

# Equalities and Human Rights Committee's inquiry on the UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill

## Scottish Commission for People with Learning Disabilities (SCLD) Submission October 2020

The Scottish Commission for People with Learning Disabilities (SCLD) welcomes the opportunity to respond to this call for views. This response addresses the questions in the consultation with a focus on how we can best ensure the human rights of children and young people with learning/ intellectual disabilities are respected, protected, and fulfilled.

### 1) Will the Bill make it easier for children to access their rights?

SCLD welcomes the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. We believe this will be an important step in defending and realising the human rights of children and young people with learning/ intellectual disabilities in Scotland. We recognise that the introduction of this Bill is a milestone on Scotland's journey towards making rights real for every child. We understand that it will be the culmination of over 10 years of campaigning by children, young people, and wider civil society, and represents the increasing support for children's rights across the Scottish Parliament, Scottish Government and Public Services.

We are supportive and appreciative of the work which has led the way for the potential incorporation of other Human Rights Treaties, such as the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)<sup>1</sup> which the Scottish Government in the Programme for Government (2020-2021)<sup>2</sup> has committed to exploring.

We recognise that while the incorporation of the United Nations Convention on the Rights of the Child (UNCRC) is not a fix-all solution we believe it is critical in embedding children's rights across

---

<sup>1</sup>[United Nations Convention on the Rights of Persons with Disabilities \(2006\)](#)

<sup>2</sup>[Scottish Government \(2020\)](#)

all areas in Scotland, providing both proactive and reactive measures to ensure children and young people's voices and views are listened to and respected.

SCLD is supportive of full and direct incorporation in so far as it is within the power of the Scottish Parliament and welcomes both the proactive and reactive measures in the Bill including:

- The duty on public authorities to not act in a way which is incompatible with the UNCRC
- The remedies for children, young people, and their families to bring proceedings against the public authority
- The courts having powers to decide if legislation is compatible with the UNCRC requirements via strike down declarators and incompatibility declarations
- The powers for the Scottish Government to change laws to make sure they are compatible with the UNCRC requirements
- The Powers for the Children and Young Peoples (Commissioner) to intervene in cases in which a child or young person UNCRC rights have been breached
- The requirement for Scottish Ministers to publish a Childs Rights Scheme and review this yearly
- The requirement for Scottish Ministers to undertake Childs Rights Wellbeing and Impact Assessment (CRWIA) on strategic decisions.

Despite our support for the Bill's aspirations and intentions, SCLD remains concerned that children and young people with learning/intellectual disabilities, whose human rights may be viewed as more challenging or resource-intensive to fulfil, will be ignored. To guard against this SCLD believes we must strengthen the Bill (See Question 3).

## 2) What do you think about the ability to take public authorities to court to enforce children's rights in Scotland?

SCLD is supportive of the ability to take public authorities to court to enforce children's rights in Scotland. We believe this is a positive step in ensuring children's rights are protected. Despite this, we do have concerns regarding how this will be implemented to ensure children and young people with learning/intellectual disabilities will have access to this method of remedy and redress.

Our concern is supported by evidence; for example, Flynn (2015)<sup>3</sup> highlighted that disabled people face significant barriers in accessing justice. This included:

- A lack of information on taking legal cases in accessible formats compounded by low literacy levels
- Attitudinal barriers facing people with learning/ intellectual disabilities who may be viewed to lack '*litigation capacity*' to instruct their counsel
- A lack of independent legal advice available to those living in institutional settings
- A lack of specialist knowledge on the issues faced by disabled people by legal professionals
- The costs of litigation and restrictions on legal aid
- Barriers in accessing complaints mechanisms including equalities infrastructure.

These findings were supported by a small-scale study produced by Norah Fry Research Centre and The University of Bristol (2013)<sup>4</sup>. This research found that major barriers to accessing remedy and redress included a lack of clear pathways to getting the right support as well as feelings of anxiety about the process and a fear of negative consequences following legal action.

Overall, SCLD believes that the ability to take public authorities to court is in and of itself a helpful move forward. We are however concerned about how this is best implemented in a way which does not exclude those groups who are most marginalised, including those with learning/intellectual disabilities who may experience the most serious violations of their human rights, as demonstrated in our response to Question 5.

### 3) What more could the Bill do to make children's rights stronger in Scotland?

To address the serious human rights violations faced by children and young people with learning/intellectual disabilities, SCLD is asking the Committee to consider a duty in the Bill which will ensure that children and young people with protected characteristics (including

---

<sup>3</sup>[Flynn \(2015\)](#)

<sup>4</sup>[Norah Fry & The University of Bristol \(2013\)](#)

learning/intellectual disabilities) are educated and informed about their rights and how to make complaints.

SCLD believes this proposal is in line with General Comment Number 5 (2003)<sup>5</sup> which states that *“For rights to have meaning, effective remedies must be available to redress violations... Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So, States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.”* (p.7).

If we accept the research outlined in Question 2 and understand that children and young people learning/intellectual disabilities face even greater challenges in *‘pursuing remedies for breaches of their rights’*, it is appropriate that additional support be implemented. SCLD believes this will be most effectively achieved through the inclusion of the suggested duty in the Bill.

As an active member of [Together \(Scotland’s Alliance for Children’s Rights\)](#), SCLD also shares several of the concerns expressed by its membership. Therefore, we would welcome consideration being given to the inclusion of the forementioned duty alongside the following four amendments to proactive measures outlined below.

#### 1) [Including a ‘due regard’ duty](#)

While SCLD is supportive of the *‘compatibility duty’* in the Bill, in our initial consultation response<sup>6</sup> we highlighted the need for a *‘due regard duty’* to ensure the rights of children and young people with learning/intellectual disabilities are central in ministerial decision making. Without this, we expressed concern that these children and young people would remain an afterthought in policy and decision making.

SCLD believes the UNCRC, and centrally Article 23<sup>7</sup>, should be used as a framework for effective policy and decision making, rather than only as the basis for taking legal action. We believe this would help ensure that the needs of children and young people with learning/intellectual

---

<sup>5</sup>[UNCRC General Comment No.5 \(2003\)](#)

<sup>6</sup>[SCLD \(2019\)](#)

<sup>7</sup>[Article 23, UNCRC \(1989\)](#)

disabilities are considered at early stages in the decision-making process, reducing the risk of rights violations. We would therefore ask that the Committee considers strengthening ‘*compatibility duty*’ with the ‘*due regard duty*’.

## 2) [Including a commitment to consider UN Committee documents](#)

SCLD is aware that the Bill states that the courts “*may*” consider certain material when interpreting the UNCRC requirements. This includes the preamble to the UNCRC, the full articles and the first and second Optional Protocols. While SCLD is supportive of this, we have concerns regarding the exclusion of other UN Committee documents, for example, the General Comments and Concluding Observations.

SCLD believes these documents are critical in contextualising UNCRC rights, outlining potential violations and offering advice on how best to comply with the UNCRC. General Comments have been recognised by the UK Supreme Court in more than one case as “*authoritative guidance*”<sup>8/9</sup>. In understanding this, SCLD does not want to see the links between the UNCRC and the General Comments lost.

The General Comments are of relevance to children and young people with learning/intellectual disabilities. For example, General Comment No. 15<sup>10</sup> which says, “*States parties have an obligation to ensure that children’s health is not undermined as a result of discrimination, which is a significant factor contributing to vulnerability...*” (p.14), is of pertinence when we consider the disproportionate impact of the coronavirus pandemic on disabled people as well as the high rates of avoidable deaths of children and young people with learning/intellectual disabilities in Scotland (please see Question 5). SCLD, therefore, asks the Committee to consider including a duty to consider UN Committee documents within the Bill.

---

<sup>8</sup>[R \(on the application of SG and others \(previously JS and others\)\) \(Appellants\) v Secretary of State for Work and Pensions \(Respondent\) \(2015\)](#)

<sup>9</sup>[Cameron Mathieson, a deceased child \(by his father Craig Mathieson\) \(Appellant\) v Secretary of State for Work and Pensions \(Respondent\) \(2015\)](#)

<sup>10</sup>[Committee on the Rights of the Child \(2013\)](#)

### 3) Providing clarity regarding who is included as public authorities

SCLD welcomes the Bill ensuring that it will be considered “... *unlawful for a public authority to act in a way which is incompatible with the UNCRC requirements*”. We also support this including private actors whose “*functions are public*”. While we welcome this, we would ask greater clarity to be given to ensure private organisations carrying out public functions are aware of their duties and are held accountable for the discharge of these. Centrally, we would welcome clarity regarding the level of accountability expected for private support and care agencies.

### 4) Strengthening the commitment to Child Rights and Wellbeing Impact Assessments (CRWIA)

SCLD welcomes the commitment for the Scottish Government to prepare CRWIA for new Bills. However, we do believe that the commitment to conduct CRWIA is through the language of the Bill. Section 14(3) of the Bill states that Scottish Government “*must*” prepare a CRWIA for new Bills, certain statutory instruments and “*decisions of a strategic nature relating to the rights and wellbeing of children as they consider appropriate*”. However, SCLD is aware that the Bill also says Scottish Ministers are to determine what constitutes a “*strategic decision*”. We, therefore, believe this clause could weaken the duty for Ministers to conduct Childs Rights Wellbeing Assessments. SCLD would therefore recommend removing phrases which allow for inconsistency like, “*as they consider appropriate*”.

For the same reason, we also have concerns regarding section 14(5). We would therefore ask that the Bill should require the publication of the CRWIA and an accessible summary which meets the needs of children and young people with protected characteristics (including learning/intellectual disabilities).

Alongside the concerns outlined here, SCLD is also aware of other several significant issues raised in Together (Scotland’s Alliance for Children’s Rights) response which should also be given consideration.

4) If you work for an organisation or public authority, what resources do you need to help children and young people access their rights? Will you require additional resources or training to implement the Bill, for example, to make or respond to challenges in court?

SCLD welcomes the Implementation Programme Costs outlined in the Financial Memorandum and we are particularly pleased to see costs attached to children's rights awareness-raising with children, young people, and their families. However, we are not convinced that £750,000 over three years will be enough funding to ensure all children and young people and their families across Scotland are knowledgeable of their rights. We are concerned that these costs may not reach groups who work with children and young people who represent protected characteristics (including learning/ intellectual disabilities). We would therefore ask that, alongside the proposed duty (recommendation 1), that additional funds are added where possible and that an allocation of this funding is for ensuring that children and young people with learning/intellectual disabilities can understand and realise their UNCRC rights.

While we would call for more resources allocated to awareness-raising, we do welcome the three-year funding for embedding children's rights in public services and are keen to work with those implementing the programme moving forward. This will help to ensure the voices of children and young people with learning/intellectual disabilities are heard as part of this process.

SCLD believes there is a role for us as a national learning disability intermediary organisation and human rights defender, to raise awareness of UNCRC rights among children, young people with learning/intellectual disabilities and their families. We also believe there is a role here for SCLD to act to link these families with the relevant legal professionals to make challenges in court. Without this role, children and young people with learning/intellectual disabilities may be missed by existing provisions.

For SCLD to meaningfully support the implementation of the Bill we would require additional resource to implement a National UNCRC Awareness Raising Programme for children and young people with learning/intellectual disabilities and their families. This would require funding for a Children and Young Persons Human Rights Defender post within the organisation. As stated, the need for this type of work should be enshrined within the Bill.

SCLD has a proven track record in engaging with people with learning/intellectual disabilities and as we move towards implementation, we would welcome the opportunity to discuss further resourcing of the organisation to ensure the realisation of UNCRC rights.

#### 5) Are there any relevant equalities and human rights issues related to this Bill, or potential barriers to rights, that you think we should look at?

It is necessary that the Bill and its implementation take account of the inequality experienced by children and young people with learning/intellectual disabilities, as Article 23 of the UNCRC states, children and young people with learning/intellectual disabilities should be able to enjoy a “...full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community”<sup>11</sup>.

SCLD knows that to make this aspiration a reality for children and young people with learning/intellectual disabilities in Scotland, a lot of work still needs to be done. Central to this will be addressing some of the starkest inequalities and human rights violations facing these children and young people. This includes but is not limited to avoidable deaths of children and young people with learning/intellectual disabilities, the use of restraint and seclusion and inequality of opportunity faced by this population. Each of these areas is discussed in more detail below.

#### Avoidable deaths of children and young people with learning/intellectual disabilities

Recent research from The Scottish Learning Disability Observatory (SLDO)<sup>12</sup> has shown that premature mortality was 12 times higher for children and young people with learning/intellectual disabilities compared to other children and young people. This figure rises to 17 times more likely for girls and young women. The same research went on to highlight the upsetting reality that treatable conditions contributed to these deaths. The Observatory states that these deaths could have been avoided through timely and effective healthcare intervention and that many accidental deaths were preventable through better health promotion.

For SCLD, this evidence presents a damning picture of the infringement of children and young people with learning/intellectual disabilities UNCRC Article 6, Right to Life, Survival and

---

<sup>11</sup>[Article 23, UNCRC \(1989\)](#)

<sup>12</sup>[Scottish Learning Disabilities Observatory \(2020\)](#)

Development<sup>13</sup>. This is concerning given that we are experiencing a countrywide pandemic which causes respiratory virus and that Observatory research showed respiratory-related deaths were 55 times higher in children and young people with learning/intellectual disabilities. SCLD's concern increases when reading these figures with the knowledge that the Care Quality Commission<sup>14</sup> reported a 134% increase in deaths of people with learning/intellectual disabilities and autism receiving care services in England, between March and April this year.

This clear inequality is even more striking when we consider the UN Committee on the Rights of the Child General Comment No.15 (2013)<sup>15</sup> which states, *"The Committee on the Rights of the Child ... recognises that most mortality, morbidity and disabilities among children could be prevented if there were political commitment and sufficient allocation of resources directed towards the application of available knowledge and technologies for prevention, treatment and care"* (p.13).

### The use of restraint and seclusion

SCLD frequently hears stories of children and young people with learning/ intellectual disabilities who are having their human rights violated. One recent example came from a young man who between the ages of 5 and 10 years old had been restrained 30 different times at several schools. This included being locked in a cupboard and put in a dark tent with lights off in the headteacher's office and given a torch to address sensory overload.

Evidence and data suggest that this is not an uncommon experience. For example, 88% of the 204 respondents to a recent survey by PABSS & Challenging Behaviour Foundation (2019)<sup>16</sup> said their disabled child had experienced physical restraint and 35% said this took place frequently. 71% said their children had experienced seclusion and 21% said it took place regularly. 50% had been medicated to deal with behaviour deemed challenging. 68% of the physical interventions took place in schools. These experiences are compounded by no current commitment in Scotland to human rights in statutory guidance or a clear protocol for how to handle restraint and seclusions in schools, care homes, supported accommodation, day services and hospitals<sup>17</sup>.

---

<sup>13</sup>[Article 6, UNCRC \(1989\)](#)

<sup>14</sup>[Care Quality Commission \(2020\)](#)

<sup>15</sup>[Committee on the Rights of the Child \(2013\)](#)

<sup>16</sup>[PABSS & Challenging Behaviour Foundation \(2019\)](#)

<sup>17</sup>[Children and Young Peoples Commissioner for Scotland \(2019\)](#)

## Inequality of opportunity

Alongside these blatant violations of human rights exist more suitable and endemic cases of rights infringements. For example, children and young people with learning/intellectual disabilities do not have the same access to education as their non-disabled peers. Findings from an SCLD commissioned report on employment highlighted this. It showed that schools cultivated low expectations of children and young people with learning/intellectual disabilities, leading to low levels of educational attainment. In 2013/14, 17% of young people with learning/intellectual disabilities achieved an SCQF level 6 or above, compared to 58% average of all pupils<sup>18</sup>. Updated data from 2016/2017 showed that this gap had widened, with 9% of young people with a learning / intellectual disability achieving an SCQF at level 6 or above as compared to 60% average of all pupils<sup>19</sup>.

Data on the future destinations for pupils with additional support needs also paints a troubling picture. This suggests that school leavers with learning/intellectual disabilities were less likely (79%) to go on to a positive follow-up destination, compared to non-disabled school leavers (95%). It is worth noting that the majority (51.4%) went onto further education, which SCLD knows includes adult learning courses which can allow for little to no future development for people with learning/intellectual disabilities.

Alongside this, children and young people with learning/intellectual disabilities are often denied their right to meaningful Relationship, Sexual Health and Parenting (RSHP) Education. This is because of limited consistent and comprehensive education programmes for children and young people with learning/intellectual disabilities, including those with profound and multiple learning/intellectual disabilities<sup>20</sup>.

---

<sup>18</sup>[McTeir et al \(2016\)](#)

<sup>19</sup>[Scottish Government \(2019\)](#)

<sup>20</sup>[SCLD \(2018\)](#)

This lack of relationship education can negatively impact their chances of having meaningful relationships as adults. This is evidenced by the fact that only 5% of respondents to SCLD's How's Life? survey lived with a partner, compared to 56% of the general population<sup>21</sup>.

#### 6) What are your views on the provisions in the Bill that allow the courts to strike down legislation judged to be incompatible with the UNCRC?

SCLD welcomes and fully supports the power for courts to strike down legislation judged to be incompatible with the UNCRC. We do however note that the strike down power is limited in that it applies only to conflicting legislation which predates the entry into force of the Incorporation Bill. While SCLD would support a strike down power being available for all legislation, we understand that this would be out with the competence of the Scottish Parliament. SCLD, therefore, supports the alternative put forward in the Bill which states that courts may make an incompatibility declarator for legislation which follows the entry into force of the Incorporation Bill.

#### 7) What are your views on the Child Rights Scheme and the requirement on public authorities to report?

SCLD welcomes and is supportive of both the Child Rights Scheme and the duty on public authorities to report on the steps taken to ensure compliance with the UNCRC. We believe this will build upon and add value to existing reporting obligations on public authorities listed in the Children and Young People (Scotland) Act 2014<sup>22</sup>. Central to both the Child Rights Scheme and public authority reporting will be providing disaggregated data on disability which includes learning/intellectual disability. Without this, it will be challenging to establish whether children with learning/intellectual disabilities are having their UNCRC rights fulfilled. SCLD would therefore welcome a duty within the Bill which states that reporting on both Children's Rights Scheme reporting and public authorities reporting includes data on protected characteristics which is disaggregated. This should be considered in line with Article 31 of the UNCPRD and viewed as a priority issue as we look to incorporate the UNCPRD moving forward.

SCLD is disappointed to see that the commitment to conduct CRWIA has not extended to public authorities. While we recognise the administrative burden this may have, we have become increasingly concerned and disappointed with the poor quality and low uptake of equality and

---

<sup>21</sup>[SCLD \(2020\)](#)

<sup>22</sup>[Children and Young People \(Scotland\) Act 2014](#)

rights-based impact assessments across the board. In practice, we see this leading to the negative lived experience of people with learning/intellectual disabilities whose needs are often not fully addressed in these processes. Due to this, we would ask the Committee to consider the need for a duty for public authorities to complete CRIWA. If the decision is taken for this to not be included, we would ask for assurances on how public authorities can ensure their work is UNCRC compliant and how this will be promoted across the public sector through training.

## 8) Is there anything else you want to tell us about the Bill?

SCLD views this Bill as an important piece of legislation in Scotland's journey to becoming a human rights-respecting nation. We believe that the Bill has several positive proactive and reactive measures which should in practice lead to children and young people having their human rights realised.

Despite our overwhelming support for this Bill, we believe that more needs to be done to ensure that marginalised children and young people, who can face the serious violations of their rights, have the same opportunities to realising their rights as well as accessing remedy and redress where this does not occur.

To achieve this, we are asking the Committee to consider the following recommendations:

- 1) A duty in the Bill which will ensure that children and young people with protected characteristics (including learning/intellectual disabilities) are educated and informed about their rights and how to make complaints**
- 2) Strengthening the existing '*compatibility duty*' with a '*due regard duty*'**
- 3) Including a duty to consider UN Committee documents within the bill**
- 4) Providing clarity to ensure private organisations carrying out public functions are aware of their duties and are held accountable for this**
- 5) Strengthening the language of the Bill to ensure CRWIA are used consistently**
- 6) Additional funding being allocated to ensure that children and young people with learning/intellectual disabilities can understand and realise their UNCRC rights**
- 7) A duty in the Bill to ensure Children's Rights Scheme reporting and public authorities reporting includes data on protected characteristics which is disaggregated**
- 8) The inclusion of a duty for public authorities to complete CRWIA.**

SCLD thanks the Equalities and Human Rights Committee for the opportunity to submit views to this enquiry.



Oonagh Brown  
Policy and Implementation Officer  
Scottish Commission for People with Learning Disabilities  
[Oonagh.b@sclد.co.uk](mailto:Oonagh.b@sclد.co.uk)