

Enable Scotland: Consultation on the Proposed Disability Commissioner (Scotland) Bill



ENABLE Scotland welcomes the consultation on the proposed Disability Commissioner (Scotland) Bill. We understand that the proposed Disability Commissioner is a step towards upholding, protecting, and furthering the rights of disabled people, and we welcome and support this intention and ambition. Our members also agree that any actions to improve the human rights of persons with a disability is a welcome and necessary step. We are therefore supportive of this Bill and its ambition to create a Disability Commissioner to uphold the rights of all disabled people, including people who have a learning disability.

However, there is a significant body of evidence to confirm that people who have learning disabilities are a group of people whose human rights are most at risk. Currently people who have learning disabilities and/or autism are defined as a 'mental disorder' in the Mental Health Act, and ENABLE Scotland will continue to prioritise all action necessary to remedy this and to support the creation and development of the Scottish Government's proposed Learning Disability, Autism and Neurodiversity (LDAN) Bill. We welcome the Scottish Government's intention to create a 'Commissioner' function to uphold the rights enshrined in this legislation, and we will be supportive of all action to consider how this may helpfully and positively interact with the proposed Disability Commissioner.

About ENABLE Scotland

ENABLE Scotland was founded in 1954 by five sets of parents of children who had a learning disability who believed that their children had the same rights as everyone else to live the life they choose as an equal member of the community. 68 years later, this remains what ENABLE Scotland believes and fights for today. Discussions with our members (people who have a learning disability and family carers of people who have a learning disability) via ENABLE Scotland's Scottish Council have informed this response.

ENABLE Scotland is part of the ENABLE Group – one of the country's largest care charities, with income exceeding £50m in 2021/22, and delivering 2.5 million hours of social care and support each year to more than 1,000 people across 27 of Scotland's local authority areas.

Across the Group's three pillars, we deliver community projects and campaigns, employability and training, and human rights-driven self-directed social care and support for over 9,000 people throughout Scotland.

ENABLE Scotland's charity is empowered by a 12,000 strong membership and supporter base, and provides direct support to over 2,500 individuals each year as follows:

Campaigns – collective advocacy to break down barriers to an equal society and full access to human rights for all people who have a learning disability.

Connects – access to high quality information, advice, and advocacy support for individuals and families about their rights to support.

Communities – community-based services which develop inclusive opportunities for all, including Local Area Coordination, 30 affiliated branches and 22 self- ACE groups.

Aims and Approach

Question 1: Which of the following best expresses your view of the proposed Bill?

Fully Supportive

ENABLE Scotland welcomes the consultation as a step in the right direction for upholding and protecting the rights of those with a disability. We believe that a Disability Commissioner for all disabled people would be a good thing, and we are content with the Equality Act 2010 definition of disability to be applied, therefore including people who have learning disabilities.

We note that the consultation document makes clear that ‘The specific role and responsibilities of the Disability Commissioner will develop as the policy for the proposed Bill is taken forward’ and that it ‘will also work collaboratively with existing public bodies and organisations where there might be some cross-over in powers’, and that further “Any cross-over in remit and responsibilities can be worked through by means of Memorandums of Understanding being established and by collaborative discussions between the various organisations”. This is very welcome.

We therefore believe it is also important that more information is set out on how the role of the Disability Commissioner will interact with the provisions of the LDAN Bill, the rights it sets out and how those are monitored and given effect including by the role of a specific Commissioner set out in this legislative proposal by the Scottish Government, which ENABLE Scotland is also fully supportive of. Whilst we believe that all disabled people experience unacceptable levels of discrimination, we also believe that the significant abuse of the human rights of people who have a learning disability and/or autism to live in the communities of their choice, direct their own social care support, be free from the trauma of seclusion and restraint, and to access education and employment are systematic, permitted and tolerated via existing legislative and regulatory frameworks, and require a separate legislative response via the forthcoming LDAN Bill. The regulatory solution which emerges from this legislation must therefore interact with the office of the Disability Commissioner as set out by the proposed Bill.

Question 2. Which of the following best expresses your view on whether there is a need for a specific, dedicated commissioner focussing solely on people with a disability?

Fully Supportive

We are in agreement that there is a need for a dedicated commissioner for disabled people.

As other organisations such as the Alliance, have stated, a Commissioner acting as a champion for disabled people would be a welcome and important opportunity to visibly and actively challenge the barriers that are faced daily by disabled people.

Question 3. Do you think legislation is required, or are there other ways in which this Bill’s aims could be achieved more effectively? Please explain the reasons in your response.

Legislation would likely be required to achieve the aims of the Commissioner as set out in the proposal, and the comparison to the legislation with enacted the Children’s Commissioner is very welcome and relevant in that regard.

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There may be other routes to achieve some of the intended roles of the proposed Commissioner such as improvements in reviewing legislation, policy and practice and having regard for the UNCRPD, which do not require the establishment of a new Commissioner via legislation, for example, by the creation of a dedicated Scottish Government Minister for Disabled People.

At UK Government level, this exists via the position of Minister of State (Minister for Disabled People, Health and Work), which carries the following responsibilities:

- departmental strategy on disability and disability employment
- cross-government responsibility for disabled people
- Employment and Support Allowance, Personal Independence Payment, Disability Living Allowance and elements of Universal Credit that relate to disabled people including the severe disability premium
- work and health strategy including sponsorship of the joint Department for Work and Pensions / Department for Health and Social Care Work and Health Unit
- Carer's Allowance
- disability benefit reform
- devolution framework
- Health and Safety Executive
- COVID-19 response
- Serious Case Panel

This would of course not achieve the independent nature of the proposed Commissioner.

Scope of the Disability Commissioner Role

Question 4. Which of the following best expresses your view of the Disability Commissioner role covering all disabilities; physical, mental, hidden and fluctuating conditions?

Fully Supportive

There are over a million disabled people in Scotland, some of whom live with more than one disability and additional long-term conditions, so we understand why the role would require a relatively broad remit. We are supportive of the use of the Equality Act definition of disability. We believe there should be a specific commissioner dedicated to learning disabilities and autism. People with learning disabilities and autism can experience deprivation of liberty by virtue of their disability alone. Evidence available confirms that thus, it is imperative that there is separate legislation and defined regulatory and accountability structures identified to uphold the terms of this legislation for people who have learning disabilities and/or autism. We would anticipate there would be opportunities for both Commissioners to work collaboratively with each other.

Finally, we would respectfully request that all future communications about this proposed legislation avoids the use of the term 'mental' disabilities. Such language in itself is unhelpful in terms of how

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people who have learning disabilities and/or autism are perceived by general society, and we are disappointed that this language is being used within the context of the consultation on a proposal to reduce discrimination faced by all disabled people.

Question 5. Which of the following best expresses your view of the Disability Commissioner having a role in reviewing laws and policies that might impact on disabled people?

Fully Supportive.

The Disability Commissioner should have a role in reviewing laws and policies that may impact on disabled people. In doing so there needs to be consistent involvement of those with disabilities to ensure that the voices of disabled people are heard throughout the process. The voices of those that policy and legislation directly impact are crucial to ensuring that their rights are being upheld.

Question 6. Which of the following best expresses your view of the Disability Commissioner promoting best practice and learning from service providers, key stakeholders and third sector?

Fully Supportive.

Sharing best practice and learning is key in ensuring that those with disabilities are having their rights upheld. Through doing so, the Disability Commissioner can make sure that services are operating to the best of their ability and that mistakes are rectified early on. However, the experience of disabled people should guide and inform the definition of quality, and therefore best practice.

Question 7. Which of the following best expresses your view of encouraging involvement of disabled people and DPOs (Disabled People's Organisations) in the work of the Disability Commissioner?

Fully Supportive.

It is crucial that there is active involvement from disabled people and DPOs in the work of the commissioner role. Disabled people should have their voices throughout the process and should continue to have a role throughout in supporting and implementation.

As the Alliance have stated, there is a responsibility to actively support involvement to make sure the responsibility does not lie with those with disabilities or DPOs to get involved. The Disability Commissioner should be active in supporting involvement. True involvement and leadership of disabled people in the function of a Disability Commissioner must not be tokenistic, and must be embedded in its budget and core operating functions. This includes every effort to ensure that paid employees of the Commissioner are disabled people.

Question 8. Who should the Disability Commissioner be allowed to investigate?

The Disability Commissioner should be allowed to investigate all public services and government agencies who deliver services accessed by disabled people, and the actions of any actors in instances where evidence has been presented that the rights of disabled people have been infringed.

Financial Implications

Question 9. What financial impact do you think this proposal could have if it became law?

Some Increase in cost

As the consultation has detailed, it is expected that there will be some financial implications. However, such implications are not to be unexpected.

There will be expected costings associated with the creation of a Disability Commissioner such as staffing and so forth. The model and associated budget of the Children's Commissioner is a helpful benchmark. However, should the role of the Commissioner expand to provide other services, for example, accessible communications, helpline, individual casework and audits, then these costs may reasonably increase.

Question 10. Any new law can have an impact on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status etc

What impact could this proposal have on particular people if it became law?

We believe the impact of this proposal would be positive for disabled people. The role of Disability Commissioner would ensure that the rights of those with disabilities are upheld, maintained and further and provides the opportunity to investigate any wrongdoing and address challenges faced by those with disabilities.

Sustainability

Question 11. Any new law can impact on work to protect and enhance the environment, achieve a sustainable economy, and create a strong, healthy, and just society for future generations. Do you think the proposal could impact in any of these areas [of sustainability]?

Promoting and securing the rights of disabled people, to inclusion within communities and opportunities in education and employment will support a more just society. As a result, this will consequently have a positive impact for a sustainable society and economy in Scotland.

General

Question 12. Do you have any other additional comments or suggestions on the proposed bill?

The consultation refers to the proposed role of the Commissioner in reviewing legislation and its impact for disabled people, to suggest improvements to legislation, and the proposal that the Commissioner must have regard for the United Nations Convention on the Rights of Persons with Disabilities. It is also the case that there will be many other areas of legislation as well as other organisations and actors with responsibilities and remits which will still be relevant to disabled people. These include the Children's Commissioner, the Scottish Human Rights Commission and the Equalities and Human Rights Commission. Indeed, as the consultation document itself highlights, until 2017 the Equalities and Human Rights Commission previously had a distinct role of Disability Commissioner, and still has a Disability Advisory Committee.

In relation to the United Nations Convention of the Rights of Persons with Disabilities, together with the Equality and Human Rights Commission, the Northern Ireland Human Rights Commission and the Equality Commission of Northern Ireland, the Scottish Human Rights Commission has been designated as part of the UK's Independent Monitoring Mechanism for the Convention (UKIM). In 2017, the Commission presented evidence to the United Nations Committee for the Convention on the Rights of Persons with Disabilities (CRPD). The reports were prepared jointly by the Commission and the other members of the UKIM.

How the role of 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 Commissioner complements and does not create duplication or unnecessarily contradictory approaches in relation to specific initiatives where more than one regulator, Commissioner or organisation has a legitimate role of oversight. We anticipate protocols and approaches which ensure effective joint working must already be in place for existing Commissioners and that a new Disability Rights Commissioner should have existing practice to refer to and we welcome the proposal set out in the consultation document for Memoranda of Understanding between the Disability Commissioner and other Commissioners established on the precedent of the Memorandum of Understanding between the EHRC and SHRC, and would welcome further consideration of how the establishment of such protocols could be set out in legislation.

It is also important that consideration is given to how the role of the Commissioner will interact, not only, with these bodies and existing legislation, but also to new legislation and bodies which are relevant to disabled people in Scotland. The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill is still being progressed following the judgement of the Supreme Court on competence of elements of the Bill, and the Scottish Government also proposes to introduce a Scottish Human Rights Bill.

This will be particularly important for a new Disability Rights Commissioner in relation to the operation of the existing Mental Health Act, Adults with Incapacity Act, and the new Learning Disability, Autism and Neurodiversity (LDAN) Bill proposed by the Scottish Government to set out in legislation rights for people with learning disabilities, autism and neurodiversity and the appointment of a Commissioner function with a specific remit to safeguard and promote these rights.

Whilst we believe that all disabled people experience unacceptable levels of discrimination, we also believe that the significant abuse of the human rights of people who have a learning disability and/or

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autism to live in the communities of their choice, direct their own social care support, be free from the trauma of seclusion and restraint, and to access education and employment are systematic, permitted and tolerated via existing legislative and regulatory frameworks, and require a separate legislative response via the forthcoming LDAN Bill. The regulatory solution which emerged from this legislation must therefore interact with the office of the Disability Commissioner as set out by the proposed Bill.

ENABLE Scotland believes this distinct legislation is vital to uphold the human rights of people who have a learning disability. When freedoms can be taken away as a result of a person's disability, this requires additional safeguards in the law which are distinct from other areas of disabilities, and a Commissioner with specific powers and responsibilities in relation to these right will have a vital role in facilitating the processes by which the rights emerging from this legislation can be secured, aligned with existing functions such as, but not limited to, the Mental Welfare Commission and the Office of the Public Guardian (Scotland). Sensitive and careful consideration should be given to any legislative measures which could be included in this proposed Members Bill which considers how it will complement and interact effectively with new legislation on rights in relation to Learning Disability, Autism and Neurodiversity.

ENABLE Scotland looks forward to continuing to support these discussions and considerations, and to working with all parties in solidarity to secure the best possible framework for upholding the human rights of all disabled people in Scotland.