



Consultation Response

Human Rights Act Reform: A Modern Bill of Rights – A consultation to reform the Human Rights Act 1998

The Scottish Commission for
People with Learning Disabilities
March 2022



Introduction

The Scottish Commission for People with Learning Disabilities (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 cultures are changed to ensure people with learning disabilities are empowered to live the lives they want in line with existing human rights conventions.

It is important to state from the outset that SCLD does not support any of the rationale or proposals in this consultation document. We believe that the recommendations contained in the consultation are a regressive approach to human rights, which is, at best, based on a lack of robust evidence and, at worst, rooted in prejudiced ideologies and discrimination. We see no benefit to people with learning disabilities and the progressive realisation of human rights in the proposals outlined in this consultation.

The UK Government will not be unfamiliar with various critiques of the proposals to amend the Human Rights Act (1998) (HRA) into a bill of rights. On Human Rights Day 2021, SCLD was one of over 100 organisations that asked political leaders to reaffirm their commitment to Human Rights¹. However, the UK Government has proceeded with this consultation, ignoring the large body of evidence presented to its Independent Human Rights Act Review (IHRAR), including SCLD's previous submission². These concerns were made clear to the UK Government in a joint statement from The Scottish Human Rights Consortium, Rights Real and Amnesty International in Scotland, who rightly identified this consultation as *'unnecessary, uncalled for and deeply divisive'*³.

Given the considerable concerns about the proposals contained in this consultation, we have chosen to focus our comments on:

¹ [British Institute of Human Rights \(2021\)](#)

² [SCLD \(2021\)](#)

³ [Scottish Human Rights Consortium \(2021\)](#)

- SCLD's case for rejecting these
- SCLD's focused response to critical areas of the consultation, including interpretation of convention rights, permissions stage, positive obligations and declarations of incapability and the impact these proposals will have on devolution and human rights realisation in Scotland.

As SCLD is an organisation working alongside people with learning disabilities protected under the Equality Act (2010)⁴, the entirety of this response should be considered relevant to question 29 on equality impacts. Additionally, SCLD's reflections on question 27 are given in the conclusion of this submission as we feel this proposal touches on the underlying principle at the centre of all the changes from the HRA to the proposed bill of rights.

2. SCLD's case for rejecting the proposals in this consultation

2.1 The HRA is important to people with learning disabilities

In a blog published by the British Institute of Human Rights, Fiona Dawson, a member of SCLD's Human Rights Town App Development group, wrote about why the HRA matters to people with learning disabilities⁵. In this, Fiona states,

"Human rights are everywhere, and it shows us how important everyone is in life. The Human Rights Act is for every individual. It's there for a purpose; it's there to protect us...Using the language of human rights helps us to have the confidence to stand up for our rights and to have a voice. We all need to be heard. It's really important we let people with learning disabilities have a voice."

As Fiona tells us, for people with learning disabilities, the HRA is critical in protecting people with learning disabilities' most fundamental rights. Notably, the HRA gives people with learning disabilities the language and framework necessary

⁴ [Equality Act \(2010\)](#)

⁵ [British Institute of Human Rights \(2022\)](#)

to stand up for themselves. For many people with learning disabilities in Scotland and across the UK, this is a matter of life and death, as data tells us:

- People with learning disabilities were at least three times more likely to die from COVID-19 in Scotland than the general population⁶
- People with learning disabilities in Scotland die 20 years earlier than the rest of the population
- Rates of child premature mortality are 12 times higher for children and young people with learning disabilities. For girls and young women, the risk of death was even higher, at a rate 17 times higher than their peers without learning disabilities⁷.

Unfortunately, people with learning disabilities must defend their human rights daily. As evidenced in the barriers they continue to face in accessing education⁸, employment⁹, living independently¹⁰, having meaningful relationships^{11/12} and even having a family¹³.

Therefore, SCLD believes it is profoundly worrying that the UK Government seeks to reduce the powers and effectiveness of the HRA given the ongoing human rights violations faced by people with learning disabilities. Even more troubling is the fact that at a time when the Office of National Statistics reported that the COVID-19 death rate in the UK surpassed 170,000 (January 2022)^{14/15}, the UK Government is not looking for ways to realise the rights of people with learning disabilities but

⁶ [SLDO \(2020\)](#)

⁷ [SLDO \(2020\)](#)

⁸ [McTeir et al \(2016\)](#)

⁹ [Office for National Statistics \(2019\)](#)

¹⁰ [McDonald \(2018\)](#)

¹¹ [SCLD \(2018\)](#)

¹² [SCLD \(2020\)](#)

¹³ [SCLD \(2016\)](#)

¹⁴ [Macintyre and Duncan \(2022\)](#)

¹⁵ Numbers of COVI-19 related deaths rising to 183,579 (02/03/22)

rather is instead actively pursuing opportunities to dismantle our existing rights framework.

2.2 The IHRAR found no case for widescale changes of the HRA

SCLD strongly supports the comments from the Scottish Human Rights Consortium in their response to this consultation where they state:

*"The most important question that should shape any reform of the Human Rights Act 1998 is this: in what ways is the HRA protecting individuals' human rights? It is disappointing that this question is not front and centre of this consultation paper."*¹⁶

SCLD believes it is a significant omission that the consultation does not examine the HRA's effectiveness, perhaps because the IHRAR findings showed no need for a widescale overhaul of the HRA. Yet despite this, the UK Government appear to have disregarded the panel's recommendations of minor amendments and instead moved forward on this consultation with no substantive evidence base to support it. The IHRAR Chair Sir Peter Gross validated our fears by highlighting the disparity between the independent review and this consultation. As he said,

*"...you cannot put ours [the review findings] down here, the Governments consultation down there and say that the two work together"*¹⁷.

2.3 Failure of the UK Government to ensure people with learning disabilities in Scotland could engage in this consultation

SCLD is concerned about the substance of the consultation process. Our view is that there has been a significant failure to provide accessible information to people with learning disabilities to participate in this consultation. For example, no appropriate Easy Read document was published. Instead, an insufficient plain language document was issued ten weeks into the process. This means that people with learning disabilities and those who support them were only left with 12 days to

¹⁶ Scottish Human Rights Consortium (2022)

¹⁷ [House of Commons \(2022\)](#)

process this information and respond, unlike the rest of the population, who had three months to formulate a response.

SCLD believes that people with learning disabilities, who are likely to be disproportionately impacted by the proposals in this consultation, have therefore not had an equitable opportunity to respond. This goes against the Government's Code of Practice on Consultation, which states that interested parties should be identified and contacted early in the consultation period (section 4.1)¹⁸. This same code of practice also says Easy Read documents and other accessible forms of communication should be made available (Section 4.4)¹⁹.

To SCLD's knowledge, at no time were people with learning disabilities in Scotland invited to take part in consultation events regarding this bill. We therefore believe their exclusion from this process deems this entire consultation process unrepresentative of one of the groups of people whom the proposed changes will most negatively impact.

3. SCLD's Response to questions in the consultation

Question 1: Interpretation of Convention rights

SCLD believes the case to '*reduce our reliance on Strasbourg case law*²⁰ is not merited. As stated, the IHRAR supported this view by highlighting that creating a gap between rights protection in the UK and what is available in the European Court of Human Rights (ECtHR) goes against the Human Rights Act's original purpose of '*bringing human rights home*'.

SCLD believes ECtHR case law can provide clarity and legal certainty around the interpretation and implementation of rights in Scotland and across the UK. Case law

¹⁸ [HM Government \(2008\)](#)

¹⁹ [HM Government \(2008\)](#)

²⁰ [UK Government, p.58](#)

also has the potential to be helpful in the realisation of the human rights of people with learning disabilities in Scotland.

In SCLD's initial response to the IHRAR ²¹, SCLD highlighted an example of helpful case law, ĐORĐEVIĆ v. CROATIA²². We said this case could have potentially significant learnings for protecting individuals with learning disabilities from a hate crime in Scotland. Given the wealth of knowledge this and other cases offer us, we reject the UK Government's proposal and support the Scottish Human Rights Consortiums point that:

"...any legislation that seeks to move away from this interpretation opens up: the risk of increased tension with the ECtHR and our European neighbours; increased need for individuals to take cases to Strasbourg and the related cost and time that this takes...exactly what the HRA was set up to prevent..." ²³

Questions 8 - 11 & 15: Permissions stage, positive obligations and declarations of incapability

This consultation document has rightly generated significant concern among human rights defenders across the UK, and SCLD shares their misgivings. Specifically, SCLD has significant fears regarding the impact of the proposed permissions stage, removal of positive obligations and removal of courts' power to declare secondary legislation incompatible with the HRA.

In considering the permissions stage, SCLD has concerns about terms such as *'genuine'* claims. Disabled people know this concept all too well; they have seen this before in the harmful dialogue of austerity. During this time, the media labelled disabled social security claimants as *'undeserving'* and presented them as *'folk devils'* guilty of manipulating and cheating the welfare system²⁴.

²¹ [SCLD \(2021\)](#)

²² [ECtHR \(2012\)](#)

²³ [Scottish Human Rights Consortium \(2022\)](#)

²⁴ [Briant et al \(2013\)](#)

The idea of *'genuine'*, and by contrast, *'spurious'* claims is a dangerous and unsubstantiated message for the UK Government to be conveying to the public. It is a message that can potentially increase ill-feeling and hate crimes, which is already a significant issue for people with learning disabilities in Scotland²⁵.

SCLD cannot support this potentially discriminatory basis for a permissions stage. The consultation presents a judgment-based approach instead of a robust evidence base for introducing the permissions stage. For example, in the section on *'prisons provision of drugs treatments'*,²⁶ the consultation document implies that prisoners should not have claimed their human rights were breached by the failure of prisons to provide them with treatment for addictions and potentially life-threatening drug withdrawals. SCLD believes this illustrates a fundamental misinterpretation of the concept of Universal Human Rights.

SCLD is clear that the focus of the Human Rights Act must be protecting individuals' human rights, not reducing cases. Instead of focusing on stopping claims, we would argue that priority must be removing barriers to access to justice for people with learning disabilities, which research suggests are significant. For example, Flynn²⁷ highlighted that disabled people face significant barriers in accessing justice, including:

- A lack of accessible information on taking legal cases, which are 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,

²⁵ [Data](#) publication shows that in over half of disability aggravated hate crimes, the perpetrator showed prejudice towards those with a learning disability (59%). This amounts to 130 incidences of hate crime recorded by the police in 2018-19.

²⁶ [UK Government \(2020\) P.40](#)

²⁷ [Flynn \(2015\)](#)

- 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.

SCLD believes the proposed permissions stage would only add to these barriers by asking judges and the court to determine whether someone faces a *'significant disadvantage'*. Our view is that this would potentially allow for direct discrimination contrary to the Equality Act (2010)²⁸. Additionally, the added caveat that a case must have *'overriding public importance'* contradicts Article 34 of the European Convention on Human Rights (ECHR), which states that courts should accept cases and not seek to hinder them²⁹.

In response to the proposal on positive obligations, SCLD believes positive obligations are critical for people with learning disabilities who require barriers to access removed so they can participate in society on an equitable basis. Additionally, SCLD believes positive obligations to be a cost-saving measure. Again, this is demonstrated by the example of *'prisons provision of drugs treatments'*. Had positive measures to provide medical treatments to the claimants been taken, a pay-out of £7 million to cover legal fees and compensation could have been avoided.

SCLD, therefore, rejects this proposal. SCLD argues this is a dangerous proposal as it has the potential to set back progressive rights realisation, such as recent developments in ensuring positive reporting obligations on Scottish Ministers in the

²⁸ [Equality Act \(2010\)](#)

²⁹ [European Convention on Human Rights \(1953\)](#)

Children's Rights Scheme found in Section 3 of the United Nations Convention on the Rights of the Child (UNCRC) (Incorporation) Bill³⁰.

Finally, in response to the proposal on declarations of incompatibility, SCLD is concerned that this proposal will remove individuals' access to justice and reduce accountability for the UK Parliament and Government Ministers. Further, this proposal would create an anomaly in the UK, where devolved legislation is held to a higher human rights standard than any other legislation. It is on this basis SCLD rejects Government suggestions on declarations of incompatibility.

Question 19: Impact on Scottish devolution and human rights realisation

SCLD believes the UK Government has failed to acknowledge the potential for legal uncertainty in Scotland, ignoring that the ECHR has an effect in UK law through both the HRA and the Scotland Act (1998). The ECHR is a fundamental and non-negotiable element of the devolution agreement. Moreover, experts in Scottish devolution believe this consultation has been written without recognition of the Sewel Convention, which states that the UK Parliament:

"... would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament." ³¹

In addition to this, the consultation's proposals disregard the considerable and growing support for human rights in Scotland. This support is evidenced in over 200 organisations (including SCLD) supporting the Scotland Declaration on Human rights, which highlights profound issues with:

"...the persistent negative rhetoric around the protection and promotion of rights in the UK." ³²

³⁰ [United Nations Convention on the Rights of the Child \(incorporation\) \(Scotland\) Bill](#)

³¹ [House of Commons \(2005\)](#)

³² [Scotland Declaration on Human Rights](#)

This groundswell of support led to over 50 organisations and individuals supporting SCLD's statement on the need to incorporate the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) into Scottish law³³.

The National Taskforce for Human Rights Leadership Report³⁴ committed to incorporate the UNCRPD, and as a result, this will be part of a new Human Rights Bill for Scotland³⁵. This new bill will also be informed directly by a Lived Experience Board of people with learning disabilities. SCLD believes this is a significant and positive step forward in ensuring people's lived experience is at the centre of human rights decision making in Scotland. However, our considerable progress in the progressive realisation of people's human rights is at risk of being set back given the UK Government's proposals in this consultation.

Conclusion

In conclusion, SCLD believes it is important to reflect on question 27 of this consultation. In this, the UK Government proposes that *"...our new human rights framework should reflect the importance of responsibilities"*³⁶. We are of the view that this premise appears to be the basis for the entirety of this consultation, in that there appears to be a desire to remove rights from individuals whose conduct may be considered *'deviant'* by the UK Government.

For people with learning disabilities who have faced years of human rights abuses and institutionalisation in hospitals³⁷, the concept of human rights being dependent on fulfilling your perceived *'responsibilities'* is harmful. Human rights are universal, and whilst at times they can be restricted³⁸, they apply to everyone regardless of behaviour. No one is *'underserving'* of human rights; we strongly urge the UK

³³ [SCLD \(2020\)](#)

³⁴ [National Taskforce for Human Rights Leadership \(2021\)](#)

³⁵ [Scottish Government 2021](#)

³⁶ [UK Government \(2020\) P.84](#)

³⁷ [McEwan \(2022\)](#)

³⁸ For example, the restrictions on rights during pandemic lockdowns could be acceptable in relation [International Covenant on Civil and Political Rights \(ICCPR\)](#) if these restrictions were deemed lawful, necessary and proportionate.

Government to abandon any and all proposals based on the premise of 'responsibilities'.

Instead, SCLD recommends that the UK Government's efforts should focus on:

- Improving routes to justice for people with learning disabilities,
- Resourcing human rights education like SCLD's educational app '[Human Rights Town](#)' in line with the recommendations of the IHRAR,
- Supporting the incorporation of international human rights treaties, including the UNCRPD.

The HRA's importance in and out of the courts cannot be understated; for example, without it, SCLD would not have been able to make a case for people with learning disabilities to receive priority COVID-19 vaccinations in Scotland. We therefore believe that preserving the HRA is a matter of life and death for people with learning disabilities. Again, it is Fiona³⁹ who says this best:

"Human rights and disability rights matter. We are all trying to live our lives as best as we can, but the human rights of people with learning disabilities are not being made real, and that is where the problem arises. Discrimination is wrong, and we need to change that. We all matter, our Human Rights Act matters, and our lives depend on it."

SCLD asks the UK Government to listen to Fiona's, and other UK human rights defenders' calls not to implement the proposals in this consultation.

The recommendations in this consultation will undoubtedly reduce the human rights protections of every individual in the UK by removing accountability. We know this will most profoundly affect marginalised groups of people whose rights are already most at risk.

³⁹ [British Institute of Human Rights \(2022\)](#)

We therefore cannot support a consultation that's proposals are rooted in prejudice and, if implemented, will undoubtedly negatively impact the lives of people with learning disabilities in Scotland.

SCLD thanks the UK Government for the opportunity to respond to this consultation.



Oonagh Brown

Human Rights Programme Lead
Scottish Commission for People with Learning Disabilities
Oonagh.b@scld.co.uk

Contact us

Website: www.sclld.org.uk

Twitter: [@SCLDNews](https://twitter.com/SCLDNews)

Facebook: [@ScotCommission](https://www.facebook.com/ScotCommission)

Instagram: [@sclldnews](https://www.instagram.com/sclldnews)

For information on Scotland's Learning Disability Strategy *The Keys to life*, visit: www.keystolife.info

The Scottish Commission for Learning Disability
Suite 5.2
Stock Exchange Court
77 Nelson Mandela Place
Glasgow
G2 1QY

