

Current Priorities for Human Rights Incorporation in Scotland

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October 2025

Introduction

The Scottish Government plans to incorporate a suite of international human rights treaties into Scots law by way of its long-awaited Human Rights Bill. There are different ways in which incorporation can be achieved. This report considers what is currently being proposed and what is possible within the constraints of devolution. Its purpose is to identify the current priorities for human rights incorporation in Scotland, both in the short-term so that change happens soon, and over the longer-term. The focus is on how to maximise the impact of the new legislation as a means of improving people's lives. It is hoped that this analysis will be helpful for civil society organisations in shaping advocacy strategies and lobbying campaigns in the lead up to next year's Scottish Parliament elections and beyond.

Background

The Scottish Government's current plans to incorporate a suite of international human rights treaties into Scots law date back to 2018,¹ when it was proposed that the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD) should all be included in a new legal framework which would restate those rights already provided under the Human Rights Act 1998 and 'provide further rights drawn from UN human rights treaties ratified by the UK but not yet incorporated, including economic, social and cultural, as well as environmental rights'.²

¹ Report of the First Ministers Advisory Group (FMAG) on Human Rights Leadership 2018, <https://humanrightsleadership.scot/>

² FMAG Report, p. 31.

A National Taskforce worked to provide further details about how incorporation could be achieved and concluded that a new Human Rights Bill should be laid before the Scottish Parliament, which would protect ‘the identified rights to the maximum extent possible within current devolved competence’.³

The plans to incorporate are now at an advanced stage and have been the subject of widespread consultation to which a high number of civil society organisations (CSOs) in Scotland have provided insightful and influential contributions.⁴ A setback occurred in 2024 when the Scottish Government failed to include a Human Rights Bill, as promised, in its last Programme for Government before the Scottish elections in 2026. The reasons for this were given as being that more time was required to consider the best way of working within the restrictions imposed by devolution, whilst ensuring the maximum possible protection for disabled people, women and those who experience racism.

Notwithstanding the delay caused by the failure to act in 2024, the current Government remains committed to incorporation and it is widely expected that a Human Rights Bill for Scotland will constitute a formative part of any future SNP Government’s plans. Its current thinking is set out in a Discussion Paper⁵ which is the focus of detailed consideration and further engagement through a range of established structures.⁶ The Discussion Paper also refers to ‘targeted and in-depth stakeholder engagement in the coming period...which could include the establishment of short, medium and longer term working groups to focus on specific issues’.

It appears that the door is still open to suggested amendments to the proposed approach and civil society organisations should take full advantage of any opportunity to shape and influence what happens next.

³ National Taskforce for Human Rights Leadership Report 2021,

<https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/>, p. 6.

⁴ Scottish Government (2023), *A Human Rights Bill for Scotland: Consultation*: <https://www.gov.scot/publications/human-rights-bill-scotland-consultation/>.

⁵ Scottish Government (2025), <https://www.gov.scot/publications/human-rights-bill-scotland-discussion-paper/>

⁶ Which include the Human Rights Incorporation & Implementation Oversight Board, chaired by the Minister for Equalities, bespoke working groups on capability building and tracker tool development, and a wider Human Rights Stakeholder Network.

The overarching aim of the Human Rights Bill is identified as being ‘to further advance a human rights culture within Scotland’ and the Discussion Paper sets out detailed proposals relating to the form of incorporation and the nature and scope of associated rights as well as an implementation strategy which includes the role of courts and tribunals, legal remedies, accountability mechanisms and enhanced regulatory powers for the Scottish Human Rights Commission and the Children and Young People’s Commissioner Scotland. All of these aspects are crucial to ensuring that Scotland gets legislation which is both accessible and impactful. However, the starting point has to be the rights framework itself which is the focus of this report.

The Scottish Government’s Current Proposals

The proposal to transpose the actual wording of the treaties into the Bill as far as possible is a welcome development. As well as helping duty bearers to understand the nature and extent of their new duties, this approach will ensure that there is alignment with the rights provided by the international human rights framework. This is particularly important as it will preserve the interdependency of those rights and make it easier for courts and tribunals to interpret them in line with existing and developing international jurisprudence.

As the Bill must operate within devolved competence, those parts of the treaty texts that cover policy areas reserved to the UK Parliament, such as employment conditions, health and safety, nationality and immigration status, will be redacted.

In setting out the proposed approach to incorporation, the Discussion Paper contains separate arrangements for ICESCR, which will be subject to a compliance duty, and the remaining treaties, CERD, CEDAW and CRPD (referred to jointly as the Group Protection Treaties (GPTs)) which will be restricted to incorporation by way of a positive duty referred to as the ‘GPT duty’, the potential scope and effect of which is considered further below.

ICESCR

In building a new rights framework for Scotland, the proposed approach is for the economic, social and cultural rights (ECSR) within the treaty to

be subject to a compliance duty placed on relevant duty bearers such as Scottish Ministers, local authorities, health boards, third sector organisations and businesses delivering public services. This duty would require them to meet certain minimum standards in relation to these rights with the standards subject to the principle of ‘progressive realisation’ or continuous improvement over time. The minimum standards would be agreed through a participatory process involving stakeholders. Failure to comply would potentially result in cases for rights breaches being heard by the Scottish courts and tribunals.

The impact of the 2021 Supreme Court judgment in the *UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill Reference* case is interpreted as restricting ECSRs to devolved functions that originate from Acts of the Scottish Parliament, Scottish Statutory Instruments (regulations) and common law powers, in effect a devolution carve-out. This will exclude those functions provided by UK legislation even where they relate to devolved policy areas such as housing, education and health. If this approach is adopted, the rights provided under the Children (Scotland) Act 1995 would, for example, be out of scope of the new Act. The Scottish Government appears to be open to further exploration of this interpretation and what it will mean for the scope of the proposed Human Rights Bill. The possibility also remains to seek amendment of the Scotland Act 1998⁷ as a means of extending the reach of the compliance duty and of the positive duties which are currently proposed.

The first of these positive duties is in the form of an ICESCR consideration duty. In preparation for the compliance duty, this proposed duty would require those delivering public services, including the Scottish Government itself, to give active consideration to the ICESCR core requirements in all decision-making processes. This would include the development and scrutiny of legislation, service design, planning, policies, action plans and budgetary decision-making. Although not yet confirmed, this could be provided as a ‘due regard’ duty.

It is proposed that the ICESCR consideration duty would commence before the compliance duty comes into force and would apply to all public

⁷ For a detailed exploration of the relevant issues and potential options, see <https://www.hrcscotland.org/resources/final-aileen-mcharg-implications-of-uncrc-reference-for-scot-human-rights-bill-april-2024.pdf>

authorities exercising devolved public functions regardless of their legislative source, and to private actors delivering devolved public functions. The duty would continue to operate once the compliance duty is in force, with the latter restricted to devolved functions derived from Acts of the Scottish Parliament, Statutory Instruments and common law, but not Acts of the UK Parliament. Although this approach seeks to navigate the devolution carve-out, it is likely to be difficult to implement in practice leading to potential confusion for rights holders and duty bearers, not least because there is no attempt to link it to the existing Fairer Scotland Duty⁸ which already requires duty bearers to consider how they can reduce inequalities of outcome caused by socio-economic disadvantage when making strategic decisions.

The Right to a Healthy Environment

The proposals outlined in the Discussion Paper include the right to a healthy environment which would incorporate provisions on clean air, safe climate, healthy ecosystems and biodiversity, access to safe and sufficient water, healthy and sustainably produced food, and non-toxic environments in which to live, work and play. However, the discussion paper is light on detail stating only that consideration is being given to ‘the most appropriate duty’ and highlighting that the right is not currently reflected in an international human rights treaty and remains subject to ongoing deliberation and development at the international level.

This provides the opportunity for further representations to the Government, the focus of which could be the clear alignment of this right with many of the provisions of ICESCR, most of which relate to devolved policy areas such as health, education and housing. It could be argued that this context provides an opportunity for Scotland to lead in the provision of a clearly defined and justiciable right to a healthy environment.

The Equality Duty

The current proposals include a second positive duty in the form of an equality duty placed on public authorities to consider how to deliver the ICESCR core requirements in line with the principle of non-discrimination as articulated in both ICESCR and the Group Protection

⁸ Section 1, Equality Act 2010.

Treaties. Under this proposal, duty bearers would be required to *give consideration to* the relevant provisions and grounds covered in ICESCR (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status) and to *take into account* the requirements of the GPTs in the design of policy and delivery of services.

The additional grounds of sexual orientation, gender identity, age, ethnic origin and disability will be explicitly included in the equality duty, and this would certainly make for a more inclusive and comprehensive approach. However, the scope provided by ICESCR is different from that of the existing equality duties imposed on public authorities by the Public Sector Equality Duty⁹ and this is likely to lead to confusion among duty bearers and rights holders regarding how and to whom the different duties should apply. In addition, the approach taken to the duty itself is relatively weak and it is unclear what difference, if any, it will make to service delivery. An alternative approach would be to align this duty with an improved and strengthened PSED to produce a clearer streamlined set of obligations. The Equality Act 2010, from which PSED derives, includes sexual orientation, gender identity, age, ethnic origin and disability within its scope.

The Group Protection Treaties

The use of further positive duties is outlined in the proposed approach to the incorporation of the GPTs themselves which would impose a ‘group protection duty’ in place of a compliance duty. It is proposed that the duty will apply to Scottish public authorities and cross-border public authorities that are exercising devolved functions. It would not require duty bearers to deliver any particular outcome but rather to actively consider these rights in their strategic decision-making and in the ways in which they provide services. The Government has justified this approach on the basis that care must be taken to enable the devolution carve-out so that incorporation of the GPTs aligns with the Supreme Court’s judgment in the UNCRC case.

On the face of it, this approach appears to be more directly relevant in the context of the GPTs when compared with ICESCR. This is because the rights contained in the GPTs are all based on the principles of equality and

⁹ Section 149, Equality Act 2010.

non-discrimination and, within the UK's legal framework, equal opportunities is a reserved matter with specific anti-discrimination legislation provided by the Equality Act 2010 (EA).¹⁰ The EA generally adopts an equal treatment approach so that those with a specified 'protected characteristic'¹¹ are protected against discrimination defined as unfavourable treatment compared to the treatment received by an appropriate comparator.

Taking sex as an example, men and women are entitled to the same treatment but neither sex is entitled to more favourable treatment. The Scottish Government's current position assumes that the rights provided by CEDAW which take a more outcomes-focused approach to the achievement of equality would go beyond the current ceiling imposed by the EA by treating women more favourably than men.

In acknowledging the widespread call from stakeholders during the 2023 consultation to go further in this respect, the Government states that this remains an area of active consideration and so it is worth exploring alternative interpretations. One such alternative is that some of the rights provided by the GPTs transcend the strict application of domestic law because they enable the achievement of equality in devolved policy areas bringing wider societal benefits which go beyond individual protected characteristic group members, for example in relation to closing educational attainment gaps for some racialised populations or ensuring equal access to the right to health regardless of sex.

The clearest example lies in realising the rights to equality and non-discrimination of disabled people which, even within the Equality Act, is recognised as requiring different treatment in certain circumstances through the provision of reasonable adjustments. Compliance with many of the provisions of the CRPD would assist greatly in providing the right to independent living without discrimination which cuts across a number of devolved policy areas including education, health and housing.

As these examples show, alternative ways of incorporating the GPTs so as to ensure the maximum impact on people's everyday lives whilst

¹⁰ Which is an Act of the UK Parliament with application across Great Britain. Northern Ireland has its own equality law regime.

¹¹ Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.

remaining within devolution constraints certainly merit further consideration and may actually require a more nuanced approach to that currently proposed. Whilst the proposal to impose a group protection duty on those providing public services undoubtedly has great potential as a means of achieving real change at the point of service delivery, this should be seen as an additional tool for rights protection alongside compliance, rather than as an alternative to it.

As the proposed group protection duty would require duty bearers to give active consideration to the GPT requirements in their decision making, one way of providing such a duty would be by way of a 'due regard' duty. The 'due regard' approach is already used in the domestic equality law context as it is how the Public Sector Equality Duty (PSED) and the Fairer Scotland Duty (FSD) are implemented. PSED does not appear to have achieved its transformative potential over the 15 years that it has been in place, and it has proved extremely difficult to evidence any positive impact on equality outcomes despite public authorities' apparent compliance with the duty.¹²

The intention of PSED is to mainstream equality and to impart structural and systemic change as an alternative to litigation for individual breaches of rights, yet there is little evidence to suggest that this has been achieved. On the contrary, economic and social inequality in respect of some protected characteristic groups continues and has widened in some areas in the years since the PSED was introduced.¹³

One explanation for this lies in the weak implementation and enforcement of the duty. The state's role is relatively hands off beyond specification of the duty, i.e. the need to pay 'due regard' to the intended outcomes, and provision of the framework for achieving it, leaving duty bearers to determine how best to meet the duty and to report on what, if any, action

¹² See Equality and Human Rights Commission, *Reviewing the Aims and Effectiveness of the Public Sector Equality Duty in Great Britain* (August 2018), available at: <https://www.equalityhumanrights.com/sites/default/files/review-of-public-sector-equality-duty-psed-effectiveness.pdf> and, on the Scottish specific duties, Equality and Human Rights Commission, *Effectiveness of the PSED Specific Duties in Scotland*, available at: <https://www.equalityhumanrights.com/sites/default/files/2022/our-work-effectiveness-of-psed-specific-duties-scotland-2018.pdf>

¹³ Equality and Human Rights Commission, *Is Britain Fairer?* (June 2019), available at: <https://www.equalityhumanrights.com/sites/default/files/2021/is-britain-fairer-2018.pdf> and *Is Scotland Fairer?*, available at: https://www.equalityhumanrights.com/sites/default/files/2021/is_scotland_fairer_accessible_1.pdf

has been taken. Enforcement, managed by the Equality and Human Rights Commission as part of its regulatory function, generally consists of a light touch approach with court action used rarely.

Does PSED's lack of success indicate that the proposed group protection duty will also yield little by way of positive change? The answer depends largely on how precisely the duty, or duties, will be designed and implemented. The best approach would require duty bearers to consider the GPTs' provisions in a holistic way when delivering ICESCR rights in line with the compliance duty, as well as in their overall decision-making. If this is achieved, the duty could result in a new framework for self-regulation by duty bearers underpinned by stronger state accountability and improved enforcement. If aligned with PSED and the FSD, both in relation to the intended outcomes and reporting regime, this framework could catalyse these existing duties by making them part of a dynamic and integrated system.

Incorporation could and should result in the transformation of Scotland's public services at the point of delivery and so its ability to effect real change will depend largely on how the Bill is implemented in the 'small places, close to home'¹⁴ by the housing officer, teacher, social worker, healthcare provider and other duty bearers. Rather than focusing solely on the compliance-based 'command and control' method of achieving change, the proposed positive duty approach, if implemented effectively, could foster and enable a system of self-regulation for public authorities which should certainly be welcomed.

In all aspects of the proposed approach to rights incorporation, there are a number of areas which will require further consideration. The Scottish Government remains open to engagement with stakeholders and, in the buildup to the Scottish elections, it is particularly important that the views of civil society organisations and the communities that they serve are aired.

So, what are the current priorities for incorporation?

Current Priorities

¹⁴ Eleanor Roosevelt, "Where do universal human rights begin?", statement on 27 March 1958 to the UN Commission on Human Rights.

1. Compliance remains the goal

Compliance-based incorporation of all the relevant treaties, not just ICESCR, by way of the so-called maximalist approach should remain the ultimate goal. Although the use of positive duties is accepted as a crucial part of the overall framework for embedding human rights in everyday public service delivery in Scotland, we should not see their use as an alternative to compliance but rather as an additional tool. Without this, the framework is likely to lack teeth. Given the complexity of the framework which requires to be built from the ground up and within the considerable constraints imposed by devolution, a full compliance model is a long-term aspiration but is still a goal worth aiming for.

2. Clarify the impact of devolution

To aid in the achievement of the goal of compliance and to enable a fully integrated human rights framework for Scotland, civil society should continue to ask the Scottish Government to seek clarification from the UK Government on the meaning and implications of the Supreme Court's judgment in the UNCRC case. If the current interpretation is confirmed as the correct one, an amendment to the Scotland Act to reverse the effect of the Supreme Court's judgment should be a key priority for all of those concerned with human rights progress in Scotland.

3. Clear articulation of the right to a healthy environment

The alignment of this right with the provisions of ICESCR and with a range of relevant devolved policy areas provides real potential for its advancement. The lack of a specific international treaty in this area should be viewed as an opportunity rather than as a barrier to progress. Clearer articulation of the content of this right and how it might operate is urgently needed as a starting point to avoid it being left behind as other provisions of the proposed Bill progress.

4. Simplify and streamline the use of positive duties

The use of positive duties in the Scottish Government's current proposals is a very welcome feature of the overall framework for incorporation. However, in attempting to navigate the boundaries imposed by the current devolution arrangements and their perceived interpretation, the proposed

framework is extremely complex and includes an array of different duties with varying scope. It is unlikely that in its current form it will fulfil the Government's stated aims 'to reduce overall complexity and to promote accessibility of the legislation for duty-bearers and rights-holders.' Clearer alignment with an improved PSED and FSD is critical if we are to enable and support duty bearers to make the necessary culture change for improved public service delivery.

5. Separate detailed consideration of the rights under CERD, CEDAW and the CRPD

As outlined above, the group protection duty is proposed as a consideration duty by which public authorities would be required to actively consider the rights contained in CERD, CEDAW and the CRPD in their strategic decision-making and in the ways in which they provide services. This would incorporate all the rights contained in the GPTs, including civil and political rights as well as economic, social and cultural rights. Although it is accepted that the constraints imposed by devolution make it extremely difficult to impose a compliance duty in respect of the rights provided under the GPTs, there are grounds for considering the three treaties separately and within the context of the existing equality and public policy frameworks in Scotland in order to identify areas where compliance may be possible. This would ensure that the Bill is able to deliver the maximum possible in terms of rights protections.

6. Protect public services from contracting out to private actors

An additional consideration relates to the proposed scope of the group protection duty. Under the current proposals, this duty would apply to public authorities when delivering all of their devolved functions, but private actors *may not be* subject to it, even when they are performing devolved public functions. One unintended consequence of this is that it could result in the increased contracting-out of public services as a way of avoiding being caught by the duty. Civil society should call for the exploration of mitigating measures to restrict procurement in certain circumstances so that public services are adequately protected.

Conclusion

Whilst it is widely accepted that a suite of international human rights treaties *should* be incorporated into Scots law alongside the UN Convention on the Rights of the Child, the method and approach by which this can be achieved is still under development. Full compliance with ICESCR, CERD, CEDAW and the CRPD should remain the long-term goal, but it is accepted that the current devolution arrangements do impose certain restrictions which may only be remedied by amendments to the Scotland Act 1998.

It is important to focus on what we should be asking for now within the current constraints. There is a lot that can be achieved in the short to medium term which could result in tangible improvements to people's lives and that is where Scotland's civil society should focus its attention in the lead-up to the Scottish Parliament elections in 2026.