



Consultation Response

Disability Commissioner (Scotland) Bill Equalities, Human Rights and Civil Justice Committee

The Scottish Commission for People
with Learning Disabilities

May 2024



Introduction

The Scottish Commission for People with Learning Disabilities (SCLD) is an independent charitable organisation and human rights defender, working to uphold, protect and raise awareness of the human rights of people with learning disabilities.

Our vision is of a fairer Scotland where people with learning disabilities live full, safe, loving and equal lives. We influence the development of policy, practice and legislation with a focus on human rights, leadership and evidence. We are respectful, inclusive, collaborative and pioneering.

SCLD welcomes the opportunity to respond to the Equalities, Human Rights and Civil Justice Committee's Call for Views on the Disability Commissioner (Scotland) Bill.

1. What are your views on the main proposal of the Bill, to establish a Disability Commissioner for Scotland?

As a human rights defender, the Scottish Commission for People with Learning Disabilities (SCLD) is supportive of all efforts and mechanisms designed to promote and safeguard the rights of disabled people. We believe there is potential for a Disability Commissioner to play an important role in respecting, protecting, and fulfilling the rights of all disabled people in Scotland including people with learning disabilities. However, we have some concerns that the lack of specific focus of a Disability Commissioner may not adequately address the unique barriers and challenges faced by people with learning disabilities. Without this, we believe there is a risk that people with learning disabilities may be overlooked or marginalised within a pan-disability agenda.

What is clear is that that the status quo is unacceptable. We know that, at present, people with learning disabilities are often unaware of their human rights and experience barriers to accessing justice and holding public bodies to account. We believe that change is required, to increase the availability of effective and accessible remedies, both in practice and in law, so that people with learning disabilities can be empowered to uphold their rights. Furthermore, we believe that for people with learning disabilities to secure their rights, public bodies must be held to account for their actions.

People with learning disabilities cannot continue to experience discrimination and human rights abuses on a daily basis. The collective failure of public bodies to deliver for people with learning disabilities has gone on for too long. Indeed, whilst SCLD understands that all disabled people experience completely unacceptable levels of discrimination, there is a significant body of evidence which demonstrates that people with learning disabilities are a population for whom their human rights are most at risk.

Indeed, people with learning disabilities regularly experience multi-layered trauma, exclusion, stigma, and poor outcomes. They continue to experience discrimination and barriers to accessing rights across a wide range of domains including the right to be active citizens and engage fully in civil and public life, to live in the communities of their choice, to direct their own social care and to be free from the trauma of seclusion and restraint¹. Furthermore, they have a lack of access to education², employment³, relationships⁴, and family lives⁵. We believe these barriers are structural in nature and, to a considerable extent, are sustained and perpetuated through existing legislative and regulatory frameworks.

In our view, current legislative developments in Scotland provide an opportunity to tackle these inequalities and address the accountability gap that people with learning disabilities experience. The Scottish Human Rights Bill, the Learning Disabilities, Autism and Neurodivergence Bill, the National Care Service Bill, the Mental Health and Capacity Law reform agenda and the Disability Commissioner Bill all offer the opportunity to establish reframed legislation which protects and respects the social, economic, and cultural rights of disabled people including people with learning disabilities.

Within this context, SCLD is supportive of the Scottish Government's plans to bring forward a Learning Disability, Autism and Neurodivergence (LDAN) Bill which is committed to establishing stronger accountability mechanisms including plans for the role of an LDAN Commission/er or giving greater powers to an existing commission. Whilst SCLD does not have a fixed view on the exact model of any new accountability mechanism, we are convinced that there is an urgent need for new resource and powers co-produced with people with learning disabilities to help target and address areas where rights are not being met and to hold Government and public bodies to account.

Therefore, our primary area of focus is the development of a new LDAN Bill and its proposed accountability mechanisms. However, we intend to explore to all avenues and circumstances in which we could meaningfully and positively support the proposed role of Disability Commissioner. Central to this would be the role of the Disability Commissioner fulfilling each of the following criteria:

- Ensure the genuine and meaningful co-production and involvement of people with learning disabilities in all aspects of the Commissioner's work.
- Promote human rights issues of all disabled people including people with learning disabilities.
- Conduct formal investigations and inquiries on salient topics affecting people with learning disabilities.
- Investigate individual cases where human rights of all disabled people including people with learning disabilities are violated.
- Promote good practice including a focus on people with learning disabilities.

2. What is your awareness of other commissions or bodies that exist to promote and protect your rights?

There are a number of Commissions and other public bodies that exist to promote and protect rights in Scotland including the Scottish Human Rights Commission, the Mental Welfare Commission for Scotland, Equality and Human Rights Commission and the Children and Young People's Commissioner. As discussed earlier the Scottish Government has also consulted on plans to create a Learning Disabilities, Autism and Neurodivergence Commission(er). Therefore, Scotland already has an arguably saturated landscape of Commissioners and Commissions with roles which discharge functions relevant to the role of Disability Commissioner.

Within this context, SCLD believes how effectively the role of Disability Commissioner interacts with work of other Commissioners with responsibilities in these areas will be an important aspect of how the role operates in practice. It will require effective collaboration with other Commissioners to ensure the work of the Disability Commissioner complements and does not create duplication or contradictory approaches in relation to specific initiatives where more than one organisation has a legitimate role of oversight. In particular, SCLD would welcome clarity on how the role of the Disability Commissioner, as currently set out, would interact with the provisions of the LDAN Bill, the rights set out within this and the mechanisms for safeguarding, promoting and giving effect to these.

In an increasingly multi-institutional scrutiny landscape in Scotland, which potentially includes the role of Disability Commissioner and/or LDAN Commission(er), it will be essential to avoid confusion, overlapping responsibilities, and inefficient use of resources.

3. What are your views on the proposal to use the definition of disability set out in the Equality Act 2010 – a physical or mental impairment which has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities.

SCLD does not agree that the Bill should be based on the definition in the Equality Act 2010. The Equality Act definition is a deficit-based definition largely based on the medical model of disability.

We believe that a great strength of the UN Convention on the Rights of Persons with Disabilities (CRPD) is its rejection of a medical model of disability and its recognition of people with disabilities as active members of society who are capable of claiming their rights, making decisions about their own lives and holding duty bearers to account – the social model of disability.⁶ SCLD is also an advocate of a Human Rights Based Approach (HRBA) which seeks to remove barriers to inclusion and include participation⁷ in contrast to the medical model which focuses on impairment to justify why disability can serve as a barrier to full participation in civil, political, social, economic, cultural life and the right to a clean, healthy and sustainable environment⁸.

We would suggest that the definition of disability in the Disability Commissioner Bill should be more aligned with the CRPD, and its broader concept of disability⁹, particularly in the context of Government plans to incorporate CRPD into Scots law.

4. What are your views on the proposal for the Commissioner to have regard to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and to encourage and observe equal opportunities requirements.

We welcome the provision in the Disability Commissioner Bill to have regard to any relevant provisions of the CRPD and to encourage and observe equal opportunities requirements. However, we believe the Bill could go further and give greater consideration to focusing the role of any new Commissioner towards implementing the requirements of CRPD in Scotland.

SCLD believes the Scottish Government's stated commitment to incorporate the CRPD into Scottish law is critical to advancing the human rights of people with learning disabilities. We are hugely concerned about any backtracking on this commitment. In our view, the CRPD must be viewed as the minimum core standards required by people with learning disabilities and other disabled people, to enjoy a full, safe, equal and loving life.

SCLD believes only a maximalist approach to CRPD incorporation which deals with the CRPD on an equal footing to ICESCR, within the confines of the devolution settlement, will set these much-needed minimum standards into Scots law and meaningfully address the decades of systemic discrimination faced by people with learning disabilities and other disabled people.

Indeed, we note 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.

In this context, SCLD believes that a Disability Commissioner, with a remit to oversee the implementation of CRPD requirements, could play a critical role in upholding the substantive rights detailed in the CRPD and supporting a right to legal remedy for people with learning disabilities and other disabled people to uphold their rights where necessary.

5. What do you think about the Commissioner's powers as set out in the Bill?

The Commissioner will have the power to:

- review law, policy and practice relating to the rights of disabled people
- promote best practice among service providers
- commission, undertake and publish research on matters relating to the rights of disabled people.

SCLD is supportive of the Commissioner's powers as set out in the Bill. However, it is our position that to adequately address the human rights abuses and inequalities that people with learning disabilities experience, a properly empowered Commissioner must fulfil each of the following criteria:

- Ensure the genuine and meaningful co-production and involvement of people with learning disabilities in all aspects of the Commissioner's work.
- Promote human rights issues of all disabled people including people with learning disabilities.
- Conduct formal investigations and inquiries on salient topics affecting people with learning disabilities.
- Investigate individual cases where human rights of all disabled people including people with learning disabilities are violated.
- Promote good practice including a focus on people with learning disabilities.

6. What do you think of the proposed power to undertake investigations of service providers to ask how they have given effect to the rights, views and interests of disabled people in general or an individual disabled person. This power to investigate will be limited to devolved matters.

We are strongly supportive of the power to undertake investigations of service providers. It is welcome that this includes the power to take actions that relate specifically to people with particular disabilities e.g. people with learning disabilities. SCLD is clear that action is required to address discrimination and human rights abuses and the collective failure of public bodies to deliver for people with learning disabilities. In this regard, it is welcome that 'service provider' includes the private, public and voluntary sectors.

7. What do you think of the proposals to:

- **encourage the involvement of disabled people in the Commissioner's work**
- **use inclusive communication to enable the fullest involvement.**

We welcome the proposals to encourage the involvement of disabled people in the Commissioner's work, although we think they should go further.

Whilst it is crucial that there is involvement from people with learning disabilities and other disabled people in the work of the commissioner role, SCLD believes that leadership and co-production are also critical. Indeed, in accordance with CRPD, people with learning disabilities and other disabled people should take the lead in shaping the work of the Commissioner. Therefore, we believe there should be a responsibility for the Commissioner not only to *consult* but to *promote and facilitate genuine co-production and leadership by people with learning disabilities and other disabled people* in the function of a Disability Commissioner.

To that end, SCLD believes that the work of the Disability Commissioner should be delivered through a co-production model, whereby a fully accessible Board of people with learning disabilities and other disabled people provide oversight and strategic direction in accordance with the legislation. It would be critical that people with learning disabilities are fairly represented in this process and are given equal opportunities to discharge their duties. This must include accessible and inclusive communications to enable their effective participation. It is essential that such an approach is not tokenistic and is embedded in the Disability Commissioner's budget and core operating functions.

In terms of the proposals around inclusive communication we are supportive of these but would like to see particular examples of accessible formats prescribed in the Bill. It is important to note that easy-read is not a panacea in terms of inclusive communication, rather easy read is just one way of making information more accessible to people with learning disabilities. Other formats, such as Talking Mats, video or voice notes, will also help some people. For many people with learning disabilities, Zoom is more accessible than Teams and will be their preferred form of communication. Furthermore, while easy read will suit some people with learning disabilities, it will be inaccessible to others.

8. Do you think there might be any unintended consequences as a result of the Bill's proposals?

We are concerned that one unintended consequence as a result of the Bill may be the continued invisibility of people with learning disabilities.

SCLD has amassed a significant amount of evidence which shows that people with learning disabilities experience more discrimination than many other people, but a remedy is still currently out of reach. This discrimination is partly due to their 'invisibility' as a population – their needs are not routinely considered by people who make policy, legislation, design services and agree funding¹⁰. SCLD believes that this continued 'invisibility' of people with learning disabilities has a central role to play in the collective failure to deliver change.

Unless the Disability Commissioner Bill includes proactive measures to ensure people with learning disabilities, as a population for whom rights are 'most at risk'¹¹, are not invisible but rather central to all aspects of the Disability Commissioner role, then our concern is that little will change.

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