act 2014²⁵ makes particular reference to the support needs of parents with learning disabilities. It states,

“There should be specific consideration given to the support needs of parents with learning disabilities. International research has identified that children are more likely to be removed from parents with learning disabilities.”

²² [Scottish Government \(2014\)](#)

²³ [Stewart, MacIntyre, & McGregor \(2016\)](#)

²⁴ [The Children and Young People \(Scotland\) Act \(2014\)](#)

²⁵ [Scottish Government \(2016\)](#)

(Scottish Government, 2016, p.14)

The Part 12 Guidance also makes direct reference to The Refreshed Good Practice Guidelines for Supporting Parents with Learning Disabilities (2015)²⁶ and highlights the need for multi-agency support, particularly for parents with a learning disability. Despite this legislation and guidance, SCLD is aware of parents who say that their children are still being removed from their care without them being provided adequate support opportunities.

This is well illustrated by Elaine's story in: 'Loving, Caring, Nurturing: How Parents with Learning Disabilities are being Supported in Highland'. This report is currently unpublished²⁷.

In this report Elaine, a parent who has a learning disability, talks about her experience of having her child removed from her care. She talks about asking Social Work Services for support to care for her child, which was not provided. Instead, the child was removed into foster care and was eventually adopted. This particular story presents a challenge to the following statement in the consultation document,

"We do not think it is likely that a parent or carer who has taken all reasonable steps to access the support of relevant services to help overcome difficulties would be said to subsequently have committed a wilful act of ill-treatment or neglect or if harm is solely caused by the lack of such support being provided."

(Scottish Government, 2018, p.30)

Stories like Elaine's demonstrate that asking for support is not always a positive experience for families. Parents with disabilities often feel they cannot ask for

²⁶ [SCLD \(2015\)](#)

²⁷ Report was made available to SCLD pre-publication. It is currently being edited but for the purpose of this response can be accessed by contacting [People First \(Highland\)](#)

support due to fear of their children being removed from their care (BBC, 2018)²⁸. In particular Tarleton (2006)²⁹ demonstrated the concerns parents with learning disabilities had about engaging with social work services due to fears of being judged or put down. This is a difficulty, which SCLD believes needs to be addressed. This challenge can be summarised in the following question:

If a parent fears child removal or does not get adequate support when it is requested, and that child is then judged to experience neglect, is it just to say that the parent's actions have been wilful?

SCLD believes that, to ensure the 1937 Act does not unfairly criminalise parents with learning disabilities, this question needs to be appropriately considered. Addressing this question can be partially achieved through the review of Part 12 of The Children and Young People (Scotland) Act 2014. This review should examine the availability of supported parenting services to eligible children and their families. By doing this, the review will give clarity to the availability of support services for parents with learning disabilities and should ask if failures to provide this type of support could result in, neglect.

Given the ongoing nature of the 2014 review, SCLD believes that it is premature for any review regarding Section 12 of the 1937 Act, to take place prior to publication of the 2014 review's findings. SCLD believes it would, therefore, be untimely to suggest further amendments to the 1937 Act which may unintentionally criminalise families who the local authority could be failing to support.

Before any move to modernise and strengthen legislation, The Scottish Government must ensure that the Refreshed Good Practice Guidelines for Supporting Parents with Learning Disabilities (2015)³⁰ is being followed by local authorities. To best

²⁸ [BBC \(2018\)](#)

²⁹ [Tarleton, Ward, & Howarth \(2006\)](#)

³⁰ [SCLD \(2015\)](#)

achieve this SCLD points to the comment made in People First (Scotland)'s³¹ response to this consultation. This states that the legislation should reflect a commitment not to criminalise parents who could be considered vulnerable. This fits with Engenders (2018)³² recent recommendation that The Scottish Government should work in partnership with care and child protection agencies to:

“Explore statutory underpinning for the good practice guidelines for supporting learning disabled parents, and integrate them across wider parenting, social care and child protection frameworks.”

(Engender, 2018, p.35)

One way this statutory underpinning could be achieved is through strengthening Part 12 of the Children and Young People (Scotland) Act (2014), by adding an explicit legal requirement that guidelines are followed. Please refer to recommendation 3, page 28.

2. The Multiple Disadvantage faced by people with Learning Disabilities: Poverty and Domestic Abuse

Question 7 16 & 17

It is not only the limited support provision for parents with learning disabilities across Scotland that causes SCLD significant concern regarding the existing 1937 legislation and the proposed changes.

SCLD believes there are also challenges with existing and proposed legal definitions within the Act. These definitions could negatively impact parents with learning disabilities who may experience multiple disadvantages as a result of either the

³¹ People First (Scotland) response to ‘Protecting Children: Section 12 of The Children and Young Persons (Scotland) Act 1937 and Section 42 of the Sexual Offences (Scotland) Act 2009 shared with SCLD.

³² [Engender \(2018\)](#)

experience of disability and poverty or disability and domestic abuse. SCLD's concerns are fully outlined below.

Poverty

Question 7

The interconnected nature of poverty and disability has been well documented (Elwan, 1999)³³. A later conceptual review of Disability and Poverty by Palmers (2011)³⁴ drew from Glendinning and Baldwin (1988)³⁵. They stated that the experience of poverty for people disabilities was a result of:

- 1) Being viewed as having lower labor value
- 2) Incurring expenses due to their disability
- 3) Having a lower overall household income due to family members assuming caring roles over full-time employment.

Economic disadvantage and the experience of poverty has been shown to be widely experienced by people with learning disabilities in Scotland. Figures from Learning Disability Statistics Scotland (LDSS) showed that 53.3% of adults with learning disabilities in Scotland live in the 40% most deprived areas. People with learning disabilities over-representation in Scotland's most deprived areas can be viewed as a consequence of their exclusion from Social Citizenship.

Exclusion from Social Citizenship

SCLD understand social citizenship as defined by Marshall (1950)³⁶. as "... whole range from the right to a modicum of economic welfare and security to the right to share fully in the social heritage and to live the life of a civilized being according to the standards prevailing in society"(p.30). SCLD views people with learning

³³ [Elwan \(1999\)](#)

³⁴ [Palmer \(2011\)](#)

³⁵ Glendinning & Baldwin (1988). *The costs of disability. Money matters: Income, wealth and financial welfare.* London, England: Sage

³⁶ [Marshall \(1950\)](#)

disabilities as not being able to establish full Social Citizenship due to exclusion from:

- Education³⁷
- Employment³⁸
- Housing that supports individuals to achieve their aspirations³⁹
- Economic welfare and security⁴⁰
- Communities, due to hate crime and cruelty⁴¹

This multi-layered exclusion can be demonstrated in the Learning Disability Statistics Scotland (LDSS) Multiple Deprivation Analysis (2017)⁴² with regard to employment opportunities. This highlighted that people with learning disabilities living in the most deprived areas in Scotland were less likely to have employment opportunities. This analysis demonstrated that among people with learning disabilities in the most deprived areas, 42 adults had access to employment opportunities while 536, did not. This is supported by recent findings from The Equality and Human Rights Commission (Scotland), which found that disabled people in work continue to earn less than their non-disabled peers⁴³.

The increased likelihood of people with learning disabilities to experience poverty and exclusion from social citizenship should be understood in line with evidence that demonstrates inequality in child welfare procedures.

Inequality of Child Welfare Procedures

Research from the Child Welfare Inequalities Project (CWIP) and the Nuffield Foundation highlighted that in Scotland children living in the 10% most deprived

³⁷ [Enable \(2016\)](#)

³⁸ [McTeir, MacDougall, McGregor, Hirst, & Rinnie \(2016\)](#)

³⁹ [Ormston, Euston, & McAteer \(2017\)](#)

⁴⁰ [Aleksia \(2012\)](#)

⁴¹ [Gravell \(2012\)](#)

⁴² [LDSS Multiple Deprivation Analysis \(2017\) Unpublished available from SCLD](#)

⁴³ [The Equality and Human Rights Commission Scotland \(2018\)](#)

areas were 20 times more likely to be looked after or on the child protection register as opposed to their peers living in the least deprived 10%.

This study of ten local authorities in Scotland showed large disparities in rates of looked after children. For example, it showed that in the least deprived local authority 25 children were looked after. This was opposed to 485 looked after children in the most deprived area. This data was presented alongside what has been termed the inverse intervention law, from Bywater's et al (2015) study⁴⁴. This term refers to intervention that does not appropriately meet levels of need.

In taking the above into consideration, SCLD believes the provision in the Act regarding failure to provide adequate food, clothing, medication or lodging should be revised.

SCLD believes that this provision allows for legally sanctioned discrimination against parents living in poverty. This is supported by Bilson et al, who stated:

“Socio-economic circumstances can be both a direct and/or indirect contributory casual factor in child abuse and neglect. The direct effect occurs when a parent is not able to adequately feed, shelter or clothe, their children or keep them warm. Thus, the changes in welfare as a result of austerity are of importance here. The indirect effects of poverty arising from the impact of low, insecure, intermittent income and the often accompanying issues in relation to housing and unemployment.”

(Bilson, et al, 2017, p.416)⁴⁵

This discrimination will potentially be most profoundly felt by parents with learning disabilities who experience poverty. These parents will face not only challenges of insufficient income but also barriers relating to limited support provision and stigma. SCLD believes this discrimination can begin to be addressed through a

⁴⁴ [Bywaters, et al \(2015\)](#)

⁴⁵ [Bilson, Featherstone & Martin \(2017\)](#)

number of policy and research developments. Please see recommendations 5 and 6, page 28.

Domestic Abuse

In addition to parents with learning disabilities who experience poverty, this legislation and its proposed revisions presents significant concerns for women who have experienced or are currently experiencing domestic abuse. This will be multiplied by the experience of learning disability.

There are strong indicators in existing research that women with impairments, long-term ill health and learning disabilities, are at risk of gender-based violence. For example McCarthy et al⁴⁶ stated that a whole range of partner abuse from financial, physical and sexual was experienced by women with learning disabilities. This is also supported by Thiara et al (2010)⁴⁷ who highlighted that partners of disabled women can use their position to abuse and control the women with whom they are in relationships with. Research from the same paper also discusses instances of impairment-specific abuse. This refers to instances of abuse where a partner exploits a person's disability to inflict suffering. For example, withholding accesses to mobility scooters or medication.

These findings are supported by a recent report by Engender (2018)⁴⁸ which cited from a small scale survey in Glasgow. This survey by Wise Women (2015)⁴⁹ showed that of the disabled women surveyed, 73% had experienced domestic abuse. The same report highlighted that disabled women experiencing domestic abuse or gender based violence are more likely to experience barriers in accessing the necessary health and support services.

⁴⁶ [McCarthy, Hunt & Milne \(2017\)](#)

⁴⁷ [Thiara, Hauge & Mullender \(2011\)](#)

⁴⁸ [Engender \(2018\)](#)

⁴⁹ [Wise Women \(2015\)](#)

This should be understood in line with Peckham's (2007)⁵⁰ work discussing people with learning disabilities increased vulnerability to sexual abuse as a result of:

- Communication difficulties
- Being dependent on support for some intimate care
- Not being offered opportunities to learn about sex and relationships
- Feeling they need to say yes to please others.

In understanding the increased vulnerability to domestic abuse and gender based violence faced by women with learning disabilities, it is critical that real consideration is given to ensuring that victims of domestic abuse are not unduly criminalised. Consideration should be given to both people with and without learning disabilities

This will be particularly complex where the victim of abuse is a parent with a learning disability who may not feel able to leave a partner, due to complexities identified by Peckham (2007) and those discussed by Thiara et al (2010)⁵¹. This inability to leave a partner could be viewed as failure to protect a child, rather than the need for increased and focused support.

While SCLD recognises The Domestic Abuse (Scotland) 2018 Act's aim to address the harm that can be caused to a child through partner based abuse, the organisation does not wish to see this further reflected in the 1937 Act review. This is due to considerable concerns regarding criminalising parents for failure to protect a child in circumstances where the parent is of increased vulnerability. This increased vulnerability can be a result learning disability, being abused or harmed and not being able to access appropriate support.

⁵⁰ [Peckham \(2007\)](#)

⁵¹ [Thiara, Hauge & Mullender \(2011\)](#)

3. The equality challenge of legal understandings of: ‘wilful’, ‘reasonable person/ parent’ and ‘emotional abuse’

Question 9 11 & 5

SCLD believes there is a considerable challenge for people with learning disabilities in the legal understanding of a ‘reasonable person’ and the understanding of neglect which is ‘wilful’. This challenge will require attention, alongside critical debate regarding the subjective understanding of ‘emotional abuse’. In discussing these areas SCLD will highlight:

- The equality challenge of establishing a ‘Reasonable Person’
- The potential to define a ‘Reasonable Person’ as separate from ‘The Other’
- The discriminatory potential of a definition of ‘Wilful’ neglect
- The challenge of subjectivity in ‘Emotional Abuse’
- The potential to use ‘Good Enough’ Parenting as the standard.

The Equality challenge of Establishing a ‘Reasonable Person’

SCLD has concerns regarding the legal understanding of a ‘reasonable person’. This concern centers on the idea of a ‘reasonable person’ as the moral superior on which society's standards are formed. In some readings, this can be understood as the neurotypical man. Take, for example, an available legal definition from Merriam Webster Dictionary⁵² which defines the ‘reasonable person’ as:

“A fictional person with an ordinary degree of reason, prudence, care, foresight, or expectation in relation to a particular circumstance or fact is used as an objective standard by which to measure or determine something (as the existence of negligence).”

⁵² [Merriam Webster](#)

From an equalities standpoint, this understanding is challenging and can raise questions about how we as a society define 'reason', 'foresight' and 'intelligence'. This challenge is illustrated by the words of a parent member of [The Working Together with Parents Network](#). This parent often says, *"People have told me I'm not normal. But what is a normal person?"*

The complexities and challenges of the 'reasonable person' definition for people with learning disabilities is further illustrated by The Commissioner of Human Rights⁵³, who in a report on the legal capacity for people with intellectual or psychological disabilities stated;

"European legal concepts on personhood have tended in the past to build on the idea of a 'rational and reasonable person' – an individual who rationally processes information chooses between foreseeable alternatives based on an analysis of their consequences and then arrives at a rational outcome, an informed decision. The problem with this idea is not only that it can exclude persons with certain disabilities but that it is based on false premises. Decision-making is a complex process which occupies researchers and scholars worldwide. The choices and decisions we make are seldom purely rational. To process all possible alternatives in any given situation is rarely possible or desirable considering the amount of time it would require. Our emotions affect our decisions as to what options are worth thinking about and which are not. The process is further influenced by our experiences and social and cultural backgrounds, including our personal networks. We also take risks and make mistakes. Some mistakes we learn from, others we repeat."

(Commissioner for Human Rights, 2012, p.19)

⁵³ [Commissioner for Human Rights \(2012\)](#)

This is supported by CELCIS⁵⁴ response where the subjectivity of the reasonable person test was highlighted. CELCIS stated,

“The impact of the use of this test on vulnerable individuals and groups should also be considered. For example, if the actions (or inactions) of a parent or carer with learning difficulties were considered through the reasonable person test to be likely to cause harm, does this imply the parent or carer is somehow ‘unreasonable’? This is stigmatising, and should be avoided.”

(CELCIS, 2018, p.9)

SCLD views measuring individuals with learning disabilities against a notional ‘reasonable person’ as discriminatory. This can potentially perpetuate the idea of people with learning disabilities as separate from the morally superior ‘reasonable person’ and instead view them as ‘deviant’ or as society’s ‘other’

The ‘Reasonable Person’ as separate from ‘The Other’

‘The other’ is understood as an individual who presents a difference in the form of disability, illness, criminality, cultural practices or nationality. The idea of ‘the other’ is sometimes understood as the ‘us/them’ discourse.

By defining the ‘reasonable person’ as a person with an average level of ‘reason’, ‘foresight’ and ‘intelligence’, the definition has the potential to ‘other’ people with learning disabilities, who will not have had the same educational opportunities or access to information to inform their decision-making processes.

The exclusion of people with learning disabilities from education and challenges they face in accessing information have been well established. With regard to exclusion from education, Enable’s (2009)⁵⁵ report IncludED in the Main stated that

⁵⁴ [CELCIS \(2018\)](#)

⁵⁵ [Enable \(2016\)](#)

more than half of the children and young people with learning disabilities they surveyed felt they were missing out on things at school. The same report pointed out that people with learning disabilities and/or autism spectrum disorders were being excluded from school due to the school claiming that child was 'not coping' (45.69%) or the school claiming the child was too disruptive (38.58%).

Limited availability of information and resources for parents with learning disabilities was cited by Tarleton et al (2006)⁵⁶ as one of the significant challenges facing parents with learning disabilities and those who support them. Findings from Lewis et al (2011)⁵⁷ regarding the accessibility of information on parenting for people with learning disabilities are also of particular significance here.

In this evaluation, Lewis et al (2011) spoke to 12 parents or expectant parents with learning disabilities about their access to the CHANGE Resources⁵⁸. This evaluation found that the majority of parents involved in the evaluation had never received a copy of this resource. Of the 5 parents in the study who did receive the resources only 2 parents said they got the resources at the required time. The evaluation also highlighted that when parents were getting access to the CHANGE resources, this was not often through mainstream services. In addition to the difficulty of accessing the CHANGE resources, parents also highlighted the inaccessibility of universal resources such as Ready Steady Baby!⁵⁹ and Ready Steady Toddler!⁶⁰

Through exclusion from education and limited availability of accessible information, people with learning disabilities are left out from the legal understanding of a 'reasonable person' and can be instead be viewed as the 'other'. The 'reasonable person' is seen as 'us' and the person with a learning disability is understood as separate and is defined as 'them'.

⁵⁶ [Tarleton, Ward, & Howarth \(2006\)](#)

⁵⁷ [Lewis, J, Wood, B, Cruickshank, S \(2011\)](#)

⁵⁸ [CHANGE Resources](#)

⁵⁹ [Ready, Steady, Baby!](#)

⁶⁰ [Ready, Steady, Toddler!](#)

This leads SCLD to question the appropriateness of a 'reasonable person' test with regard to harm and neglect in the presence of educational exclusion and the absence of appropriate parenting support and information for people with learning disabilities.

The discriminatory potential in the understanding of 'wilful' neglect

Similar to concerns about the 'reasonable person' standard outlined above, SCLD sees the same problems arising with regard to the understanding of 'wilful' neglect and validity of the mental state (Mens Rea) of a parent. SCLD sees a significant challenge for parents with learning disabilities with regard to the proposed changes.

This problem is most clearly articulated within the following statement of the consultation document⁶¹ which reads:

"We think it should be the case that the subjective mental state or level of awareness of the accused as to the risk of harm is irrelevant to proving the offence as long as the accused actions are wilful/deliberate and objectively likely to be harmful to the Child"

(Scottish Government, 2018, p.25)

Failing to consider both the mental state and a level of awareness of a parent with a learning disability charged with 'wilful' or deliberate neglect can be viewed as discriminatory. This relates back to earlier points made regarding parents with learning disabilities lack of access to information and the limited provision of support. Further, how the courts establish 'wilful' or deliberate neglect will require additional consideration and scrutiny. This is discussed by People First (Scotland)⁶²

⁶¹ [The Scottish Government \(2018\)](#)

⁶² [People First \(Scotland\) response to 'Protecting Children: Section 12 of The Children and Young Persons \(Scotland\) Act 1937 and Section 42 of the Sexual Offences \(Scotland\) Act 2009 shared with SCLD.](#)

response to this consultation. They state, that there will be circumstances in which a lack of support will mean that a parents actions will not be wilful. In this response, the organisation give an example of a parent who receives a letter about a child's medical appointment on the Wednesday. The parent does not read well and has not been sent an Easy Read Version of the letter. In addition the parent is not getting support until that Friday. The result of this circumstance is that the parent does not understand the letter and the child misses the medical appointment. The question worth discussion is, in such circumstances, is it fair to say this is 'wilful' neglect?

In thinking about this, SCLD does not welcome any legislation which may discount the mental state or understanding of a parent with a learning disability. However, SCLD does acknowledge the challenge of removing both a 'reasonable person standard' and an understanding of 'wilful' from legislation and believes this will require further attention and discussion to best ensure children are protected and parents considered vulnerable do not experience discrimination.

The challenge of subjectivity in emotional abuse

Alongside concerns about the 'reasonable person' and the legal understanding of 'wilful', there is an issue of potential subjectivity in the consultation's understanding of 'emotional abuse'. As with the idea of the 'reasonable person' definition, SCLD believes parts of the emotional abuse understanding can potentially criminalise parents who do not conform to legally defined morality. This is the most clearly seen in, the consultation's⁶³ understanding of 'corrupting' as to:

"...tolerate or encourage inappropriate or illegal behaviour; to expose the child to anti-social role-models or violence and anger; and advocate bullying of others. The adult may reward substance abuse or bigotry; promote illegal activities; and/or reward the child for such behaviours as lying, stealing, etc."

⁶³ Scottish Government (2018)

(Scottish Government, 2018, p.18)

While SCLD supports ensuring all children are protected and brought up in an atmosphere of love and care, SCLD believes that the type of language outlined above potentially perpetrates an understanding society's deviants. This feeds in to the aforementioned 'us' and 'them' rhetoric. For SCLD, it is not unfeasible that a household including 'anti-social' role models, would be a household that also has love and support. Human beings and families are often a mixture of both good and bad. At times of high stress or challenges, household dynamics may become difficult. In these instances a family's capacity to change should be examined and support provided.

This is supported by Sir James Munby, president of the Families Division⁶⁴ who said,

"Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done."

Re A (A Child) (2015)

Despite concerns regarding the subjective language used to describe emotional abuse, SCLD strongly supports ensuring all children are protected and brought up in an atmosphere of love and that children are protected from emotional abuse. SCLD recognises the long term impact of emotional abuse on a child and the need for robust legislation to protect children. This legislation should ensure that children are protected from the most serious instances of emotional abuse which may

⁶⁴ [Re A \(A Child\) \(2015\)](#)

accompany other forms of abuse. In achieving this, careful consideration should be given to the statement in Aberlour's response to this consultation⁶⁵. They state that an emotional abuse offence is likely to disproportionately impact families experiencing disability and poverty due to their circumstances.

As with the definitions of 'reasonable person' and 'wilful', SCLD has concerns regarding the definitions and understandings of 'emotional abuse'. To mediate this challenge, SCLD believes a more nuanced approach as part of the existing Child Protection Improvement Programme is required. Part of this should include consideration regarding the potential of establishing a 'good enough' parenting standard. The potential for developing this in legislation is outlined in the next section.

The potential to use 'Good Enough' Parenting as the standard instead of a 'Reasonable Person/ Parent Standard'

The concept of good enough parenting is a well-established term cited in psychology and legal cases. It was recently used in an English family law case regarding parents with learning disabilities in 2017⁶⁶. The judgment stated,

"With specific reference to the parents' learning disabilities, HHJ Dancey noted that a court must ensure that a parent is not disadvantaged simply because of their disability. The question is whether that parenting can be good enough if support is provided."

A Local Authority v G (Parent with Learning Disability) (2017)

The judgment went on to state that, parents with learning disabilities can be 'good enough' parents when the appropriate support is made available.

⁶⁵ Aberlour's response to 'Protecting Children: Section 12 of The Children and Young Persons (Scotland) Act 1937 and Section 42 of the Sexual Offences (Scotland) Act 2009 shared with SCLD.

⁶⁶ Family Law Week (2017)

However, the expressed view of some parents with learning disabilities and the professionals who support them is that parents with learning disabilities are held to a much higher standard of parenting than those without disabilities. Therefore, their failing are magnified. This is discussed by Tarleton et al (2006)⁶⁷ who said that the professionals they surveyed said that parents with learning disabilities were expected to be 'perfect parents'.

However, Baroness Hale's⁶⁸ comments on the complexity of parenting and human nature bring into focus the challenge that parenting can present to all of us. As she stated,

"We are all frail human beings, with our fair share of unattractive character traits, which sometimes manifest themselves in bad behaviours which may be copied by our children. But the State does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, who suffer from physical or mental illnesses or disabilities, or who espouse antisocial political or religious beliefs."

Re A (A Child) (2015)

Baroness Hale's comment about the frailty of humanity is forceful. All parents are human and in being so will make errors and mistakes. For parents with learning disabilities, some aspects of parenting may be more challenging. But in these cases, it is a role for the local authority to ensure the parent has the information, advice, and support to meet the 'good enough' parenting standard. Furthermore, where care proceedings are in place, the information and support should make clear what the 'good enough' standard of parenting is. This should take account of both individual's needs and strengths. Where those supporting individuals fail to do this and instead

⁶⁷ [Tarleton, Ward, & Howarth \(2006\)](#)

⁶⁸ [Family Law Week \(2015\)](#)

focus attention on critique, this can be damaging to parents. A respondent Stewart et al (2016)⁶⁹ in research highlights this. They said,

“Constantly being told you are failing to meet the required standard, particularly when you don’t really know what the standard is and you are not being assessed in a way you can relate to or that is really relevant to your needs, can really undermine a parent’s confidence and self-esteem.”

(Stewart et al, 2016, p. 52)

In considering this, SCLD welcomes an approach to child protection legislation based on a refreshed understanding of ‘good enough’ parenting. Such standards should be made clear to parents. In addition, the understanding of ‘good enough’ parenting should not be based on an understanding of what a ‘normal’ or ‘reasonable’ parent would consider suitable. Instead, it should be based on what a child needs to thrive. This should include an environment of love, care, and security. Where necessary parents who need help to achieve this fully should be supported. It will be helpful to clearly articulate what those standards are as this could define both the required actions of parents and support needed to achieve this.

SCLD recognises there will be a number of legal complexities in moving away from ideas of reasonable personhood and ‘wilful’ neglect to an approach based on ‘good enough’ parenting. SCLD also recognises that the existing understanding of good enough parenting will require improvement and enhancement.

SCLD believes in the importance of appropriate legislation to allow children at risk of harm to be protected. SCLD would therefore welcome future opportunities for legal experts and those working in the field of equality and human rights to come together to construct the best way forward for all our children and their parents. This should be part of the suggested wider on going Child Protection Improvement Programme.

⁶⁹ [Stewart, MacIntyre, & McGregor \(2016\)](#)

Conclusion

In line with the concerns which have been expressed in this response, SCLD would welcome the Child Protection Improvement Programme giving serious consideration to the challenges that any potential review of legislation, policy and guidance, including the 1937 Act, will have for parents with learning disabilities. SCLD would also welcome the opportunity to discuss the concerns of people with learning disabilities regarding the review of the 1937 Act with the Child Protection Improvement Programmes Advisory Group. In addition, SCLD would welcome the opportunity to discuss how the ongoing work of the Improvement Programme can make significant changes to policy and practice which will allow for support provision for vulnerable families.

SCLD asks that the Child Protection Improvement Programme examines how all child protection components work together ensuring that, where possible, families are given the best opportunity to stay together. An in-depth systemic review and analysis should not reassemble this current consultation focus on small changes in wording and definition. True modernisation of Section 12 of The Children and Young Persons (Scotland) Act 1937 will require more than a changing of language and semantics. Instead, it will need a whole system approach that represents the values of a modern Scottish Society, based on The Human Rights Act (1998), The United Nations Convention of The Rights of Disabled People and The United Nations Convention on the Rights of a Child.

For this to be ensured, SCLD asks for ministerial support for the task group with a formal report on the implementation plan's outcomes. This would support this work in the future and ensure that parents with learning disabilities have the required support and therefore are not unduly criminalised.

SCLD thanks the Scottish Government for the opportunity to respond to this important consultation and would welcome the opportunity to be involved in further discussion where appropriate.

Please see the following pages 29 and 30 for SCLD's recommendations regarding this consultation.

Recommendations

SCLD suggests the following recommendations are given due consideration as part of The Child Protection Improvement Programme:

1. Ensure The Children and Young People (Scotland) Act (2014)⁷⁰ outlines the supported parenting provision to be made available for parents with learning disabilities in local authority areas
2. Withhold any Review of Section 12 of The Children and Young Persons (Scotland) Act (1937)⁷¹ and instead refocus on the Review of The Children and Young People in (Scotland) Act (2014)
3. Provide statutory underpinning for The Refreshed Good Practice Guidelines for Parents with Learning Disabilities in line with recommendations from Engender (2018)⁷²
4. Consider the impact of The Child Cruelty offence, in the Serious Crime Act (2015)⁷³ in England
5. Work in partnership with The Child Welfare Inequalities Project and The Nuffield Foundation to undertake a disability analysis of their existing data regarding looked after children in Scotland. This should support any potential work by The Scottish Learning Disability Observatory regarding numbers of mothers with Learning Disabilities in Scotland

⁷⁰ [The Children and Young People \(Scotland\) Act \(2014\)](#)

⁷¹ [The Children and Young People \(Scotland\) Act \(1937\)](#)

⁷² [Engender \(2018\)](#)

⁷³ [Serious Crime Act \(2015\)](#)

6. Reconsider the appropriateness of the provision of: Failure to provide adequate food, clothing, medication or lodging as neglect in section 12.2 (a) of the 1937 Act. This reconsideration should pay attention to the experiences of families living in poverty who also have a learning disability
7. Work with Engender and Scottish Women's Aid to establish the best vehicle for protecting children from domestic abuse which does not unfairly criminalise parents who are victims of an offense
8. Work with SCLD to give further consideration to the potential for discrimination inherent in the definition and understanding of a reasonable person
9. Work with SCLD to give more thorough consideration to the impact of mental state, education and information made available to people with learning disabilities in any definition of 'wilful'
10. Explore the potential to move away from a concept of emotional abuse, to a 'good enough parenting standard' with children's organisations, The Child Protection Improvement Programme External Advisory Group, and SCLD
11. Bring together experts in the field of equality and law as well as parents with learning disabilities, to discuss the potential best way to address some of the issues raised in this consultation response and to further develop the concept of 'good enough parenting'.

Appendix One

The Review of Section 42 of the Sexual Offences (Scotland) Act 2009

At this time SCLD has made the decision to not respond to the Review of Section 42 of the Sexual Offences (Scotland) Act 2009. This is due to concerns regarding the unhelpful conflation of the two reviews in one consultation document. SCLD acknowledges that sexual abuse is a significant issue for people with learning disabilities. Considerable academic research and writing have identified this which is outlined in Peckham's (2007)⁷⁴ paper on the increased vulnerabilities of people with learning disabilities to sexual abuse.

In considering this SCLD asks that a separate consultation document is issued to review Section 42 of the Sexual Offences (Scotland) Act (2009). SCLD would welcome the opportunity to give a fully considered response to the review of this Act which takes into account the potential vulnerabilities of people with learning disabilities to sexual abuse and does not risk conflating acts of sexual abuse with acts of neglect.



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⁷⁴ [Peckham \(2007\)](#)

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