
Incorporating International Human Rights: Putting independent advocacy at the heart of the new human rights statutory framework in Scotland

INTRODUCTION

Scotland is on the precipice of significant human rights reform. A Bill to introduce the UNCRC into Scots law has been introduced to the Scottish Parliament. Taking a maximalist approach within the devolved settlement, this Bill is world-leading, setting out direct incorporation of this treaty into domestic law. It proposes vital new duties on public bodies to not act incompatibly with the UNCRC, is set to lead to significant change in the extent to which children's rights are embedded in decision-making and – for the first time – these rights will be ultimately enforceable in court.

In parallel, a National Taskforce on Human Rights Leadership is developing recommendations for a new human rights statutory framework for Scotland. Set to include a raft of economic, social and cultural rights as well as the right to a healthy environment, the Taskforce is also considering incorporation of CEDAW, CRPD and CERD.

Taken together, these developments point to a radical and ambitious new human rights landscape in Scotland - one that is aimed at ensuring that an increased culture of human rights is backed by human rights-based decision making that will ultimately see many more people having their human rights fulfilled.

It is into the midst of these developments, that this paper outlines the reasons why independent advocacy should be embedded as a core part of this new human rights framework. In many ways, each and every day, independent advocates are already enabling rights to be made real and consideration of their crucial place in the new framework is timely and important. For example:

- Independent advocates support people attending mental health tribunals to ensure the lawfulness of their detention
- Independent advocates work with disabled people to help them realise their right to choose where they live and who they live with
- Independent advocates support people to be involved in decisions made about their treatment and care, including the use of Advance Statements
- Independent advocates defend the right to adequate housing by supporting tenants whose accommodation is not habitable

WHAT IS INDEPENDENT ADVOCACY?

There are two types of independent advocacy – individual and collective.

Individual or one-to-one independent advocacy

This includes i) professional or issue-based independent advocacy, in which an advocate supports an individual to represent his/her own interests or represents the views of an individual if the person is unable to do so ii) citizen independent advocacy, in which an ordinary citizen is encouraged to become involved with a person who might need support in the community, in a voluntary capacity and iii) peer independent advocacy, in which a peer independent advocate has life experiences they share with their independent advocacy partner (for example, they may share age, gender, ethnicity, diagnosis or issues) which they use to understand and have empathy with their independent advocacy partners, increasing self-awareness, confidence and assertiveness so that the individual can speak out for themselves.

Collective independent advocacy

Collective independent advocacy creates spaces for people to get together, support each other to explore shared issues and find common ground. It supports people to speak up about their experiences, values and expectations. It enables people to find a stronger voice, to campaign and influence the agendas and decisions that shape and affect their lives. Collective independent advocacy can help planners, commissioners, service providers and researchers to know what is working well, where gaps are in services and how best to target resources. It helps legislators and policy makers to create opportunities for people to challenge discrimination and inequality and helps

people learn to become more active citizens. Collective independent advocacy groups can use a human rights-based approach to get change.

THE ROLE OF INDEPENDENT ADVOCACY IN PROTECTING HUMAN RIGHTS

• Empowers rights-holders

Human rights are all about power, and the sharing of that power between those impacted (rights holders) and those who are in a position to make decisions (duty bearers). If Scotland's human rights framework is to be effective and lead to more people having their human rights respected, protected and fulfilled, the framework itself needs to recognise that power is not shared equally. The framework needs to embed measures that bring balance of power. This is particularly true because those who are most often denied their rights are those with least power. For example:

- * People living in poverty are often marginalised, seldom heard and living in circumstances where they are not given the social capital to be able to raise their voice.
- * People for whom English is not their first language, or have low educational attainment, struggle to fill in the paperwork and argue their case in formal writing.
- * Families with disabled children or unpaid carers who have to fight all the time for what they need are often too tired to keep speaking to those in power.

Independent advocates work alongside marginalised people and groups, supporting them to be empowered to take part in decision-making about their lives, and about policy and law making, on an equal basis.

• Enables the right to participation

Participation – both in decisions directly affecting your life such as where you live, care provided, employment and taking part in cultural activities, as well as participation in policy and political life – is the bedrock of international human rights. This right of participation can be seen in many UN rights treaties such as the UNCRPD Articles 29 and 30, CEDAW Article 13, and UNCRC Article 12.

Participation is the ‘P’ of the PANEL outline of a human rights based approach. In addition, the right to autonomy is part of the right to private and family life in Article 8 of the ECHR. Participation is both a core human right – that of having agency, thus protecting your dignity – but is also crucially an enabler of better human rights-based decisions.

Participation is a key element of the Sustainable Development Goals – target SDG 16.7 aims to “*Ensure responsive, inclusive, participatory and representative decision-making at all levels*”.

Participative decision-making is also evident throughout Scottish law and policy as both a tool for and evidence of adopting best practice in working with communities, for instance in making good decisions on priority setting for local budgets. It is also present as a means of progressing social inclusion and cohesion.

Independent Advocacy at its very heart enables people to participate. Without independent advocacy support, many, many people would simply be unable to participate in decisions that impact their lives. By providing information and understanding, emotional and practical support, directly speaking up and being by the side of rights holders at the decision-making table, independent advocates directly enable this right to participate to be fulfilled. It is important to note that the role of independent advocates in enabling participation

not only helps the individual or group of rights-holders – it is very much a service that enables duty bearers to meet their obligations around participation, enables best practice, and most of all makes for better, more efficient and more effective decision-making.

• Enables routes to remedy

Article 8 of the Universal Declaration on Human Rights states that there must be effective remedy for when there has been denial of rights, and that this requires the remedy to be accessible to all. However, it is overwhelmingly the case that when someone experiences a serious human rights denial, it can be very difficult for them to navigate the systems and processes of remedy. It can be hard to know who to turn to, where to get advice and what practical steps to take. Challenging those in power can be an overwhelming and isolating experience, particularly so for those in the most vulnerable situations such as people living in care homes, the mental health system or in detention.

Independent advocates provide all of the information and support that someone needs to take each step towards remedy, whether through meeting with duty bearers, writing letters, expressing problems in rights-based terms, pursuing complaints, or navigating the processes around non-court or court-based remedy. Independent advocates are a vital part of accountability, whether everyday accountability in local decision-making or last-resort accountability in court.

• Enables better understanding of rights

A recurring theme of engagement around human rights with civil society across Scotland is that people just do not know that they have rights. When they do know that they have rights in general,

they often do not know who to turn to get advice or understand how to enforce their rights. Independent advocates are an important source of education and information about rights. For example, Who Cares Scotland members highlight the role of advocates in this regard¹. Advocates can also provide individuals with in-depth information about their rights when they have a problem and can be the crucial opener of doors to be able to use human rights for everyday accountability and to get change.

• As Human Rights Defenders

‘A “Human rights defender” is a term used to describe people who, individually or with others, act to promote or protect human rights. Human rights defenders are identified above all by what they do... it is impossible to catalogue the huge variety of contexts in which human rights defenders are active. However, common to most defenders are a commitment to helping others, a commitment to international human rights standards, a belief in equality and in non-discrimination, determination and, in many instances, tremendous courage.’

Independent advocates who take a rights-based approach to their work are Human Rights Defenders. As such the UN states that:

‘Implementation of international human rights standards within countries depends to a great extent on the contribution of individuals and groups (working inside as well as outside the State), and support to these human rights defenders is fundamental to achieving universal respect for human rights.’²

RIGHT TO INDEPENDENT ADVOCACY IN SCOTS LAW AND POLICY

Independent advocacy is framed as part of Scots law and policy in a number of different ways:

- A right to (independent) advocacy for particular groups, e.g. for those with a mental disorder as set out in the Mental Health (Care & Treatment) (Scotland) Act 2003; for a disabled person accessing social security entitlements as set out in section 10 of the Social Security (Scotland) Act 2018
- A duty to provide advocacy services e.g. duty on health boards and local authorities to secure availability of advocacy services for those with a mental disorder as set out in Mental Health (Care & Treatment) (Scotland) Act 2003
- A duty on councils to consider the importance of independent advocacy services e.g. for adults at risk from harm as set out in the Adult Support and Protection (Scotland) Act 2007
- A duty to provide information about available advocacy services e.g. as set out in Social Care (Self-directed Support) (Scotland) Act 2013 where it specifically notes *independent* advocacy services; to children referred to a Children’s Hearings as set out in the Children’s Hearings (Scotland) Act 2011
- A duty to ensure that people can access the advocacy service e.g. in Mental Health (Care & Treatment) (Scotland) Act 2003
- The right for views expressed by advocates to be taken account of in decision-making e.g. Adults with Incapacity Act 2000
- A duty on Scottish Ministers to develop and publish service standards around provision of advocacy e.g. in the Social Security (Scotland) Act 2018
- A duty to allow advocates to take part in discussions or make representations on an individual’s request e.g. Education (Additional Support for Learning) (Scotland) Act 2004
- A duty to ensure that advocacy support is available and free of charge when someone is going to a Tribunal or Hearing e.g. in the Education (Additional Support for Learning) (Scotland) Act 2009 or Children’s Hearings (Scotland) Act 2011

INDEPENDENT ADVOCACY, AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Independent advocates across Scotland already work in a range of situations to support people to understand and realise their economic, social and cultural rights. For example:

- The right to health – providing independent advocacy to an individual with problematic substance use, supporting them to engage with addiction and mental health services.
- The right to education – providing independent advocacy to a young person requiring additional support, supporting them to access appropriate education that best meets their needs.
- The right to housing – a collective group of tenants coming together to clarify and understand their rights and engage with their housing provider to address issues of concern.
- The right to social protection and social security – providing independent advocacy to a family from the Gypsy Traveller community, supporting them to access their entitlement to free school meals for their children.
- The right to take part in cultural life – providing independent advocacy to a learning-disabled woman, supporting her to challenge a local drama group which had excluded her from joining, without providing a justifiable reason.

PLACING INDEPENDENT ADVOCACY AT HEART OF HUMAN RIGHTS IN SCOTLAND

Given all of the above, and from the experience and expertise of the Scottish Independent Advocacy Alliance members, independent advocacy should be placed at the heart of human rights work in Scotland:

- There should be a right to independent advocacy in Scotland
- This right to independent advocacy should be accompanied by a duty on relevant duty-bearers to provide the service and to provide information about the service to rights-holders
- Advocacy within the human rights framework must be independent – this means it must be independent structurally, financially and psychologically³
- Independent advocacy must be a core part of any non-court and court routes to remedy – this should mean that the views of advocates should be taken into account by remedy decision-makers, and individuals should be given information about available independent advocacy services at every stage of routes to justice.
- Independent advocacy services must be resourced in such a way as to be available to all those who need it for as long as they need it
- Guidance that accompanies the new human rights framework should include more detail on the role of independent advocacy
- Scottish Ministers, in reporting on actions related to this new human rights framework, should be required to include reporting on availability of independent advocacy.

January 2021

This briefing is published as part of the Civil Society Brexit Project, a partnership between the Human Rights Consortium Scotland and the Scottish Universities Legal Network on Europe (SULNE), funded by the Legal Education Foundation.

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Footnotes:

- 1 Who Cares Scotland, Navigating a World of Rights, 2020: [Navigating-The-World-of-Rights-Summary-Report-Dec-2020-1.pdf](#) ([whocaresScotland.org](#))
- 2 UN OHCHR Factsheet No. 29, Human Rights Defenders: Protecting the right to defend human rights: [0440463_FactSheetInside.qxd](#) ([ohchr.org](#))
- 3 For more information about SIAA's definition of independence in the context of advocacy work, please refer to the [Principles, Standards and Code of Best Practice](#), SIAA, 2019

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