



# A Human Rights Bill for Scotland: Consultation SIAA Response

October 2023



Scottish  
Independent  
Advocacy  
Alliance



## SIAA Consultation Response | October 2023

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### A Human Rights Bill for Scotland: Consultation

#### In brief - why should independent advocacy be included in the Human Rights Bill?

Independent advocates are human rights defenders. For the Human Rights Bill to be effective in bringing about the realisation of human rights for people across Scotland, independent advocacy must be included to enable rights to participation, access to justice and enable everyone to have their voices heard.

Without clear mechanisms and tools built into the Human Rights Bill to make rights real for people, the Bill will not be effective. Independent advocacy is ready made to bring human rights to life. When properly resourced, independent advocacy can create the context for people to be heard, services to uphold their rights and justice to be realised.

#### What is independent advocacy?

Independent advocacy is about speaking up for, and standing alongside individuals or groups, and not being influenced by the views of others. Fundamentally it is about everyone having the right to a voice: addressing barriers and imbalances of power, and ensuring that an individual's human rights are recognised, respected, and secured. Independent advocacy supports people to navigate systems and acts as a catalyst for change in a situation.

Independent advocacy can have a preventative role and stop situations from escalating, and it can help individuals and groups being supported to develop the skills, confidence and understanding to advocate for themselves.

## Scottish Independent Advocacy Alliance and our members

The [Scottish Independent Advocacy Alliance \(SIAA\)](#) advocates for independent advocacy. As the only national organisation with a remit to promote, support and advocate for independent advocacy we have been examining the provision, quality, availability, and accessibility of independent advocacy for over two decades. Our aim is to raise awareness about the value and impact of independent advocacy, and influence decision makers with the aim of widening access to quality independent advocacy for all who need it in Scotland.

SIAA is a membership organisation that has members providing independent advocacy across Scotland. [SIAA members](#) are a diverse range of organisations and groups that provide independent advocacy to different people and groups in a variety of settings including:

- individual independent advocacy in the communities, hospitals, forensic mental health, and prison settings,
- organisations specialising in citizen advocacy,
- carers advocacy organisations,
- collective advocacy groups based in hospitals, care homes and the community, and
- organisations providing independent advocacy to remote and rural communities.

Each SIAA member works to the [Independent Advocacy Principles Standards and Code of Best Practice](#), which is the foundational document for independent advocacy in Scotland. The Principles and Standards are provided in Appendix 3. We will provide more detail on how independent advocacy, both individual and collective, works in practice in our response. The Independent Advocacy Principles Standards and Code of Best Practice are intrinsically linked to the principles of Participation, Accountability, Non-discrimination and equality, Empowerment and Legality (PANEL). Independent advocacy groups have a human rights-based approach that support individuals and groups to consider how human rights laws may apply to their specific circumstances.

## Models of Independent Advocacy

### Individual or one-to-one advocacy

This includes professional or issue-based advocacy. It can be provided by both paid and unpaid advocates. An independent advocate supports an individual to represent their own interests or represents the views of an individual if the person is unable to do so. Advocates provide support on specific issues and provide information, but not advice. This support can be short or long term.

Another model of individual advocacy is **citizen advocacy**. Citizen advocacy occurs when an ordinary citizen is encouraged to become involved with a person who might need support in the community. The citizen advocate is not paid. The relationship between the citizen advocate and the advocacy partner is on a one-to-one, long-term basis. It is based on trust between the partner and the citizen advocate and is supported, but not influenced, by the advocacy organisation. The citizen advocate supports the advocacy partner through natural skills and talents rather than being trained in the role. For many people their Citizen Advocate is the only person not paid to be in their life. Citizen Advocates provide essential support for local people at key times of vulnerability and need. A key part of many partnerships is the support citizen advocates provide, whether by ensuring their partner has the information they need to make choices, by sharing activities to widen opportunities and by ensuring their partner understands the legal processes they are part of.

### Collective advocacy

Collective 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 advocacy also takes the onus off the individual to solely address a human rights issue, the collective voice means people do not have to continuously reshare difficult experiences to make change happen and improve systems.

Collective independent advocacy provides opportunities for people to have a meaningful voice in legislative processes, policy making and strategic planning, combating discrimination, inequality and enables people to take part as active citizens.

Collective 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. Collective advocacy groups benefit from skilled help from an independent advocacy organisation and with the support of resources. However, it is important to note that collective advocacy groups cannot be 'mandated' into existence, they must continue to emerge from the needs, wants and views of their potential members. Collective advocacy groups are run by their members, who set their own agendas.<sup>1</sup>

## Part 4: Incorporating the treaty rights

Question 1 - What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?

SIAA agree with the proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill. SIAA are supportive of the calls from across civil society for dignity to be required to be considered when interpreting the rights.

Question 2 - What are your views on our proposal to allow for dignity to be a key threshold for defining the content of minimum core obligation (MCOs)?

SIAA agree with the proposal for dignity to be a key threshold for defining Minimum Core Obligations.

Question 3 - What are your views on the types of international law, materials and mechanisms to be included within the proposed interpretative provision?

SIAA agree with the proposed approach which will help ensure Scotland keeps pace with developments in international human rights law and practice. Provisions of the new Bill should be interpreted in light of the guidance provided through the United Nations system (such as General

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<sup>1</sup> <https://webarchive.nrscotland.gov.uk/20230327160310/https://cms.mentalhealthlawreview.scot/wp-content/uploads/2022/09/SMHLR-FINAL-Report-.pdf>

Comments, Concluding Observations, decisions and days of general discussion), the Council of Europe, comparative law and others. SIAA are supportive of Together's<sup>2</sup> outline of what sources should be included within the interpretative provision and their recommendation that this provision be drafted as broadly as possible, avoiding 'ranking' of resources to allow for other sources to be included over time.

#### Question 4. What are your views on the proposed model of incorporation?

SIAA agree with the proposed 'copy and paste' model for incorporating the four treaties removing any text that relates to reserved areas, and that the right to a healthy environment should be recognised and included in this Bill. We support Human Rights Consortium Scotland's (HRCS) position that there should initially be a procedural duty on public bodies (and as far as possible private actors) to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right to a healthy environment. The period of time where there is only a duty to have due regard should be no more than two years and be specified in the Bill. After this a duty to comply should be added and apply to ICESCR and the right to a healthy environment.

We agree that the special protection treaties should also be considered when interpreting and delivering ICESCR rights and the right to a healthy environment. We agree with placing a procedural duty on the special protection treaties, and this procedural duty should be the duty to have due regard.

The decision to not place a 'duty to comply' on the special protection treaties is a significant departure from full incorporation of these treaties. Many of the rights set out in 1966 in ICESCR have since been given stronger expression in subsequent treaties – particularly CRPD. We support calls from Scottish Commission for People with Learning Disabilities (SCLD) that there should be further consideration of a duty to comply for all substantive CRPD rights to the maximum extent permitted by devolution.

SIAA are supportive of CEMVO Scotland and Engender's calls for the Scottish Government to recommit to a maximalist approach for the special protection treaties and give more consideration, with the support of legal expertise, to where a duty to comply could be considered when incorporating these treaties.

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<sup>2</sup> [https://togetherscotland.org.uk/media/3474/hrb\\_draftresponse\\_v4.pdf](https://togetherscotland.org.uk/media/3474/hrb_draftresponse_v4.pdf)

SIAA echo the ALLIANCE's concern about the potential for a two-tiered and hierarchical system to be created for the rights and duties if the special protection treaties are only given a due regard duty.

Finally, SIAA would like to note that expertise from the journey to incorporating the United Nations Convention on the Rights of the Child (UNCRC) into Scots Law has highlighted the need for a legislative audit at an early stage when progressing the Human Rights Bill. We urge the Scottish Government to look at the three-step approach suggested by Together<sup>3</sup> to identify where acts of the Scottish and UK Parliament (that fall within devolved competence fall short of human rights standards and enable amendments to be passed before incorporation takes place.

### Question 5. Are there any rights in the equality treaties which you think should be treated differently?

We echo HRCS's concerns that "equalities treaties"<sup>4</sup> is not a helpful term to refer to the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of Persons with Disabilities (CRPD). The term "special protection treaties" should be used instead.

SIAA call for the Scottish Government to have a duty to comply, where possible within devolved competence, for all substantive rights within the special protection treaties.

The CRPD includes rights that are not part of ICESCR, as outlined by HRCS. We consider that without a duty of due regard but also the duty to comply on the substantive rights of UNCRPD the Scottish Government will not be carrying out its commitment to implement the National Taskforce for Human Rights recommendations<sup>5</sup>, nor will it deliver human rights for disabled people.

SIAA recommend the Scottish Government carefully consider incorporation of the UNCRPD in light of the move towards supported decision-making (from current substitute decision-making) that is already been considered across Scottish policy, see Scott Review, and internationally<sup>6</sup>. Supported decision-making is central to ensuring that disabled people can access the same rights as non-

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<sup>3</sup> [https://togetherscotland.org.uk/media/3474/hrb\\_draftresponse\\_v4.pdf](https://togetherscotland.org.uk/media/3474/hrb_draftresponse_v4.pdf)

<sup>4</sup> <https://hrcscotland.org/wp-content/uploads/2023/08/Final-HRCS-Guide-to-responding-to-Human-Rights-Bill-for-Scotland-consultation-August-2023-1.pdf>

<sup>5</sup> <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/>

<sup>6</sup> <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-six-from-provisions-to-practice-implementing-the-convention-5.html>

disabled people<sup>7</sup>. Incorporating the substantive rights within UNCRPD is not possible without an understanding of supported decision-making, or in other words ensuring that a person's will and preferences are discerned and given effect. As noted by Professor Jill Stavert Article 12(3) CRPD requires states parties to provide access by persons with disabilities to the support they may require in exercising their legal capacity. This is to ensure that the rights, will and preferences of persons with disabilities are enjoyed on an equal basis with others [Articles 12(1)(2) and (4) CRPD]. Moreover, the Committee on the Rights of Persons with Disabilities has made it clear that supported decision-making must replace substitute decision-making arrangements as these are discriminatory and deny equal enjoyment of the right to exercise of legal capacity for persons.<sup>8</sup> Independent advocacy enables supported decision-making and can support other forms of advanced planning when needed for example Advanced Statements. It is therefore vital that independent advocacy is considered as a tool to help realise the substantive rights of UNCRPD and the other special protection treaties when implementation is planned. See answer to question 27 for more on this.

## Part 5: Recognising the right to a healthy environment (covers questions 6-11)

SIAA are supportive of the Scottish Government's proposal to use the Aarhus Convention's definition of the environment. SIAA echo the calls Environmental Rights Centre for Scotland's (ERCS) layout in their response and call on the Scottish Government to reconsider the exclusion of adequate sanitation under safe & sufficient water, given the systemic problems of sewage pollution and wastewater treatment in Scotland. The right to healthy and sustainably produced food should also be included as a substantive right.<sup>9</sup>

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<sup>7</sup> <https://www.mwscot.org.uk/sites/default/files/2021-02/Supported%20Decision%20Making%202021.pdf>

<sup>8</sup> <https://www.frontiersin.org/articles/10.3389/fpsy.2020.571005/full>

<sup>9</sup> [https://www.ercs.scot/wp/wp-content/uploads/2023/09/230921\\_HR-Bill-consultation-Pt5\\_ERCS-response\\_V3.pdf](https://www.ercs.scot/wp/wp-content/uploads/2023/09/230921_HR-Bill-consultation-Pt5_ERCS-response_V3.pdf)



## Part 6: Incorporating Further Rights and Embedding Equality

### Question 13: How can we best embed participation in the framework of the Bill?

SIAA supports explicit reference to participation within the Human Rights Bill. The UNCRC Bill provides a helpful framework for how participation could be embedded – for example, Scottish Government could include a corresponding requirement to consult with rights-holders in the development of the Human Rights Scheme.

We echo the Human Rights Consortium Scotland's (HRCS') calls for participation to be embedded throughout the Bill, including in its purpose, in reporting on implementation of the Bill, and in monitoring and accountability. As well as calls around groups whose rights are most at risk;

- Being involved in defining Minimum Core Obligations and;
- Being embedded in the Scottish Human Rights Commission's participation work

SIAA support the ALLIANCE's detailed outline of where participation should be explicitly referenced in the Bill<sup>10</sup>.

The Human Rights Scheme should include a requirement on Scottish Ministers to consult people whose rights are at risk. The Scott Review<sup>11</sup> noted that collective advocacy was seen to be an important element within a human rights-based approach accountability framework. It has an ability to address systemic issues, identify trends and geographical areas where rights are being violated, and identify solutions and good practice. People valued its role in campaigning for human rights. It increases citizen participation and empowers people.

SIAA recommend that Scottish Government look in detail at the Scott Review recommendations around collective advocacy and consider how explicit reference to collective advocacy can be made in the Human Rights Scheme to support participation (as well as supporting other aspects of the Bill like Access to Justice). SIAA also urge the Scottish Government to consider how supports for collective advocacy can be increased to address rights issues for communities of locality or interest. This should be done at a grassroots level with expertise of existing collective advocacy groups

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<sup>10</sup> <file:///C:/Users/RhonaWillder/Downloads/Human-Rights-Bill-Consultation-Draft.pdf>

<sup>11</sup> <https://webarchive.nrsotland.gov.uk/20230327160310/https://cms.mentalhealthlawreview.scot/wp-content/uploads/2022/09/SMHLR-FINAL-Report-.pdf>

utilized to ensure the principles of independent advocacy are maintained and human rights are central to their approach.

## Questions 14-18 on Equality provision, protection of rights of LGBTI and older people

SIAA supports the inclusion of an equality provision in the Bill. We echo calls from experts across civil society including Amnesty Scotland, Equality Network and HRCS that LGBTI, older people and Care Experienced people should be specifically named on the face of the Bill. There is significant benefit in these groups being visible given the particular consideration needed to address barriers to their rights. A naming approach would also help to overcome the fact that Care Experienced people have historically not been recognised by the broad category of “other status”.

SIAA supports calls made by Who Cares? Scotland<sup>12</sup> that Care Experienced people of all ages should be named in and explicitly protected by the equality provision. We know from the Independent Care Review and other evidence that people of all ages who grew up in care can experience greater barriers in realising their rights to family life, health, housing, education and financial support. In order to reduce the inequalities this group face, Care Experienced people of all ages to be recognised as a group of rights holders and given extra support and protection throughout their lifetime. This includes access to independent, relationship-based, lifelong advocacy for every Care Experienced person in Scotland who needs it.

## Part 7: The Duties

### Question 19: What is your view on who the duties in the Bill should apply to?

To achieve maximum rights protection, the duties in the Bill should apply as widely as possible within devolution and extend to private bodies that are delivering public services.

### Question 20: What is your view on the proposed initial procedural duty intended to embed rights in decision making?

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<sup>12</sup> <https://www.whocaresscotland.org/wp-content/uploads/2023/09/WCS-Scottish-Human-Rights-Bill-consultation-response-Oct-2023-Final.pdf>

SIAA are supportive of civil society organisations calling for the procedural duty to be a ‘due regard’ duty that is applied across all of the treaties that the Bill will incorporate.

### Question 21: What is your view on the proposed duty to comply?

SIAA are supportive of Together and HRCS’s calls to strengthen the incorporation model by placing a duty to comply on more rights, especially CRPD standalone rights.

### Question 26: What is your view on the proposed duty to publish a Human Rights Scheme

SIAA supported the proposed duty to publish a Human Rights Scheme. As Together note in their response to this consultation, there are already positive impacts from the Children’s Rights Scheme, despite the ongoing work to pass the amended UNCRC.

## Part 8: Ensuring access to justice for rights holders

### Consultation Question 27. What are your views on the most effective ways of supporting advocacy and/or advice services to help rights-holders realise their rights under the Bill?

As the national organisation for independent advocacy in Scotland, SIAA have provided a detailed response to Question 27 that draws on evidence, expertise and views from our membership of independent advocacy organisations and groups.

Although SIAA and our members are encouraged to see advocacy mentioned in the consultation document under Access to Justice, we urge the Scottish Government to discuss ‘independent advocacy’ rather than ‘advocacy’ and to agree on a definition of independent advocacy. SIAA and our members are keen to provide our expertise when looking at this definition. We will provide more information on this later in our response.

Below is a summary of our key asks of Scottish Government in relation to independent advocacy when drafting the Human Rights Bill:

1. The Bill should guarantee access to independent advocacy for all individuals, ensuring that this provision is included in the Human Rights Scheme. This call is supported by organisations across civil society including HRCS and the ALLIANCE.

2. As implementation work on the Bill proceeds, part of this must be a clear roadmap to increasing access to independent advocacy, this roadmap must
  - Ensure that those with current rights to independent advocacy in Scots law can access it
  - Utilize different models of independent advocacy including collective advocacy to support groups to address systemic human rights issues
  - Provide individual independent advocacy and citizen advocacy first to those who experience the greatest barriers to having their rights realised
  - Progressive realisation of rights should be supported by sustainably increasing access to independent advocacy so that eventually it can be accessed by anyone with a human rights issue. This should be done in consultation with existing grassroots and local independent advocacy organisations and groups.
3. 'Independent advocacy' must have a clear definition in the Bill that aligns with the Independent Advocacy Principles, Standards and Code of Best Practice<sup>13</sup> as follows:

"Independent advocacy organisations or groups providing support and representation must:

  - Have structural, financial and psychological independence from others
  - Provide no other services, have no other interests, ties or links other than the delivery, promotion, support and defence of independent advocacy."

## Why should independent advocacy provision be strengthened?

Independent advocacy has been a key feature of recent independent reviews and policy recommendations. Most importantly, when people with lived and living experience of barriers to having their rights realised are asked what has helped to break down those barriers, independent advocacy has frequently and consistently featured. 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."<sup>14</sup>

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<sup>13</sup> <https://www.siaa.org.uk/wp-content/uploads/2021/02/SIAA-Principles-Final-2nd-print-run-with-ISBN.pdf>

<sup>14</sup> <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet29en.pdf>

## Human Rights Bill Lived Experience Boards<sup>15</sup>

The consultation document itself notes that, “The importance of advocacy has been a common theme in the discussions of the Lived Experience Board.” And provides further quotes from Lived Experience Board members on their positive experience with independent advocacy.

## All Our Rights in Law<sup>16</sup>

The All Our Rights in Law project that brought together over 430 people for over 35 community conversations to talk about a new human rights law for Scotland concluded that one of the thirteen key recommendations to make rights reality was: “Independent advocacy services should be available to all”, independent advocacy also supports a number of the other thirteen recommendations in the following ways:

**1. People need to know and understand their rights** - A key part of independent advocates work is to provide impartial information about choices and raise people’s awareness about their human rights.

**3. Systemic change on human rights should not rely on individuals** – collective advocacy creates space for groups to lead in creating change.

**6. We need a human rights culture across public authorities** – independent advocacy reminds services of their responsibilities and duties. Having an independent advocate in a room where decisions are made that will impact a person’s rights can be enough to shift the power dynamic and create change.

**8. Voices of marginalised people should guide public decision-making** – the independent advocacy movement, particularly collective advocacy, is rooted in and has grown from the voices of marginalised people, for example those with mental ill health<sup>17</sup>.

**9. Mechanisms for public accountability should be built in** – independent advocacy can act as a reminder of accountability mechanisms and provide information about what they are so people can make informed choices.

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<sup>15</sup> <https://www.gov.scot/groups/human-rights-bill-lived-experience-boards/>

<sup>16</sup> <https://www.allourrightsinalaw.scot/>

<sup>17</sup> <https://capsadvocacy.org/collective-advocacy/oor-mad-history/>

From the All Our Rights In Law report “It was marked that, whilst advocacy services were not highlighted particularly within the All Our Rights resources, many participants spoke about these services as being critical to making the new rights system work for marginalised people. Some spoke about advocacy services being currently patchy and available mainly to those in the mental health system. They also spoke about their concern around recent cuts in these services.”

### **Independent review recommendations**

The Scottish Mental Health Law Review (SMHLR)<sup>18</sup> chaired by John Scott gathered expertise from across Scotland including from those with lived and living experience. This is particularly relevant to assessing where independent advocacy can be improved and utilized as people that fall under current mental health and incapacity legislation have some of the strongest access to independent advocacy at present. Recommendations around independent advocacy, particularly around how it supports human rights, enables participation and allows for supported decision making, are a theme of the final report. SIAA urge the Scottish Government to consider the Scott Review recommendations on independent advocacy when looking at UNCRPD incorporation and to support joined up policy making across Government including future proofing approaches that may be taken in upcoming years to mental health and capacity law.

Other reviews that have made recommendations to strengthen independent advocacy in Scotland are the Independent Review of Adult Social Care<sup>19</sup> (Feeley Review) and the Independent Review of Learning Disability and Autism in the Mental Health Act<sup>20</sup> (Rome Review). The Feeley Review report noted that “advocacy arrangements need to be improved, so that people with incapacity and others who are accessing supports and services have their needs, rights and preferences properly represented.”

Recommendations from the three independent reviews include:

- greater resource and right to access collective advocacy
- individual and collective advocacy groups should have an explicit right to raise a court action for human right breaches

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<sup>18</sup> <https://webarchive.nrscotland.gov.uk/20230327160310/https://cms.mentalhealthlawreview.scot/wp-content/uploads/2022/09/SMHLR-FINAL-Report-.pdf>

<sup>19</sup> <https://www.gov.scot/groups/independent-review-of-adult-social-care/>

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[https://www.researchgate.net/publication/342314047\\_Final\\_report\\_of\\_Scotland%27s\\_Independent\\_Review\\_of\\_Learning\\_Disability\\_and\\_Autism\\_in\\_the\\_Mental\\_Health\\_Act](https://www.researchgate.net/publication/342314047_Final_report_of_Scotland%27s_Independent_Review_of_Learning_Disability_and_Autism_in_the_Mental_Health_Act)

- increased access to independent advocacy for infants, children, and young people
- culturally appropriate independent individual and collective advocacy provision
- developing a national training programme for independent advocates
- an existing or new organisation should have responsibility for monitoring and continuing development of independent individual advocacy
- align legislation and policy to ensure consistency regarding the definition of independent advocacy
- independent individual and collective advocacy are sustainably funded
- opt out access to independent advocacy for certain groups at risk of their rights not being met
- increased independent advocacy for carers

### **Independent advocacy in the Children’s Hearing System**

Within the Children’s Hearing System a child may be informed of the availability of independent advocacy by the Chair. The Hearings System Working Group's Redesign Report states that: “In the current Children’s Hearings System, independent advocacy workers play a crucial role in helping children to tell the Children’s Hearing what they want—how they feel, what they think, and what they would like to happen. The aim of this is to give children the offer of support of an independent advocacy worker as and when they need one, in order for them to give their views clearly and definitely, and to have their voice magnified within the Children’s Hearing... The HSWG has heard that this provision is positive and recognises its significance for children.”

Care experienced people are a group that experience many barriers to having their rights realised and it is clear that independent advocacy is a vital component of ensuring some of those barriers are removed. The whole system approach Scottish Government has taken when introducing independent advocacy into the Children’s Hearings System has been widely praised by SIAA members and within wider analysis of the redesign of the system<sup>21</sup>. The systems change approach has been made possible through the joint work of Scottish Government, Children’s Hearings, Scottish Children’s Reporter Administration, independent advocacy organisations and others in the Expert Reference Forum working together to tackle barriers and affect system change. SIAA and members would encourage Scottish Government to identify key learnings from colleagues working

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<sup>21</sup> <https://thepromise.scot/resources/2023/hearings-for-children-the-redesign-report.pdf>

on independent advocacy within the Children's Hearing System and seek to understand how the approach they have taken to funding (that supports local, grassroots independent advocacy organisations) evaluation, monitoring and training, could be applied.

Scottish Government must ensure independent advocacy is clearly understood within the Human Rights Bill team and across policy areas.

### **Independent advocacy and Access to Justice**

Independent advocacy can support access to justice by ensuring someone's voice is heard and providing information so a person can understand their rights. If resourced well, independent advocacy is;

**Accessible** – one of the three key principles of independent advocacy is 'independent advocacy stands up to injustice, discrimination and disempowerment'. In order to do this independent advocates work hard to make sure they work is as accessible as possible.

**Affordable** - it is always free at the point of access

**Timely** – Independent advocacy, when resourced well, can be very effective in ensuring that decisions are explained by services, challenged and often prevented from escalating.

**Effective** – no matter the outcome, having independent advocacy involvement will ensure a person's voice has been heard, supported participation and will have provided information about their rights.

The independent advocacy relationship does not have the conflicts of interest inherent in other relationships with family, friends, service providers and professionals. People accessing independent advocacy are protected from undue pressure, advice or others' agendas. Often professionals and organisations make decisions that are in the best interests of an individual because they have a duty to do so. Independent advocacy does not have such a legal duty. Independent advocates do not have the same conflicts of interest as other professional workers who are expected to make judgements about who is in need, deserving or most eligible for a service. Because independent advocates do not have this sort of power over people and do not control access to resources, they are in a better position to see things from the person's point of



view. From the outset of the advocacy relationship they are more likely to have the trust of the people they are working with.

Although SIAA and our member organisations believe access to justice is a crucial part of how independent advocacy can support human rights, independent advocacy enables a range of participation, is effective when used in an early intervention approach to breaches of human rights and can be particularly important for people and groups that experience the greatest barriers in having their rights realised.

**Accountability mechanism** - Independent advocacy can act as an 'everyday' accountability mechanism by providing information to advocacy partners about what duties public services have and what choices an individual has when accessing services, for example asking for a second medical opinion or asking for paperwork to evidence decision making. Advocacy workers can also help people to access complaints processes, courts and tribunals, often making the processes more participatory by shifting power dynamics.

**Early intervention and prevention** - When independent advocacy is accessed early when a person is experiencing a human rights issue, it can prevent things from escalating and leading to expensive statutory processes, complaints or legal processes. Sometimes people tolerate things in their lives because they don't know they can be changed. Independent advocacy can help them address this.

**Addressing the implementation gap** – the oft cited 'implementation gap' that exists between Scottish policy and the reality of people's experience of services can be highlighted through collective advocacy.

### **Definition of independent advocacy**

In order for independent advocacy to work well and be resourced effectively it needs to be clearly defined in law and policy and understood by funders and commissioners as well as the advocacy partners it is available to.

An independent advocacy group only provides independent advocacy. All the activities it undertakes are about providing, promoting, supporting, and advocating for independent advocacy. Independence means that it does not provide any other services and is structurally, financially, and psychologically separate from other organisations and interests.

‘Independent advocates’ or ‘advocacy workers’ work or volunteer for independent advocacy groups. Independent advocates help people to get the information they need to make real choices about their circumstances and support the person or ‘collective advocacy’ group to put their choices across to others. An independent advocate may speak on behalf of people who are unable to do so for themselves.

SIAA’s Principles, Standards and Codes of Best Practice sets out the definition of independent advocacy, which was created with and alongside the diverse SIAA membership. The Principles document highlights the three elements of ‘Independence’.

### **Structurally**

An independent advocacy group is a separate organisation in its own right. For example, it is registered as a charity or company and has its own Management Committee or Board of Directors. Everyone in the organisation recognises that it is separate and different from other organisations and services.

### **Financially**

An independent advocacy group has its own source of funding that does not cause any conflicts of interest and that does not compromise the work it does.

### **Psychologically**

It is important that independent advocacy groups actively consider the three elements of independence and put plans in place to mitigate any potential conflict of interest at a structural, financial, and psychological level.

A definition agreed by SIAA and our members can be found in the Principles, Standards and Code of Best Practice, which is the foundational document for independent advocacy in Scotland. **The definition states that independent advocacy should:**

- **Have structural, financial and psychological independence from others**
- **Provide no other services, has no other interests, ties or links other than the delivery, promotion, support and defence of independent advocacy.**

This goes far beyond semantics - SIAA knows from our members how important the concept of independence is to people using independent advocacy and how critical the use of the word ‘independent’ is in positively shaping their perceptions of and engagement with independent

advocacy. If people feel the advocacy is related to or attached in any way to another system or service they also use, this can erode the ability to build trust.

### **Independent advocacy and ‘best interests’**

As the Scottish Government develops its understanding of independent advocacy and develops legislation and policy for the Human Rights Bill and beyond, SIAA would urge the Scottish Government to consider independent advocacy as a concept in and of itself and not discuss independent advocacy as a ‘service’. Independent advocacy is a human rights tool and its strength is often that it is not working in best interests and it is accountable to the person or advocacy partner and independent advocacy organisation. 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). 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.

One of the guiding principles of the UNCRPD in Article 3 is the “Respect for [the] inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons”<sup>22</sup>. Independent advocacy can support people to understand and make their own choices and develop their own personal autonomy independent from others who may have undue influence or conflicts of interest. This can include professionals that must work in best interests and family or carers that often must have other considerations as well as the individual’s will, wishes and preferences. The SIAA Principles, that underpin independent advocacy in Scotland, are intrinsically linked to the principles of Participation, Accountability, Non-discrimination and equality, Empowerment and Legality (PANEL). Independent advocacy groups have a human rights-based approach that support individuals and groups to consider how human rights laws may apply to their specific circumstances.

### **Independent advocacy and advice**

In response to the consultation document stating: “When we talk about advocacy, we are referring to advocacy, information and advice provided to and for rights holders in relation to the rights in

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<sup>22</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/guiding-principles-of-the-convention.html>

the Bill.”<sup>23</sup>, SIAA would like to take this opportunity to highlight that independent advocacy and advice are mutually supportive, but distinct, avenues of assistance. Independent advocacy and advice are not interchangeable - they fulfil different functions and provide different levels of support. In addition, it is a fundamental tenet of independent advocacy that people accessing it are “protected from undue pressure, advice or others’ agendas” (SIAA Principles, 2019). Independent advocacy does not give advice but supports people or groups to access information so they can make their own informed decision.

### SIAA recommendations

**SIAA encourage Scottish Government to review and consider the evidence, especially from marginalised rights holders, that independent advocacy is crucial to having their rights realised and made real.**

**SIAA recommend the Scottish Government adopt the definition of independent advocacy agreed by SIAA members.**

**SIAA recommend that independent advocacy is understood as a way of enabling participation and supported decision making as well as within the context of access to justice.**

### Independent advocacy in Scots law and policy

Only some people have the right to access independent advocacy dependent on the specific legislation. The Mental Health (Care and Treatment) (Scotland) Act 2003 gave people the most significant right to independent advocacy. Under Section 259 of the Mental Health (Care & Treatment) (Scotland) Act 2003 there is a legal right to access independent advocacy for everyone with ‘mental disorder’ (as defined by the Act) as per s328 of the Act. However, as highlighted by the Mental Welfare Commission in The Right to Advocacy 2018 report, the way the funding has been distributed in Scotland often means people subject to statutory processes under this legislation are prioritised in their access to independent advocacy. Meaning people not subject to compulsory treatment may have to wait or may not even have access to independent advocacy.

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<sup>23</sup> <https://www.gov.scot/publications/human-rights-bill-scotland-consultation/pages/9/>

For a full list of here and how independent advocacy has been written into Scots law and policy please see Appendix 2.

The way independent advocacy was written into the legislation, and has subsequently been resourced, has meant both a widening of access to independent advocacy but also a funnelling of independent advocacy provision, linking it to statutory processes (e.g. a Mental Health Tribunal) in the minds of both advocacy partners and public services. This has meant independent advocacy cannot fulfil its potential in the context of early intervention and prevention or enable participation and supported decision makings as fully as it could. In order to address this a clear definition of independent advocacy should be included in the Human Rights Bill and other upcoming legislation as well as addressing the underutilization of different models of advocacy, specifically collective advocacy and citizen advocacy. Finally human rights budgeting approach should be taken to funding grassroots independent advocacy, as we know from our members the benefit

The gaps and lack of access, despite the right in law was reinforced in the Independent Review of Learning Disabilities and Autism in the Mental Health Act<sup>24</sup> which highlighted that although autistic people and those with an intellectual disability have the right to access independent advocacy under the Mental Health (Care and Treatment) (Scotland) Act 2003, the reality is that people do not have equal access to independent advocacy. SIAA research for The Advocacy Map<sup>25</sup> shows there are significant gaps in the provision of independent advocacy across Scotland, including:

- children and young people
- people with dementia
- people with intellectual disabilities
- autistic people
- people within the prison system
- unpaid carers.

### **Why is grassroots, locality based independent advocacy effective?**

The independent advocacy movement has grown and developed over the last 35 years. Many of the grassroots, community focused independent advocacy groups continue to develop based on the

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<sup>24</sup> <https://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2020/02/IRMHA-easy-read-final-report-10-1-20.pdf>

<sup>25</sup> <https://www.siaa.org.uk/information-hub/siaa-advocacy-map-sustainability-of-independent-advocacy-in-scotland/>

specific needs of their community. The Principles, Standards and Codes of Best Practice highlights the importance that independent advocacy groups be embedded in the community or community of interest it serves. Independent advocacy groups are often led and influenced by people with lived expertise and the needs of the specific community of interest and locality.

SIAA strongly supports grassroots, community based independent advocacy groups who have developed their expertise, knowledge, and practice of independent advocacy over many years. All these groups continue to hold the SIAA Principles, Standards and Codes of Best Practice central to their work to ensure local people and groups can have their voices heard and taken into account.

### **Collective advocacy and access to justice**

Scottish Human Rights Commission (SHRC) in their paper, written by Professor Katie Boyle, note that there are three distinct approaches to facilitating a collective or structural response to systemic problems and currently there is an over reliance on the approach that involves an individual taking a test case. 'The research suggests this can exacerbate access to justice issues for those impacted and that public interest litigation and collective cases are required to help alleviate the individual burden of a test case and the potential adverse impact on those cases that are suspended.' A key question to enable access to justice asked in the paper is; What other mechanisms might help support collective complaints or collective advocacy movements? SIAA suggest that the Scottish Government should use the Human Rights Bill as an opportunity to create the resources to support collective advocacy groups to raise collective human rights issues via judicial and non-judicial routes. SIAA strongly support the recommendations related to this in the Scott Review around collective complaints, namely:

- collective advocacy groups should have an explicit right to raise a court action for human right breaches. This right must be supported by access to legal advice, guidance and support for groups who wish to take this step.
- there should be an alternative way for collective advocacy groups to be able to escalate human rights issues that remain unresolved and unaddressed by services to another scrutiny body/Commissioner to investigate. This would need to be supported by a participatory process of referral and consideration within the identified scrutiny body.

Ensuring that there judicial and non-judicial pathways for collective groups to raise issues means that each group can decide for themselves which option is best for their collective. SHRC further

noted in their report that independent advocacy is vital in creating an access to justice system that works for rights holders: 'In order for access to justice to function people should be able to participate in the system and in the decisions that impact them. The role of advocacy services can play an indispensable role in supporting and ensuring genuine participation and informed decision making.'<sup>26</sup> Furthermore, UNCRPD Committee has said that governments need to strengthen the capacity of collective advocacy groups and emphasizes their importance in General Comment No. 7<sup>27</sup>

Law Society of Scotland in their response to the Scott Review noted that independent advocacy organisations were well placed to notice patterns in human rights breaches and therefore are well placed to take court action for alleged human rights breaches. However, they conclude that 'without a corresponding proposal to develop and promote legal services available to individuals we have real concerns regarding how individuals and groups will be able to access justice.'<sup>28</sup>

SIAA members are keen to reiterate that agendas must be set by collective advocacy groups themselves. The work of collective advocacy cannot be dictated to by public bodies/commissioners looking to make improvements. Scott also identified a need for greater awareness within NHS Boards and public bodies about what collective advocacy is and to engage with it.<sup>29</sup>

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<sup>26</sup> <https://www.scottishhumanrights.com/media/2496/access-to-justice-for-everyone-a-discussion-paper.pdf>

<sup>27</sup> <https://www.ohchr.org/en/treaty-bodies/crpd/general-comments>

<sup>28</sup> <https://webarchive.nrscotland.gov.uk/20230327160310/https://cms.mentalhealthlawreview.scot/wp-content/uploads/2022/09/SMHLR-FINAL-Report-.pdf>

<sup>29</sup> <https://webarchive.nrscotland.gov.uk/20230327160310/https://cms.mentalhealthlawreview.scot/wp-content/uploads/2022/09/SMHLR-FINAL-Report-.pdf>

## SIAA recommendations

**People that already have access or rights to independent advocacy in law must be prioritised as independent advocacy is widened in the scope of the Human Rights Bill.**

**SIAA recommend the Scottish Government supports the resourcing and sustainable growth of collective and citizen advocacy models to support rights holders to address systemic issues and groups with greatest barriers to realising their rights.**

**SIAA recommend that grassroots independent advocacy, rooted in a local community or community of interest, is protected and strengthened through provisions in the Bill, for example in the proposed Human Rights Scheme.**

## Legal Aid

SIAA here echo that in relation to collective advocacy, groups seeking access to justice must have legal aid available if a group is taking an action to court. As detailed in our response above we hope collective groups will have explicit rights to raise a court action for human rights breaches, as recommended in the Scott Review.

## Question 28-29. Complaints handling

Front line complaints handling mechanisms of public bodies should be improved by co-producing systems with groups whose rights are most at risk.

Part of the systems improvement should be training for public bodies on independent advocacy as we aim to see access to independent advocacy increased across policy areas in Scotland. SIAA have delivered awareness raising sessions about independent advocacy to SPSO staff in the past few years, however we believe a better understanding of the practice and landscape of independent advocacy would be beneficial across many scrutiny bodies and public bodies handling complaints.

SIAA recommend that consideration is given to how independent advocacy organisations and collective advocacy groups will be resourced to gather expertise on the changing landscape of complaints and judicial routes as implementation for the Bill begins. Upskilling across independent advocacy will be required to ensure that they can provide accurate information to rights holders



and provide high quality independent advocacy to ensure rights holders voices are heard when pursuing a complaint.

### 36. If you do not agree that existing judicial remedies are sufficient in delivering effective remedy for rightsholders, what additional remedies would help to do this?

SIAA strongly support Just Right Scotland's position<sup>30</sup> that the Bill must include the substantive international human right to an Accessible, Affordable, Timely and Effective remedy for breach of the rights contained in the Bill. Incorporation of the right to an effective remedy will ensure a connection to international standards on access to justice, which will continue to evolve and be elaborated upon.

Just Right Scotland notes that devolution limits should not prevent the Scottish Parliament from incorporating this right in relation to the rights in the Bill. Scotland has always had a separate legal system, which was protected when Scotland united with England and Wales in 1707, and this did not change through devolution.

## Part 9: Implementing the New Scottish Human Rights Act

### 40. What are your views on our proposals for a Human Rights Scheme?

SIAA supports the proposal to establish a Human Rights Scheme, as it serves as a crucial tool for accountability on the Scottish Government's commitment to advance human rights. The Human Rights Scheme should be modelled on the Children's Rights Scheme as set out in the UNCRC Bill.

The Human Rights Scheme should include:

- Access to independent advocacy, including both collective and individual independent advocacy
- A clear definition of independent advocacy
- Reporting on the availability of independent advocacy for all who need it

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<sup>30</sup> <https://www.justrightscotland.org.uk/2023/09/access-to-justice-and-the-new-scottish-human-rights-bill/>

### 43. How can the Scottish Government and partners provide effective information and raise awareness of the rights for rights-holders?

As detailed in our answer to question 27, independent advocacy, when properly resourced is ready made to support rights holders to learn about their human rights.

SIAA support HRCS's call to work of rights holders with the greatest barriers to having their rights realised to co-produce the development of a National Network for Human Rights Information, Education, Legal Services and Advice. This Network should provide information that is accessible, in a wide range of different mediums and formats, with an inclusive communications approach. It should be available nationally but importantly should also operate at a community level, this would mean independent advocates could use it in their work.

### 44. What are your views on monitoring and reporting?

SIAA support Together's call for Scottish Government to place a reporting duty on the Scottish Parliament, mirroring the provision in the UNCRC Bill.

As stated above Human Rights Scheme should include reporting on the availability of independent advocacy for all who need it.

## Appendix 1 - Examples of independent advocacy upholding human rights

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

### **The right to education**

Brian and his mum contacted an independent advocacy organisation as Brian had been asked by his deputy head to collect and sign a leaver's form and told he could not attend the winter ball. Brian did not want to leave school and had planned to complete 5th year, so he refused the leaver's form. He was panicked as he thought he must have been excluded.

Brian's mum informed the independent advocate that she had been requesting additional support for Brian since his transition to high school, but that it had not been forthcoming.

The independent advocate shared information with Brian about his rights to attend and engage with education. The advocate established, from speaking to the deputy head, that Brian was not officially excluded but that the school thought it best for him to engage in college or work instead. With the support of the independent advocate, Brian was empowered to meet with the deputy head and ask why the decision to give him his leaver's form had been taken and ask that his rights be upheld. The legal information and guidance relating to exclusion and additional support was shared with the school. Shortly after this meeting, Brian was given a new timetable with support to complete his studies.

### **The right to housing**

Many months before he sought this advocacy support, Malcolm had been having work carried out on his council house. Whilst carrying out the repairs, workmen discovered drug paraphernalia and left the premises immediately because of the related health and safety concerns. Malcolm was told by the local authority that, before the remainder of the work could be completed, his house would have to be 'made safe' by environmental health. In the meantime, he was left without a working toilet and had had to rely on the kindness of his neighbours letting him use their facilities.

This had been going on for over a year - environmental health inspectors visited the property on numerous occasions and found no drug paraphernalia and therefore no work that needed to be done to make it safe. However, despite Malcolm's repeated requests, the original repairs were not completed.

Malcolm met with an independent advocate, who spent some time with him outlining his various options and getting to know the situation. Malcolm expressed a desire to contact the local authority again, this time with independent advocacy support, so he and the independent advocate called their offices. Malcolm observed that, on this occasion, he was treated much more respectfully by the local authority and the issue was handled in a totally different way. The person he was speaking to took time to explain the relevant processes, looked into what might be going wrong and took the necessary actions to set things right.

As a direct result of the phone call, local authority workmen were sent to Malcolm's house within the week. They completed the repairs, thus restoring his dignity and materially improving his living conditions.

## The right to health

Sometimes, collective advocacy groups already in existence can initiate specific pieces of work to address issues that have arisen for group members. One such example comes from a collective advocacy group led by people with lived experience of a mental health problem or diagnosis.

Group members had shared their experiences of A&E services at two hospitals and found that various aspects of the A&E environment had been challenging for them. In some cases, A&E staff had perceived them differently once their mental health history was known, which had sometimes overshadowed diagnosis and negatively impacted on their treatment.

These common experiences then became the catalyst for the development of a project. With funding secured, a group of peer researchers was recruited to gather views from people with lived experience of mental health problems who had experienced A&E in hospital. As the project developed, efforts were continually made to ensure that group members were comfortable with its direction and regularly offered the opportunity to be involved. The importance of understanding that a collective advocacy group is made up of individuals was always a consideration - members had the option to be involved flexibly, in different ways, taking part on their own terms. In this way, they felt safe and in control, rather than feeling overwhelmed by their involvement.

The release of the peer research results initiated an invitation from senior NHS staff to discuss the issues raised and steps that could be taken to improve people's experiences at A&E. This, in turn, led to specific positive actions, including group members taking part in training for NHS staff, and the development of an emergency card that people can choose to fill in and present at A&E. The card sets out information they want staff to be aware of and enables them to communicate more easily their wishes at a time of potential stress.

Over the course of this piece of work, the collective advocacy group raised issues, identified common themes, initiated a project, collected and represented experiences, broke down barriers and, ultimately, made positive changes in order to address the problems they had experienced.

For more examples of how independent advocacy works in practice to uphold rights please see Independent advocacy in action: Case studies illustrating SIAA's 'Principles and Standards'<sup>31</sup>

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<sup>31</sup> <https://www.siaa.org.uk/wp-content/uploads/2021/05/Independent-advocacy-in-action-SIAAs-%E2%80%98Principles-and-Standards-in-action.pdf>

## Appendix 2 - 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

## Appendix 3 – Principles and standards of independent advocacy

Principle 1: Independent advocacy is loyal to the people it supports and stands by their views and wishes.

- Standard 1a: Independent advocacy follows the agenda of the people supported regardless of the views, interests, and agendas of others.
- Standard 1b: Independent advocacy must be able to evidence and demonstrate its structural, financial, and psychological independence from others.
- Standard 1c: Independent advocacy provides no other services, has no other interests, ties, or links other than the delivery, promotion, support, and defense of independent advocacy.

Principle 2: Independent advocacy ensures people's voices are listened to and their views are taken into account.

- Standard 2a: Independent advocacy recognises and safeguards everyone's right to be heard.
- Standard 2b: Independent advocacy reduces the barriers people face in having their voice heard because of communication, or capacity, or the political, social, economic, and personal interests of others.

Principle 3: Independent advocacy stands up to injustice, discrimination, and disempowerment.

- Standard 3a: Independent advocacy recognises power imbalances or barriers people face and takes steps to address these.
- Standard 3b: Independent advocacy enables people to have more agency, greater control, and influence.
- Standard 3c: Independent advocacy challenges discrimination and promotes equality and human rights. Find out more about independent advocacy and how it works in Scotland from the Independent Advocacy Principles, Standards and Code of Best Practice.

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