



## Consultation Response

# Children's Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our domestic law in Scotland

The Scottish Commission for  
Learning Disability  
August 2019



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 life (2013)<sup>1</sup> and The keys to life Implementation Framework (2019-2021)<sup>2</sup>. The implementation framework defines a learning disability as follows:

*"A learning disability is significant and lifelong. It starts before adulthood and affects a 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."*

(The keys to life, 2019-2021, p.9)

SCLD is committed to creating an environment in which systems and culture are changed and in which people with learning disabilities have opportunities and are empowered to improve their own lives. SCLD 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 developing this response SCLD has:

- Engaged with key stakeholder Together Scotland
- Attended a consultation event held by The Health and Social Care Alliance

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<sup>1</sup> [The keys to life \(2013\)](#)

<sup>2</sup> [The keys to life \(2019-2021\)](#)

- Held a consultation event with children and young people with learning disabilities on 31<sup>st</sup> July (Please see Appendix 1)

SCLD believes the incorporation of the United Nations Convention on the Rights of the Child (UNCRC) into Scottish Legislation should be the beginning of a process of improving access to active citizenship<sup>3</sup> and the realisation of rights of children and young people with learning disabilities in Scotland. Unfortunately, SCLD is aware that children, young people, and adults with learning disabilities experience significant discrimination and difficulties in challenging misconceptions and overcoming barriers. As a result, these children and young people are often excluded as both active citizens and rights holders.

## **The exclusion of children and young people with learning disabilities from access to their rights under the UNCRC**

People with learning disabilities have historically experienced exclusion from active citizenship and their position as rights holders. This exclusion has taken place both in the physical environment, through institutionalisation, and at a societal level through lack of access to education<sup>4</sup>, employment<sup>5</sup>, relationships<sup>6</sup>, and family lives<sup>7</sup>. This multi-layered process of exclusion has seen people with learning disabilities experiencing a societal '*othering*'. As Parr and Butler (1999)<sup>8</sup> stated, individuals with learning disabilities in communities following deinstitutionalisation were viewed as "*the ultimate other*".

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<sup>3</sup> By active citizenship SCLD refers to the self-determination, participation and contribution of people with learning disabilities as it relates to T.H Marshalls (1950) concepts of civil, political and social citizenship.

<sup>4</sup> [Enable \(2018\)](#)

<sup>5</sup> [McTeir, MacDougall, McGregor, Hirst & Rinnie \(2016\)](#)

<sup>6</sup> [SCLD \(2018\)](#)

<sup>7</sup> [Stewart, Macintyre & McGregor \(2016\)](#)

<sup>8</sup> [Parr and Butler \(1999\)](#)

Today, children and young people in Scotland, still experience exclusion and *'othered'* lives, are denied self-determination, dignity and respect as human beings and active citizenship. In particular, there are stark examples of violations of children and young people's rights with regard to education, liberty, relationships, and play. Examples of each of these are outlined below:

## Education

Findings from IncludED in the Main<sup>9</sup> highlighted the exclusion of children and young people with learning disabilities from mainstream education. This report stated that of the 503 parents surveyed 40% said their child, who has a learning disability, had been excluded from school. 19% of the same parents said that this was a regular occurrence. While the reasons the school gave for the child's exclusion was usually related to the child's behaviour or the activities being unsuitable for the child or young person, the parents felt that the majority of the exclusions were a result of the school not coping (52.48%), the child not getting the support they needed (74.75%) and the child not being listened to (43.07%)<sup>10</sup>.

In terms of further education, SCLD is currently aware of circumstances in which young people with learning disabilities are excluded from opportunities to take part in college courses. Recently, SCLD has been contacted by a family who has had to go to great lengths to ensure a young person with a learning disability could participate in a mainstream college course with support. This family was initially told that due to the young person's learning disability they would need to take part in a pre-course trial to establish if they could join the course. Experiences like this highlight the additional barriers children and young people with learning disabilities experience in trying to exercise their UNCRC rights. This exclusion from education,

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<sup>9</sup> [Enable \(2018\)](#)

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

significantly impacts children and young people's employment opportunities, as the move into adult life. As McTeir et al (2016)<sup>11</sup> stated,

*"Findings from the available data shows that the employment rate for people with a learning disability is in the range of 7%-25% compared to a disability rate of 42% and an overall employment rate of 73%."*

*(McTeir; 2016, p.8)*

In more stark examples, The Children and Young People's Commissioner's report 'No Safe Place' identified a worrying lack of consistent policies regarding restraint and seclusion in schools across Scotland, limited information on restraint and seclusion as well as insufficient consideration on the damaging emotional impact this practice can have on a child or young person's emotional wellbeing<sup>12</sup>.

## Liberty

SCLD is aware that across the UK children and young people with learning disabilities, do not have access to full liberty due to being placed in out of area care or due to being placed in secure accommodation.

It is pertinent that the children's social work statistics 2016-2017 stated that 34% of young people in secure care accommodation had at least one disability, defined as:

*"a mental or physical impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities."*

*(2016-17, p.25)<sup>13</sup>.*

While there are no current figures of children and young people in out of area accommodation in Scotland, recent figures from McDonald (2019)<sup>14</sup> highlighted that

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<sup>11</sup> [McTeir \(2016\)](#)

<sup>12</sup> [Children and Young People's Commissioner for Scotland \(2018\)](#)

<sup>13</sup> [Children Social Work Statistics \(2016-17\)](#)

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

there were 705 people aged 16 and above with learning disabilities living in out of area placements. 453 were there against their choice, and 79 were placed outside of Scotland. These figures present significant concerns regarding the situation for those under 18, which will require further attention.

## Relationships

For children and young people with learning disabilities, their opportunities to engage in meaningful relationships, both friendships and romantic relationships, are significantly restricted. Findings from IncludED in the main found that 60% of 116 children and young people aged between 5 to 18 said they feel lonely at school.

Challenges in establishing safe and meaningful relationships and friendships for children and young people with learning disabilities is at times due to exclusion and isolation in education<sup>15</sup>, experiences of overprotection<sup>16</sup>, and a lack of high-quality relationship, sexual health, and parenting information<sup>17</sup>.

## Play

The importance of play in developing children's self-regulation and control and in developing skills in numeracy and literacy has been outlined in 'The case for play' (2015)<sup>18</sup>. However, despite the acknowledged importance of play for all children and young people and a commitment to play outlined in Article 31, SCLD is aware that children and young people with learning disabilities in Scotland are often excluded from leisure and play activities with their peers. This is often as a result of multiple barriers and intersections between poverty, disability, disadvantage, and inaccessible environments<sup>19</sup>.

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<sup>15</sup> [Enable \(2017\)](#)

<sup>16</sup> [Barnardo's \(2015\)](#)

<sup>17</sup> [SCLD \(2018\)](#)

<sup>18</sup> [Playground Ideas \(2015\)](#)

<sup>19</sup> [Scottish Government \(2015\)](#)

As well as physical exclusion, research conducted by Diamond and Hong (2010)<sup>20</sup> in Nebraska highlighted that children with physical impairments were more likely to be excluded from social play by their peers. As the authors stated,

*“The results of the current study provide further evidence that preschool children’s ideas about inclusion are affected by a variety of factors including disability, activity setting demands, and issues related to fairness and equity. Consistent with previous researchers (Favazza & Odom, 1997<sup>21</sup>; Nabors & Keyes, 1997<sup>22</sup>), we found that children are more likely to choose a doll representing a child without disability than a child with a disability to join a play activity. This result is consistent with observational research suggesting that children with disabilities are excluded from play significantly more often than their peers without disabilities”*

(Diamond & Hong; 2010, p.171)

While this study refers to the exclusion of children and young people with physical impairments from play, SCLD believes it is not inappropriate to suggest that this same social stigma and exclusion could be potentially experienced by children and young people with learning disabilities in Scotland. However, more research is required to establish if this is the case.

At SCLD’s recent consultation event, SCLD were told by both children and their families that bullying in school or in public places was a significant barrier in accessing play. However, those at the event also shared positive practice in promoting inclusion in leisure. One person spoke about support their child who communicated non-verbally got to take part in swimming lessons. This involved the use of a picture exchange tool to communicate with the young person. While SCLD acknowledges that some good practice examples exist, the organisation suspects that learning disabilities are often excluded from play.

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<sup>20</sup> [Diamond and Hong \(2010\)](#)

<sup>21</sup> [Favazza & Odom \(1997\)](#)

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In understanding the exclusion of children and young people with learning disabilities, SCLD believes the direct incorporation of the UNCRC into Scottish Law presents a significant opportunity to create a rights-respecting culture which supports an environment which empowers children and young people with learning disabilities to access active citizenship.

While SCLD believes the UNCRC incorporation presents a significant opportunity, we have concerns that there is potential to leave children and young people with learning disabilities behind. To ensure this is not the case a number of key issues need to be addressed:

- Creating a framework for incorporation which supports the rights of children and young people with learning disabilities which can be enforced
- Ensuring direct incorporation of the UNCRC into Scottish legislation
- Ensuring a timescale for incorporation which balances urgency and realisation of rights for children and young people with learning disabilities
- National and local realisation of the UNCRC for children and young people with learning disabilities
- Including children and young people with learning disabilities within children's rights bill

Each of these areas is expanded on below with reference to the consultation document's key questions.

## **Creating a framework for incorporation which supports the rights of children and young people with learning disabilities which can be enforced**

*Question 1: Are there particular elements of the framework based on HRA as described here that should be included in the model of incorporation of the UNCRC in domestic law? Please explain your views*



*Question 2: Are there any other aspects that should be included in the framework?*

*Please explain your views.*

*Question 3: Do you agree that the framework for incorporation should include a*

*'duty to comply with the UNCRC rights? Please explain your views.*

*Question 4: What status, if any, do you think General Comments by the UN*

*Committee on the Rights of the Child and Observations of the Committee on reports made by states which are party to the UNCRC should be given in domestic law?*

In considering Question 1 of the consultation document, SCLD welcomes an approach to full incorporation of the UNCRC which follows the same mechanisms as the Human Rights Act (1998). In particular, SCLD is supportive of a duty to comply being placed on public authorities similar with that which is in place regarding the European Convention on Human Rights (Question 3). This view supports the position of The Children and Young People's Commissioner for Scotland<sup>23</sup>, Together Scottish Alliance for Children's Rights<sup>24</sup> and The Health and Social Care Alliance.

Further, than this, SCLD asks that the Scottish Government and partners develop a robust process of enforcement, to ensure that children and young people with learning disabilities have real opportunities to access redress, which is supported by legal aid. SCLD believes the role of enforcement will also displace areas and public services from human rights breaches and reduce the number of legal cases brought are reduced.

With regard to additional aspects which could be added to the framework (Question 2), SCLD supports the proposal made by Together Scottish Alliance for Children's Rights that proactive duties should be in place to support rights-based decision making and to complement the reactive duties instated by the Human Rights Act Framework.

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<sup>23</sup> [Children and Young People's Commissioner for Scotland \(2019\)](#)

<sup>24</sup> [Together \(Scotland\) \(2019\)](#)

In their response to Government, Together Scottish Alliance for Children's Rights outline their reasoning's for supporting additional proactive duties,

*"The Rights of Children and Young People (Wales) Measure 2011 (the 'Welsh Measure') shows the value of having a 'proactive' duty to promote rights-based decision-making. The Welsh Measure places a duty on Ministers to have 'due regard' to the UNCRC when exercising any of their functions. This embeds the UNCRC as part of the framework for policy development in Wales and places children's rights at the forefront of all Ministerial decisions. Ministers have to reflect on relevant articles of the UNCRC when considering policy proposals and reflect on how they can exercise their functions to give better effect to children and young people's rights. In this way, the UNCRC is seen first and foremost as a framework for effective policy and decision-making, rather than the basis for a legal claim."*

*(Together; 2019, p.4)<sup>25</sup>*

SCLD believes this proposed model of proactive measures, will help to ensure the rights of children and young people with learning disabilities are at the forefront of legislative and policy decision making and are not considered as an *"afterthought"* in wider policy decision making. (Please refer to recommendation 1).

SCLD, however, would welcome similar value being given to the UNCRPD in Scotland and its relationship to the HRA and the UNCRC. SCLD proposes developments around the incorporation of the UNCRC should lead us to begin a conversation in Scotland about the role of the UNCRPD. A central focus of this should be the potential need for partial or full incorporation of this international convention. (Please see recommendation 2). The need for this approach is supported by thinking from Mergret<sup>26</sup> who highlighted the potential exclusion of people with disabilities to realise their rights and stated,

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<sup>25</sup> [Together Scottish Alliance for Children's Rights \(2019\)](#)

<sup>26</sup> [Megret \(2008\)](#)

*“Where the ‘able-bodied’ may be in a position to maximize their rights in a context ‘laissez-faire’, the disabled typically require a much more complex social, political, economic and institutional set- up to enjoy rights on an equal basis. Furthermore, persons with disabilities have been particularly prone to ‘fall between the cracks’ of various divisions internal to human rights, as their position is uniquely vulnerable to omissions, lack of coordination and narrow focuses.”*

(Megret; 2008, p.263)

SCLD, therefore, welcomes discussion of the potential to incorporate the UNRCPD following incorporation of the UNCRC, to ensure people with learning disabilities are empowered in a human’s rights culture in Scotland. (Please refer to recommendation 2).

## **Ensuring direct incorporation of the UNCRC into Scottish Legislation**

*Question 12: What is your preferred model for incorporating the UNCRC into domestic law? Please explain your views*

*Question 4: What status if any, do you think the General Comments by the UN Committee on the Rights of the Child and Observations of the Committee on reports made by States party to the UNCRC should be given in our domestic law?*

SCLD understands incorporation in line with the definition provided by the UN Committee on the Rights of the Child which stated:

*“Incorporation should mean that the provisions of the convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic law.”*

(UN Committee on the Rights of the Child General Comment No.5; 2003, p.6)<sup>27</sup>

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<sup>27</sup> [UN Committee on the Rights of the Child \(2003\)](#)

In considering question 12 of the consultation document, SCLD believes that for incorporation to truly reflect it's above definition, direct incorporation should be the chosen model. Further, SCLD recognises that Lord Reed Deputy President of the Supreme Court, does not seem daunted by interpreting children's rights in a domestic court. As stated,

*“Although we share the fundamental values reflected in the Convention, the way in which they have developed in detail, and continue to develop, varies from one country to another, reflecting differences in history and social development. So all of us whether we work in Strasbourg or in a national court, are charged with the responsibility of ensuring respect for human rights; but it is primarily the national judges who are best placed to make necessary judgements. In order to fulfil that role we need to understand a large developing body of jurisprudence, and then apply it in the particular circumstances of our own society.”*

(Lord Reed; 2019, p.3)<sup>28</sup>

SCLD supports the statement made by the Children and Young People's Commissioner for Scotland that the UNCRC rights cannot be divided as they are both 'independent and interrelated'. With regard to their interconnected nature, SCLD believes a rewriting of the convention into Scottish law will present a significant challenge in ensuring the rights remain interconnected.

SCLD believes both Together Scottish Alliance for Children's Rights and The Children and Young People's Commissioner for Scotland present compelling arguments for direct incorporation. In particular, SCLD refers to Together Scottish Alliance for Children's Rights evidence regarding incorporation internationally. As they stated,

*“In countries that have directly incorporated, courts have not had difficulties in interpreting UNCRC rights. Direct incorporation provides clarity and means that domestic law keeps pace with developments in international human rights law. It*

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<sup>28</sup> [Lord Reed \(2019\)](#)

*gives courts certainty that the rights incorporated into law are UNCRC rights rather than an alternative version. It allows courts to look to other countries that have directly incorporated the UNCRC and draw from General Comments and wider jurisprudence to inform decisions. Countries including Belgium, Norway, and Spain are developing detailed case law which could be used by courts in Scotland to aid interpretation. In Norway, it has been reported that the judiciary experienced little difficulty in interpreting the UNCRC. This is partly because, like Scotland, most legislation is already in line with the UNCRC, or in some cases gives stronger protections."*

(Together; 2019 p.7)<sup>29</sup>

Additionally, SCLD recognises any move away from direct incorporation to a Scottish suite of rights will loosen connections to the general comments. SCLD believes the general comments should be interpreted, considered, particularly in regard to Article 23 of the convention, *'The rights of children with disabilities'*. Therefore in response to Question 4, SCLD supports interpretation and consideration of the General Comments being given.

While SCLD is strongly supportive of direct incorporation and its potential impact on improving the lives of children and young people with learning disabilities, SCLD must highlight some reticence about the wording of the 30-year-old convention.

In particular, SCLD has concerns regarding the outdated and potentially disempowering language of Article 23, in particular, the term *'mentally disabled'* and the *'special needs of a disabled child'*. SCLD believes this language is counter to the social model of disability which appears to be at the heart of general comments. These state,

*"The committee emphasises that the barrier is not the disability itself but rather a combination of social, cultural, attitudinal and physical obstacles which children*

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<sup>29</sup> [Together \(2019\)](#)

*with disabilities encounter in their daily life. The strategy for promoting their rights, is, therefore, to take the necessary actions to remove the barrier.”*

(UN Convention on the rights of the child General Comment No.9; 2006, p.4)<sup>30</sup>

While SCLD does not support the outdated language used in Article 23, SCLD is aware that a rewriting of the legislation will lead to connections being lost between the article and the general comments. In addition, at SCLD’s consultation event most of the children and young people and parents consulted with, agreed that direct incorporation was the best way to ensure their rights. One parent did, however, state that a suite of rights could be an *“opportunity to do better”* and a chance to move away from outdated terminology. On balance, SCLD supports full incorporation, as opposed to the Scottish suite of rights. SCLD, therefore, recommends that the UNCRC be fully incorporated and, in the future, the challenges of the terminology used in Article 23 is presented to the United Nations and considered internationally. (Please refer to recommendation 3).

## **Ensuring a timescale for incorporation which balances urgency and realisation of rights for children and young people with learning disabilities**

*Question 14: Do you think there should be a ‘sunrise clause’ within legislation? Please explain your views.*

*Question 15: If your answer to the question above is yes, how long do you think public bodies should be given to make preparations before the new legislation comes into full effect?*

In their response to this consultation Together Scottish Alliance for Children’s Rights stated,

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<sup>30</sup> [UN Committee on the Rights of the Child \(2009\)](#)

*“The UK ratified the UNCRC almost 30 years ago in 1991. The UK’s ratification of the UNCRC placed binding obligations on the Scottish Government and, as a result, the UNCRC has already been embedded into legislation, policy, and practice in Scotland over many years, albeit on a piecemeal basis. The Children and Young People (Scotland) Act 2014 has further raised awareness and understanding of the UNCRC obligations among public authorities by placing reporting duties on public authorities should be ready by 2021 to apply the more comprehensive duties that result through UNCRC incorporation”*

(Together; 2019, p16)<sup>31</sup>

SCLD understands the view that minimum standards in relation to the UNCRC should already be achieved in Scotland. However, SCLD is aware that we are far from the full realisation of the UNCRC rights for children and young people with learning disabilities at the highest attainable standard. Please refer back to the section: *Exclusion of Children and Young People with Learning Disabilities from access to their Rights under the UNCRC.*

Despite the Children and Young People (Scotland) Act (2014), SCLD has identified gaps in service planning for children and young people with learning disabilities. This was addressed in SCLD’s (2019) response to the Scottish Government in which we stated:

*“SCLD believes that Children’s Rights should be central to any children’s services plan and should be at the forefront of local areas’ plans. However, SCLD believes the national guidance fails to present a clear picture of how these rights can be ensured and best articulated in service planning. For example, the statutory guidance, in line with the Act states that local authorities and territorial health boards can report on UNCRC requirements,*

*“...in such a manner as the authority considers appropriate”*

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<sup>31</sup> [Together \(2019\)](#)

*(Scottish Government; 2016, p.70)<sup>32</sup>*

*“While SCLD understands the legislative framing of the Act to allow local area flexibility, SCLD believes the guidance does not present a clear enough requirement to address children’s rights and this could potentially allow for varying inconsistencies in practice.”*

(SCLD; 2019, p4-5)<sup>33</sup>

Despite best efforts, SCLD are aware that at present local areas do not collect data regarding children and young people with learning disabilities and this is not routinely monitored as part of [Learning Disabilities Statistics for Scotland](#). This highlights the significant need for incorporation of UNCRPD, following the incorporation of the UNCRC. As Article 31 of the UNCPD which places a duty on state parties to “...undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention”<sup>34</sup>. In understanding this gap and the interconnected nature of all rights, SCLD has concerns that without a discreet workstream, children and young people with learning disabilities, may be excluded.

Therefore, SCLD welcomes a separate high priority workstream of Article 23 running from 2021 to 2024 to ensure Article 23 is met for children and young people with learning disabilities at the highest standard in Scotland.

This work stream should be led by a Scottish Government task group with the representation of local areas. This group should exist as the reporting mechanism on the implementation of Article 23 between 2021 to 2024 and should have a duty to report back to Scottish Ministers. This commitment to full implementation and a requirement to report on this should be written into Children’s Rights (Scotland) Bill. SCLD would welcome the opportunity to facilitate and support this work. (Please

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<sup>32</sup> [Scottish Government \(2016\)](#)

<sup>33</sup> [SCLD \(2019\)](#)

<sup>34</sup> [UNCRPD \(2006\)](#)



refer to the recommendation 4). This work could potentially feed into and work with Regional Improvement Collaboratives.

SCLD asks that the following is central to the work of this group:

- Ensuring robust data collection for children and young people with learning disabilities to inform service delivery
- Reviewing current local area services for children and young people with learning disabilities In line with Article 31 of the UNCRPD
- Implementing additional services were required to support children and young people in education, employment, and engagement in community life
- Developing and implementing a national awareness-raising campaign on the needs and assets of children and young people with learning disabilities and their rights for children, young people and their families. This should be included as a programme within schools and could be tied to UNICEF rights respecting schools
- Ensuring national public services' learning disability awareness training to take place across; health, criminal justice, social care, education, and social work.

(Please refer to recommendation 5 a-e).

During this time period, SCLD asks that a coinciding group is formed to address the issues regarding restraint and seclusion of children and young people with learning disabilities in Scottish Schools because this issue presents significant violations across the UNCRC articles including Articles: 3,19,23 and 28. This group should have similar reporting duties to the group outlined above. (Please refer to recommendation 5.f)

## **Legislative and Non-legislative realisation of the UNCRC for children and young people with learning disabilities**

*Question 13: Do you think that a requirement for the Scottish Government to produce a Children's Rights' Scheme, similar to the Welsh example, should be included in this legislation? Please explain your views.*

*Question 16: Do you think additional non-legislative activities not included in the Scottish Government's Action Plan and described above, are required to further implement children's rights in Scotland? Please explain your views.*

To ensure the aspiration of incorporation is reflected in the lived experience of children and young people with learning disabilities, consideration must be given to how we can achieve this, through legislative and non-legislative means.

SCLD sees a clear role for legislative activities to support the realisation of rights and non-legislative activities to be conducted on a local level. With regard to legislative responsibilities, SCLD sees value in a children's rights impact assessment which includes elements of an equality and human rights impact assessment. With regard to non-legislative activities, the families SCLD spoke to at our consultation event outlined some proposals which they felt would support children and young people with learning disabilities. Both these areas are discussed below.

### **Legislative Realisation of the UNCRC Rights**

#### Impact Assessments

SCLD supports the position of Children and Young People's Commissioner for Scotland with regard to the development of a Children's Rights Scheme and a mandatory requirement to complete a Child's Rights Impact Assessment. However, SCLD is clear that any Child's Rights Impact Assessment must emphasise the importance of ensuring that the rights of children and young people with learning disabilities are realised to the highest standard.

SCLD are aware that currently, Human Rights in Scotland are at times misunderstood and disvalued. Findings from a YouGov survey of more than 1,500 Scottish adults found that 57% of those surveyed were conflicted, opposed or disengaged to/ from Human Rights.<sup>35</sup>

If we accept that those delivering and planning services are made up of the general population, we must accept that varying opinions on human rights will exist. Therefore, we must ensure that the process of impact assessments is robust and conducted by those with knowledge and expertise in this area.

At present, SCLD is aware existing assessments do not give sufficient space for those completing it to think about and address the needs and aspirations of children and young people with learning disabilities' and the intersections of disability, race, socio-economic status, gender, and sexuality.

For the mandatory child's rights impact assessment to fully address the intersections of children and young people with learning disabilities lived experience, SCLD welcomes building in an equality and human rights impact assessment into the child's rights assessment. This should go further than asking if any distinct groups will be impacted. Instead, the assessment should require those working to produce assessments on a national and local level to address fully the impact their proposals have for children and young people with learning disabilities across a number of intersections.

This is supported by the Scottish Government Guidance for the Child's Rights and Wellbeing Impact Assessment. This stated,

*"Sometimes, the findings in CRWIAs may conflict with those in EQIA and other impact assessments. Impact assessments undertaken in isolation risk missing or underestimating the cumulative impacts of major change on different groups. Identifying these should lead to consultation between the different policy leads to*

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<sup>35</sup> Yougov (2017) cited in [SHRC \(2018\)](#)

*ensure that the assessments are based on the best evidence possible and that the decision-making progress is transparent”.*

(The Scottish Government, 2019, p. 10-11)<sup>36</sup>

SCLD therefore believes that any child’s rights wellbeing assessment should include as part of this process a merged equalities and human rights impact assessment, which ensures the rights of children and young people under the UNCRC is met for all children and young people, not just those in the best position to articulate and realise their rights. Critical to this will be that these assessments do not become tick box exercises and that they should be completed by independent accessors who have relevant competency and experience in equality and human rights. (Please refer to recommendation 6)

### Ensuring accessibility of complaints procedures

SCLD fully supports Together Scottish Alliance for Children’s Rights) response to this consultation in which they state,

*“Barriers in access to justice and long-drawn-out processes can seriously compromise a child’s ability to assert their rights. The UN Committee emphasises the importance of independent complaints procedures and child-friendly information, as well as access to the courts. These should be accompanied by access to independent advocacy...The Committee’s position is endorsed by Together members, who repeatedly set out the need for child-friendly complaints mechanisms at all levels of government.”*

(Together; 2019, p.14)

SCLD would, however, ask that further consideration be given to how we ensure these child-friendly complaints procedures are inclusive to those with learning disabilities. Historically, people with learning disabilities have been forgotten with

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<sup>36</sup> Scottish Government (2019)

regard to the advancement of human rights and active citizenship in the UK, In particular this population have been left behind in the realisation of their social citizenship<sup>37</sup>.

To ensure children and young people with learning disabilities have the opportunity to access complaints mechanism consideration must be given to what this process looks like. Particular attention should be given to how these processes can be made accessible to children and young people with profound and multiple learning disabilities. Research from both the UK and the US has identified significant barriers faced by children and young people with nonverbal communication. These barriers have included:

- Being viewed by adults as unable to take part in decision making
- An organisational structure which excludes their participation<sup>38</sup>
- A believed lack of benefit from their self-determination
- A lack of training and information on promoting self-determination and priorities focused elsewhere<sup>39</sup>.
- Limited access to self-advocacy groups<sup>40</sup>.

In considering the above, it is critical that following the incorporation of the UNCRC into Scottish law, public services and local authorities ensure the accessibility of complaints procedures to children and young people with learning disabilities and those with communication needs for more widely, [The Communication Hub](#) may be a helpful starting point in developing this. With particular reference to people with learning disabilities, the following must be ensured:

- The provision of independent advocacy and self-advocacy groups across Scotland (Please refer to Recommendation 7)

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<sup>37</sup> [Walmsey \(1991\)](#)

<sup>38</sup> [Franklin and Sloper \(2009\)](#) cited in [Potter and Whittaker \(2011\)](#)

<sup>39</sup> [Wehmeyer, Agran, and Hughes \(2000\)](#) cited in [Potter and Whittaker \(2011\)](#)

<sup>40</sup> [Potter and Whittaker \(2011\)](#)

- Work with self-advocacy groups to improve the representation of individuals with nonverbal communication (Please refer to recommendation 7.a)
- Accessible complaints procedures in all public services including schools, health, social care, and police. These processes should allow for use of a range of communication tools including but not limited to Easy Ready Documents, Talking Matts and augmentative communication tools including Eye Gaze (Please refer to Recommendation 8)
- Awareness-raising of rights under the UNCRC and the opportunity to complaint and enforcement where these rights are not being met. (Please refer to recommendation 9)

Further, it will be critical that legal enforcement supports this process. Therefore SCLD welcomes:

- Free legal process to support complaints and redress of children and young people with learning disabilities and their families, this could link with Audit Scotland to report annually on the number of complaints made and legal cases taken (Please see recommendation 10)
- Legal redress process which ensures the burden of proof is with the duty holders and not the rights holders (recommendation 11)

## The non-legislative realisation of UNCRC Rights

The children and young people and their families SCLD spoke to, told us they felt they were an “*afterthought*” in both their communities and the services they accessed. They told us that there was a significant gap between government policy between support for children and young people with learning disabilities and their lived experience.

To address this, the children, young people, and families that SCLD has spoken to have a number of suggestions on how knowledge could be improved on a local level. These included:

- Improved knowledge and education for children and young people on the UNCRC Rights. This should include a clear understanding of what this means for children, young people and families in practice
- Stronger joined-up working between children and adult services regarding transitions for children and young people with learning disabilities
- The wider availability and uptake of accessible communication techniques including, but not limited to, Talking Mats.

In addition to this, one of the families SCLD spoke to, expressed that exclusion from education as a result of bullying was a particularly critical issue. As SCLD understand, all rights are indivisible and interdependent, it will therefore be vital that more work is done to ensure all children can access education under Article 26. To achieve this we must ensure the realisation of freedom from discrimination (UNCRC, Article 2) and tackling institutional barriers to access (UNCRC, Article 23). To do this there will be a role for disability awareness-raising and training for all pupils in local areas, monitored by the proposed task group. (Please refer back to recommendation 5.d).

Further, SCLD believes that children and young people with learning disabilities themselves will have more to input into the discussion on non-legislative measures

to ensure their rights. Unfortunately, due to the timescale for responses which took place over the school summer holiday, it was challenging to collect a large scale number of views on this issue. Therefore, SCLD believes more work is required to hear from these excluded voices to outline further measures. (Please refer to recommendation 12).

## **Including children and young people with learning disabilities within children's rights bill**

*Question 7. We would welcome your views on the model presented by the advisory group convened by the Commissioner for Children and Young People in Scotland and Together (Scottish Alliance for Children's Rights).*

SCLD supports the Bill proposed by The Children and Young People's Commissioner for Scotland and Together Scottish Alliance for Children's Rights. Centrally, SCLD supports the objectives of the bill including direct incorporation, ensuring a proactive culture of rights, providing redress where children and young people's rights are breached and ensuring the best interests of children and young people at all levels of Scottish Government.

SCLD does however believe further work is required to ensure the aspirations and needs of children and young people with learning disabilities are not lost within the Bill. SCLD appreciates the expertise which has been drawn upon to establish this Bill and supports its introduction into Scottish Legislation. SCLD asks that the Children and Young People's Commissioner for Scotland, Together Scotland and Equalities groups are brought together to ensure the particular needs of those with protected characteristics are included in this bill. In the case of learning disability, this would be a legal obligation to accessible complaints processes and an obligation to produce information on the process and decision making in a format accessible to the individual. This may take the form of a national complaints model which is built into the proposed Bill, to ensure children, young people and their families are not subject



to postcode lottery and varying standards of practice when making a complaint. Critically there should be a focus on systems and structure around accountability. Additionally consideration should be given to legislative duties regarding reporting on Article 23 advancements in local areas. (Please refer to recommendation 13)

## Summary

SCLD is supportive of direct incorporation and a framework for incorporation which is both proactive and reactive, as well as a duty to comply with the UNCRC and is broadly supportive of the Children's Rights (Scotland) Bill drafted by international experts and set forward by The Children and Young People's Commissioner for Scotland and Together Scottish Alliance for Children's Rights. SCLD believes the incorporation of the UNCRC marks an important step in advancing the rights of children and young people with learning disabilities in Scotland and ensuring active citizenship and status as rights holders on the same basis as all others.

However, SCLD is also aware that for children and young people with learning disabilities, realising their human rights is a more challenging process, involving a complex interplay of societal barriers and institutional discrimination. Because of this, SCLD fears that without additional attention children and young people with learning disabilities may be lost and left behind in this move to incorporation. This by no way means that SCLD is unsupportive of a timely move to incorporation. Instead, SCLD believes additional provisions should be made to ensure Article 23 is realised progressively between 2021 and 2024, with reporting mechanisms in place to ensure this is achieved via the suggested workstream and task group.

For many people with learning disabilities, there is a feeling that existing human rights legislation at times fails them. SCLD believes this is because of a failure in implementation of the legislation. In understanding this, it is important we ensure a move towards incorporation which best works for children and young people with learning disabilities. SCLD therefore, asks that we give particular consideration to the following as we move forward:

- A dedicated high priority workstream in relation Article 23 of the UNCRC to ensure its realisation with legislative duties to report to Ministers.
- A national conversation on utilising the value of the UNCRPD (For example Article 31 of the UNCRPD) & potential for incorporation
- A child rights impact assessment which includes elements of equality and human rights impact assessments and promotes adequate consideration of the needs and aspirations of children and young people with learning disabilities
- Ensuring an accessible complaints process supported with legal aid
- Work with children, young people, and their families to outline non-legislative measures which will support the realisation of rights
- The opportunity for SCLD and other equality and human rights organisations to comment on Children's Rights Bill, with a focus on ensuring legal obligation to provide accessible complaints procedures.

SCLD's full list of recommendations is available on p23-24.

SCLD is appreciative of the work of organisations including The Children and Young People's Commissioner and Together Scottish Alliance for Children's Rights as well as The Scottish Government in ensuring the rights of children and young people in Scotland are respected. We look forward to ensuring that incorporation is taken forward with a view to the particular requirements of children and young people with learning disabilities. SCLD thanks the Scottish Government for the opportunity to respond to this important consultation.

## Recommendations

- 1) Scottish Government to ensure both reactive and proactive legal mechanisms to ensure the full incorporation and implementation of the UNCRC rights
- 2) Scottish Government to begin a national conversation on the role of the UNCRPD and its impact on the lived experience of individuals with learning disabilities
- 3) Scottish Government to ensure the full incorporation of the UNCRC with a view to an international review of the wording of Article 23
- 4) High priority workstream in relation to Article 23 to ensure its full and meaningful incorporation by 2024. This should be supported by Scottish Government-led task group which should exist as a reporting mechanism with legal duties to report to Scottish Ministers. Please see recommendation 5.
- 5) As part of the Article 23 implementation workstream, the following should be achieved:
  - 5.a National data collection for children and young people with learning disabilities to inform service delivery in line with the duty outlined in Article 31 of the UNCRPD
  - 5.b Local area review of current services for children and young people with learning disabilities
  - 5.c Provision of additional local services where required in education, employment and community life
  - 5.d National awareness-raising campaign on the needs and assets of children and young people with learning disabilities and their rights, targeted at the pupil population. This could potentially be linked to UNICEF Rights Respecting Schools.
  - 5.e Free national public services' learning disability awareness training
  - 5.f A coinciding task group to address the issues regarding restraint and seclusion of children and young people with learning disabilities in Scottish Schools from 2021 – 2024.

- 6) A mandatory child's rights impact assessment which includes elements of an EQHIA to address the intersections of children and young peoples lived experience. This should be completed by independent accessors.
- 7) Scottish Government and local authorities should ensure the provision of independent advocacy and self-advocacy groups across Scotland
- 7.a Work with self-advocacy groups to improve the representation of individuals with nonverbal communication
- 8) Local authorities should ensure accessible complaints procedures in all public services including schools, health, social care, and police. These processes should allow for use of a range of communication tools including but not limited to easy ready documents, Talking Mats and augmentative communication tools including Eye Gaze
- 9) Scottish Government should produce awareness-raising campaign of rights under the UNCRC and the opportunity to complain and have enforcement where these rights are not being met. This campaign should be produced in partnership with third sector organisations who represent children and young people groups with protected characteristics including The Scottish Commission for Learning Disability
- 10) Free legal process to support complaints and redress of children and young people with learning disabilities and their families. This could link with Audit Scotland to report annually on a number of complaints made and legal cases taken
- 11) Legal redress and enforcement process which ensures the burden of proof is with the duty holders and not the rights holders
- 12) Further opportunities for children and young people with learning disabilities and their families to input into future discussions on the realisation on the UNCRC
- 13) Scottish Government to ensure the opportunity of equalities groups and organisations to review The Children's Rights (Scotland) Bill, with a view to

building in complaints mechanism and additional reporting duties with regard to Article 23.

SCLD thanks the Scottish Government for the opportunity to respond to this important consultation.

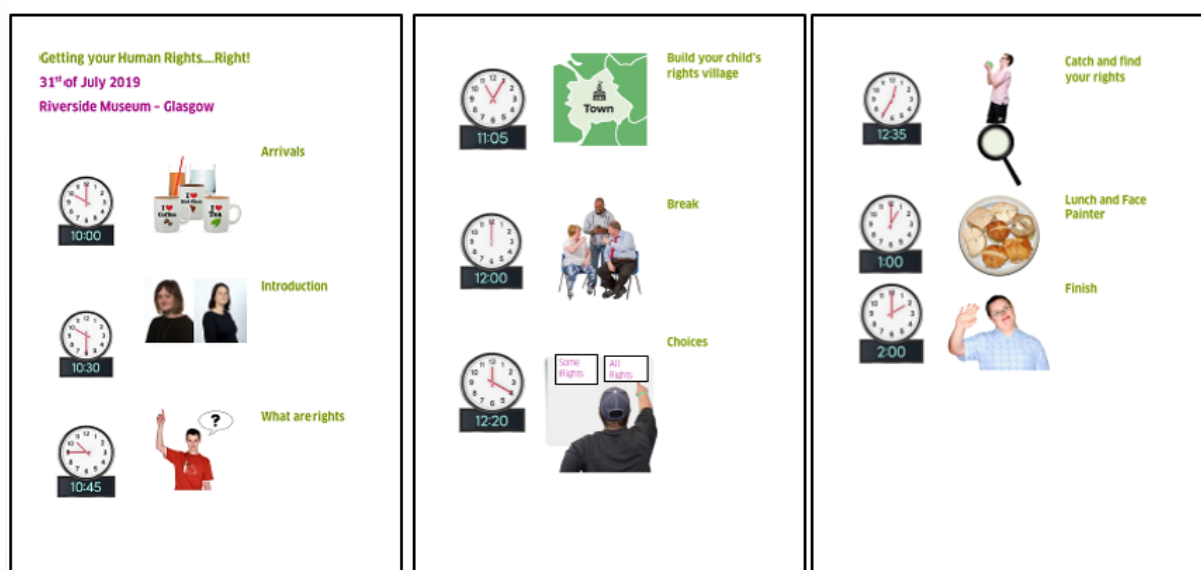


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## Appendix One

### Getting your Human Rights, Right! Event on the 31<sup>st</sup> of July 2019 at the Riverside Museum

To support SCLD in the development of this response, we organised a small focus group event at the Riverside Museum for children and young people with learning disabilities to discuss their access to the rights outlined in the UNCRC.



*Figure 1: The agenda from the session outlining the activities children and young people and their parents/ carers were asked to participate in.*

At the time of organising the event, it was the school summer holidays. 12 people booked a place (6 children and young people and 6 parents and carers). However, on the day 2 children and 2 parents and carers attended, but we assured participants that their opinions would count. Had the consultation taken part over a different part of the year we are confident there would have been higher levels of engagement.

A lack of engagement on this topic could also be a result of children, young people and their families and carers not seeing Human Rights as a critical issue for them,

due to limited engagement and understanding of human rights, discussed within this document.

## Key discussion points



Figure 2: Graphic illustration was used to outline the key points from the day. Full size image available in Appendix 2.

Key points from the discussion included:

- Bullying still happens in schools and it was felt it was the responsibility of the parent to address this issue with the school
- Children were being removed from attending schools due to bullying
- Some doctors were not doing the best thing for children and young people
- A constant change of teachers in school made it hard for children and young people to build relationships and trust
- Advocacy for children and young people should be made available
- Children and young people with learning disabilities were not always able to access alternative technology
- Children and young people with learning disabilities were often afterthoughts
- All information should be in the public domain and in easy read
- Article 23 of the UNCRC gave children no right to access mainstream schooling provision

- Supportive of mainstream provision, however when children and young people have nonverbal communication it is positive for them to have peers who share the same experience
- Training for those working in public services around learning disability awareness and accessible communication was viewed as important. Particular attention was given to a need to train those in public services on the use of Talking Mats.
- There is a need for joined-up thinking across services particularly between children's services and adults services
- Government strategy did not match service delivery
- Provision and access to both social care and education was dependent on a postcode lottery
- There needs to be clear pathways for children and young people with learning disabilities at points of transition
- Everyone should know about the UN Convention on the Rights of the Child
- To ensure everyone knows about it we need to be creative and inclusive
- The rights of the child should be visible in communities, pinned to the walls of community centres, police stations and schools
- Finding out about the UN Convention on the Rights of a Child should be made fun for children and young people. We can use different and creative ways to communicate information
- Information should also be available online and on YouTube.

To ensure the complex discussion points in this consultation were articulated as clearly as possible, SCLD staff used a number of techniques to ensure children and young people had the space to talk about issues which were important to them. Please see figures below:

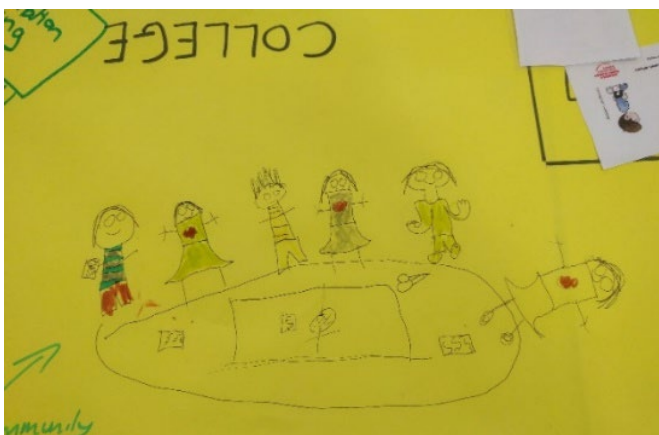


## Children's Rights Town



To allow the children and young people to discuss their experiences in relation to 7 key articles from the UNCRC, SCLD produced a large drawing of a town.

This included an illustration of a school, police station, local amenities, and community centres. SCLD staff then provided children and young people with cards illustrating these seven articles produced by The Children and Young People's Commissioner for Scotland.



*Figure 3: Pictures of the Children's Rights Town*

Those articulating were then offered the space and time to discuss why they felt some of these rights were being met in some of the places illustrated and why they were not being met in others and to share their experiences.

SCLD staff left spaces on the illustration to allow children and young people to add drawings of other things which were important to them.

## Choices / Catch and Find your Rights



*Figure 4: Drawings used to help illustrate the methods of incorporation and the duty to comply*

To support understanding of the options being proposed in the consultation between direct incorporation of the UNCRC or the Scottish suite of rights, SCLD used the visual of a fish moving between two fishbowls. One fishbowl had lots of other fish in it. This was used to illustrate direct incorporation. The other bowl only had a few other fish in it. This was used to illustrate the Scottish suite of rights. Those participating were then asked to use thumbs up stickers to illustrate which option they preferred. The majority of the group selected direct incorporation.

To facilitate a discussion around the duty to comply, using a drawing of a gavel SCLD staff asked those participating at the event to decide if it should be against the law not to follow the UNCRC. Those participating supported the duty to comply.



## Appendix 2: Graphic Illustration of Event



## Contact us

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For information on Scotland's Learning Disability Strategy *The Keys to life*, visit: [www.keystolife.info](http://www.keystolife.info)

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