



Independent Human Rights Act Review (IHRAR) Call for Evidence

Scottish Commission for People with Learning Disabilities Submission

March 2021

The Scottish Commission for People with Learning Disabilities (SCLD) welcomes the opportunity to respond to this important review.

SCLD is an independent charity and non-governmental organisation. SCLD aims to make a significant contribution to creating an environment in Scotland in which systems and culture are changed to ensure people with learning disabilities are empowered to live the life they want in line with existing human rights conventions.

At SCLD we base everything we do on what people with learning disabilities tell us their priorities are - their hopes and dreams for the future, as well as their fears and their experience of discrimination.

In responding to this call for evidence, SCLD has:

- Outlined key human rights issues currently impacting people with learning disabilities in Scotland and across the UK
- Outlined our support for the Human Rights Act (HRA) and the importance it holds for people with learning disabilities and SCLD
- Responded to the two key themes in the call for evidence and offered recommendations regarding these.

Key Human Rights Issues Facing People with Learning Disabilities in Scotland

Scotland is changing, and for people with learning disabilities, these changes should be significant in empowering them to live the life they want. We know that for most people with learning disabilities their lives have already changed in the last 20 years. They no longer live in institutions, separated from the rest of society with limited or no choice or control over their lives. However, despite this, they still face significant barriers in realising their human rights. This

has never been clearer than in people with learning disabilities experience during the COVID-19 pandemic. Recent evidence from The Scottish Learning Disability Observatory (SLDO) found that people in the learning disabilities population were more than three times more likely to die from COVID-19 than those in the general population¹. This sits alongside a range of additional issues facing people with learning disabilities during this time such as the removal of support and loss of independence, the impact of social isolation on mental health, confusion and anxiety surrounding public health information, concerns regarding medical decision making and limited access to school hubs².

Beyond the current pandemic, SCLD is aware that people with learning disabilities in Scotland face some of the starkest violations of human rights. This can be evidenced in their experience of restraint and seclusion^{3/4}, detention and non-consensual treatment^{5/6/7/8}, the increased use of guardianship orders that are not legitimate and proportionate to the individual's situation⁹, and the experience of delayed discharge and out of area placements¹⁰.

These violations sit alongside the more insidious removal of human rights people with learning disabilities can face. This includes hate crime¹¹, lack of appropriate housing¹², low educational aspirations¹³, low levels of employment¹⁴, higher mortality rates¹⁵, increased risk of gender-based violence¹⁶, a lack of comprehensive relationships, sexual health and parenting education¹⁷, a lack of opportunity to parent¹⁸ as well as loneliness and isolation¹⁹.

¹ [SLDO \(2021\)](#)

² [SCLD \(2020\)](#)

³ [PABSS & Challenging Behaviour Foundation \(2019\)](#)

⁴ [Children and Young Peoples Commissioner for Scotland \(2019\)](#)

⁵ [Mental Welfare Commission for Scotland \(2016\)](#)

⁶ [SLDO \(2017\)](#)

⁷ [Public Health England \(2015\)](#)

⁸ [Tyrer & Cooper \(2014\)](#)

⁹ [Mental Welfare Commission for Scotland \(2018\)](#)

¹⁰ [McDonald \(2018\)](#)

¹¹ [SLDO \(2021\)](#)

¹² [SCLD \(2017\)](#)

¹³ [McTeir et al \(2016\)](#)

¹⁴ [Office for National Statistics \(2019\)](#)

¹⁵ [The keys to life \(2013\)](#)

¹⁶ [Engender \(2018\)](#)

¹⁷ [SCLD \(2018\)](#)

¹⁸ [SCLD \(2016\)](#)

¹⁹ [SCLD \(2020\)](#)

The Value of the HRA to People with Learning Disabilities in Scotland

At the outset, it is important that we are clear about SCLD's support for the HRA: for the duties it places on government and publicly funded agencies; for the rights it gives people and their families; for the collective benefit in UK law complying with minimum human rights standards agreed by all countries that agree to be a member of the Council of Europe. At SCLD we hope that this review will not lead to loosening of human rights protections and enforcement in the UK for people with learning disabilities.

For SCLD, the HRA offers significant protections for people in the UK and Scotland. At SCLD we regularly use the HRA to make the case for policy and legislative changes to ensure the human rights of people with learning disabilities are respected, protected, and fulfilled. Most recently SCLD, amongst others, has used the HRA to ensure protections are given to people with learning disabilities in situations of emergency such as the Coronavirus pandemic. Without the HRA, SCLD would not have been able to make such a strong case for people with learning disabilities to be included as part of priority group 6 for vaccinations²⁰.

To date, the HRA has had a considerable impact in Scotland by incorporating the civil and political rights of the European Convention on Human Rights (ECHR). This has allowed for the challenge of human rights violations in Scotland. For example, the judicial review regarding prison conditions and the inhumane practice of 'slopping out'²¹ and the human rights case on access to a solicitor during police detention that was finally settled by a UK Supreme Court decision²².

Despite the positive use of the HRA in bringing judicial review cases in Scotland in matters regarding immigration, asylum, prisons as well as issues of planning, we have not seen a high-profile judicial review based on a person's learning disability in Scotland²³. Access to the courts is problematic but much can be achieved using the law, to negotiate changes in practice and services. Therefore the HRA's beneficial impact cannot simply be judged on cases at court. The HRA holds value for people with learning disabilities and its universality enables case decisions to

²⁰ [SCLD \(2020\)](#)

²¹ [Robert Napier v. The Scottish Ministers](#)

²² [Cadder v HM Advocate](#)

²³ [SPICe \(2016\)](#)

have a European wide benefit. For example the learning from Wales where the HRA was used to stop unnecessary isolation of a person with a learning disability during the pandemic²⁴.

From both our own experience and the experience of others, SCLD knows the HRA is a valuable tool in protecting the rights of people with learning disabilities. Given this, we support both The British Institute on Human Rights and The Human Rights Consortium Scotland's response to this Review. Like these organisations, SCLD seeks to ensure this review does not make recommendations that cause the HRA to lose strength as the effect would be to contradict maximalist approach taken in Scotland to incorporate the United Nations Convention on The Rights of the Child (UNCRC) in Scotland as well as the future potential to incorporate other international human rights conventions.

In line with The Human Rights Consortium Scotland, we, therefore, agree that “...*any amendments to the HRA and how it operates could have highly regrettable, detrimental impacts on these very positive and welcome human rights advances in Scotland*”²⁵. With this statement in mind, we have responded to the two key themes of the review below.

Theme 1: The relationship between UK courts and the European Court of Human Rights

SCLD believes that at present the relationship between UK Courts and the European Court of Human Rights (ECtHR) is important for two key reasons. These are increased legal clarity and opportunities for the progression of human rights in Scotland.

Increased legal certainty and clarity

SCLD believes the relationship between the ECtHR and UK courts is critical as it allows UK courts to consider case law from the ECtHR. This in turn leads to greater legal certainty and clarity in how the European Convention on Human Rights (ECHR) applies to individual circumstances in Scotland and across publicly funded services. In practice, currently in Scotland there is an opportunity to work with and learn from the expertise and resources of similar organisations and networks across Europe. This allows for a mutual understanding of the ECHR.

²⁴ [BIHR \(2020\)](#)

²⁵ [Human Rights Consortium Scotland \(2021\)](#)

Further, case law from the ECtHR has helped to clarify what ECHR rights mean in practice. This has helped courts, policymakers, and those taking part in policy discussions to apply the principles of the ECHR to Scots law and policy. For example, the case of *Dordevic v. Croatia*²⁶ could have the potential to have widescale implications regarding how cases of hate crime against people with learning disabilities in Scotland are handled.

In this case, *Dorđević* who is a disabled man with both a physical impairment and learning disability, was subjected to low levels of insidious psychological harassment by pupils who attended a school nearby Dordevic's house. Over time the harassment escalated to physical violence which Dordevic's mother reported to relevant authorities. This included social services, the police, the Ombudswoman for Persons with Disabilities, and the school, all of whom did not respond to *Dorđević*'s mother's concerns. As a result, Dordevic and his mother took a case and it was found that there was a breach by the Croatian Government in failing to protect *Dorđević* from torture and inhumane treatment (Article 3 of the HRA) as well as a failure to protect the family life of his mother (Article 8 of the HRA).

Applying the outcome of this case in a Scottish context, recent research from SLDO found that people with learning disabilities disproportionately experience all forms of violence throughout their life. This includes childhood sexual violence, physical abuse, violence in long-stay hospitals and care, and financial abuse. People with learning disabilities who took part in the research (22 participants) said that:

- They had experienced violence and harassment as children, young people, and adults; for many violence was ongoing
- They feared violence and that they experienced long-lasting impacts of violence which led to anxiety, depression, self-harm, and suicide attempts
- They said they were sometimes afraid to leave their homes, or would only leave with a support worker which meant that they did not feel able to live independent lives in the community
- They also said that they were frequently not believed by support workers, family members, and the police, which made them feel isolated, lonely, and scared.

²⁶ [Dordevic v. Croatia \(2012\)](#)

Given the similarity of experiences faced by Dordevic and people with learning disabilities in Scotland, SCLD believes that judgments such as those taken in *Dordevic v. Croatia* can help the Scottish Government, Police Scotland and other relevant stake holders to better be able to take into account human rights implications when responding to the issue of disability hate crime.

This mutual understanding can be seen in the recent commitment in the Hate Crime Bill to ensure disaggregated data on disability which includes learning disability²⁷. Until this point, no disaggregated data on hate crimes against people with learning disabilities had been collected which has negatively impacted any legislative or policy change to support this population group.

Opportunities for progressing Human Rights in Scotland

SCLD believes the HRA has been critical in ensuring a standard of rights for all people in the UK. Further, SCLD welcomes and supports the consistency of approach the HRA offer us with European rights based approaches to new and emerging challenges such as the current pandemic. Despite these positives, SCLD recognises the standards of rights protections offered by the HRA is a 'minimum' and not a ceiling. This is clear when we look at the range of rights violations facing people with learning disabilities in Scotland and across the UK. Given this, we want to see the HRA as part of a wider human rights framework in Scotland to ensure we go beyond the minimum standard to ensure that the rights of people with learning disabilities are respected, protected, and fulfilled.

Central to this will be ensuring that Scotland directly incorporates the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) into domestic law as part of the wider work of the Scottish First Minister's National Human Rights Leadership Taskforce, in a similar fashion to work undertaken to incorporate the UNCRC into domestic law in Scotland.

SCLD would, therefore, not wish to see any changes to Section 2 of the HRA. Instead, in line with The Human Rights Consortium Scotland, SCLD asks the panel to support the approach of the Scottish UNCRC Bill and First Minister's Advisory Group on Human Rights Leadership to ensure Scotland's human rights framework enables explicit links to the widest range of international interpretive human rights tools to enable effective implementation and ongoing interpretation.

²⁷ [Scottish Parliament \(2021\)](#)

Theme 2: Impact of the HRA on the relationship between the judiciary, the executive, and the legislature

SCLD believes that at present roles of the Courts, Government and Parliament are balanced and Articles 3 and 4 of the HRA work well. We agree with the Human Rights Consortium Scotland in the strengths they have identified in their response. In particular, SCLD believes the existing relationship allows for remedies and redress for individuals and accountability of public services. Each of these is discussed in more detail below.

An effective remedy for individuals

SCLD believes the role of Courts is vital as an avenue for people who face discrimination and violations of their human rights to seek access to an independent process, secure accountability and to have a voice in proceedings. We believe that without opportunities for judicial review, these individuals rights would be infringed upon, and individual lives negatively impacted without any way to challenge this. Judicial review can give people hope, dignity, and ultimately the protection of their basic rights. This is not to say that opportunities for judicial review are equally accessible to people with learning disabilities.

Instead, research tells us that people with learning disabilities face significant barriers in accessing justice. For example, Flynn²⁸ highlighted that disabled people face significant barriers in accessing justice. This included:

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

²⁸ [Flynn \(2015\)](#)

While we do believe the current system presents barriers to people with learning disabilities accessing their rights, we have seen instances where these systems have worked for people with learning disabilities. For example, the investigation led by the Children and Young People's Commissioner on restraint and seclusion and the following legal intervention led by the Equality and Human Rights Commission²⁹ which led to commitment from the Deputy First Minister to produce guidance on restraint and seclusion which involved children, young people and their families,. This was alongside a commitment to consider statutory action and develop and introduce a standard data set to monitor incidents of restraint and seclusion across Scotland.

Given this, we would therefore not want to see the system changed at this time, but rather an increased focus being given to ensuring accessibility of these systems for people with learning disabilities through legal aid, access to advocacy, upskilling of the learning disability and legal workforce and human rights-based education. SCLD hopes that the inequality of access to an effective remedy, protected Under Articles 13 and 14 of the ECHR, will be addressed through UNCRPD incorporation.

Accountability of public services

SCLD recognises that Parliament makes laws for everyone, but how the law will be applied, particularly across such a wide range of circumstances and individuals may lead to people with certain protected characteristics, such as disability facing both direct and indirect discrimination. This is a considerable issue for people with learning disabilities who often find current laws do not take account of their needs and aspirations. This is where Courts can support holding public services to account on behalf of people with learning disabilities. For example, in the case of a Local Authority V G (Parent with a Learning Disability)³⁰.

In this case, while a decision was made to remove children from the parents' care, the judgment highlighted that there had been a failure on the part of the local authority to not have guidance for working with parents with learning disabilities nor training for social work staff. In this way, the case highlighted failures of the local authority to support families where the parents had

²⁹ [Children and Young Peoples Commissioner Scotland](#)

³⁰ [Local Authority V G \(Parent with a Learning Disability\) \(2017\)](#)

learning disabilities. This case did not contradict the will of Parliament, rather it ensured what happened locally was lawful.

Given this, SCLD supports the Human Rights Consortium Scotland in their statement that *"Holding government to account cannot be left to elections only, but there need to be avenues of accountability throughout our system of public decision-making. Sometimes where human rights infringements have been raised with the government and with the legislature but no actual action has been taken to address these rights infringements, it is right and proper that the courts step in to insist on remedy and to be a guarantor of human rights"*³¹.

The agility of human rights law to provide remedy should not be ignored. As the Council of Europe points out, it has proven to be a 'living treaty':

*"What gives the Convention its strength and makes it extremely modern is the way the Court interprets it: dynamically, in the light of present-day conditions. By its case-law the Court has extended the rights set out in the Convention, such that its provisions apply today to situations that were totally unforeseeable and unimaginable at the time it was first adopted..."*³² (p.7)

In recognising the above, SCLD recommends that no change is made to how the roles of the courts, government, and Parliament are balanced, and to Articles 3 and 4 of the HRA. Instead, we would seek the incorporation of the UNCRPD to address the barriers the existing system presents to people with learning disabilities.

Conclusion

SCLD is clear that any of our critique of existing human rights legislation is not based on its intention or operational functions. Rather, we are concerned that the existing legislation does not go far enough to ensure the realisation of human rights for people with learning disabilities. SCLD regularly sees evidence of people with learning disabilities being lost in the universalism of existing human rights dialogue and a lack of accessible options to achieve remedies and redress. However, for these issues to be fully addressed, we need the HRA to remain intact.

SCLD, therefore, is mindful of the caution offered by from Professor Nicole Busby who said that:

³¹ [Human Rights Consortium Scotland \(2020\)](#)

³² [The European Convention on Human Rights - a living instrument](#)

“The IRHRA [Independent Review of the Human Rights Act] does not, on the face of it, contain any direct threat to the continuance of Scotland’s human rights journey...However, the disturbance of any existing arrangements to the current structures within which the HRA operates risks unsettling the complex interaction between devolution and human rights which could give rise to a range of consequences for Scotland and her fellow devolved nations³³ (p.10).

Given this, SCLD does not want to see a regression of the HRA. Instead, as intended, we hope to see the HRA used as a minimum standard of rights across the UK. This should sit alongside the progressive realisation of the rights of people with learning disabilities in Scotland, addressed through the incorporation of the UNCRPD and wider international treaty incorporation.

SCLD therefore suggests:

- The Panel recommends no change to Section 2 of the HRA
- The Panel endorses the approach of the Scottish UNCRC Bill and Scottish First Minister’s National Taskforce on Human Rights Leadership, to enable explicit links to the widest range of international interpretive human rights tools for all of those charged with its implementation and ongoing interpretation
- The Panel recommends no change is made to how the roles of the courts, government, and Parliament are balanced, and to Articles 3 and 4 of the HRA.
- The Panel endorses UNCRPD and wider international convention incorporation in Scotland.

SCLD thanks the UK Government for the opportunity to respond to this important call for evidence.



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³³ [Busby \(2021\)](#)