

Scottish Commission for People with Learning Disabilities

Scottish Mental Health Law Review 2022 - Response

April 2023

1. Context

People with learning disabilities in Scotland face significant discrimination throughout their lives. Central to their experience is the denial of a number of their fundamental human rights including their right to access justice. As Scottish mental health legislation currently stands, learning disability is included in the Mental Health (Care and Treatment) (Scotland) Act (2003) definition of ‘*mental disorder*’. This means that people with learning disabilities can be detained in hospital on the grounds of their disability alone – they do not need to have a serious mental health condition. SCLD believes this is unacceptable in a Scotland committed to being a world leading proponent of human rights.

As a result of this, people with learning disabilities have been detained in hospital for years at a time for no other reason than being a disabled person. This situation has been identified as a key concern for the Scottish Government who have published the Coming Home Implementation Plan¹ which accepts that for every day spent unnecessarily in hospital, a person loses part of their connection with their community, their family, and their friends. Kevin Stewart MSP, the then Minister for Mental Health and Social Care, stated:

“The recommendations are key to achieving our mission to significantly reduce delayed discharge and inappropriate out-of-area placements for adults with learning disabilities and complex care needs by March 2024. Visibility and accountability are critical. This is not going to be an easy task, but we have a collective responsibility to take action.”

This commitment by the Scottish Government was reinforced internationally when the United Nations Committee for the Rights of Disabled People published its guidelines on deinstitutionalization, including in emergencies². This said,

“Institutionalization is a discriminatory practice against persons with disabilities, contrary to article 5 of the Convention. It involves de facto denial of the legal capacity of persons with disabilities, in breach of article 12. It constitutes detention and deprivation of liberty based on impairment, contrary to article 14. States parties should recognize institutionalization as a form of violence against persons with disabilities. It exposes persons with disabilities to forced medical intervention with psychotropic medications, such as sedatives, mood stabilizers, electro-convulsive treatment, and conversion therapy, infringing articles 15, 16 and 17.”

¹ [Coming Home Implementation report - gov.scot \(www.gov.scot\)](http://www.gov.scot)

² [CRPD/C/5: Guidelines on deinstitutionalization, including in emergencies \(2022\) | OHCHR](#)



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SCLD believes the vision detailed in the Coming Home Implementation Plan will be increasingly difficult to realise whilst people with learning disabilities are included in purview of mental health legislation and able to be hospitalised on the grounds of their disability alone.

Furthermore, SCLD believes that the current approach in Scotland, of defining learning disability within mental health legislation, is contrary to both UNCRPD General Comment 1³ and the International Principles and Guidelines on Access to Justice for Persons with Disabilities⁴ published in 2020.

SCLD is aware that the Scottish Mental Health Law Review (SMHLR)⁵ has recommended to change the language used within the Mental Health (Care and Treatment) (Scotland) Act (2003) to redefine learning disability as '*intellectual impairment*' rather than '*mental disorder*'. This is whilst recommending retaining the ability to detain people with learning disabilities in hospital on the grounds of a learning disability alone. This is despite the rights outlined in the UNCRPD, international best practice, the recommendations of the Independent Review of Learning Disability and Autism in the Mental Health Act^{6/7} (IRMHA) and the SMHLR's own discussions with people with learning disabilities and the organisations that work with and for them.

2. Background

IRMHA, led by Andrew Rome and published in December 2019, made a range of transformational recommendations regarding the removal of learning disability and autism from current Scottish mental health legislation. The IRMHA Review was an exemplar of inclusive and accessible practice and people with learning disabilities, the Scottish Commission for People with Learning Disabilities (SCLD) and our stakeholders were led to believe that the subsequent SMHLR Review would incorporate the IRMHA Review recommendations as part of its process.

With this belief, SCLD made every effort to engage with the SMHLR during its three-year lifespan – 2019 to 2022. This included developing detailed written responses to the consultation process, often within very tight timescales, the last one of which included no less than 78 recommendations⁸ on how the SMHLR should address the significant inequalities faced by people with learning disabilities within the Mental Health (Care and Treatment) (Scotland) Act (2003).

In engaging in the SMHLR, SCLD collaborated closely with People First (Scotland) and many of the people with learning disabilities and individual human rights defenders we work with, including our Expert Group and our wider stakeholder group of individuals, family carers and organisations.

³ [General Comment No. 1 - Article 12: Equal recognition before the law \(Adopted 11 April 2014\) - Plain English version | OHCHR](#)

⁴ <https://www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons-disabilities>

⁵ [Scottish Mental Health Law Review Final Report | Scottish Mental Health Law Review](#)

⁶ NB: The Rome Review Report has subsequently been deleted from the Scottish Government website and is only accessible through the National Records Scotland archive.

⁷ [\[ARCHIVED CONTENT\] \(nrscotland.gov.uk\)](#)

⁸ [Published responses for Scottish Mental Health Law Review consultation - Scottish Government - Citizen Space](#)



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However, as the SMHLR proceeded, we became increasingly concerned that the arguments of people with learning disabilities, ourselves and other stakeholders that learning disability should be removed from the existing mental health legislative framework were not being heard. Indeed, we found it difficult at times to find opportunities to engage in the SMHLR despite our best efforts. These challenges to engagement were also experienced by People First (Scotland).

This was despite the submissions made by SCLD and others detailing what we believed to be international best practice as outlined in the United Nations Convention on the Rights of People with Disabilities (UNCRC), and as endorsed in the recommendations of the IRHMA.

When the SMHLR Report was finally published in September 2022, we welcomed this, despite the nine hundred plus pages and two hundred recommendations. We also stated that significant time and resource would be required to analyse the report in detail before we could come to any conclusive position on its contents with regard to the human rights of people with learning disabilities.

This task has taken a number of months to complete and has included ongoing discussions with People First (Scotland) and other stakeholders, significant investment of organisational resources in analysing the information contained in the report and attendance at events led by members of the SMHLR team.

SCLD's earlier concerns have only been heightened by information shared at these events as to the basis of and implications for the SMHLR's proposal that learning disability remain (albeit with some changes in terms of language and superficial concepts) within the purview of mental health legislation.

SCLD has continued to express a number of concerns in regard of the SMHLR which include the:

- Inaccessibility of the Review's Report (and indeed of the review process itself);
- Extent to which the Review was led by people's lived experience;
- Tensions between revising language and achieving real change.

Critical to all of this is the fact that the IRMHA (Rome Review) recommendations appeared to have been ignored and that that the SMHLR has acted against Scotland's intention and commitment to incorporate the UNCRC into domestic law.

3. Detailed Response

SCLD does not support the recommendations of the SMHLR with regard to people with a learning disability. SCLD are fundamentally opposed to a number of key SMHLR recommendations, based on their apparent denial of the human rights of people with learning disabilities. Put simply, the review recommends the redefinition of learning disability whilst at the same time the retention of it within the purview of the mental health legislation. This merely serves the status quo.

SCLD are concerned and disappointed that the review does not contain an explicit recommendation to remove learning disability from Scottish mental health legislation. This failure



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to recognise that people with learning disabilities in Scotland are people first, have a unique identity, and are not simply a collection of inappropriate '*diagnosis labels*' viewed through a lens of '*mental disorder*' is unacceptable and unjust. Furthermore, SCLD believe this would constitute legal understandings of disability discrimination both in terms of the Equality Act (2010) and Article 2 of the UNCRPD.

SCLD fully accepts that people with learning disabilities may also have a diagnosis of a mental health condition. This means the person requires additional support and protections, as it can with anyone else, but this affects a small proportion of people with learning disabilities and should not be considered automatically to be the case.

SCLD believes that despite the SMHLR's intention to react to and ensure that the powerful voice of lived experience and the voice of carers was at its heart so that "*others will fare better in our mental health systems*"⁹, it has failed to address the most significant and fundamental issues. This goes against the SMHLR's own acceptance that some areas of the Human Rights Act 1998 had not been previously achieved.

Furthermore, the SMHLR aimed to recommend radical change supporting a "*long history of progressive thinking to go beyond changes in law to ensure that human rights are, correctly, for all.*"¹⁰ However, having considered the SMHLR Review Report in detail, SCLD does not believe that has this been achieved, and would dispute that the voices of people are at its heart with regard to people with learning disabilities.

The SMHLR stated that it had been framed with '*due regard*' to the information that people previously felt medicalised and disrespected in respect of mental health legislation. However, despite recognising that learning disability was one of the "*strongest challenges*" of the SMHLR, and a commitment to (with reference to tests of incapacity) "*move away from a definition focused on diagnosis,*" SCLD believes that the recommendations propose to continue to do exactly this, where people with learning disabilities are concerned.

With the assumption that all people with learning disabilities are by definition '*without capacity*' as a starting point, the recommendations the Review makes continue to be framed within a medical model which fails to engage with the challenge of respecting, protecting, and fulfilling the human rights of people with learning disabilities.

Neither does the SMHLR's report appear to accept that people with learning disabilities are able to live full, connected, and vibrant lives as part of a progressive Scotland when they are able to access their fundamental human rights. Instead, the SMHLR appears to recommend excessive overreach of mental health legislation into the lives of people with learning disabilities, claiming that it should be used as the primary legislative mechanism for recognising people with learning disabilities' human rights¹¹.

⁹ Op. cit., Footnote 5, SMHLR Final Report, Page 10, 'Message from the Chair'

¹⁰Op. cit., Footnote 5, SMHLR Final Report, 'Introduction'

¹¹ "Recommendation 2.2 The new purpose for mental health and capacity law should be to ensure that all the human rights of people with mental and intellectual disability (and otherwise included under AWI) are respected, protected and fulfilled."

In fact, information shared during post-publication engagement events alluded to the inability of the SMHLR to recommend full human rights realisation for people with learning disabilities as this was ‘not affordable’ given the wider challenges faced in post-pandemic Scotland. The suggestion was that people with learning disabilities would be unable to get what they wished (full human rights realisation) but rather would get what others believed they needed.

This sense of a disconnect between individuals with learning disabilities and those undertaking the SMHLR was further compounded by the fact that the Review details evidence gathered during the consultation hierarchically with ‘professionals’ and ‘experts’ first and most prominent, and then with selected voices of lived experience added. We believe this overtly professionalised approach is disrespectful to people with learning disabilities who have, often at considerable emotional cost, shared their experiences with the SMHLR.

By focusing on the small percentage of people with a learning disability who may additionally have a diagnosis of a severe mental health condition and applying that definition to the larger percentage of people with learning disabilities who do not, the recommendations of the SMHLR cut across its own aims of equality, valuing lived experience and recognising that human rights have in the past not been fully realised.

As the SMHLR stands, SCLD is firmly of the view that human rights for people with learning disabilities will remain as they presently are in law; not fully realised. If the recommendations of the SMHLR are supported by the Scottish Government, Scotland will retain a level of deprivation of liberty and inability to access justice for the thousands of people with learning disabilities, and their families, based solely on a perception of the medical definition of the individuals they are hoping to empower and respect.

While the Scottish Government moves forward on its journey to incorporate international human rights treaties into domestic law in a new Human Rights Bill, the approach of the SMHLR review seems untenable.

4. New Zealand and England and Wales - examples of best practice

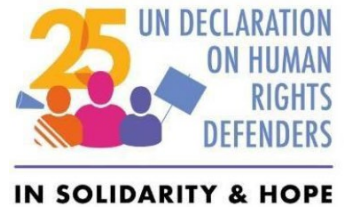
At an international level, New Zealand has a long-established history of mental health legislation which sits within a framework of human rights, disability, and constitutional protections¹².

In New Zealand, people cannot be subject to either assessment or treatment based on a ‘*mental disorder*’ alone, but must also present risks to themselves or others, or be at risk of significant self-neglect. ‘*Intellectual disability*’ is explicitly excluded from ‘*mental disorders*’ in New Zealand law, and discrimination by disability is outlawed under their Human Rights Act 1993.

Indeed, the New Zealand Government introduced amendments to their Intellectual Disability (Compulsory Care and Rehabilitation) Act (2003)¹³ with a specific clause clarifying that “*The*

¹² <https://www.cambridge.org/core/journals/bjpsych-international/article/mental-health-law-in-new-zealand/BF331F80F0351C8C9FABBA8A3F27B455>

¹³ <https://www.legislation.govt.nz/act/public/2003/0116/latest/DLM224578.html>



help inform the creation of a new Human Rights Bill for Scotland. The Board published two reports^{18/19} and made a number of recommendations to Government. This included that:

“The New Human Rights Bill for Scotland should take a mixed model approach to incorporation that seeks to directly incorporate all international treaties recommended by the National Taskforce on Human Rights Leadership (including the UNCRPD) as far as is legislatively competent within the context of devolution.”

However, following the recent publication of Equality, Opportunity, Community New Leadership – A Fresh Start²⁰ (which failed to re-affirm previous commitments to incorporate the UNCRPD^{21/22}), SCLD have become increasingly concerned about the potential that these previous commitments will be overlooked. This would leave people with learning disabilities’ human rights at significant risk from a number of the recommendations in the SMHLR.

To defend people with learning disabilities from the continuing removal of their rights and the proposed overreach into Human Rights legislation of the Scottish Mental Health Law Review, SCLD believes it is critical that the new Human Rights Bill for Scotland prioritises incorporating elements of the UNCRPD into law, where this can be achieved. This should include a compliance duty on public bodies on all devolved articles the UNCRPD.

Without this Scotland cannot claim to be aligned to what The Scottish Human Rights Commission defines as a Human Rights Based approach, which is, *“about making sure that people's rights are put at the very centre of policies and practices”*²³. If the Scottish Government are committed to developing ‘world leading’ human rights legislation, the UNCRPD must be at its heart.

In parallel with the development of the new Human Rights Bill for Scotland, the recently published SNAP 2 Action Plan²⁴ aims to further develop Scotland’s ability to better fulfil international Human Rights obligations and to realise the ambition to be a leading nation on Human Rights.

SNAP 2 was guided by the basic principle that everyone has the right to participate in decisions that affect them and their rights, with access to information in a form and language that can be understood. SCLD would argue that this fundamental principle has not been respected within the recommendations of the SMHLR.

SNAP 2 has recognised that to change the current culture in relation to human rights, a greater acceptance and understanding of human rights and international human rights law is required. SCLD passionately believe that this approach should inform the Scottish Government in their response to the SMHLR.

¹⁸ [Human-Rights-Lived-Experience-Board-Report-1.pdf \(sclد.org.uk\)](#)

¹⁹ [06813-Solving-the-Human-Rights-Puzzle-report WEB.pdf \(sclد.org.uk\)](#)

²⁰ [Equality, opportunity, community: New leadership - A fresh start - gov.scot \(www.gov.scot\)](#)

²¹ [National Taskforce for Human Rights: leadership report - gov.scot \(www.gov.scot\)](#)

²² [Supporting documents - If not now, when? - Social Renewal Advisory Board report: January 2021 - gov.scot \(www.gov.scot\)](#)

²³ <https://www.scottishhumanrights.com>

²⁴ [Scotland’s second National Human Rights Action Plan – SNAP 2 \(snaprights.info\)](#)

Furthermore, SNAP 2 contains a recommendation to consider actions in relation to mental health based upon the response from the Scottish Government to the SMHLR. Within this context, SCLD recommends that the Scottish Government consider, as a matter of urgency, the lives of people with learning disabilities and their families and the restriction to their human rights that would result from the implementation of the SMHLR as it stands.

Given all of the above information, SCLD urges the Scottish Government to incorporate the UNCRPD, within devolved competency, and to take action to address and introduce the recommendations from the Rome Review in light of the examples of good practice from the UK Government and others. Part of this should include the Scottish Government continuing to fully and comprehensively develop a Learning Disability, Autism and Neurodiversity Bill to support the implementation of UNCRPD incorporation.

In taking this approach, the Scottish Government would achieve a much clearer and stronger alignment with their commitment to develop a world leading human rights approach in Scotland.

6. Conclusions

In summary, SCLD is firmly of the opinion that the SMHLR is inherently unjust. The Review set out an aspiration to be led by voices of people with lived experience, including those with learning disabilities, to radically improve and protect human rights. However, the resulting recommendations in relation to people with learning disabilities appear not only inherently medicalised but professionally led, focused and benefitting.

SCLD believes aspects of the changes to mental health law in Scotland proposed by the SMHLR have not been considered against good practice nationally or internationally. Therefore, the proposals retain the link and assumption between learning disability and '*mental disorder*' despite a change in language. This could result in future legal challenges from people with learning disabilities, their families and those that support them, based on a restriction of basic human rights.

Furthermore, SCLD believes that, should the Scottish Government accept the underlying basis and recommendations of the Scottish Mental Health Law Review people with learning disabilities in Scotland could well be faced with access to fewer human rights than those living in England and Wales as the UK Government remove the automatic link and assumption between learning disability and '*mental disorder*' in law²⁵.

SCLD appeals to the Scottish Government to support a necessary, fair and appropriate change to mental health legislation to support the human rights of people with learning disabilities. SCLD believes that it is imperative that as a minimum, UNCRPD incorporation in Scotland leads to the removal of learning disability or any similar definitions from mental health legislation, in line with the recommendation of the Rome Review and international best practice.

²⁵ <https://www.gov.uk/government/publications/draft-mental-health-bill-2022>



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One of the final acts of Nicola Sturgeon as Scotland's First Minister was to issue a heartfelt formal apology on behalf of the Scottish Government²⁶ for the previously common practice of forced adoption in Scotland during the twentieth century describing the policy as "*the worst injustice in our history*" which affected thousands of children, mothers, and families.

During her apology the First Minister reinforced that the "*the level of injustice faced then was hard to comprehend in 2023*", that "*the state is morally responsible for setting standards and protecting people*", and pledged that by setting the record straight, and by acknowledging the wrongs of the past in an apology, similar injustices should never happen again.

SCLD believes that the failure of the SMHLR to disentangle and separate learning disability from the purview of mental health legislation is a matter of equal national importance and would urge the Scottish Government to act now to avoid any similar apology having to be given to people with learning disabilities in Scotland, and their families, colleagues, and friends, in the decades to come.

7. Organisational Detail

The Scottish Commission for People with Learning Disabilities (SCLD) is an independent charitable organisation and human rights defender.

SCLD is committed to creating an environment in Scotland in which legislation, policy, systems and culture are changed to ensure people with learning disabilities have opportunities and are empowered to live the life they want in line with existing human rights conventions.

SCLD believes that the discrimination and barriers faced by people with learning disabilities and other disabled people are not inevitable. These barriers stop people with learning disabilities and other disabled people being included in society and participating on an equal basis.

Charlie McMillan
Scottish Commission for People with Learning Disabilities
May 2023

²⁶ <https://www.gov.scot/publications/apology-historical-adoption-practices-first-ministers-speech-22-march-2023/>