
Incorporation of International Human Rights Briefing Series: The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

by Professor Nicole Busby*

BACKGROUND

In March 2021 the Scottish Government [announced its intention](#) to introduce a Human Rights Bill to the Scottish Parliament. This world-leading legislation will directly incorporate four key United Nations Human Rights treaties into Scots law, subject to devolved competence. This will provide a new human rights framework for Scotland and is the result of a process which started with the 2018 Report of the First Minister's Advisory Group on Human Rights and culminated with the [National Taskforce for Human Rights Leadership Report](#), (also available in [easy read format](#)). The process was informed by extensive engagement with a wide range of representatives from the public sector, civil society and human rights experts. A public consultation process was conducted which resulted in the [All Our Rights in Law Report](#).

The relevant treaties 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 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- The UN Convention on the Rights of Persons with Disabilities (UNCRPD).

The overriding aim of the new framework is to protect and advance the realisation of human rights for everyone in Scotland.

This Briefing series provides an overview of each of the treaties as well as some of the related rights and is intended to aid civil society's knowledge and understanding of the new framework and its potential future application.

OVERVIEW OF THE CONVENTION

The [Convention on the Elimination of All Forms of Discrimination against Women](#) (CEDAW) is a UN Convention which was signed by the United Kingdom in 1981 and ratified in 1986. The treaty has been ratified by 187 of the 194 member nations of the United Nations. Commonly referred to as the ‘women’s bill of rights’, CEDAW reflects the need for gender equality to underpin human rights so that they can be enjoyed, in full and without discrimination, by all women and girls.

The Convention provides an agenda for state action to guarantee the enjoyment of those rights. The 30 articles which comprise CEDAW provide a common international legal framework which sets out women’s claims for rights and equality spanning rights in public and political life, marriage and family life, education, employment and health. CEDAW provides that women and girls should be able to enjoy all these rights without discrimination, which is defined in Article 1 as,

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and

fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Efficacy and implementation of the Convention at domestic level is monitored by UN’s [CEDAW Committee](#), a body of 23 independent experts who are responsible for holding states to account on their efforts towards protecting and realising women’s human rights.

KEY PROVISIONS

CEDAW places a positive duty on states to bring about changes in cultural norms and practices which are ‘based on the idea of the inferiority or the superiority of either of the sexes’ (Article 5). This duty requires states to take proactive steps to bring about gender equality. Fulfilling this obligation effectively requires that states amend domestic law and take any other steps necessary to ensure compliance within their own legal systems.¹

Article 5 of CEDAW explicitly requires that states ‘pursue by all appropriate means and without delay a policy of eliminating discrimination against women’ including embodying the principle of the equality of men and women in their national constitutions, adopting appropriate legislative and other measures, and establishing legal protection of the rights of women on an equal basis with men.

1. CEDAW Committee general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention.

CEDAW's scope is broad and comprehensive: it covers women's civil, political, social and economic rights across a range of activities. The substantive areas covered by CEDAW can be grouped into three broad categories: women's participation in public and private life; reproduction, health and the provision of care; the impact of cultural factors on gender relations.

Women's Participation in Public and Private Life: Article 7 provides women with a right to vote, to hold public office and to exercise public functions. Article 8 provides equal rights for women to represent their countries at the international level. Article 9 provides for the statehood of women, irrespective of their marital status. Articles 10, 11 and 13, respectively, affirm women's rights to non-discrimination in education, employment and economic and social activities.

Article 14 acknowledges the need for women in rural locations to be able, among other things, to participate in and to benefit from rural development and planning.

Article 15 deals with women's legal status by proclaiming that women shall be accorded equality with men before the law and that all instruments directed at restricting women's legal capacity 'shall be deemed null and void'. Women are accorded the same legal rights as men with regard to the movement of persons and

the freedom to choose their residence and domicile.

Article 16 asserts equal rights and obligations for women and men in their choice of spouse, parenthood, family name, profession and occupation as well as in relation to property.

Reproduction, Health and the Provision of Care: CEDAW expressly links the principle of non-discrimination with women's reproductive rights and the equal sharing of care responsibilities between men and women.

Article 4 provides for special measures for maternity protection, which go beyond the equal treatment approach but which 'shall not be considered discriminatory'.

Article 5 calls for 'a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children'. Provisions for maternity protection and childcare are proclaimed as essential rights and incorporated into all areas covered by the Convention, including employment, family law, health and education.

Article 12 calls on states to take all appropriate measures to eliminate discrimination against women in the field of health care and equal access to relevant

services, including those related to family planning.

Article 16 accords women and men ‘the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights’, and Article 10 provides for ‘Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.’

The Impact of Cultural Factors on Gender Relations: CEDAW aims to overcome the influence of cultural and traditional norms in restricting women's enjoyment of their fundamental rights in certain specific ways. As its preamble acknowledges, ‘a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality of men and women’.

Norms and stereotypes which define women’s role as being located within the private domestic domain and men’s role within the public world of work and political participation are the target of specific attention throughout the Convention which affirms equal responsibilities for care, and equal rights in respect of education and employment. Article 5, for example, places

an obligation on states to eliminate ‘prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’.

KEY POTENTIAL IMPACTS OF INCORPORATION

Following on from the [First Minister’s Advisory Group on Human Rights Leadership’s recommendation](#) to fully incorporate a range of international human rights Conventions including CEDAW, the National Taskforce for Human Rights Leadership has been examining how CEDAW and its sister Conventions which deal with race² and disability,³ might be brought into Scots law through incorporation.⁴ [Direct incorporation](#) means that the provisions of an international agreement, such as CEDAW, become part of the national law. It is the first legal step towards making human rights enforceable in the national legal system. Enforceability means that there are institutions and procedures available to provide a remedy when a human right is abused or violated. Incorporation will encourage stronger implementation, which includes all of the law, policy and other measures taken to ensure that human rights are respected, protected and fulfilled.

2. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

3. UN Convention on the Rights of Persons with Disabilities (UNCRPD)

4. National Taskforce for Human Rights Leadership, [Leadership Report](#), 12 March 2021.

Despite the UK's ratification of CEDAW, full and direct incorporation has not yet been forthcoming within any of its jurisdictions. This was highlighted by the CEDAW Committee in its [2019 Concluding Observations](#) at the end of its programme of examination of the UK,

The Committee calls upon the State party to seize this opportunity to reinforce its human rights framework across its territory, including by incorporating the Convention into its national law, and to utilize the Convention as a strategic mechanism for empowering women... At this critical juncture, the Committee stresses that placing women's rights at the heart of its deliberations and ensuring that women's rights are strengthened will result in creating a stronger and more resilient society⁵

While CEDAW already provides an important symbolic function by enabling and supporting advocacy for women's equality in Scotland, it does not place any specific requirements on Scottish public bodies to enhance women's rights, and offers women limited options to address the widespread and systemic inequality that impedes the realisation of their human rights. Incorporation offers an opportunity to change this in areas where relevant [policy is devolved to the Scottish Parliament](#).

Under the current devolution arrangements, 'equal opportunities', and therefore equality law, is a reserved matter subject to certain limited exceptions.⁶ Women's social and economic rights are dealt with in the Equality Act 2010 which is an Act of the UK Parliament which applies to Great Britain, with Northern Ireland having its own equality law regime in place. The Equality Act's scope is broad: it provides protection on the grounds of a range of 'protected characteristics' (PCs)⁷ including sex and pregnancy and maternity in relation to employment (also a reserved matter) and its coverage includes protection in relation to the provision of goods and services, the exercise of public functions, housing and education in relation to the characteristics of sex, sexual orientation, race, religion or belief, age and disability. In addition, women and men are entitled to equal pay for equal work or work of equal value.

The Act prohibits discrimination by applying an equal treatment approach to ensure that a person with a specified PC and a person who does not have the PC are treated the same. There is limited scope for different or 'special' treatment between PC group members and their comparators, even where inequality derives from historical disadvantage including formerly legally sanctioned differentiated treatment, or where the wider context and/or

5. Committee on the Elimination of Discrimination against Women Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland CEDAW/C/GBR/CO/8, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GBR/CO/8&Lang=En paragraph 9

6. See the Scotland Act 1998, Schedule 5 L2, as amended by section 37 of the Scotland Act 2016

7. The protected characteristics are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex.

circumstances relevant to the person with the PC and his or her comparator are not the same. This is referred to as the ‘formal equality’ approach. CEDAW, in common with other international human rights Conventions, provides for an alternative or ‘substantive equality’ approach which, *requires states to take steps to eliminate discrimination in order to achieve substantive equality of outcome and address structural injustices. International law requires that access and delivery of human rights, including economic, social and cultural rights, should not exclude groups, particularly those who are marginalised and possibly ‘hidden’ from the system.*⁸

CEDAW’s incorporation into Scots law would require the adoption of a substantive approach to women’s equality and the interpretation of related rights based on women’s lived experiences which are often very different to those of men. This approach is capable of instilling change to the systems, practices and processes which currently perpetuate women’s disadvantage. Although the reservation of equality and employment law limits Scotland’s power to act in certain respects,

many policy areas relevant to the realisation of women’s full and substantive equality are devolved to Scotland, including education, health, housing and criminal justice. In some other areas which are reserved, arrangements are in place to enable decisions about policy and service delivery to be taken at the Scottish rather than UK level, including some elements of social security. Furthermore, working within reserved equality and employment law offers some potential progress, for example through the use of the positive action measures provided by the Equality Act⁹ which have not been widely used to date so that their specific boundaries remain untested. More generally in the provision of services as well as in employment, further potential for progress in the Scottish context exists under the Public Sector¹⁰ and Fairer Scotland¹¹ Duties. CEDAW’s incorporation would provide a comprehensive and strengthened legal framework which could be used to improve the implementation of women’s rights, even in areas with existing provision.

To ensure that the promise of women’s equality is realised through better implementation of rights under existing

8. Katie Boyle [Models of Incorporation and Justiciability for Economic, Social and Cultural Rights](#), (Scottish Human Rights Commission, 2018), p. 8.

9. See Section 158, Equality Act 2010, which allows for ‘any action’ to be taken to support those with a protected characteristic as long as it is a ‘proportionate means of achieving a legitimate aim’, and section 159 which provides a specific exemption in relation to recruitment and promotion which permits an employer to take a protected characteristic, such as sex, into consideration when deciding whom to recruit or promote in circumstances where people having the protected characteristic are at a disadvantage or are under-represented.

10. Section 149, Equality Act 2010 which requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities. In Scotland a further set of additional Scottish specific duties are imposed on public bodies including the requirement to publish a set of equality outcomes and to report on progress every two years. In setting these outcomes, public authorities must consider relevant evidence and take steps to involve people with protected characteristics.

11. Section 1, Equality Act 2010 which places a legal duty on public authorities in Scotland to pay due regard to how they can reduce inequalities of outcome caused by socioeconomic disadvantage when making strategic decisions.

frameworks as well as those flowing from CEDAW's incorporation, it is important that Scottish civil society ensures that the voices of those it represents are heard. Appropriate action could include pressing for changes to the devolution framework so as to give the Scottish Parliament enhanced powers over equality law or holding the Scottish Government to account for the better realisation of women's equality in devolved policy areas. CEDAW provides an important tool which can be used to support such claims and it is important to remember that the UK is already bound by its provisions through the ratification process and that, despite the complexities of devolution, incorporation would place an obligation on the Scottish government to maximise the enjoyment of the rights provided by CEDAW for all women and girls in Scotland.

NEXT STEPS

In line with the Human Rights Taskforce recommendations, the establishment of a new statutory human rights framework will be a multistep process. The aim of the new framework is to incorporate a range of internationally recognised human rights, including those set out in CEDAW, as well as civil and political rights and special attention to individuals or groups of individuals who have often been given the least attention by society. To accomplish this, further consultation on the approach to be taken is necessary. This includes pre-legislative consultation processes across all parts of society followed by public

participation as part of the normal legislative process. Extensive law and policy guidance will be developed so that all people, public authorities and government understand what respecting, protecting and fulfilling human rights means in law, policy and practice. Together, everyone can play a part in making rights real in Scotland.

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USEFUL RESOURCES

Academic Advisory Panel to the National Taskforce on Human Rights Leadership,
<https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/>

Committee on the Elimination of all Forms of Discrimination against Women,
<https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

EHRC, CEDAW, 2021,
<https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/convention-elimination-discrimination>

Engender Blog, Four Things You Need to Know About CEDAW, 2018,
<https://www.engender.org.uk/news/blog/five-things-you-need-to-know-about-cedaw-/>

Engender, Incorporating CEDAW into Scots Law, 2020,
<https://www.engender.org.uk/content/publications/5-organisations-CEDAW-incorporation-paper.pdf>

Engender, Follow-up to Concluding Observations, 2021,
<https://www.engender.org.uk/content/publications/CEDAW---FOLLOW-UP-TO-CONCLUDING-OBSERVATIONS-SCOTLAND.pdf>

First Minister's Advisory Group on Human Rights Leadership, Final Report, 10 December 2018,
<https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

Human Rights Consortium Scotland, resources for civil society around human rights incorporation, available at:
<https://hrcscotland.org/incorporating-human-rights/incorporation-general/>

Incorporating Human Rights in Scotland, project website, including infographics, easy-read, and other resources,
<https://www.law.ed.ac.uk/research/research-projects/incorporating-human-rights-in-scotland>

National Taskforce for Human Rights Leadership, Leadership Report, 12 March 2021,
<https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/>
Women's Resource Centre, CEDAW, <https://www.wrc.org.uk/cedaw>

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