

Written Evidence

Disability Commissioner (Scotland) Bill

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Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Equalities, Human Rights and Civil Justice Committee of the Scottish Parliament's call for views¹ on the Disability Commissioner (Scotland) Bill ("the Bill").² The sub-committee has the following comments to put forward for consideration.

Questions in the call for views

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

We welcome steps to promote and safeguard the rights of disabled people and recognise the important role that Commissioners can play in providing independent scrutiny.

In our response to the consultation on the proposed Bill in August 2022³ we adopted a largely neutral stance on the proposal to establish a Disability Commissioner for Scotland. We reiterate this position.

In our 2022 response, we highlighted that Scotland already has a rather crowded landscape of Commissioners and organisations with roles which do, could or should discharge functions relevant to the purposes of the Bill. Such organisations include in particular the Mental Welfare Commission for Scotland, Equality and Human Rights Commission, and the Scottish Human Rights Commission. In our response to the Scottish Government's recent consultation on proposals for a Learning Disabilities, Autism and Neurodivergence Bill⁴ we highlighted that establishing a new Commissioner within this landscape could increase confusion and an overlap in responsibilities. We have also recently submitted evidence to the

¹ <https://yourviews.parliament.scot/ehrcj/disability-commissioner-bill/>

² <https://www.parliament.scot/bills-and-laws/bills/disability-commissioner-scotland-bill>

³ <https://www.lawscot.org.uk/media/5q2pam5b/22-08-03-mhd-proposed-disability-commissioner-scotland-bill.pdf>

⁴ <https://www.lawscot.org.uk/media/uxybdlfq/24-04-21-mhd-crim-equ-ldan-bill-consultation.pdf>



Scottish Parliament's Finance and Public Administration Committee inquiry into Scotland's commissioner landscape.⁵

We note that in the Policy Memorandum, the member in charge acknowledges that there is some overlap between the proposed functions of the Disability Commissioner and those of other organisations such as the EHRC, SHRC and the Mental Welfare Commission and suggests that memorandums of understanding could be put in place between relevant organisations to deal with such overlap. We would welcome further clarification on how this would operate in practice.

We recommend that there should be a clear policy decision as to what the future landscape should look like, and how it should fulfil the requirements of UN CRPD in relation to all people with disabilities in accordance with the definition in CRPD, effectively, efficiently and in particular without confusion and duplication as to roles. It is essential that any new Commissioner is properly resourced.

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

See our comments above.

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.

In our response to the 2022 consultation, we noted the proposed focus on the Equality Act and the definition of disability in terms of that Act, and highlighted that the Equality Act is a reserved matter.

We would suggest that any Scottish proposals should be focused more on the UN Convention on the Rights of Persons with Disabilities ("CRPD"), and the broader concept of disability in CRPD, particularly in view of the policy intention to incorporate CRPD into Scots law.⁶ We suggest that consideration be given to focusing the role of any new Commissioner towards implementing the requirements of CRPD in Scotland.

In our 2022 response, we highlighted that the Equality Act definition has been developed for a particular purpose and may exclude some conditions or societal barriers. It is also largely based on a medical model of disability, which the CRPD challenges. The CRPD stresses that 'disability is an evolving concept' and includes its own non-exhaustive definition in Article 1 – 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.' In ordinary language,

⁵ <https://www.lawscof.org.uk/media/boihec5l/24-03-11-clhr-scotlands-commissioner-landscape-a-strategic-approach.pdf>

⁶ <https://www.gov.scot/policies/human-rights/>

'disability' is a broad and flexible concept. Drawing from that a statutory definition for a particular purpose must be adapted to that particular purpose. The definition for the role of a Disability Commissioner needs to be broadly drawn, leaving a margin for more precise application by the Commissioner in any particular circumstances that the Commissioner requires to address. Put simply, the definition must not prevent the Commissioner from addressing circumstances that might arise, and which cannot be predicted at time of drafting, which ought reasonably to be addressed by the Commissioner, and in particular which the Commissioner considers ought to be addressed. The acknowledgement at the beginning of the CRPD definition that disability is an evolving concept is essential, to ensure that any legislation is reasonably future-proofed. The inclusive rather than exclusive approach of the CRPD definition is essential. Short-term impairments should not necessarily be excluded, particularly in the event that a pattern of discrimination in relation to a particular such disability is alleged or identified. We agreed with the suggestion in the consultation document that hidden and fluctuating disabilities should be expressly included. We strongly recommend that any such role should explicitly include both matters concerning people who themselves have disabilities, and also those whose lives are impacted by the disabilities of others.

[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.](#)

See our comments above.

[What do you think about the Commissioner's powers as set out in the Bill?](#)

We have no specific comments.

[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 note that it is proposed that the Commissioner will have the power to carry out both general and individual investigations.

Given our comments above, we welcome the clarification provided at section 6(2) that the Commissioner may not carry out an investigation if the Commissioner is satisfied that the investigation is properly the functions of another person. We also welcome the clarification that the Commissioner would not be able to investigate making of decisions or taking of action in particular legal proceedings before a court or tribunal, or a matter which is the subject of legal proceedings before a court or tribunal.



We note that the focus of such investigations appears to be on service providers- with the example given in the Policy Memorandum of a small charity-run care home- rather than on the public sector or Government.

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 suggest that in accordance with CRPD and the CRPD Committee's General Comment Number 7 on participation of people with disabilities,⁷ organisations of disabled people and organisations for disabled people should take the lead in shaping the role of any such Commissioner as is proposed, the effect of the statutory provisions in relation to such an appointment, and that disabled people should be involved in any Commissioner's work.

Consideration could be given to including a specific requirement to consult such organisations when preparing a draft strategic plan under section 12(2).

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

Careful consideration must be given to the interaction of the Bill's provisions with the existing legislative landscape and with other proposed legislation including any forthcoming Scottish Human Rights Bill; a Learning Disabilities, Autism and Neurodivergence Bill; the National Care Service Bill; and any legislation resulting from the Scottish Mental Health Law Review

Do you have any other comments you have on the Bill.

We have no further comments at this stage.

⁷ <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no7-article-43-and-333-participation>



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