

Rights Here, Rights Now!

The Human Rights Bill for Scotland Consultation SCLD Briefing



What is the new Human Rights Bill for Scotland?

In 2018 the former First Minister Nicola Sturgeon MSP asked human rights experts in Scotland to form an [Advisory Group on Human Rights](#). They were asked to explore how Scotland could protect and promote human rights better. They published a report and called for Scotland's new Human Rights Bill. They also called for creating a special Taskforce to determine what the new Bill should deliver.

[The National Taskforce for Human Rights Leadership](#) was formed in 2019. It included human rights academics and human rights experts from civil society. The Taskforce met with lots of different groups with an interest in human rights. In 2021, the Taskforce [published 30 recommendations](#), and Scottish Ministers accepted these in full. The Scottish Government has developed plans for the Human Rights Bill following these recommendations.

In June 2023, the Scottish Government published a consultation on the new Human Rights Bill for Scotland.



What is going to be in the new Human Rights Bill for Scotland?

The Human Rights Bill will bring four international human rights treaties into law in Scotland. It will also introduce a new right to a healthy environment and includes measures to ensure those rights apply to everyone equally. The new Human Rights Bill will only apply in Scotland.

The Bill is focused on The International Covenant on Economic, Social and Cultural Rights (ICESCR). This is about ensuring people have a standard of living that reflects their human dignity. It sets out everyone's right to an adequate standard of living, including access to adequate food, housing, and clothing. It also contains rights to the highest attainable standard of physical and mental health, to education, and to take part in cultural life.

The Scottish Government thinks this should apply equally to all people without discrimination.

The Scottish Government are proposing that there should be a duty on Scotland's public bodies and some private companies to comply with the International Covenant on Economic, Social and Cultural rights.

The Scottish Government have said there should be a **procedural duty** on public bodies and private companies delivering public functions concerning the Convention on the Rights of Persons with Disabilities (**CRPD**), Convention on the Elimination of all forms of Discrimination Against Women (**CEDAW**) and Convention on the Elimination of all forms of Racial Discrimination (**CERD**).

The meaning of this **procedural duty** is unclear in the consultation.

SCLD analysis is that a **procedural duty** means a **duty to consider**. What this will mean in practice is when delivering ICESCR rights, disabled people, women and black and minority ethnic people should be thought about by decision makers.



Why does Scotland's new Human Rights Bill matter to people with learning disabilities?

SCLD welcomes the Scottish Government's Human Rights Bill consultation paper. At SCLD, we believe it is vitally important that people with learning disabilities' rights should be respected and protected by law.

The Human Rights Bill consultation proposals are particularly relevant to people with learning disabilities because they face some of Scotland's most significant human rights violations. These human rights violations can occur in all areas of people's lives and are often systemic within organisations and institutions. Examples of some of these human rights violations are listed below:

Premature Mortality

People with learning disabilities in Scotland are statistically more likely to die earlier than the general population, often from preventable illnesses.

- Evidence shows that people with learning disabilities die on average **20** years earlier than the general population.¹
- Premature mortality from preventable illnesses was **12** times higher for children and young people with learning disabilities than non-disabled children and young people.²
- The risk of death for girls and young women with learning disabilities in Scotland was **17** times higher than for their non-disabled peers.
- Premature deaths were often found to be due to **potentially preventable conditions**.

Deprivation of Liberty

People with learning disabilities in Scotland often find that their rights to liberty and home life are removed. Significant causes are delayed discharge, where people live in a hospital without clinical need, and out-of-area placements.

- The 2018 'Coming Home'³ report, which found **67** people with learning disabilities were subject to delayed discharge, **22%** of whom had been in the hospital for more than ten years.
- The same report found **705** people living in out-of-area placements, **45%** of whom have been in these placements for more than **ten years**.
- Updated figures published in 2022⁴ highlighted **39** people with learning disabilities experiencing delayed discharge, facing delays of over **two years**.
- The same data set highlighted that people with learning disabilities generally face the longest stay in inpatient health services. This was over **four years** and was experienced by those in non-forensic learning disability units.
- The 2022 data evidenced a total of **603** people in long-stay hospitals in Scotland, and a further **72** people placed outside of Scotland.

¹ [The Keys to Life \(March 2019\)](#)

² [SLDO \(2020\)](#)

³ [Scottish Government \(2018\)](#)

⁴ [Mental Health and Learning Disability Bed Census \(2022\)](#)

Restrictions on personal autonomy

Current laws, while intended to protect the well-being and needs of people with learning disabilities, have resulted in a widescale removal of personal autonomy. Many people with learning disabilities have found themselves unable to make decisions and control their own lives because of this.

- People with learning disabilities represent **46%** of all welfare guardian orders under the Adults with Incapacity Act. Evidence demonstrates that **4%** of these orders are indefinite.⁵
- Indefinite orders are **not legally required to face periodic judicial scrutiny**.⁶
- During the Covid-19 pandemic, people under guardianship orders were often moved without consent or the protection of legal authority, potentially breaching the European Convention on Human Rights.⁷
- Women with learning disabilities have said the Adult Support and Protection Act (2007) is being used to restrict personal autonomy when crimes of gender-based violence are committed against them.⁸

Torture, cruel, degrading and inhumane treatment

People with learning disabilities in Scotland often experience practices which would meet the criteria for torture, cruel, degrading and inhumane treatment. The most common being the use of physical restraint, seclusion and the use of antipsychotic medication. Research in this area has found:

- Of 720 children with learning disabilities surveyed in the UK, **86.5%** of the children had experienced instances of restraint which resulted in physical injuries.⁹
- Two thousand six hundred seventy-four cases¹⁰ of restraint or seclusion relating to **386** children. The same research found **ten local authorities failed to record all instances of restraint or seclusion against children**. At the same time, a further four local authorities kept no records¹¹.
- Antipsychotic medication is often used to manage people with learning disabilities who may display '*challenging behaviours*'¹². These drugs are exclusively designed to treat people experiencing psychosis. Yet, despite this, adults with learning disabilities are prescribed antipsychotic medications at much higher rates than reported rates of psychosis among people with a learning disability.¹³ The primary purpose of using drugs on people with learning disabilities appears to be sedation.¹⁴ **Administration of the drugs is usually non-consensual, compulsory, and occurs on a long-term basis despite several adverse side effects.**¹⁵

⁵4% of 17,101 guardianship orders

⁶ [Mental Welfare Commission \(2018\)](#)

⁷ [Mental Welfare Commission \(2021\)](#)

⁸ ['Unequal, Unheard and Unjust: But Not Hidden Anymore'](#)

⁹ [PABBS & CBF \(2020\)](#)

¹⁰ [The Children and Young Peoples Commissioner Scotland \(2018\)](#)

¹¹ [The Children and Young Peoples Commissioner Scotland \(2018\)](#)

¹² This terminology is used in the cited research. This is not a term SCLD supports.

¹³ [Scottish Learning Disabilities Observatory \(2020\)](#)

¹⁴ [Scottish Learning Disabilities Observatory \(2020\)](#)

¹⁵ [Tyler & Cooper \(2014\)](#)



Issues to consider In responding to the consultation

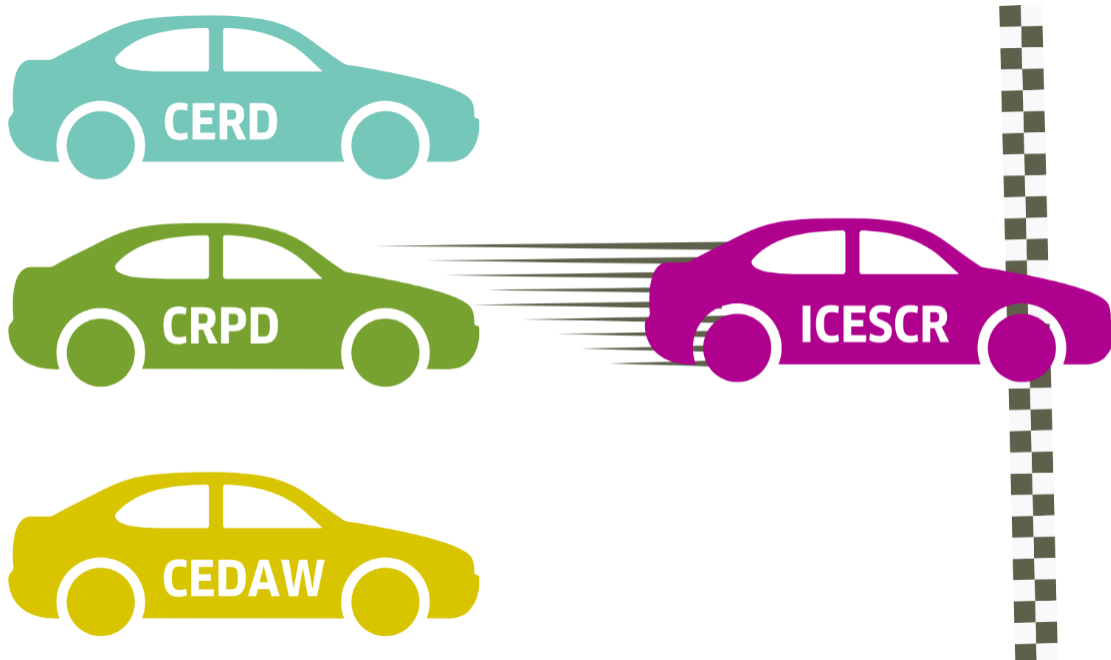
The Scottish Government want to incorporate four different international treaties into the new Human Rights Bill. These are:

- The International Covenant on Economic, Social and Cultural Rights (**ICESCR**)
- The Convention on the Elimination of all forms of Discrimination against Women (**CEDAW**)
- The Convention on the Elimination of all forms of Racial Discrimination (**CERD**)
- The Convention on the Rights of Persons with Disabilities (**CRPD**).

One potential issue with the Bill is that it gives **ICESCR** much more prominence and importance in law than the other three treaties.

To understand this better, it might help to think of each treaty as being like a car. Putting these treaties into law is like putting fuel into a car. Just as fuelling a car would give it the power to get going, putting a treaty into law would give it the ability to get going. These treaties will get enough fuel from the new Human Rights Bill to require duty-bearers to consider them when making decisions.

However, the importance placed upon the **ICESCR** by the new Human Rights Bill means that it would be like a car receiving much more fuel than the rest, with it being the only treaty in the Bill that duty-bearers have to comply with. If the four treaties are seen as cars, **ICESCR** would race ahead, leaving the three others far behind.



SCLD believes this is problematic because all of the treaties included in the Bill should have equal power put into them. This is particularly the case for the **CRPD**, which should be given as much power as possible to order to ensure that the rights of people with disabilities, including people with learning disabilities, are protected as much as possible.

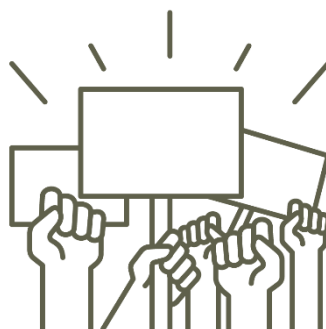


What did people with learning disabilities say about the proposal for a Human Rights Bill for Scotland?

People with learning disabilities raised the following points about the Human Rights Bill Consultation at a meeting of the Include For Good Rapporteurs and SCLD Expert Group:

- People with learning disabilities feel they do not have a voice, and when they speak up, they aren't listened to.
- The group agreed that the approach proposed by the Scottish Government would not fully meet the needs of people with learning disabilities because it did not give enough power to the **CRPD**.
- There must be duties to ensure that people with learning disabilities are supported and have their rights protected in all walks of life, including housing, education, employment and social security.
- The new Human Rights Bill should ensure that people's human rights are still protected in the event of disease pandemics such as the recent Covid-19 pandemic
- The new Human Rights Bill should support self-advocacy for people with learning disabilities, as they are best placed to tell the Government's and organisations how their rights should be protected.
- Disabled people should have access to training on human rights, where they are told what human rights are and why it is essential that they be protected.
- The following rights must be enshrined in law. It should be against the law not to provide them to disabled people, including people with learning disabilities,
 - **Access to justice**
 - **Protection from abuse**
 - **Protection from torture, cruel or degrading treatment**
 - **The provision of accessible information**
 - **Inclusion within one's community**
 - **Access to employment training**
 - **Access to the physical environment, transportation, information, and communications.**
- There should be a commission or commissioners to ensure that the new duties introduced in the Human Rights Bill are being carried out.

Additionally, initial public consultation with people with learning disabilities and those who support them indicates strong support for duty to comply with devolved rights within the CRPD.





SCLD's Summary Response to Key Consultation Questions

SCLD welcomes the Scottish Government's efforts to strengthen human rights law in Scotland by incorporating international human rights treaties into domestic law. However, based on the current proposals, SCLD is concerned the proposed Human Rights Bill will not end the human rights violations experienced by people with learning disabilities in Scotland.

SCLD, believe it is essential that people with learning disabilities and those who support them, including civil society and service providers, can engage with and respond to questions within the consultation.

Therefore, SCLD has identified four critical questions in the consultation that are significant to people with learning disabilities. We hope our summarised responses to these questions offer you (individuals, service providers and other third-sector organisations) the opportunity to consider, engage with and respond to the consultation.

Model of Incorporation

What are the Scottish Government proposing?

The Scottish Government plans to directly incorporate the text from the 4 treaties into the Human Rights Bill while removing any text related to matters reserved to the UK Parliament. They are proposing a an **initial procedural duty** for public bodies to build the ICESCR into their decision-making processes. Following this, there will be a commitment to include a **duty to comply** with the **ICESCR**, ensuring that duty bearers must meet several core obligations related to the **ICESCR** rights when delivering services.

The Scottish Government are calling **CRPD**, **CEDAW** and **CERD** '*equality treaties*' and are suggesting a **procedural duty** on duty-bearers has been proposed, which will mean the three equality treaties will need to be thought about when delivering ICESCR rights and making general decisions.

The Scottish Government have also suggested including an **interpretative provision** in the new Bill that ensures all the rights can be interpreted in light of international human rights standards and the concept of human dignity.



Question 4: What are your views of the proposed model of incorporation?

SCLD are concerned that the proposed incorporation model does not impose a duty on relevant public bodies and private companies to comply with the **CRPD**. This is unfortunate because, if this happens, the proposed Bill will not be able to address some of the most grievous human rights violations against people with learning disabilities in Scotland.

This also means that legislation which is not compliant with the **CRPD** will remain unchallenged. As a result, some of the most problematic pieces of legislation regarding human rights, such as the Mental Health (Care and Treatment) Scotland Act 2003, will not be able to be challenged. This

means that people with learning disabilities may still be able to be detained under the Mental Health (Care and Treatment) Act 2003.

It is therefore really important that the **CRPD** should be incorporated into the new Bill and that existing legislation, public bodies and private companies should have to comply with it. Incorporating the **CRPD** in Scotland powerfully conveys that Scotland will not tolerate human rights abuses against people with learning disabilities and other disabled people.



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

Yes. SCLD believe that the **CRPD** is much more than a '*equalities treaty*'; it includes **substantive rights**. All articles within devolved competency within the **CRPD** should therefore be given the same weight as ICESCR rights. Significantly SCLD believe there are critical **CRPD** articles requiring focused attention. In particular:

- **Article 12 - Equal recognition before the law**
- **Article 13 - Access to justice**
- **Article 19 - Living independently and being included in the community.**

Participation

What are the Scottish Government proposing?

The Scottish Government have said they believe that stakeholder participation is vital when it comes to developing, implementing, and delivering the new Human Rights Bill. The Scottish Government want to imbed participation within the new Bill. This includes both in the participation in the development of the Bill and its implementation once it has passed into law. The Scottish Government have said this will align with the broader approach to participation, which they have included in previous legislation and consultations.



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

Participation, particularly from people with experience of human rights abuses, is crucial in developing the new Human Rights Bill. SCLD have therefore been pleased to facilitate the Human Rights and Learning Disability Lived Experience Board¹⁶ for the Scottish Government. SCLD believes embedding participation into the Bill is critical. Key to this, is ensuring the recommendations of all three of the lived experience boards (including the boards facilitated by the Human Rights Consortium and Together Scotland) are considered in both the creation and implementation a new Human Rights Bill. This will ensure that rights holders have an active role in overseeing the impact of the new Human Rights Bill and holding duty bearers to account.

SCLD have been disappointed that, despite recommendations from the Learning Disability Lived Experience Board, there is no compliance duty to the **CRPD** within the Scottish Government's

¹⁶ [SCLD \(2022\)](#)

proposals. Both the Learning Disability Lived Experience Board and SCLD have been clear that putting a duty on public bodies to think about the rights of particular groups does not always deliver the much needed action to realise rights.

SCLD therefore believe more attention must be given to what all the lived experience boards have said. For more information, please view the SCLD's lived experience board reports, available [here](#).

Equalities Provision

What is the Scottish Government Proposing?

The Scottish Government has proposed including an **equality clause** within the Bill to ensure everyone has equal access to their rights. This clause would align with the Equality Act 2010 and require duty bearers to deliver the **ICESCR** rights and right to a healthy environment contained within the Bill in a way which ensures equal access for all.

The Scottish Government are thinking about including within the Bill specific characteristics which are protected in the equality clause of Article 20 of **ICESCR** and Article 14 of the European Convention on Human Rights. These characteristics are listed as being "sex, race, colour, language, religion, political or another opinion, national or social origin, property, birth or other status"¹⁷. This would ensure that duty bearers would have to consider these characteristics when ensuring equal access to human rights. The Scottish Government also considers listing LGBTI and older age as characteristics the clause should protect.

The equality clause will also instruct direct duty bearers to consider the three equality treaties in the Bill when interpreting the **ICESCR** rights and the right to a healthy environment for protected groups.



Question 14: What are your views on the proposed approach to including an equality provision to ensure everyone is able to access rights in the Bill?

Everyone must have equal access to their rights. For this reason, SCLD is fully supportive of a general equalities clause. However, as we have mentioned before, SCLD believes that **CRPD** compliance is of the utmost importance and that the Bill incorporated the **CRPD substantive rights**. SCLD are clear that the **CRPD** has substantive rights for disabled people, including people with learning disabilities which goes over and beyond the rights contained in **ICESCR**, and these should be included in the new Bill—for example, the right to independent living.

SCLD notes that the Equality Act 2010 has not served people with learning disabilities in Scotland well. There is a lack of data to show that the Act has had any positive effect on the lives of people with learning disabilities in Scotland; meanwhile, **people with learning disabilities in Scotland are clear that they are not having their human rights respected, protected or fulfilled**.

¹⁷ [Scottish Government \(2023\) p.11](#)



Conclusion

Overall, SCLD welcomes a new Human Rights Bill for Scotland and believes it has the potential to make Scotland world leading in its approach to realising the human rights of its citizens. However if the Bill is to work for people with learning disabilities, there must be a duty to comply with the **CRPD** on public bodies and private companies delivering public functions, where this achievable within the confines of the devolution agreement.

To ensure the protection of human rights for everyone in Scotland, different pieces of legislation must be cohesive and complement each other. To this end, the new Human Rights Bill must incorporate the **CRPD** to set a standard in Scotland where all legislation supports the realisation of disabled people, including people with learning disabilities', human rights. This should include, among other things, removing learning disability from the definition of '*mental disorder*' in the Mental Health Act. The human rights framework set out in the proposed Bill should also allow for new legislation which allows for additional support for people with learning disabilities to ensure their rights are upheld under the **CRPD**.

For more information about the Human Rights Bill for Scotland please contact admin@scld.co.uk or by telephone on **0141 248 3733**.



How do I respond?

The consultation closes on the **5th of October 2023**.

You can find out more about how to respond to the consultation [here](#).

There are easy read and audio versions of the consultation available.

