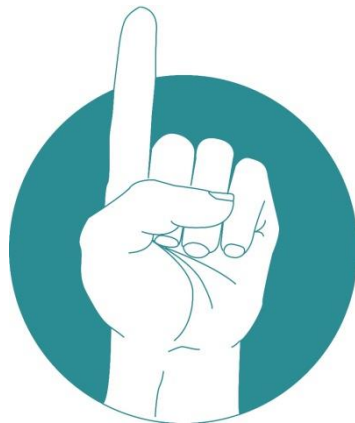


The case for a new legal framework to cover the lives of people with learning disabilities in Scotland



People First (Scotland)

Contents	Page
Foreword	3
Introduction	4
Part 1: Definitions, Objectives	5
Part 2: Purpose and Principals	6
Part 3: Protection of Rights	7
Part 4: Supported decision-making	8
Part 5: Services for Persons with Disabilities	8
a) Independent Living: Housing and Housing Support, Support Services	9
b) Health Services	11
c) Education	11
d) Employment	12
e) Relationships and Family Life	13
f) Criminal Justice	15
g) Transport	16
Part 6: Safeguarding	
Part 7: Monitoring, Evaluation and Improvement	17

Foreword

In 2011, People First Scotland held a Citizens' Grand Jury to explore the Human Rights of people with learning disabilities in Scotland. The findings of the Jury clearly showed that we find it much more difficult to obtain and hold onto our human rights than other citizens in this country. We were not alone in noting this. Similar findings were made by the UK House of Lords House of Commons Joint Committee on Human Rights (A Life like Any Other? Human Rights of Adults with Learning Disabilities Seventh Report of Session 2007–08) by the Equality and Human Rights Commission (Is Britain Fairer? 2015), by Scottish Human Rights Commission (Disability Rights in Scotland 2017), by Fairer Scotland (Action Plan 2016), by the Mental Welfare Commission in Scotland (2003, 2005, 2008, 2012, 2014) and by others.

We are deprived of our rights in Education, in Health and Housing, in relationships and family life, in access to work and employment, to equal treatment before the law and in rights to a fair trial and even the right to have legal entity status as citizens.

Because this situation has been going on for so long, our Citizens' Grand Jury found that the system could not be trusted to simply begin to implement the principles and the intention of existing legislation. There has been no shortage of guidance from Scottish Government and agencies like the Mental Welfare Commission in Scotland over the years but to no effect. The system has continued to treat us as either vulnerable and in need of protection or as dangers to society and, whichever view is taken, that we cannot be trusted to take part as active citizens.

The Jury recommended that people with learning disabilities be removed from the definition of Mental Disorder in the Mental Health (Care and Treatment) (Scotland) Act 2003; that the provisions for removal of our rights to make our own decisions under the Adults with Incapacity (Scotland) Act 2000 be repealed and that the removal of our rights to a fair trial under the Criminal Procedures (Scotland) Act 1995 also be repealed.

We are delighted that our request for a review of the Mental Health Act and the definition of mental disorder has been listened to and the review is underway. We are also pleased that the Adults with Incapacity Act is being considered and changes will shortly be out for consultation.

In place of these Acts, we have asked for a new piece of legislation to be drafted in Scotland, based on a recognition of people with learning disabilities as independent citizens with human rights. This document is our idea of what that new piece of legislation should contain.

Keith Lynch
Chairperson People First (Scotland)

Introduction

Throughout history, people with an intellectual impairment have received very poor treatment, sometimes alongside other groups of devalued people. In some periods, people with learning disabilities were warehoused in institutions – long-stay hospitals, asylums, hostels and group homes and this, sadly, remains the case still for some people with this label.

What is not disputed is that people with learning disabilities have had poorer health outcomes, poorer educational opportunities, been generally excluded from the world of work and that it has been widely recognised that people with learning disabilities have often been denied the human rights that other citizens are able to access. Part of the reason for the poor life outcomes of people with learning disabilities is that services, in the main, have focused on the impairment itself and the idea of “treatment” for the condition, rather than a focus on the people who happen to have an intellectual impairment and their hopes and dreams for their lives.

A new legislative framework must begin with the explicit idea that people with intellectual impairment are citizens who happen to have an impairment and who may require support in their independent living arrangements and their exercise of legal capacity and other aspects of active citizenship. It must be acknowledged that no impairment or disability can ever be grounds for denial of citizenship and legal entity status.

The existing legal framework is based on an entirely outdated idea that people with intellectual impairments are different from other people, unable to contribute to society. While the idea of eugenics – removing intellectual impairment and people who have that condition from society is no longer actively proposed as it was by Winston Churchill and George Bernard Shaw, what remains is the prejudiced assumption that people with this condition are a drain on society, need to be looked after and, usually, separated from other people.

Current laws in Scotland reinforce that idea. The Mental Health (Care and Treatment) (Scotland) Act 2003 includes intellectual impairment “however caused or manifested” as a “Mental Disorder”. The Act allows detention, supervision and compulsory “treatment” solely on the basis of that definition. The Adults with Incapacity Act 2000 allows legal capacity to be removed from a person solely on the grounds of being “mentally disordered” as defined by the Mental Health Act and a substitute decision-maker (guardian) to be appointed. The Criminal Procedures (Scotland) Act 1995 allows a person who has committed an offence to be denied a trial and simply detained on a “finding of fact” in a way that would never be considered for a citizen not considered to be “mentally disordered” and is in clear breach of both the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disability.

Our argument for a new law is being offered at a time when the principal pieces of legislation are actively under review, considering (yet again) whether people with intellectual impairments are worthy to take their place in society. We know that there is reluctance, in some quarters, to make changes to the law, not out of malice or indifference but as a result of the understanding that the changes required will be considerable and significant. Our view is that massive change is needed and this is the right time to make the changes.

Our hope is that Scotland will lead the world in recognising and accepting people with intellectual impairments as citizens and accord the same human rights to them as to all other citizens.

Part 1: Definitions, Objectives

Nowhere in existing Scottish legislation is there a definition of intellectual impairment. Instead, there has been a simple adoption of intellectual impairment as one of a number of “mental disorders”. A new piece of legislation must accept and acknowledge that an intellectual impairment or intellectual impairment is not a disease, illness or mental disorder but a permanent condition of impaired intellect or cognition and offer a definition which is robust and which accords with other international definitions and respects the dignity of those who will carry the label.

An intellectual impairment (also commonly referred to as an intellectual disability or intellectual impairment amongst other terms) is, simply stated, an impairment that significantly affects one's ability to learn and use information. It is an impairment that is present during childhood and continues throughout one's life. A person who has an intellectual impairment can participate in all aspects of daily life, but sometimes requires a different approach or more assistance than others in learning a task, adapting to changes in tasks and routines, and addressing the many barriers to participation that result from the complexity of our society. Some people will require extensive support and while their participation in daily life may sometimes be limited, they are individuals whose rights, will and preference should be respected. Every person with an intellectual impairment is different, each is a unique individual and the degree of intellectual impairment is different, one person to another. Equally, the supports required to assist the person to adapt, to learn and to develop will be different, from one person to another.

This document adopts the World Health Organisation definition of intellectual disability but replaces the concept of ‘cope independently’ with ‘cope without support’. This aligns with the definition and principles of Independent Living.

The resulting definition we are therefore using is:

“Intellectual disability is a significantly reduced ability to understand new or complex information and to learn and apply new skills (impaired intelligence¹). This results in a reduced ability to cope without support (impaired social functioning), and begins before adulthood, with a lasting effect on development.

Disability depends not only on a person's health conditions or impairments but also and crucially on the extent to which environmental factors support the person's full participation and inclusion in society.”

The use of the term intellectual disability in the context of the WHO initiative “Better health, better lives” includes children who have been placed in institutions because of perceived disabilities or family rejection and who consequently acquire

¹ Intelligence refers to general mental capability and involves the ability to reason, plan, solve problems, think abstractly, comprehend complex ideas, learn quickly, and learn from experience.

developmental delays and psychological problems. This document follows that definition.

Part 2: Purpose and Principals

The primary aim of a new Act will be to advance the dignity, worth, human rights and full potential and to achieve complete inclusion of intellectually impaired persons in Scottish society. The new Act should be explicitly based on the social model of disability, recognising that our society creates barriers to inclusion and participation, and society disables the person, not the impairment of the individual.

The new Act should be based on a set of Principles which should be interwoven throughout the paragraphs of the legislation rather than stated separately in a way which allows them to be ignored.

These Principles might be stated as:

- a) Intellectually impaired persons have the same human rights as other members of society. Where a person requires support to exercise these rights, that support should be available.
- b) Every person with an intellectual impairment is entitled to exercise maximum control over every aspect of his or her life. The rights, will and preferences of the person are paramount and should be recognised as they are for every other citizen.
- c) On no account should the adult person with intellectual impairment have his or her rights to make decisions in respect of his or her own life prevented or prohibited. If there are exceptions to this, they must be clearly stated and described and must apply in the same way as they would for other non-impaired citizens. Explicitly, the Act must declare that limits to intellectual capacity are never grounds for removal of legal capacity.
- d) Capacity assessments are discriminatory and lead to a disproportionate number of people with intellectual impairments losing their right to legal capacity. Capacity assessments should be replaced with assessments of support needs.
- e) Every person with an intellectual impairment should have access to support to exercise legal capacity as distinct from and separate from support for independent living.
- f) Intellectually impaired persons have the same right as other members of the community to enjoy a reasonable quality of life and to the relationships which are an essential component of that.
- g) Intellectually impaired persons have the right to services that support this. It is the responsibility and duty of Scottish Government, Local Authorities and Health Authorities to plan, fund and ensure the provision of these services.
- h) Every intellectually disabled person has the capacity for physical, social, emotional and intellectual development which should be supported throughout the person's life.

- i) Disabled people's organisations (DPO's) should be adequately funded and recognised. There should be an obligation to consult with and actively involve persons with disabilities, through their DPO's in the development and implementation of legislation and policies.
- j) The families of intellectually impaired persons have an important role to play in supporting, and encouraging the development of family members with an intellectual impairment and families, where they exist, should have recognition and support for that function, always provided, of course, that the intellectually impaired person has elected to receive family support.
- k) Every person with an intellectual impairment should have access to independent advocacy at no cost to themselves.
- l) Persons with disabilities should be included in all aspects of decision-making that affect their lives. This includes an obligation to consult with and actively involve persons with disabilities, in the development and implementation of legislation and policies.

Part 3: Protection of Rights

As stated earlier, securing human rights has been historically much more difficult for people with learning disabilities than for other citizens. There is no acceptable reason for withholding or removing rights from citizens on the basis of being disabled. The Act should commit to securing human rights on an equal basis with others.

To ensure that people with learning disabilities are viewed and treated as equal citizens in all aspects of life, this new legislation will need to commit to implementing the full range of human rights covered by the United Nations Convention on the Rights of Persons with Disabilities. In doing so, it will ensure that the Scottish Government meets the ambitions of 'A Fairer Scotland for Disabled People'.

One practice which undoubtedly discriminates against people with learning disabilities is the appointment of substitute decision-makers to make a deprivation of liberty lawful. The new Act should ensure that this practice is no longer lawful.

There should be a section of the new Act which entitles people with intellectual impairment to independent advocacy. If the term "mental disorder" is no longer to apply to people with learning disabilities, they should not lose their right to access advocacy and local authorities and health authorities should continue to have the duty to advise of the right to advocacy and to secure the provision of independent advocacy through allocation of public funds.

Similarly, the duties of public authorities under the Equalities Act should remain and be specifically applied to people with intellectual impairments. This should include:

- Protection from discrimination
- Accessibility of places
- Accessibility of services
- Accessible information

While probably not necessary in the text of the new Act, there should be detailed guidance given on how to fulfil these duties for people who are intellectually impaired.

Part 4: Supported decision-making

The right to legal entity status – the right to make one’s own decisions about one’s life should be enshrined in this piece of legislation since it has not been in any other. In compliance with the UN Convention on the Rights of Persons with Disability, it should be made clear that removal of a person’s legal capacity is not an option for families or the courts or public authorities and such an act would be a clear breach of human rights.

While there does seem to be a growing commitment at a policy level to include support for decision-making for people who are intellectually impaired, this new legislative framework should include a new duty on local authorities and health authorities to secure and develop support for decision-making for this population.

Further, if no other legislation is proposed for this purpose, this new Act could be the vehicle to establish the framework for supported decision-making, the registration process for supporters of decision-making, the penalties for abuse of power in that role and, importantly, the rights of the supported person to select the supporter(s) and dismiss or replace them if necessary.

Again, whether or not included in the text of the new Act, there should be detailed guidance about the function of support for decision-making and how the role should be conducted.

Our aim in establishing support for decision-making should be to replicate the processes which other citizens enjoy when making decisions: to have advice, to be made aware of options and choices, to have support from people who care about one in considering consequences and to be alerted to favourable and unfavourable outcomes. The People First (Scotland) published “Framework for Supported decision-Making” gives more detail on a vision for this process.

Part 5: Services for Persons with Disabilities

Although other laws already cover entitlements to benefits and services, the publication of a new Act for people with intellectual impairments would be a good opportunity to give detailed and specific direction to support services for people with intellectual impairments.

Authorities who commission support services have appeared to be willing to allocate funds to ensure people are fed, housed, clean and safe (in relative terms). What has been less available and often entirely absent has been support to learn, support to form and develop relationships, support to develop skills, support to exercise legal capacity, support to find work and hold down a job and support to contribute to and be included in community life. The recent history in local authorities of building eligibility criteria for services for all groups of people on the foundation of the needs of frail older people will inevitably miss out on many of the fundamental needs of people with lifelong intellectual impairments, especially in their younger years.

We will briefly address each service area below but there are some areas which need to underpin the different services.

Firstly, the Scottish Government, through this legislation, must establish the foundation for an entirely new paradigm in how to think about intellectual impairment and intellectual impairment. It must identify people who are intellectually impaired as full citizens and whole human beings who have all the needs and aspirations of any other citizen, regardless of degree of impairment. Services, from the youngest age and earliest opportunity must address the need for intellectually impaired persons to develop to their fullest potential and to see themselves as human beings with all the rights that other human beings have. Any segregation of people with intellectual impairments enforces the message of “different” and “not quite” and “flawed” rather than equal and entitled to expect fulfilment from life.

Secondly, Scottish Government has a responsibility to promote, actively through education programs and any other means available, worthwhile, positive, and enhancing social images of intellectually impaired persons as citizens of the country. This would include education of members of the public about intellectual impairment and the needs and capacities of intellectually impaired persons in order to achieve acceptance and inclusion. People with an intellectual impairment should be included in all aspects of planning and delivering these campaigns. We believe this obligation arises out of Article 8 of the UN Convention addressing awareness raising and attitude change. Scottish Government has, we think, done a good job in this area in respect of mental illness and ill-health (for example the “See Me” campaign) but has not made much progress in respect of intellectual impairment.

Thirdly, in accordance with Article 29 of the UN Convention, the Scottish Government has a responsibility to support the existence of disabled person’s user-led organisations and this is equally true of organisations of intellectually impaired

persons so that their voices can be heard and they can influence the shape and development of policy and service systems.

5a Independent Living: Housing and Housing Support, Support Services

Although there has never been anything in law which says people with intellectual impairments should be treated differently from the rest of the population in their need for housing and shelter, historically, this has often been the experience of this population. While there has been a shift away from institutional living for most people with an intellectual impairment in Scotland, it is still the experience of many that they are expected to live with their parents and, when parents die or this option is otherwise not possible, they are often “placed” in shared accommodation with people they have not chosen to live with. Some people have managed to set up individual tenancies or live with partners or chosen friends but this is far from the norm. In periods of pressure on public funds like the recent “austerity measures”, we routinely hear that single tenancies for people with an intellectual impairment are unlikely to continue and group living arrangements are back on the policy planning table in a way that could never be countenanced for other citizens. Some intellectually impaired people, who have developed unsocial behaviours or who find it difficult to communicate conventionally, still find themselves being placed in locked institutions of one kind or another.

We expect the state systems to support and encourage what we might call “ordinary living” arrangements, reflecting the options that other citizens can expect throughout their lives.

- a) Support services should promote maximum physical and social integration through the participation of intellectually impaired persons in the life of the community.
- b) Services should enable people with intellectual impairments to establish and maintain their own homes in valued community settings living with persons that they have chosen to live with just as other citizens do.
- c) Services generally available to all members of the community should be adapted to ensure access by intellectually impaired persons including not only physical access but also accessible information in different formats, booking systems and the like. Specialised supplementary services should be provided to the extent required to meet individual needs.
- d) Services to intellectually impaired persons should be provided in such a manner that an individual need not move out of his or her local community or travel inordinately long distances to receive the services needed.
- e) Services to intellectually impaired persons should be sufficiently flexible in structure and organisation to meet the varying needs of intellectually impaired persons in developing towards independent living and to maximise the choices open to them.
- f) Early support and intervention services should be available to all intellectually impaired persons

- g) Intellectually impaired persons should have access to recreational services to access community recreational opportunities.
- h) The Scottish Government and Local Authorities have a duty to ensure that intellectually impaired persons in institutions have the opportunity, as soon as possible, to live in community-based accommodation with the benefit of support services and, until a better, more individualised, permanent living arrangement can be established for them, they receive high quality individualised care in a facility as close to their home communities as possible.
- i) While prioritising early discharge from institutional life, as long as there are still intellectually impaired individuals who reside in institutional settings, a high quality of care and developmental programming for persons will be expected to accelerate their discharge and their return to their natural communities with a focus on habilitation and rehabilitation and community integration and inclusion.

5b Health Services

Ever since the publication of “A Life Like No Other” the national audit of specialist inpatient healthcare services for people with learning difficulties in England and, in fact, “A Life Like Any Other” the House of Lords and House of Commons Joint Committee on Human Rights of Adults with Learning Disabilities, it has been clear that health care for people with intellectual impairments has been of a much lower standard than for the rest of the population. Although these reports focused on the English experience, since both reports were published (2007), there has been a concerted effort on the part of Scottish Government and NHS Scotland to change that picture. Some of the reasons for that difference still need to be better understood and other reasons which are understood still need to be addressed, despite that stated intention to improve matters.

- a) Crucially, steps must be taken within health services to ensure the tendency to “diagnostic overarching” (attributing physical ill health symptoms to the intellectual impairment) does not occur and that physicians listen and professionally diagnose and treat episodes of ill health.
- b) Considerations of assumed “quality of life” of intellectually impaired patients must not be used to limit treatment options.
- c) In line with NHS policy of patients as partners in health treatment, medical professionals must take the time to explain and discuss health and treatment and care options with patients who have intellectual impairment, using the resources of supported decision-making, intellectual impairment liaison nurses or advocacy where necessary.

- d) Intellectually impaired persons should have equal access to health services within mainstream health provision.

5c Education

Although the official education policy of Scottish Government is for all children to be educated in mainstream schools with additional support when required, that is still not the common experience of children with intellectual impairments. Significant numbers are still segregated into separate “special schools” and even with some inclusion into mainstream settings, there are still elements of exclusion and separate classes or even meal arrangements.

The most persuasive argument for mainstream schooling is about inclusion and belonging. The message for disabled children and non-disabled children alike is that everyone belongs and social systems should provide supports where they are useful to assist people to take their place in society and contribute to it.

One of the most damaging aspects of early life for children with intellectual impairments is that they get consistent messages about not being able, not managing, needing to be looked after and being at risk if they try. More subtly, they also understand that they are not worth the investment of time or resources to help them learn and manage. Education systems know that these are severely damaging ideas for any child to internalise and we need all to understand that this is equally true of children with intellectual impairments.

With that in mind, there needs to be a more robust legal requirement to include children with intellectual impairment in mainstream education settings and to make every effort to support their genuine social and educational inclusion.

- a) Intellectually impaired children and young people should have access to education in mainstream education settings including pre-school, primary school, secondary school and tertiary education settings.
- b) The curriculum should, as far as possible, be the same for disabled children, including those with intellectual impairments, and non-disabled children.
- c) The focus of education for all children should be on preparation for adulthood including the ideas of citizenship, gainful employment, family life and lifelong learning.
- d) Career guidance should form part of the curriculum for young people with disabilities, with the same amount of choice offered and the opportunity for additional support if this is required or requested by the individual.
- e) The pace of learning will normally be slower for students with intellectual impairments and more learning support will usually be necessary, following the student’s own rate of learning and progress.

- f) If Inclusion, Acceptance of difference and Change in Attitudes towards people with an intellectual impairment is genuinely to be addressed, then including children with their age peers from the earliest age is one of the most effective ways to do this.

5d Employment

Actual figures on employment of adults with an intellectual impairment are difficult to access, confusing and different sources contradict each other significantly.

The confusion reflects societal attitudes as much as anything. For some researchers, having any kind of occupying activity outside the home counts as work; for others, anything which is not Day centre activity is classified as “work”, including a half-day volunteering in a charity shop (one of the most common experiences). A very few people with intellectual impairment have what most of society considers to be waged work.

This is quite ironic since we know from the work of Marc Gold and others in the 1960s that there are reliable and effective ways to support people with even very profound intellectual impairments and other disabilities to complete tasks – many of which were quite complex and enable them to hold down paid jobs. The processes followed were without exception based on individual training and instruction founded on the principle that the instruction method has the responsibility to succeed rather than the individual participant.

There is no excuse for adults with an intellectual impairment being denied access to the world of work and all of the benefits that brings to citizens of the country.

- a) Intellectually impaired persons should have access to vocational and employment support services to access real employment opportunities.
- b) School and college courses which lead to employment should be open and available to students with intellectual impairments
- c) Qualifications could be divided into separate components so that, for example, the SVQ level 1 in Hairdressing and Barbering might be split into hair washing, hair conditioning and blow drying as separate qualifications so that students might still be able to qualify if they struggle with one of the elements and employers could be encouraged to employ specialists who might focus on a narrower range of tasks. Similarly, there might be a qualification in mixing mortar, another in transporting bricks and another in bricklaying rather than combining these tasks into a single SCQF level 4 qualification.
- d) Many citizens who are seeking work and are dependent on benefits find the current system oppressive, punitive and unreasonable. If people with intellectual impairments are to genuinely join the productive workforce, there needs to be a much more supportive system in place with opportunities to be

flexible and try and for failure to be allowed and learned from rather than punished.

5e Relationships and Family Life

People with intellectual impairment have, historically, been seen as perpetual children with no need for intimate adult relationships and, where they have sought them, have often been punished or detained. Laws, even now, criminalise sexual relationships between intellectually impaired people often on the basis of assumptions about intellectual capacity and the understanding of sexual matters. Tests are sometimes applied to determine that capacity which many non-intellectually impaired citizens would fail. There are very well documented cases of couples who have been allowed to marry but are then prohibited from being intimate with each other.

Even where couples set up home together and children are born to them, there are immense barriers to people with intellectual impairments being allowed to care for and rear their children. The incidence of children being removed from parents with an intellectual impairment is many times more than for other citizens. The welfare and support systems structure makes it very difficult for adults with an intellectual impairment to be supported to care for their children and social work teams are set up either to support disabled adults in elements of their lives or to accommodate children when adults are unable to care for them or where the children are at risk. The structures and finance need to change to allow disabled adults to be supported in their parenting roles and/or for children to have supplemented parenting while remaining in their family homes rather than add to the barriers for family life.

All people with an intellectual impairment have a need for companionship, for closeness and for intimacy as all other human beings do.

Education and support systems must recognise this and work to prepare people to find and maintain relationships of all kinds so that these needs have some chance of being met.

It is unacceptable to determine that anyone lacks the capacity to have a relationship or to forbid a relationship or to detain and seclude people so that relationships become impossible.

Some people will need a significant amount of support to find or form a relationship and many will need support to manage relationships in their lives.

Even with good support, not everyone will succeed in having an intimate relationship and our society accepts that can be the case in the lives of many citizens.

Where relationships are formed and children are born, additional support needs arise and social care and welfare systems need to have the flexibility to resource the

supports necessary for the wellbeing and healthy development of children and young people where one or both parents have an intellectual impairment.

Equally, where a child is born with an intellectual impairment, parents and families must be well supported and resourced to maximise the opportunities for healthy development and social inclusion of the child without draining and exhausting the family resources or other family members.

Some intellectually impaired parents will require intensive support and sometimes over protracted periods. This is not uncommonly for the duration of the child's childhood. This support, at different times of the child's life should come from maternity and health services, care and support services and education services including educational psychology. The concept of supplemented parenting is an important one, where persons other than the parents might provide elements of what we might consider to be parenting such as advice, guidance, help with homework, etc.

5f Criminal Justice

The Criminal Procedures (Scotland) Act 1995 was a progressive step forward when it was enacted and, for the first time, created a legal process for people with intellectual impairments when they were to be detained. Our experience since that time, however, has demonstrated that the process is fatally flawed.

Contrary to requirements of the European Convention on Human Rights and now the UN Convention on the Rights of Persons with Disability, the Criminal procedures Act excuses offenders with "mental disorder" from standing trial and, instead, conclude with a "finding of fact" determining simply, "was the act done?". If it was, and many people with intellectual impairment will readily agree that they have done whatever they are accused of, there is no attempt to understand why the act was done or if there were extenuating circumstances or justifiable explanations. The reason for not looking into these matters as a criminal court trial defence would, is that the offender is removed from the criminal justice system, is not punished for the act but instead is diverted into the mental health and forensic treatment system where compulsory "treatment" is administered or the person is detained and kept under the care of psychiatrists – Approved Medical Practitioners. To those under "treatment" or detention, they simply experience loss of liberty, loss of autonomy, often administration of drugs to control them and, crucially, for much longer periods than if they had been found guilty of the alleged crime and imprisoned. The human rights violations are denied on the grounds that the process is defined as medical treatment and detention and not imprisonment.

Those who oppose changes to Scots Law in respect of people with intellectual impairment have often cited the experience of changes to the New Zealand when people with intellectual impairments were, for the first time, not included as “mentally disordered” under the 1992 Mental Health Compulsory Assessment and Treatment Act. They discovered that they had failed to make arrangements for intellectually impaired people who committed criminal offences. Their error was addressed with the introduction of a new law – the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

Fairly obviously, with that experience in mind, it is important to make plans to deal with people with intellectual impairments who might be accused of or arrested for offending behaviour.

However, the current practice of diverting people with intellectual impairments from the criminal justice system into the forensic intellectual impairment system needs to end. People who find themselves in this situation are likely to be detained longer than if they had entered the mainstream criminal justice system for the same offence.

Evidence collected by the SOLD Project indicates that depending on the area of Scotland between a third and a half of those detained have been assessed as ready to move back to the community. They are being prevented because of a lack of appropriate housing and support in the community.

There needs to be ‘reasonable adjustment’ applied to the criminal justice system to allow all people with an intellectual impairment to serve sentences appropriate to and addressing their offence instead of their offences being medicalised in a hospital setting. Where a prison sentence is appropriate, the focus should be on reforming the prison system to make it a safe environment for people with an intellectual impairment.

Our belief is that a new piece of legislation in Scotland should guarantee every citizen the right to a fair trial in a court of law regardless of intellectual ability. There should be reforms of the court and criminal justice process to take account of different levels of intellectual ability, many of which are currently being considered by the judiciary and by the Procurator Fiscal’s office in Scotland. The work of SOLD – Supporting Offenders with Learning Disabilities – is making a significant contribution to this shift in thinking and in developing practice within the criminal justice system.

5g - Transport

Transport is important as it allows people to go to places in their own time and to meet their own needs. Transport services also help people to live independently and give them more control over their own lives. This is especially the case for those who

live in rural areas. There are, however, several barriers which prevent people with an intellectual impairment from using public transport.

We have seen first-hand what happens when a person with an intellectual impairment temporarily loses their travel concession card. Their life immediately closes down, activities reduce and isolation usually follows. It is imperative that concessionary travel passes apply to people with intellectual impairments in common with other groups of disabled people. For many, their entitlement is based on the label of “mental disorder” and if there is to be a change to that label, it is important that entitlement to concessionary travel is not withdrawn.

Transport Scotland has been working hard to take steps towards a more accessible transport network as has the Scottish Accessible Transport Alliance and local Access Panels. Many of the ideas developed in these forums, however, do not progress very far due to lack of resources.

Accessibility of information and clear signposting in a variety of ways is almost as important as physical accessibility for passengers with intellectual impairments. Equally, some understanding of intellectual impairment on the part of transport staff is essential if intellectually disabled passengers are to feel confident about travelling.

Part 7: Safeguarding people with an intellectual impairment

People with an intellectual impairment, alongside everyone else in society, may be at risk of harm at times in their life. Currently in Scotland, The Adult Support and Protection (Scotland) Act 2007 defines an 'Adult at Risk' as an adult who:

- (a) is unable to safeguard their own well-being, property, rights or other interests,
- (b) is at risk of harm, and
- (c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

This legislation recognises that at times persons with intellectual impairments may require additional support to keep themselves safe.

Thus far, the legal powers under the Adult Support and Protection (Scotland) Act 2007 are very rarely used. The numbers of Assessment Orders, Banning Orders and Removal Orders actually implemented is very small indeed and, instead, Adult Protection Officers and the Committees much more commonly engage in discussion and exploration of options in a way that supports the autonomy and decision-making of the individual. It is for this reason that the safeguarding of adults with an intellectual impairment should continue to be covered by the Adult Support and Protection (Scotland) Act 2007 and existing processes, as long as people with an intellectual impairment are safeguarded on an equal basis with others in society considered to be an 'adult at risk'.

Part 7: Monitoring, Evaluation and Improvement

For years, people with an intellectual impairment have been treated differently to others in society, and have been included in Acts of Parliament that have not been appropriate for them. The most prominent example is that of the Mental Health (Care and Treatment) (Scotland) Act 2003 which is currently under review. People with an intellectual impairment have been denied the right to inclusive education, the right to choice, the right to a job and often the right to family life. It is because of this that we recommend an independent monitoring body be set up to assess, monitor, review and implement all aspects of the new legislation. In England and Wales, there has been recent discussion about the appointment of a Learning Disability Commissioner using the same model as the Children's Commissioner. In Scotland, we do have a Scottish Commission for Intellectual impairment but it does not have the same powers or responsibilities as other Commissioners such as the Children's Commissioner, the Information Commissioner, the Mental Welfare Commission Scotland or, indeed, the Scottish Human Rights Commission.

A new law should specifically require that persons with intellectual impairments should be involved in the delivery, planning, monitoring and evaluation of services intended to support them, in accordance with Articles 21 and 29 of the UN Convention on the Rights of Persons with Disability and with General Comment 7 of the UN Committee which says:

"9. States parties should acknowledge the positive impact on decision-making processes and the necessity of involving and ensuring the participation of persons with disabilities, through their representative organizations, in such processes, notably because of their lived experiences and knowledge of the rights to be implemented."

The Scottish Government, Local Authorities and Health Boards must ensure that government and non-government organisations providing services to intellectually impaired persons are accountable for the extent to which the rights of intellectually impaired persons are advanced, independent living is supported and service quality assured.

To this end some kind of independent body should have oversight of the processes of delivery and change and the authority to intervene if progress is lacking and human rights continue to be denied to and removed from citizens with an intellectual impairment.