

Questionnaire on the Children (Scotland) Bill

Financial Memorandum

Finance and Constitution Committee

Scottish Commission for Learning Disability Written Submission

8th of November 2019

Introduction

The Scottish Commission for Learning Disability (SCLD) welcomes the opportunity to provide comment on the Financial Memorandum which accompanies the Children (Scotland) Bill. This submission provides commentary on the proposed finances, we are keen to ensure there is sufficient funding allocated by the range of agencies engaged, to deliver the aim of the Bill. SCLD have chosen to primarily focus our response on questions 1, 2 and 8. Based on our realistic analysis of the Financial Memorandum, we set out the reasons why the Bill requires to be better resourced if its aims are to be realised to:

- Ensure the voice of the child is enabled and heard by the system and staff who serve in it
- Ensure explanations to the child about the process and outcomes are a requirement of the system and fit their individual needs
- Ensure women with learning disabilities who have experienced gender-based violence have their rights respected, protected and fulfilled
- Provide family support where parents are failing to meet enforcement orders so that the rights of families and of the children meet the minimum standards in human rights law.

In considering our submission, SCLD would emphasise that we have drawn on the following:

- **The Scottish Parliament - The report of the Equalities and Human Rights Committee 'Getting Rights Right - Human Rights and the Scottish Parliament'** which made 40 recommendations including budget scrutiny¹

¹ [Scottish Parliament, Equality and Human Rights Committee \(2018\)](#)

- **The First Minister** – Nicola Sturgeon has set up a Task Force to deliver her Advisory Group on Human Rights Leadership Report ‘Recommendations for a new human rights framework to improve people’s lives’²
- **The Scottish Government** - It is planning to incorporate the UN Convention on the Rights of the Child (UNCRC) and has adopted ‘A Fairer Scotland for Disabled People’³ which is its delivery plan to 2021 for the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). As well as *The keys to life*, Scotland’s Learning Disability Strategy focuses on the whole population, whole person and rights-based approach to empowering people with learning disabilities in Scotland.

In addition, SCLD has also drawn on:

- European Convention on Human Rights, given effect through the Human Rights Act (1998), which requires MSPs to be given sufficient information in order to form an opinion Article 10. We believe there is insufficient information in the Financial Memorandum to be satisfied that the ambitions of the Bill, in respect of people with learning disabilities, can be delivered fairly
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴ which, under Article 2, places a duty on the Scottish Government to progressively realise to the maximum extent of its available resources the rights it contains including those on children and family rights
- ‘Protecting *Scotland's Future*’, the *Government's Programme for Scotland 2019-20*⁵ includes a commitment to give practical effect to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁶. CEDAW includes *Article 16* which outlines states parties obligations to take appropriate measures to eliminate discrimination against women in all matters relating to family.

² [First Ministers Advisory Group on Human Rights Leadership \(2018\)](#)

³ [A Fairer Scotland for Disabled People \(2016\)](#)

⁴ [International Covenant on Economic, Social and Cultural Rights \(1976\)](#)

⁵ [Protecting Scotland's Future: the Governments Programme for Scotland 2019-2020](#)

⁶ [Convention on the Elimination of all forms of Discrimination Against Women and Girls \(1979\)](#)

SCLD wishes to record its appreciation of the huge amount of work that has been invested in drafting this Bill, and the accompanying documents, so that MSPs can now provide scrutiny.

Response

Questions 1 & 2

SCLD took part in the original consultation, ['Review of Part 1 of The Children in \(Scotland\) Act 1995 and the creation of a Family Justice Modernisation Strategy'](#) in September 2018. In this, people with learning disabilities and advocacy staff highlighted 4 key points:

1. The need to keep individuals safe
2. Ensuring contact is a safe and a positive experience where it is possible
3. The value of parental rights to parents with learning disabilities
4. Ensuring adequate protection for individuals who had experienced domestic abuse.

The focus of SCLD's initial response was to ensure that parental rights remained intact. We made a number of suggestions regarding support for parents with learning disabilities with regard to these procedures which would have implicit costs attached.

Regarding question 2, SCLD does not believe our comments about the need for additional support for parents with learning disabilities or wider family support has been reflected in the Financial Memorandum. We cover this point in more detail under question 8 below.

Question 8

Voice of the child

SCLD believes the costings made in relation to courts obtaining the view of the child should be reviewed. SCLD believes that in a number of cases, the estimated figure of £875 per case, will not cover the costs needed to include a child with a learning disability. For example, a child or young person with a learning disability may require a range of augmented and accessible communications tools. This could include easy read documents, Talking Mats and Eye Gaze. All such tools have costs attached and training requirements. SCLD, therefore, believes an additional fund should be added

to obtaining the views of the child. This should be fully costed based on the current prices of augmentative and accessible communication tools as well as the time of trained staff and training costs.

Ensuring children and young people with learning disabilities can effectively participate in matters relating to them is fully supported by the UNCRC. The General Comment Number.12 on the right of the child to be heard details the obligations on governments:

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

*(UNCRC, General Comment No.12, p.6)*⁷

The same General Comment covers all forms of communication. This includes nonverbal communication and that children with disabilities should be equipped with the resources needed to communicate their view. To achieve this, SCLD believes a re-evaluation of the costs assigned is needed, dependent on examining the best available data regarding children and young people with learning disabilities and their needs. It is useful to note that the right of a child to express an opinion is also included in Article 7 of the UNCRPD and enabling the right to access support and communication is included in Article 9⁸.

Unfortunately, as part of [Learning Disability Statistics for Scotland](#) data is not collected on the number of children with learning disabilities. SCLD's best suggestion is that costings for these types of tools are based on existing data which states that 14,200 children with a learning disability are registered as receiving additional support in Scotland's Schools⁹ and figures regarding family courts,

⁷ [UNCRC General Comment Number 12 \(2009\)](#)

⁸ [The United Nations Convention of Persons with Disabilities \(2006\)](#)

⁹ [The keys to life \(2019-2021\)](#)

for example, the number of contact and residence cases between 2017 and 2018 which was 2,003¹⁰. Additionally, the number of children referred to children's hearings in Scotland each year is estimated at 5,500¹¹ should also be given consideration.

Establishing an estimate based on existing knowledge may be suitable as a temporary measure, as we move forward to the incorporation of the UNCRC into Scottish Law. However, the Scottish Government and local areas will need to ensure that we build a robust picture of the number of children and young people with learning disabilities in Scotland to ensure service planning adequately addresses their needs. For SCLD this will be fundamental in the full realisation of Article 23 of the UNCRC¹² and links Article 31 of the UNCRPD 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”* (UNCRPD, Article 31, 2006)¹³.

There will need to be decisions taken to establish who should provide this data gathering service. SCLD would suggest that the expertise of the third sector and those with experience working with individuals with communication needs is drawn upon in establishing accurate data to enable informed costing.

Explaining Decisions to a Child

In addition to concerns regarding the cost assigned for ensuring the voice of the child is heard. SCLD has reservations that the cost of £800 for explaining a decision to a child via child welfare reporters is insufficient. For example, in cases involving a child or a young person with a learning disability, who may need more time and a range of tools to support their understanding. SCLD noted that the financial memorandum states, *“...the Scottish Government are aware that very young children or those with severe learning disabilities may not be able to understand”* (2019, p.10)¹⁴.

¹⁰ [Scottish Government \(2017-18\)](#)

¹¹ [Children's Hearings Scotland](#)

¹² [United Nations Convention on the Rights of the Child \(1989\)](#)

¹³ [United Nations Convention on Persons with Disabilities \(2006\)](#)

¹⁴ [Children \(Scotland\) Bill Financial Memorandum \(2019\)](#)

While SCLD understands there will be cases in which understanding may be impaired, SCLD does not believe this should be used as a reason to exclude children and young people with learning disabilities from this process or to restrict funds which may enable them to enact this. SCLD would refer the committee back to the UNCRC General Comment number 12, the right of the child to be heard, which highlights that state parties should not assume that a child cannot express their views. SCLD would suggest that the obligations are twofold: to enable and to ensure a child understands. For SCLD, understanding is critical to informing individuals views, which is referenced in the General Comments regarding the implementation of the child's right to be heard and a need to prepare a child to take part. SCLD, therefore, asks that consideration is given to ensuring that the additional fund for making a child's voice heard extends to encouraging understanding of decision making and its impact. SCLD are aware of good practice examples of hearing the child's voice in matters relating to contact in [West Lothian](#) and the potential for this to be adapted to suit the needs of children and young people with learning disabilities.

Vulnerable Witnesses

SCLD notes the Financial Memorandum states that no financial costs will be incurred as a result of special measures for vulnerable parties in proceedings such as child welfare hearings under section 11 of the 1995 Act, as courts should already have facilities such as screens and live video link available. However, SCLD questions whether these services, if they are working, go far enough to ensure that women with learning disabilities who have experienced domestic abuse are both safeguarded and able to fully participate. To ensure this SCLD welcomes consideration being given to the role of intermediaries within the Bill for individuals who may experience vulnerability, as a result of gender-based violence and learning disability. This is further discussed in our response to the call for views on the Children (Scotland) Bill. The role of intermediaries could be to help ensure the person understands the questions and feels supported throughout the process.

Enforcement Orders

SCLD welcomes section 16 of the Bill, that courts must establish why a contact and residence order has not been complied with. However, SCLD has concerns about the majority of this work being undertaken by the courts and child welfare reports only being utilised in certain circumstances.

SCLD would see merit in, where possible, child welfare reports being utilised which ensure both the voice of the child and parents are heard. This was a key area in which respondents to our initial consultation remarked upon, with one advocate worker saying, *“There is probably a reason they are not following a contact order. It is important for professionals to understand the family's circumstances and history and take that into account.”* (SCLD, 2018, p.14)¹⁵

SCLD is disappointed to see that no financial provisions have been made for family support in cases in which a contact or residence order had not been complied with. We heard from parents with learning disabilities that there may be several reasons why they may struggle to meet the requirements of an enforcement order, including not understanding an order, not having support to arrange contact and not having the financial means to attend contact. SCLD believes it is critical that in cases where a parent has a learning disability and is failing to meet an order, an investigation is activated to discover why that is, and to identify what support must be provided to ensure the agreed contact takes place. This should be where contact is appropriate and is in line with the views of the child in cases involving contact where there have been experiences of domestic abuse¹⁶.

SCLD is aware of a number of stories which provide useful insight into what can be done. For example, a parent with a learning disability was struggling to attend contact sessions with their child due to challenges with independent travel. They were able to access third sector support and staff worked with this parent to attend contact, which they regularly managed to do after this intervention. SCLD, therefore, believes without the provision of support for families failing to comply with orders, there is a risk of unjustly penalising parents with learning disabilities. SCLD would, therefore, welcome a centrally operated fund to provide support to parents who fail to comply due to an identifiable support need. As part of this submission, SCLD has attached a fact sheet regarding the number of parents with learning disabilities in Scotland and the rates of child removal which may be helpful in determining why this is an issue and the potential figure needed to fund a support service for these parents. Please refer to appendix 1.

SCLD believes there could potentially be a role here for the third sector in the provision of this type of support. Several third sector providers already have experience in supporting parents with

¹⁵ [SCLD \(2018\)](#)

¹⁶ [Children and Young People's Commissioner for Scotland](#)

learning disabilities and other parents who may be experiencing challenges with the parenting role. For example, Aberlour Family Service in South Ayrshire. In their service evaluation, Aberlour estimated that by providing family support to parents with learning disabilities and diverting children and young people away from the looked after system they saved £1.4 million of public money a year¹⁷. SCLD asks that any provision of family support provided in cases where enforcement orders have not been followed takes its principles from The Scottish Good Practice Guidelines for Parents with Learning Disabilities¹⁸, as we know that what works in support for parents with learning disabilities often also works for other families who are struggling in the parenting role.

Summary

SCLD believes that for the Bill to effectively meet the Equality and Human Rights commitments to both children and young people with learning disabilities and parents with learning disabilities further attention needs to be given to creating and funding services which can support and ensure:

- That the voices of children and young people with learning disabilities are heard
- That children and young people with learning disabilities are supported to understand decisions which impact them
- Ensuring women with learning disabilities can participate and be safeguarded
- Parents with learning disabilities and others have access to family support where they were failing to meet an enforcement order.

SCLD notes that little consideration has been given to the needs of parents, children and young people with learning disabilities across the Equality Impact Assessment, the Fairer Scotland Impact Assessment and the Child Rights Impact Assessment. SCLD is concerned with the statement in the Equality Impact Assessment that the Bill will have no impact on advancing the equality of opportunity for disabled people.

In the case of parents with learning disabilities, having the right to family life on an equal basis to all others necessitates a range of measures which will cost money to ensure the purpose of this Bill is achieved. For example, to not provide support in cases when parents with learning disabilities are failing to meet enforcement orders. It is our view that the aim of the Bill will be lost if children,

¹⁷ [Aberlour \(2017\)](#)

¹⁸ [SCLD \(2015\)](#)

young people and parents with learning disabilities are negatively impacted by a lack of additional budget assigned to ensure their voice is heard. SCLD believes that the Bill requires to be underpinned by a new culture, different practice and increased finance. All are inter-dependent in achieving the successful impacts sought by the Bill.

SCLD thanks the Finance and Constitution Committee for the opportunity to comment on the Financial Memorandum. SCLD asks that this submission is read in conjunction with our submission regarding The Children (Scotland) Bill call for views to the Justice Committee. SCLD would welcome the opportunity to answer any questions the Committee may have or to provide further information on any points. Additionally, SCLD would be pleased to give oral evidence to the Committee.

Appendix 1: Parents with Learning Disabilities October 2019

How many parents have learning disabilities?

Several factors make it difficult to count how many parents with learning disabilities there are, including; fragmented services, poor records, no common definitions, missing assessments and the invisibility of many parents to official agencies.¹⁹ The most robust data that exists on the number of parents with learning disabilities are from a survey conducted in England in 2003/4 by [Emerson et.al \(2005\)](#)²⁰.

The Emerson study found that of the 2898 adults interviewed, **1 in 15, (around 7%) of people with learning disabilities are parents.**

How many parents in Scotland have learning disabilities?

If we assume that 2% of adults in Scotland have a learning disability, and one in fifteen of those adults will be parents, we can estimate that in Scotland in 2018 around **6,000 people with learning disabilities will be parents.**²¹

¹⁹ [Booth, Booth & McConnell \(2005\)](#)

²⁰ [Emerson et. al. \(2005\)](#)

²¹ Calculated using [National Records of Scotland 2018 mid-year population estimates](#)

If we use LDSS figures we can say that **of the 23,446 adults known to local authorities** in Scotland in 2018 around **1600** are likely to be parents.

How many parents with learning disabilities look after their children?

Emerson et. al. (2005)²² study also found that of the people who had dependent children, just over half (52%) looked after their children.

This study did not ask whether parents with learning disabilities had their children removed from their care, but simply whether they looked after them.

What we can say is that **48% of parents with learning disabilities do *not* look after their children.**

Rates of child removal for parents with learning disabilities²³

International studies, cited in [McConnell & Llewellyn \(2002\)](#)²⁴ show a rate of 40-60% of children being removed from their parents with learning disabilities, though they caution that parents with learning disabilities included in research studies tend to be those who are already known to service providers or those with histories of institutionalization.

The same article cites their earlier study, [McConnell et al \(2000\)](#)²⁵ to settle on a rate of child removal from parents with learning disabilities of around **one child in two**, with these parents

²² Emerson et. al. (2005)

²³ Our report [Supporting Parents with Learning Disabilities in Scotland: Challenges and Opportunities](#) lifts a quote directly from [Wilson et. al. \(2013\)](#), though this muddies the water a little by suggesting 40-60% of parents with learning disabilities have their children removed, rather than **40-60% of children are removed from their parents with a learning disability**

²⁴ [McConnell & Llewellyn \(2002\)](#)

²⁵ [McConnell et. al. \(2000\)](#)

being significantly over-represented in child protection proceedings, and their children placed out-of-home significantly more often than their peers of parents without learning disabilities.

Therefore we can say that international studies suggest that **one child in two (50%)** is removed from the care of parents with learning disabilities.

For comparison, according to [Children's Social Work Statistics Scotland 2017-18](#) **2% of children** in Scotland are looked after or on the child protection register.



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