

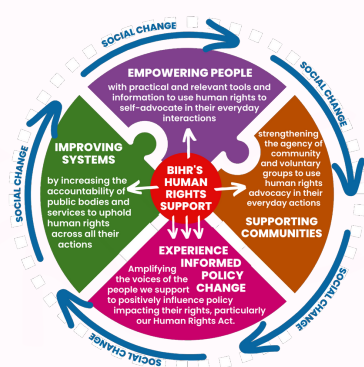
# A HUMAN RIGHTS BILL FOR SCOTLAND: CONSULTATION RESPONSE

"They matter not because they are words but because they contain the power to enable us all to be better than we are or have been, and to create a society where dignity is as inalienable as the air we breathe."

– Donald Macaskill, Why our Human Rights Act Matters to Scottish Care

## About the British Institute of Human Rights

The British Institute of Human Rights (BIHR) is a charity working in communities across the UK to enable positive change through the practical use of human rights law beyond the courts, sharing this evidence of change and people's lived experiences to inform legal and policy debates.



We work with people to provide the information they need to benefit from their rights; with community groups to advocate for social justice using human rights standards; and with staff across local and national public bodies and services to support them to make rights-respecting decisions.

This enables us to call for the development of law and policy which truly understands people's experiences of their human rights.

We welcome the opportunity to respond to this consultation and to draw on our unique expertise in putting human rights into practice. We have seen first-hand the crucial role the Human Rights Act plays in making rights real for people across the UK and therefore how important it is to ensure that any work to develop human rights protections does so by building on the Human Rights Act (and the European Convention on Human Rights) as a foundation.

## We welcome the commitment to the Human Rights Act



– Mhairi Snowden, Director of Human Rights Consortium Scotland, [Why Our Human Rights Act Matters to People in Scotland](#)

“Unquestionably, human rights are often now a fundamental part of the debate and developments around policy and law-making in Scotland, and the question is asked -not whether to recognise or keep our human rights legal protections - but how they should be recognised and implemented...We need the Human Rights Act and all of our human rights to affect and change government decision-making. We need our Human Rights Act to continue to be the secure foundation.”

We welcome the acknowledgement at the beginning of the consultation that the goal should be to “build on existing human rights and equality protections” including the Human Rights Act. It is therefore essential that any proposed legislation does not, even inadvertently, undermine or make the case against existing protections – particularly given the UK Government’s recent attempts to replace the Human Rights Act with its own “[Rights Removal Bill](#)”, which would have weakened protections for everyone in the UK. We were pleased to see the Scottish Government’s strong opposition to this Bill and [its response to the related consultation](#), which emphasised: “The Human Rights Act is one of the most important and successful pieces of legislation ever passed by the UK Parliament. It has a 20-year track record of delivering justice, including for some of the most vulnerable people in society, and it plays a critically important role in protecting human rights and fundamental freedoms throughout the whole of the United Kingdom.”



- Tom Bennett, Rights in Recovery Development Officer at Scottish Recovery Consortium, Why our Human Rights Act Matters to People in Recovery.

"Human rights are the basic elements and protections that all humans require to live in safety and with dignity... it is encouraging to note that Scottish Government is taking an entirely different approach."

## Our response

BIHR's work has always been informed by what the Human Rights Act means for people in their everyday lives. We incorporate co-production and experience-informed research into our policy work to ensure that any conversations about human rights have people's real-life experiences at the heart of them.

However, we have not been able to work directly with people with lived experience to create a formal consultation response in this instance. This is largely due to the length and complexity of the consultation questions – factors that risk excluding people from having a say on the very Bill designed to “embed equality”. We believe that policy-making, particularly human rights policy-making, must be underpinned by human rights principles (such as the Scottish Human Rights Commission's PANEL framework, standing for participation; accountability; non-discrimination; empowerment; and legality). We recognise that the Scottish Government has issued a range of versions of the consultation, which is welcome, and too often at UK level we see this missing.

In addition, there has been an immense amount of work by partners and civil society to create valuable spaces and supports to engage people in the consultation.

Notwithstanding this, the highly legal technical nature of over 40 consultation questions embeds inaccessibility.

Additionally, throughout, there are questions drafted in the all-too familiar pattern of governmental consultations where it is clear that the answer has already been set by the power asking.

In our 2021 research on government consultations, 49% of people who wanted to take part in a consultation but were unable to said they didn't have time. Concerns were raised about consultations being "extremely long" and leaving people feeling "somewhere between overwhelmed and powerless". One organisation said that "to [respond to a consultation] meaningfully it takes time and resource. We can often feel rushed, under resourced and frustrated that more support is not available to reach hard to reach audiences."

We agree with this statement in the Scottish Government's guidance on consultations: "When done well, a consultation provides valuable evidence of the range of experiences and opinions, knowledge and ideas regarding a given issue. This can help policymakers improve their decision making." We therefore would have liked to have seen the Scottish Government's approach to progressing rights protections coupled with a similarly progressive approach to consultation. We hope that further stages of this process will recognise the time and resources that need to be put into improving people's skills and capacity so they can contribute meaningfully to the consultation.

This should have broad reach, including those who are least often heard by public power.

Positive examples of this can be seen in the approaches taken by other countries to introduce Bills of Rights: the South African public consultation process took two years; Northern Ireland trained up facilitators and worked with Civil Society groups to improve public awareness and engagement; Canada heard presentations from 300 interest groups; and even Victoria in Australia held targeted meetings with 55 community groups across the state.

We have been able to engage with other civil society groups through work led by the Human Rights Consortium Scotland and particularly support their work with the Lived Experience Board (see page 2 of their response). We would urge the Scottish Government to listen to their concerns about this process.

However, given the general difficulties with the consultation itself which have prevented us from co-producing a formal consultation response or conducting experience-informed research, we have instead opted to respond through this letter.

We will focus on questions regarding ensuring the Human Rights Act is a core pillar of human rights law in Scotland (Question 12); identifying who has duties (Question 19) and supporting duty-bearers to put rights into practice (Question 42); supporting human rights advocacy (Question 27); and ensuring people know and can claim their legal human rights (Question 43).



– Mhairi Snowden, Director of Human Rights Consortium Scotland, Why Our Human Rights Act Matters to People in Scotland

“Progressive developments on rights in law within devolution, and the considerable support for human rights across Scotland, have their foundation in our Human Rights Act. This Act is the underpinning floor that protects vulnerable individuals from an overbearing government. Everyday, in discussions affecting people’s lives in care, in mental health settings, in schools, in our police stations, and more, the Human Rights Act protects individuals.”

Like Human Rights Consortium Scotland, we believe that clear understanding and implementation of Scotland’s full human rights framework can only be achieved by simultaneously building people’s understanding and awareness of the proposed Bill and the existing human rights protections under the Human Rights Act (see page 10 of their response).

Under Section 3 of the Human Rights Act, the public bodies making decisions about people’s lives every day must apply other laws and policies in a way that upholds our rights so far as possible. Combined with the Scotland Act 1998, which requires courts to strike down laws that cannot be interpreted compatibly, this means that the proposed Bill can only be applied in a way that is compatible with the Human Rights Act.

However, we often find that when the Section 3 obligation is not met, it is because neither the public bodies nor the people accessing services know about it.

During the Covid-19 lockdown, we conducted research into the impact of the pandemic on human rights. 64% of respondents in Scotland said decision-makers did not tell them about their human rights when a decision was being made about their care and support and that they weren't aware of these rights before Covid-19 either. The Independent Human Rights Act Review similarly found "examples where public bodies are not aware of their own duties and responsibilities. Greater education and communication of the UK's rights protections would be a useful outcome".

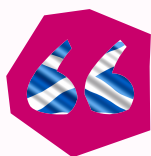
**We therefore encourage the Scottish Government to take this opportunity to reinforce its commitment to the Human Rights Act by explicitly stating on the face of the Bill that it is intended to be read in conjunction with and build on the Human Rights Act. We also want to use this opportunity to highlight how crucial it is that those with duties and responsibilities are central to the implementation phase of this new legislation.**

## **Identifying who has duties and supporting them to put rights into practice**

Section 6 of the Human Rights Act places a duty on all public bodies to act in a way that is compatible with human rights wherever possible. While an exhaustive list has deliberately not been provided, this covers both core and hybrid public bodies i.e. any body performing a "public function" whether private, charitable or otherwise.



We often find people, even those who are classed as public body workers, find this confusing and a lot of time is spent during our human rights programmes explaining this in practical and understandable terms.



- Tom Bennett, Rights in Recovery Development Officer at Scottish Recovery Consortium

“At Scottish Recovery Consortium we believe that all staff (duty bearers) should have mandatory human rights training to maximise the opportunity to successfully embed positive, systematic, and cultural change that ensures individuals have their human rights respected and fulfilled. Our experience shows that without this full system approach, new legislation will fall short of making the changes it aspires to.”



**It is therefore essential that the proposed Bill does not cause further confusion or conflict with the Human Rights Act on who has duties to uphold human rights. Proper funding and structure must be put in place to provide training and ongoing support for those responsible for upholding human rights. This means that not just frontline practitioners but people working across all aspects of public bodies should be supported to understand their duties at all levels, from frontline decisions right through to strategy and service design.**



– Joint Committee on Human Rights, The Case for a Human Rights Commission

“A human rights culture is one that fosters basic respect for human rights and creates a climate in which such respect becomes an integral part of our way of life and a reference point for our dealing with public authorities...in which all our institutional policies and practices are influenced by these ideas...The building of a human rights culture [depends] not just on courts awarding remedies for violations of individual rights, but on decision-makers internalising the requirements of human rights law, integrating those standards into their policy and decision-making processes, and ensuring that the delivery of public services in all fields is fully informed by human rights considerations.”

**We recommend that the Scottish Government carries out stakeholder sessions to establish what kinds of practical information and resources are required to support duty-bearers to understand and implement human rights.**

From our work, we know how transformative this understanding can be both for the staff in public bodies and the people who they support.



Ian Chisholm, Nurse Practitioner project-managing the expansion of Ongoing Supportive Conversations and Reflection at NHS Lothian

“As a palliative nurse involved in implementing an anticipatory care planning project encouraging care home staff to be integral to the process, it was clear that human rights were foundational...”

...To help people understand the importance we offered training around human rights and this without doubt helped us understand and gave clarity on the importance of what we were trying to achieve. Nothing should cloud the implementation or understanding of these rights, and any changes or additions must not confuse our understanding of them. Unless there is a defined path to restitution and proper plans for education there is a danger of losing sight of the fundamental basis for all human rights.”

In particular, the most sustainable change comes from long-term programmes that offer support across all levels of an organisation. One-off training is not enough; making human rights real is a continuous process that needs to be embedded into service design and development and the policies and processes that guide everyday decisions.

We are currently working with Midlothian Health and Social Partnership in Scotland (HSCP) on a human rights programme designed to ensure staff are trained and supported to deliver advance care planning in line with their legal human rights duties. Asked what actions they would be most likely to take after participating in the programme, 96% of respondents said supporting people to be involved in decisions about their lives; 92% said reviewing decisions about people’s support which risks their human rights; and 52% said reviewing local policy or guidance that impacts people’s human rights.

**Writing in the law is the basic first step; the real work begins with putting in place the resources and systems that support and review and improve implementation. Duty-bearers should also be able to refer individuals to advocacy provision where needed to ensure accountability.**

## Supporting advocacy and ensuring people know and can claim their legal human rights



- Why our Human Rights Act Matters to Dates-n-Mates

"And we all want a happy life, whatever that may mean to us. A life and people in it that allow us to be involved in the decisions that matter to us. A life where our basic human rights and needs are respected.

John says that human rights are important to him and "making your own decisions are important. A lot of people with learning disabilities don't always get to make their own decisions in life, which is not fair and not right. We all have the right to speech (freedom of expression)"."

Upskilling rights-holders alongside duty-bearers is essential for ensuring that putting human rights into practice is a collaborative, rather than combative, process.

It is important that individuals know and understand their rights, but this will be made harder if the rights in the proposed Bill do not clearly align with those in existing human rights law. If the proposed Bill reinvents or restates what already exists, it runs the risk of turning what can currently be an understandable (if properly explained) package of 16 human rights under the Human Rights Act into a maze of similar-sounding, sometimes-overlapping, sometimes-different rights that exceed 100 items across all the Conventions being listed in the consultation.

We welcome the acknowledgement of the vital role of advocacy and advice services. We have seen first-hand the life-changing impact that human rights advocacy can have.



### **In real life: Robert and Muriel's Story**

Robert was 79 and living with dementia when he had a fall at home. He was taken to hospital but his wife, Muriel, was not allowed to go in the ambulance with him. Robert stayed in intensive care for 12 weeks, but Muriel was not allowed to visit him. After leaving hospital, Robert was discharged to a residential care home which was then locked down because of a positive Covid test so Muriel again could not visit. For four months after Muriel watched Robert leave in an ambulance, they had no contact; Robert was too distressed to talk on the phone, and his mental and physical health deteriorated drastically. The thought that she might not get to say goodbye kept Muriel awake at night.

A support group that has worked with BIHR advised that the severe impact this was having on both Muriel and Robert risked breaching the right to be free from inhuman or degrading treatment. Muriel wrote to the care home explaining this and pointing out their legal duty to protect Robert and Muriel's rights. The care home then arranged for Muriel to be provided with full PPE so that she could visit Robert regularly and ensured that she was vaccinated together with staff so that she could spend time with Robert as he neared the end of his life.

We recently completed a Rights in Recovery Leadership Programme with Scottish Recovery Consortium. After the programme, 100% of participants rated their knowledge of the rights and duties under UK human rights law as “good” or “excellent” whereas before, 80% said “average” and 20% said “poor” or “non-existent”.

Asked how they had put their new knowledge of human rights law into practice, respondents said, “review of partner’s medicated treatment to enable them to participate with an improvement in their capacity”; “housing allocation”; “in meetings with Publish Health Scotland”; and simply, “I think the knowledge is making me better at my job”.



– Rights in Recovery Leadership Programme participant

“A lot of things we’ve been dealing with would have been dealt with a lot quicker if we’d been using human rights.”

However, it is important to note the fundamental principle of access to justice demands that individuals are not assumed to be reliant on these (often stretched or unavailable) services. Individuals must also be supported to have the confidence and capacity to claim their human rights in their own interactions with public power.

It is also important that advocacy and advice services have the resources and capacity to be able to offer effective support.

**There needs to be adequate funding provision for these services and practical resources and/or training and ongoing support in place to support advocates and advisors. We recommend that the Scottish Government undertakes a participatory process with these services to plan how support will be delivered.**

We recently provided a human rights workshop for a group of frontline Independent Advocates from mixed disciplines. Before the workshop, only 68% of advocates said they were supportive of the Human Rights Act versus 100% afterwards.



Knowledge of the Human Rights Act increased to 4.5/5 (from 3.2/5) and confidence discussing the Human Rights Act with people accessing services and public officials increased to 4.8/5 (from 4/5).

After the workshop, 85% said they were more likely to use the Human Rights Act to make positive changes in their work or life and 50% said they needed more training or capacity-building sessions to further support them to take action to support people's human rights.

**Similarly, the Scottish Government needs to raise awareness and provide funding and information to support individuals to understand and claim their human rights. This could be done through a range of means (e.g. training sessions, guidance, etc.) but these should be co-produced with people who will be using them to ensure they are accessible and relevant.**



## – Independent Human Rights Act Review

“The Panel strongly recommends to Government, for its consideration, a focus on civic, constitutional education as integral to ensuring that... our human rights framework, as with the rest of our framework develops and is refined to ensure it continues to meet the needs of the society it serves. Refining such a programme would require consideration of education at school, university, and adult education levels, together with the scope for its delivery by way of online learning.”

### **Embedding human rights in everyday life**

We welcome positive steps to build on the UK’s legal human rights protections with the Human Rights Act as a blueprint and a foundation. There is a real opportunity for the Scottish Government to show human rights leadership here and to change the political narrative to positively reflect the true nature of the legal framework that has improved innumerable lives in innumerable ways. However, rights-respecting policy must start with a rights-respecting process and must centre the voices of people whose rights will be impacted. The long and complicated nature of this consultation has excluded many people from participating and has meant that even legal experts have struggled to respond.



As we have seen time and time again through our work at BIHR, human rights law is not and cannot be made just for a legal audience. In talking about the universality of human rights, Sian of our RITES Committee (a group of lived experience experts with a range of background, expertise and experiences using human rights in everyday life) said, “we talked in our campaigns group with our members about human rights being for everybody, it’s about every part of our lives. That’s what it’s meant for some of our members: it’s not something that’s separate from them, this is something that’s key and integral to every part of their lives and the situations that they live in.”



– Sir Nicolas Bratza, former President of the European Court of Human Rights

“The success of the [Human Rights] Act can I think equally be judged by cases that have not received public attention and have not even involved recourse to litigation. These are cases where individuals have been empowered by the provisions of the Act itself to assert their own rights and where the police, social services, health authorities and local authorities have been guided and encouraged by the Act to respect and uphold those rights.”

## **Our hope for what happens next**

For the proposed Bill to be effective, it must be embedded in people’s lives in the same way. The Scottish Government must focus on reality, not rhetoric, and prioritise implementation alongside setting the standards down in law.

We look forward to the work of the Implementation Working Group referred to in Part 9 of the consultation. Our hope is that this group centres the voices of both rights-holders and duty-bearers. The people we work with across the UK are looking to the Scottish Government, with this momentous opportunity to truly prioritise the implementation of a culture of respect for human rights. To do that, the implementation process must support people to know their rights and support those responsible to implement rights under existing and new human rights legislation. We hope to see an Implementation Working Group made up of people with lived experience of accessing services (or supporting people to access services) and those with lived experience of delivering them. Alongside the perspective of legal and policy professionals, the group and its work must amplify the voices of people, families, nurses, teachers, prison officers, support workers, advocates and those who lead services. How successful this Human Rights Bill is for the people of Scotland depends now on what happens next.

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