

Our approach

Amnesty International is a global movement of over seven million people who stand up for humanity and human rights. Amnesty International UK is part of the worldwide Amnesty movement and is used as a collective name for AIUK Section (Limited Company) and AIUK Section Charitable Trust.

The stated purpose of this proposed legislation is to build on existing human rights protections, to incorporate ICESCR, CEDAW, ICERD, and CRPD (“the four treaties”) into Scots law, within the limits of devolved competence, to secure the non-discrimination principle through an equality clause, to provide clear duties on public bodies, to create a multi-institutional approach, to ensure routes to remedy and to build a human rights culture. AIUK supports all of these aims.

However, it is important to be clear that the proposed Bill will not result in a comprehensive ‘Bill of Rights’, in part due to Scotland’s complex constitutional arrangements. The recent Scottish Government publication ‘Building a new Scotland’ discusses the creation of a modern Constitution for an Independent Scotland.¹ The paper proposes that with independence, Scotland would be bound by the same international treaties as the UK and would consider further ratification of additional treaties. An interim constitution would embed human rights set out in the ECHR, as well as the core international human rights. Whilst we acknowledge the long-term goal of the Scottish Government in this regard, it is essential that these discussions do not distract from the commitment to incorporation by way of primary legislation within this Parliamentary session.

Before approaching the specific consultation questions, we will set out our approach to responding.

AIUK’s over-arching priority is to ensure that incorporation is led by, and results in tangible improvements for, rights holders in Scotland, especially those who face the greatest barriers to enjoyment of rights and those whose rights are most at risk. Scotland’s National Human Rights Action Plan² has already commenced work on identifying a non-exhaustive list of groups, including Black and Minority Ethnic people, Scottish Gypsy /Travellers and Care Experienced people.³ In addition, international human rights sources direct us to groups requiring special protections, for example in relation to cultural life, including migrants and people living in poverty.⁴

The Civil Society Working Group on Incorporation is a group of civil society organisations, convened by AIUK and the Human Rights Consortium for Scotland (“HRCS”) with vital input from academics. The group has been actively campaigning

¹ Scottish Government (2022) Paper 4: [Creating a modern constitution for an independent Scotland](#)

² Scotland’s Second Human Rights National Action Plan: <https://www.snaprights.info/>

³ The non-exhaustive list includes: Black and Minority Ethnic people; Care Experienced people; children and young people; families of accused persons and people in custody; disabled people, including people with learning disabilities and autistic people; LGBTQIA+ people; lone parents; migrants, refugees and people seeking asylum; older people; people on remand; people in poverty; people with lived experience of homelessness; people with lived experience of substance use; people with long term conditions; people with mental health conditions; people with religious belief/faith; people living in rural or remote areas; Scottish Gypsy/Travellers; unpaid carers; and women.

⁴ Mitchell, L, Webster, E and Camps, D: [The Right to Cultural Life in Scotland](#), published by HRCS and Article 27

for the incorporation of a range of international human rights treaties into Scots Law in recent years. Building on the Group's 'Essential Features' paper⁵, AIUK will approach this consultation by assessing the recommendations against indicators which are rooted in international best practice and a 'human rights -based approach'⁶. The PANEL principles, for example, are one way of breaking down what a human rights-based approach means in practice. PANEL stands for Participation, Accountability, Non-Discrimination and Equality, Empowerment and Legality. Drawing on these sources, we have identified the following Incorporation Outcomes ('IOs' for ease):

1. **Maximalist approach:** the legislation must offer the most effective means of protecting, promoting and fulfilling rights, within our constitutional arrangements.
2. **Building a human rights culture:** the legislation will be the foundation of human rights culture in Scotland. Equality, non-discrimination, equity and respect for human dignity will be core values. The legislation will result in tangible improvement for rights holders. People who face the biggest barriers to realising their rights, and those whose rights are most at risk must be prioritised.
3. **Bringing Scots Law into line with international human rights standards:** existing and future laws passed by the Scottish Parliament, and scrutinised by our courts and tribunals, must be compatible with the rights given effect by the legislation. Urgent steps must be taken to rectify incompatibilities identified.
4. **Establishing a floor not a ceiling:** the legislation will provide a trusted reference point for human rights standards, but public bodies in Scotland must continually strive to promote, protect and fulfil human rights, without discrimination and without regression.
5. **Keeping step:** the legislation will be a living instrument which will keep step with developments in international human rights law.
6. **Empowerment and access to justice:** the rights will be enforceable by rights holders, with robust and accessible routes to effective remedy, adequate resourcing to ensure individuals can access information, education, advice, representation and independent advocacy where needed.
7. **Accountability and transparency:** there must be clear mechanisms to ensure responsibility, answerability and enforceability. This will include robust reporting duties and monitoring mechanisms, there must be coherent and accessible pathways to ensure scrutiny, rights violations must not fall through the gaps between scrutiny bodies.
8. **Legal certainty:** the legislation must be clear and accompanied by accessible information to ensure that individuals can name and claim their rights and that duty bearers are clear as to their powers and duties under the Bill.

⁵ Civil Society Working Group (2020) [Features of an Act of Parliament to Incorporate International human rights into Scots Law](#)

⁶ enhri.org: The Human Rights Based Approach is a conceptual framework directed towards promoting and protecting human rights, based on international human rights standards. It puts human rights and corresponding state obligations at the heart of policy and can be used by NHRIs as a tool to empower the most vulnerable people to participate in decision-making processes and hold duty-bearers accountable.

9. **Participation and collaboration:** People should be actively involved in decisions that affect their rights. Implementation and operation of the legislation will be rights- holder led.
10. **Taking an intersectional approach:**⁷ to the legislation and developing practice around it will recognise people's multiple identities and the need to address intersectional forms of discrimination and inequality they face in overcoming barriers to their rights. ⁸

We will approach each question by analysing it through the lens of these outcomes, whilst identifying any gaps in the reasoning behind the proposals and suggesting potential solutions and improvements where appropriate.

We are grateful to the Human Rights Consortium for Scotland and our partner organisations and academics in the Civil Society Working Group for their generous expert collaboration and we will refer to, and draw from, their input in focussed areas where appropriate, for example around the equality clause and the right to a healthy environment.

Part 4: Incorporating the treaty rights Q 1-5

Q1 What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?

Our position on the proposal

We agree with the proposition, that “human dignity (is) a helpful tool in understanding and interpreting key human and comparative constitutional rights.”⁹ The UN Framework Principles on Human Rights and the Environment¹⁰ recognise that *‘pursuing environmental and development goals in accordance with human rights norms not only promotes human dignity, equality and freedom, the benefits of fulfilling all human rights.’* As a longstanding philosophical and moral concept embracing justice, fairness, decency and equality, dignity offers a means by which the content of ESCR can be defined and guaranteed, including with respect to Minimum Core Obligations (“MCOs”). Dignity seeks to ensure that the enjoyment of ESCRs goes beyond mere subsistence but reflects what it means to live a decent life which can be progressively enhanced over time. This approach also accords with the vision of Scotland’s Second National Action Plan for Human Rights (“SNAP 2”), being a Scotland where everyone can live with human dignity,¹¹ thus contributing to a coherent human rights culture for Scotland (**IO 2**). We also note that the Equality

⁷ Defined as an analytical framework for understanding how systems of power and privilege affect marginalised identities, and how those identities interact with each other when facing discrimination. See Crenshaw, K, (1989) Demarginalising the Intersection of Race and Sex, University of Chicago Legal Forum, Vol 1989 Issue 1

⁸ National Taskforce for Human Rights Leadership Report, p60

⁹ Consultation p14

¹⁰ Knox, J (2018) [Framework Principles on Human Rights and the Environment](#), UN Human Rights Special Procedures

¹¹ Scotland’s Second Human Rights National Action Plan: <https://www.snaprights.info/snap-2>

Network will emphasise the importance of human dignity to realising the rights of LGBTI people in Scotland, beyond formal equality.

We acknowledge that discussions around a Constitution for Scotland may present further opportunities to explore embedding dignity as a substantive, constitutional right to human dignity.¹² For example, human dignity is enshrined in the First Article of the German Constitution which sets out a clear duty,¹³ which reads: *Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.* Under our current constitutional framework, the meaning and scope of ‘dignity’ must be clear for rights holders, duty bearers and the courts. This will avoid creating expectations that there is a substantive, constitutional, standalone right to human dignity **(IOs 6 and 8)** and ensure both the potential and limitations of human dignity are clear. In order to achieve this clarity, we recommend positioning human dignity as an underpinning value and interpretive aid.

We note that the proposal is to ensure the interpretative clause of the Bill allows courts to consider dignity when adjudicating on the rights in the Bill, with reference to the text of international treaties and materials. Reminding and allowing the courts to reference international materials would inevitably lead to human dignity already having two distinct roles within the Bill.

Firstly, by incorporating the text of CPRD and ICESCR into primary legislation, respect for dignity would play a substantive role in interpretation of specific rights which expressly reference dignity. For example, this would apply in the context of education (Article 13 CESC and Article 24 CRPD), freedom from exploitation, violence and abuse of disabled people (Article 16 CRPD), and the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability (Article 25 CRPD).

Secondly, by including wider materials such as general comments in an interpretative clause, respect for dignity would consequently assist in the interpretation of other rights such as the right to adequate food¹⁴ and adequate drinking water and sanitation as fundamental for human dignity.¹⁵

This approach has the benefit of aligning Scots law with international standards **(IO 3)**. Courts and tribunals in the UK already have expertise in using dignity as a value to interpret the rights within the ECHR, through case law rather than on the face of the HRA¹⁶

There is an additional function of the value of dignity found in examples within the treaty framework which could be used in reading and interpreting the legislation as a whole. This can be found within the preamble of all four treaties, e.g., CRPD: *“recalling the principles proclaimed in the Charter of the United Nations which*

¹² See further discussion in Webster, E, (2020): The Underpinning Concept of Human Dignity, Academic Advisory Panel

¹³ For a further international example, see section 1 and 10 of the South African Constitution

¹⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), para. 4.

¹⁵ UN Committee on Economic, Social and Cultural Rights, General Comment No. 15: the right to water, para 11 and 29

¹⁶ For example, under Article 8 in *R (on the application of Diane Pretty) v Director of Public Prosecutions* [2001] UKHL 61

recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world” (CRPD).

Whilst this wording is helpful, the practical difficulty is that Acts of the Scottish Parliament are not permitted to include a preamble¹⁷ and the Bill must operate within Scots law (**IOs 1 and 8**). The National Taskforce for Human Rights Leadership (“the Taskforce”) suggested instead a ‘purpose clause.’¹⁸ The Taskforce does not expand upon the anticipated legal effect of the purpose clause. It could, for example, form part of the ‘long title’ of the Bill, which sets out the principal purpose of a Bill.¹⁹ However, it must not ‘contain material to promote or justify the policy or to explain the Bill’s effect and must accurately describe what the Bill does.’²⁰

Additional recommendations:

One formulation might be to include a ‘principles clause,’ along the lines of Article 3 CRPD, which reads (in full):

The principles of the present Convention shall be:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

This Article 3 definition has the advantage of recognising individual autonomy alongside dignity, so that dignity is used in a way which recognises that there can be tensions between an individual’s sense of autonomy and self-determination based on their subjective sense of dignity, and the state’s objective interpretation of how best to safeguard an individual’s dignity.²¹ We are suggesting that Article 3 CRPD be used as a model for the formulation of a principles clause and that it could be adapted to include other relevant principles and to fit the Scottish context.

The Scottish Parliament has a track record of successfully embedding dignity as a principle within legislation and placing duties on those ‘exercising functions’ under the legislation. For example, respect for the dignity of individuals is to be at the heart

¹⁷ Parliamentary Counsel Office, *Drafting Matters*, (2018) Second Edition, p31

¹⁸ National Taskforce for Human Rights Leadership, (2021) [Final Report](#), Recommendation 9

¹⁹ Parliamentary Counsel Office, (2018) *Drafting Matters*, Second Edition, p31

²⁰ Parliamentary Counsel Office, (2018) *Drafting Matters*, Second Edition, p18

²¹ For example, in relation to areas such as medical ethics, homelessness, social work interventions

of the Scottish social security system, through the Scottish Social Security Principles.²² The legislation is clear that breach of the principles does not of itself give rise to grounds for any legal action.²³ Instead the effect of the Scottish social security principles is that:

- (a) they can be reflected in the Scottish social security charter;
- (b) the Scottish Commission on Social Security can have regard to them, and
- (c) a court or tribunal in civil or criminal proceedings may take the principles into account when determining any question arising in the proceedings to which the principles are relevant.

Similarly, those ‘exercising functions’ in relation to Scotland’s Redress scheme must have regard to the principle that people, including applicants to the scheme, must be treated with dignity, respect and compassion.²⁴

We see no reason why using dignity as a means of interpreting rights needs to end with the judiciary, as proposed.

A principles clause could also embed other principles such as recognition of the importance of participation (**Taskforce Recommendation 29 and IO 9**) (alongside more concrete examples of embedding participation within the legislation, discussed further below.) It could also be used to emphasise that human rights are universal, indivisible, interrelated and interdependent, as well as the principle of intersectionality, (**IO 10**) which was recognised by the Taskforce²⁵ but has not been addressed within the proposals.

Q2 What are your views on our proposal to allow for dignity to be a key threshold for defining the content of MCOs?

Our position on the proposal

We have commented more fully in relation to the specifics of the process for defining the content of MCOs in our response to Q24. Overall, we agree that there are advantages in using dignity as a key threshold for defining the content of MCOs, as a means of retaining connection to the international framework and reflecting on the underpinning values (**IO 5**) whilst also ensuring the MCOs are tailored for the needs of people in Scotland (**IO 2**).

The work of the Lived Experience Board suggests that ‘dignity’ could be a useful way of defining specific human rights concerns (**IO 9**) for example:

The right to food needs to be realised in a way that protects dignity: ‘What we were finding was people are too ashamed to go to food banks, so they’re not eating at all. So that’s where we’ve got to reach people who are going there with something like [food cards], it’s something that is taken in a supermarket, it takes stigma away as

²² S. 1 (d) Social Security (Scotland) Act 2018

²³ S. 2 (3) Social Security (Scotland) Act 2018

²⁴ S.13 Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021

²⁵ National Taskforce for Human Rights Leadership, (2021) [Final Report](#)p11

well.’ *‘There’s a dignity problem...people tend to prefer food vouchers, rather than queuing up in a Food Bank, because it’s a dignity problem for many.’*²⁶

Additional recommendations

As dignity can be hard to define, it would be helpful for the participatory process, discussed further in Q24, to include developing a shared understanding of the meaning and role of human dignity, whilst retaining the link with international human rights law sources (**IOs 3 and 9**). It would also be helpful to draw on the experiences of other countries in applying this concept to concrete situations including the content of MCOs, whilst being mindful that many international examples will have a Constitutional basis underpinning their approach.²⁷

Q3 What are your views on the types of international law, materials and mechanisms to be included within the proposed interpretative provision?

Our position on the proposal

The proposals for the interpretative clause indicate that duty-bearers, courts and tribunals will all be able to read, apply and interpret the rights in line with international materials. We support this proposal, which will be an important step towards achieving a maximalist approach and ensuring that Scots law keeps step (**IOs 1 and 5**). We support the inclusion of duty-bearers within the interpretative clause, noting that this goes further than the UNCRC Bill.²⁸

We are aware of arguments that clauses such as these “threaten the independence of the judiciary.” However, we support inclusion of the interpretative clause to put the matter beyond doubt in light of the Supreme Court’s position in SC:

*Although a treaty such as the UNCRC which the UK has ratified is binding on the UK in international law, it is not part of UK domestic law and does not give rise to any legal rights and obligations in UK law unless and until it is incorporated by legislation.*²⁹

We are equally aware of arguments that this ‘may’ power should be strengthened to a ‘must’ duty. However, we are of the view that the ‘may’ power strikes the appropriate balance between independence of the judiciary and legal certainty. It will also allow flexibility in situations where there are conflicting or overlapping views of different UN Committees.

Further clarity needed

We note that it is unclear precisely which materials will be listed within the interpretation clause. In relation to dignity, the Consultation lists: the treaties, preambles, accompanying guidance, concluding observations and international jurisprudence. In relation to the interpretative clause more generally, the list given is

²⁶ Human Rights Bill Lived Experience Board, Block 3 June 2022

²⁷ E.g., South Africa and Germany

²⁸ Clause 4

²⁹ SC v Secretary of State for Work and Pensions [2019] EWCA 615, para 96

subtly different: general comments, recommendations of UN Committees, concluding observations, and other mechanisms at international or regional level.³⁰

The list of sources in clause 4 UNCRC Bill is again subtly different and includes recommendations following days of general discussion and other international law and comparative law.

It is also unclear whether or not courts, tribunals and duty-bearers will be able to take into account international treaties to which the UK is not a signatory.

Additional recommendations

The interpretative clause could also contain clarification that, for the avoidance of doubt, nothing in this Act modifies the Equality Act 2010, or the Human Rights Act 1998 and a general statement that the rights can only be applied in areas of devolved competence to allow for future variations to the devolution settlement.

It is essential that the status of the interpretative clause is clearly drafted so that rights holders, decision makers and duty bearers are clear when there is a duty and/or a discretion to take account of these materials and which sources are expressly included (**IOs 3, 6 and 8**). The list of materials should take a maximalist approach and include all of the types of materials listed above, including a 'catch all' of 'other relevant mechanisms at international or regional level.' It would be helpful to specifically reference UN adopted legal Principles, such as the UN Principles for Older Persons and the Guiding Principles on Business and Human Rights.

Q4 What are your views on the proposed model of incorporation?

Our position on the proposal

Whichever model of incorporation is adopted, the Bill must: adopt a maximalist approach (**IO 1**), result in tangible improvements for rights holders (**IO 2**), keep step with developments in international human rights (**IO 5**) and ensure legal certainty (**IO 8**). Overall, in our view both the transposition model and the direct treaty approach have potential to achieve these IOs.

The CESCR Committee supports incorporation as desirable and appears to lean towards a direct treaty approach:

“While the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.”³¹

However, this is within the context of a General Comment and so does not consider the devolution complexities in Scotland. In the absence of further publicly available

³⁰ Consultation page 14

³¹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 9, para 8

analysis, it would appear that both models have benefits, but also carry equal risks in relation to straying into reserved areas, which could potentially be addressed through the interpretative clause. We have set out some of our concerns and proposals below.

Further clarity needed

We are unclear from the consultation paper what factors were taken into account in supporting the direct treaty model, or how the Government reached the conclusion that the transposition model would lead to greater risks around future interpretation which could not be mitigated through an interpretative clause. In our international experience, transposition is often applied effectively and neither model is superior in terms of interpretation.

We acknowledge that some reservations under the Scotland Act which will impact in this area include: fiscal, economic and monetary policy; immigration and nationality; social security (with some exceptions); occupational and personal pensions; equal opportunities, (with some exceptions) and employment and industrial relations.

In order to achieve meaningful participation, it is essential that the Scottish Government publishes clear and unambiguous analysis of which treaty rights would have to be removed as falling within a reserved area, and how they would approach areas such as social security, employment and equal opportunities where there are both reserved and devolved elements.³²

Additional recommendations

A direct treaty model may have some advantages in terms of retaining the precise language of the treaties (**IO 3**), promoting a human rights culture (**IO 2**) and keeping step (**IO 5**). It may also present a quicker solution.

However, this language is not always easily translated into a meaningful sense of what it means for rights holders (**IO 5**). Some rights are framed within the treaties as state duties as opposed to rights.³³

Given the need to navigate the devolution settlement, a degree of transposition will already be required. A transposition approach could assist to ensure robust rights and duties in the area of LGBTI rights and older people's rights, where the framing is through recommendations rather than requirements.³⁴

SHRC has identified³⁵ that for LGBTI people these could include: *the right of "LGBT+" people to freely live and manifest their sexual orientation and gender*

³² See further discussions below on employment under CEDAW and on equal opportunities more generally

³³ For example, Article 13 CRPD provides that States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, rather than framing this as a right to effective access to justice.

³⁴ E.g. United Nations Principles for Older Persons, Adopted by General Assembly resolution 46/91 of 16 December 1991

³⁵ Scottish Human Rights Commission (2022) Building a new human rights framework for Scotland: Key legal features para [3.7.1](#)

identity, the right of LGBT+ people to live a dignified life that is free from violence, hatred and discrimination of any type, the right of “LGBT+” people to live in an environment where their civil, political, economic, social and cultural rights can be fully realised.

Similarly, SHRC has identified that rights for older people could be drawn from the United Nations Principles for Older Persons, as Adopted by General Assembly in 1991. “*These Principles recognise ... five core principles necessary for the protection of the rights of older persons: Independence, Participation, Care, Self-fulfilment, and Dignity.*”³⁶

In addition, will be a need to assist rights holders to navigate overlaps between different treaties, for example, rights relating to education in Article 13 ICESCR, Article 24 CRPD, Article 7 ICERD and Article 10 CEDAW.

Under a transposition model it may be more accessible for rights holders to find these grouped together thematically under the heading of the area in which their rights are being threatened e.g., education, rather than having to read through four different instruments. This may also aid an intersectional approach **(IO 10)**.

Finally, a transposition model could offer the opportunity to update some of the language in the treaty texts, some of which were drafted in the 1960s, for example to remove patriarchal terminology.³⁷ We share the Equality Network’s concerns about gendered language and around the concept of family as ‘the natural and fundamental unit of society’. A transposition model could present an opportunity to harmonise key definitions across the treaties, aligning the protected characteristics within ICESCR (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) with CRPD, CEDAW and ICERD (‘the special protection treaties’).

For example, ‘disability’ is not specifically referenced at all within ICESCR, instead falling within ‘other status’ in terms of the international jurisprudence. ‘Race’ is included within ICESCR but ICERD provides an expanded definition of racial discrimination, as follows: *any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

Article 1 (2) of ICERD states that “*this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.*” However it is also clear that: “*under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of*

³⁶ Scottish Human Rights Commission (2022) Building a new human rights framework for Scotland: Key legal features para 3.6

³⁷ E.g., Article 10 and 11 ICESCR

the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."³⁸

Under a transposition model, some fairly minor changes to wording could address some of these challenges and to achieve a maximalist approach (**IO 1**). However, it is recognised that this would be an ambitious project which would require considerable resource and parliamentary time. A compromise might be to treat the forthcoming Bill as a framework, which allows scope for further regulations to work towards making Scotland a world leader in human rights.

We will address the procedural duty/ duty to comply, in questions 20 and 21 below.

Q5 Are there any rights in the equality treaties which you think should be treated differently? If so, please identify these, explain why and how this could be achieved.

Our position on the proposal

We broadly support the proposal that there should be an equality clause which ensures equal access for all to the rights within ICESCR and will respond more fully on this in Part 6/ Question 14.

Part 5: Recognising the right to a healthy environment (Q 6 – 11)

Q6. Do you agree or disagree with our proposed basis for defining the environment?

Our position on the proposal

We support the use of the Aarhus definition of the environment, making specific reference to ecosystems and the biosphere, in keeping with a maximalist approach, bringing Scots law into line with international standards (**IO 1 and 3**).

Additional recommendations

We also support the Environmental Rights Centre for Scotland's emphasis on the Aarhus Convention's Preamble, and Article 1 and 2 being reflected in the Bill.

In doing so, the Bill would explicitly acknowledge *'that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.'* It would also acknowledge the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being. This could be embedded within the principles/ purpose clause proposed above, to further emphasise that human rights are indivisible and inter-dependent.

Q7. If you disagree please explain why.

³⁸ See discussion under CERD Committee (2004) General Recommendation 30 on Discrimination against Non-Citizens, CERD/C/64/Misc.11/rev.3, para 4

Not applicable.

Q8. What are your views on the proposed formulation of the substantive and procedural aspects of the right to a healthy environment?

Our position on the proposal

We agree with the proposed formulation of the substantive and procedural aspects of the right to a healthy environment, bringing Scots law into line with international standards **(IO 3)**.

We agree that the substantive aspect should be understood as including clean air; safe and sufficient water; non-toxic environments (in which to live, work, study and play); healthy ecosystems and biodiversity; and safe climate. We recommend that the language of the right should draw from the text of the 2022 General Assembly on the right to a safe, clean, healthy and sustainable environment, as referenced in the Consultation Paper.³⁹

Further clarity needed

In terms of the procedural aspect, whilst we welcome the commitments made, the proposals do not provide any detail on how the Government will implement necessary reforms in order to rectify the ongoing breach⁴⁰ of Article 9(4) of the Convention, which states that access to justice should be 'fair, equitable, timely, and not prohibitively expensive. **(IO 6)**

Additional recommendations

We support the ERCS call to emphasise that adequate sanitation should be included under the right to safe and sufficient water, given the systemic problems of sewage pollution and wastewater treatment in Scotland, in order to build a human rights culture that provides solutions where rights are most at risk in Scotland **(IO 2)**.

We refer to our response to the questions in Part 8 on access to justice and emphasise that rights must be enforceable by rights holders, with robust and accessible routes to remedy, adequate resourcing to ensure individuals can access information, education, advice, representation and independent advocacy where needed **(IO 6)**. The procedural element of the right should meet Aarhus requirements, including access to environmental information, public participation in environmental decision-making, access to justice and effective remedies. There must be clear mechanisms to ensure responsibility, answerability and enforceability of the right to a healthy environment **(IO 7)**.

³⁹ UN General Assembly (2022) The Right to a Safe, Clean, Healthy and Sustainable Environment A/76/L.75

⁴⁰ In September 2021, the governing institutions of the Aarhus Convention made their tenth consecutive finding that the UK is in breach of Article 9(4) of the Convention. In October 2021, the Convention's Meeting of the Parties (MoP) adopted Decision VII/8s6 – requiring the UK government to submit an action plan to the ACCC, detailing how it will, 'as a matter of urgency' address the findings and recommendations of the Decision.

Whilst we support the aims of embedding the right to a healthy environment alongside ESCRs, given the urgency of the climate crisis, it is essential that the rights are immediately enforceable and are not considered to be subject to progressive realisation and maximum available resources and there must be no retrogression.

Q9. Do you agree or disagree with our proposed approach to the protection of healthy and sustainable food as part of the incorporation of the right to adequate food in ICESCR, rather than inclusion as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.

Our position on the proposal

We welcome incorporation of the right to food under Article 11 of ICESCR, which guarantees the right to adequate, culturally appropriate, accessible and available food, as well as the acknowledgement of the interdependent and indivisible nature of human rights, in keeping with a maximalist approach, bringing Scots law into line with international standards (**IO 1 and 3**).

Additional recommendations

In our view the ICESCR definition, as elaborated in ICESCR General Comment 12, does not fully address the inter-related but distinct right to healthy and sustainably produced food as a constituent part of broader environmental health, acknowledging the adverse environmental impacts across the food supply chain.⁴¹ Recognising the right to healthy and sustainably produced food would be a more coherent approach when considered alongside recognition of safe and sufficient water as a substantive feature of the right to a healthy environment (see question 10). Doing so is in line with a maximalist approach which would bring Scotland into line with international standards (**IOs 1 and 3**).

This approach is further supported by the terms of the recent UNCRC draft General Comment on children's rights and the environment, with a special focus on climate change.⁴² This explicitly recognises that "*Air and water pollution, exposure to toxic substances, including chemical fertilizers, soil and land degradation and other types of environmental harm increase child mortality, especially among children under 5 years of age, and contribute to the prevalence of disease, impaired brain development and subsequent cognitive deficits. The effects of climate change, including water scarcity, food insecurity, vector-borne and waterborne diseases, the intensification of air pollution and physical trauma linked to both sudden- and slow-onset events, are disproportionately borne by children.*"⁴³

⁴¹ See Environmental Rights Centre for Scotland (2021) The relationship between the human right to a healthy environment and the right to food.

⁴² Committee on the Rights of the Child, Draft General Comment No.26 (2023) on Children's rights and the environment, CRC/C/GC/26

⁴³ Ibid, para 40

Q10. Do you agree or disagree with our proposed approach to including safe and sufficient water as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.

Our position on the proposal

We agree with the proposal to distinguish between the right to water for human consumption under ICESCR, and the importance of safe and sufficient water as an essential part of the wider environment. This proposal is in keeping with a maximalist approach, bringing Scots law into line with international standards and achieving legal certainty (**IO 1, 3 and 8**).

Additional recommendations

We also support the ERCS proposal that this feature should refer to the right to adequate sanitation given the widespread and persistent issues of sewage pollution in Scotland.⁴⁴ This would reflect the need for a maximalist approach and robust accountability (**IOs 1 and 7**). ‘Safe and sufficient’ must address wastewater and pollution from sewage, agricultural discharge, and other sources, the impacts of climate change on water availability, and measures for enhanced water monitoring, testing, and enforcement against polluters.

Q11. Are there any other substantive or procedural elements you think should be understood as aspects of the right?

Our position on the proposal

We refer to our preceding responses and emphasise the importance of interpreting the right to a healthy environment in accordance with international best practice (**IO 3**) and achieving the highest possible standards for Scotland (**IO 1**).

Additional recommendations

We emphasise that there must be dedicated reforms with clear timelines to make the Right to a Healthy Environment fully enforceable, in accordance with **IOs 6 and 7**.

Part 6: incorporating further rights and embedding equality (Q 12 – 18

Q12 Given that the Human Rights Act 1998 is protected from modification under the Scotland Act 1998, how do you think we can best signal that the Human Rights Act (and civil and political rights) form a core pillar of human rights law in Scotland?

Our position on the proposal

⁴⁴ Scotland’s sewage problems are well documented. See for example, <https://www.heraldsotland.com/news/23670560.scotlands-sewage-spills-beaches-key-locations-affected/>

As outlined in our response to Q1, the interpretative clause and/ or a principles clause could assist to emphasise that human rights are indivisible, interrelated and inter-dependent and the specific relevance of the ICCPR and ECHR could be emphasised through a statutory code of practice or guidance materials.

As outlined in our response to Question 3, the interpretative clause could also contain clarification that, for the avoidance of doubt, nothing in this Act modifies the Equality Act 2010, or the Human Rights Act 1998. It is notable that many of the rights within CERD/ CEDAW, although devolved, are civil and political in nature.

Further clarity needed

In line with the maximalist approach (**IO1**), we question the decision not to pursue UNCAT within this legislative provision and the limited explanation given for this decision.

While the ECHR Article 3 prohibition against torture is directly incorporated through the HRA 1998 and exists in sectoral legislation, (including s.134 Criminal Justice Act 1988), the extent to which the specific UNCAT obligations link into the general criminalisation of torture in Scotland is minimal.⁴⁵

The definition of torture in UK law, which is also applicable in Scotland, does not meet the standards of Articles 4 and 5 UNCAT which require that states criminalize torture through law and establish jurisdiction over the offense of torture. The CAT repeatedly has noted the ambiguity of UK law in the context of assuring the prohibition against torture.⁴⁶ There are three main inconsistencies:

- s.134 permits a defence through 'lawful authority', 'justification' or 'excuse'⁴⁷ whereas the CAT allows no defence;⁴⁸
- UK law fails to definitively exclude evidence obtained through torture or threat of torture;
- private actors carrying out functions of the state are not necessarily bound by the same obligations as the state. In Scotland this is of particular concern in relation to some prison services which are routinely provided by private actors.⁴⁹

..

The absence of an obligation to rehabilitate torture victims in line with UNCAT Article 14 is a further gap in the existing protection against torture and cruel, inhuman or degrading treatment in Scotland. While there is an obligation on the state to ensure access to physical and mental health services for individuals qualifying for care with the NHS, the existing legal framework does not explicitly address the rehabilitation of

⁴⁵ We acknowledge the input in this section of McCall-Smith, K (2022) University of Edinburgh, 'Incorporating the UN Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (unpublished)

⁴⁶ E.g. CAT, Concluding observations on the sixth periodic report of the UK, para 8

⁴⁷ Criminal Justice Act 1988 s134(4)

⁴⁸ E.g., CAT, Concluding Observations on the sixth periodic report of the UK, paras 12-13

⁴⁹ In Scotland, for example, HMP Kilmarnock Prison is privately run by Serco and HMP Addiewell is run by Sodexo.

torture victims. This obligation applies even where the torture was not inflicted on persons by state actors within Scotland.

Additional recommendations

This Bill presents an opportunity for Scotland to lead the way in the UK by incorporating the UNCAT Article 1 definition of torture into Scots law with a specific reference to the international interpretive tools available in order to cure the existing gaps between the UK definition of torture⁵⁰ and the UNCAT. The Bill should also incorporate a right to rehabilitation for survivors of torture. Doing so would be in keeping with a maximalist approach to incorporation (**IO 1**). Scotland should ensure private actors carrying out delegated state duties are subject to the same duties as state actors, and that there is sufficient clarity for duty bearers and rights holders around which bodies are covered by the new duties, in order to achieve legal certainty and in keeping with a maximalist approach (**IOs 1 and 8**).

Q13 How can we best embed participation in the framework of the Bill?

Our position on the proposal

Participation is fundamental to a human rights-based approach (**IO 9**). Taskforce Recommendation 29 was for further consideration to be given to including an explicit right to participation, drawn from the principles of international human rights law, within the legislation.

*'It plays a crucial role in the promotion of democracy, the rule of law, social inclusion and economic development. It is essential for reducing inequalities and social conflict. It is also important for empowering individuals and groups, and is one of the core elements of human rights-based approaches aimed at eliminating marginalization and discrimination.'*⁵¹

Participation is embedded within the four treaties⁵² and the UN has published guidelines for states on the effective implementation of the right to participate in public affairs.⁵³

Additional recommendations

In our view participation should be both a principle that underpins the legislation (see our response to Q 1) as well as a specific right built into the implementation of the

⁵⁰ While the UK definition would still be applicable when the Criminal Justice Act 1988 is applied, Scottish Courts should be required to follow the guidance of the CAT and its interpretations that demonstrate an evolutionary understanding of the prohibition going forward.

⁵¹ UNOHC: Guidelines for States on the effective implementation of the right to participate in public affairs

⁵² E.G, ICESCR Article 14 and 15, CRPD Art. 3, CEDAW Art. 7 & 14, ICERD Art. 5.

⁵³ UNOHC: Guidelines for States on the effective implementation of the right to participate in public affairs

Bill wherever possible and appropriate. Such opportunities could include: human rights budgeting, within devolved competence, the human rights scheme, within accountability and monitoring frameworks, and in the process for determining the content of Minimum Core Obligations.⁵⁴ The importance of participation in terms of the specific articles of the four treaties outlined above, should be emphasised within codes of practice and guidance materials.

In order to achieve full participation of ‘groups that have been historically excluded, or whose views and needs have been inadequately addressed in decision-making processes (see resource above), duty bearers should have powers and duties which enable them to target participation proactively and to hear from communities whose rights are most at risk, as well as clear guidance materials to support them to do so, drawing from the UN Guidelines for States on the effective implementation of the right to participate in public affairs.

It is crucial that participation mechanisms are inclusive, meaningful and lead to tangible change. The time and input of participants must be respected, valued and accompanied by clear policies around paid participation⁵⁵ with a view to co-creating empowering and meaningful solutions.

Q14. What are your views on the proposed approach to including an equality provision to ensure everyone is able to access rights, in the Bill?

Our position on the proposal

We consider the inclusion of an equality clause to be an essential aspect of building a human rights culture in Scotland **(IO 2)** and of bringing Scots law into line with international standards **(IO 3)**. We are of the view that it will create opportunities to embed an intersectional approach **(IO 10)**.

It is essential that the equality clause is easily understood by duty bearers, rights holders and judicial and non-judicial decision makers **(IO 8)**. Whilst the proposed model reflects the advantages discussed above in terms of a direct treaty model of incorporation, in particular in relation to keeping step/ the living instrument doctrine **(IO 5)**, it could lead to uncertainty, for example surrounding what is meant by discrimination, how this provision interacts with discrimination law under the Equality Act and which groups are protected.

Further clarity needed

The definition of discrimination will require further explanation. Further clarity could be achieved through an interpretation clause, guidance materials or codes of practice, with reference to CESCR General Comment 20,⁵⁶ which expands:

⁵⁴ See for example Clause 11, UNCRC (Scotland) Bill

⁵⁵ Scottish Human Rights Commission (2021) Paying people with lived experience for their participation

⁵⁶ Committee on Economic, Social and Cultural Rights General Comment 20, Non-discrimination in economic, social and cultural rights (2009) E/C.12/GC/20

Discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.

The terminology and understanding around discrimination have been expanded upon by the Committees, for example the Committee on Elimination of Racial Discrimination has discussed concepts otherwise described as objective justification and indirect discrimination:

The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.⁵⁷

All of these terms have equivalents within the Equality Act 2010, which sets out six clearly defined forms of discrimination.⁵⁸

Another area of uncertainty relates to the goal of achieving substantive equality. General Comment 20 is clear that:

In order for States parties to “guarantee” that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively.⁵⁹

The availability of ‘temporary special measures’ within Article 4 CEDAW is central to the purpose of the Convention:

which is to eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms. States parties to the Convention are under a legal obligation to respect, protect, promote and fulfil this right to non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of de jure as well as de facto equality with men.⁶⁰

There is similar provision allowing for temporary special measures within Article 1 (4) of ICERD.

Recommendations

⁵⁷ Committee on the Elimination of Racial Discrimination (1993) General Recommendation 14 on Article 1 Paragraph 1 of the Convention A/48/18.

⁵⁸ Sections 13, 15, 19, 20, 26 and 27

⁵⁹ Committee on Economic, Social and Cultural Rights, General Comment 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3)

⁶⁰ Committee on the Elimination of Discrimination against Women, General recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, para 4

We appreciate the difficulties in navigating the equal opportunities reservation within the Scotland Act.⁶¹ We understand this to mean that the starting position is that the Scottish Parliament cannot legislate on ‘equal opportunities’ as it is a reserved matter and equal opportunities has a definition which goes beyond the Equality Act.

However, there is an exception which allows the encouragement (other than by prohibition or regulation) of equal opportunities and in particular the observance of equal opportunity requirements. This includes imposing duties on the Scottish Government and any Scottish public authority with mixed or devolved functions, to carry out their functions with due regard to the need to meet the equal opportunity requirements, for example through the PSED specific duties. This also applies to cross-border public authorities in relation to their Scottish functions. We assume that it is this exception which the Government anticipates will allow the imposition of the ‘procedural duties.’

The second exception relates very specifically to the inclusion of people with protected characteristics in non-executive boards of Scottish Public authorities.

The third exception relates to equal opportunities and the Scottish functions of any Scottish public authority or cross-border public authority, except any function associated with the inclusion of persons in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions.

We understand this exception does not include modification of the Equality Act and associated subordinate legislation. However, it does allow:

- a. Provision that supplements or is otherwise additional to provision made by that Act;
- b. In particular, provision imposing a requirement to take action that that Act does not prohibit;
- c. Provision that reproduces or applies an enactment contained in that Act, with or without modification, without affecting the enactment as it applies for the purposes of that Act.

This exception is novel and untested, and we would encourage the Scottish Government to be clearer about where they see the parameters of this exception sitting and to draft the equality clause in an ambitious way which maximises the potential for this exception.

We recommend that, in particular if a direct treaty approach is followed, then it is supplemented with clear guidance materials which refer directly to General Comment 20 in order to clarify what is meant by discrimination.

Clear links should be drawn within guidance materials between the pursuit of substantive equality and the procedural duties which direct duty-bearers to the equality treaties in order to interpret ICESCR rights and the right to a healthy environment for those protected groups, alongside what can lawfully be achieved

⁶¹ Schedule 5, Part II, section L2

under the positive action provisions, the PSED and the Fairer Scotland Duty within the Equality Act 2010, to its maximum potential.

Q15. How do you think we should define the groups to be protected by the equality provision?

Our position on the proposal

Whichever model is followed, the exception to the equal opportunities' reservation should be used to its maximum potential to ensure that the Bill protects, respects and fulfils the rights of all, paying particular regard to those who face the most significant barriers (**IO 1 and 2**).

One approach, which retains the connection with international human rights law, might be to frame the equality clause along the same lines as Article 2 ICESCR which protects on the basis of the following characteristics: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

However, it is important to acknowledge that Article 2 does not name all of those who will be otherwise given express protection under the Bill, as discussed above in relation to the definitions under ICERD and CRPD.

This risk could be partially mitigated through the proposal to interpret the rights in light of General Comments. General Comment 20 explains that additional grounds are commonly recognized when they reflect the experience of groups that have suffered and continue to suffer discrimination and marginalisation.⁶² It provides a non-exhaustive list of examples of 'other status' which includes disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social situation.⁶³ Other possible prohibited grounds referenced within the General Comment include the denial of a person's legal capacity because he or she is in prison, or involuntarily interned in a psychiatric institution, or due to the intersection of two or more prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.⁶⁴

Additional recommendations

We appreciate the difficulties in navigating the equal opportunities reservation within the Scotland Act 1998, as amended.⁶⁵ We understand this to mean that the Scottish Parliament can encourage equal opportunities, but not prohibit or regulate them. However, we understand that the Scottish Parliament is empowered – notwithstanding the general reservation of equal opportunities – to legislate on equalities in relation to the devolved functions of public authorities, so long as the legislation supplements and does not contravene the Equality Act 2010.

⁶² Para 27

⁶³ Para 28 - 35

⁶⁴ Para 27

⁶⁵ Schedule 5, Part II, section L2

We recommend that if a direct treaty approach is followed, then it is supplemented with clear guidance materials which refer directly to General Comment 20 in order to clarify who is covered by this provision.

An alternative approach, through a transposition model would be to use general comments from across the four treaties to create a non-exhaustive list of protected groups on the face of the Bill, with a power to add protected characteristics by regulations, along the lines of that found in s. 12 Hate Crime and Public Order (Scotland) Act 2021. This approach would provide clarity for those not named within the four treaties, building a human rights culture **(IO 2)** empowering those most at risk **(IO 6)**, supporting legal certainty **(IO 8)**, allow flexibility to keep step **(IO 5)** and support an intersectional approach **(IO 10)**.

Q16. Do you agree or disagree that the use of ‘other status’ in the equality provision would sufficiently protect the rights of LGBTI and older people?

As outlined above, the ‘other status’ may ultimately and indirectly afford protection for older people and LGBTI people amongst other marginalized groups. However, naming the groups who face the greatest barriers on the face of the Bill would place the matter beyond dispute, affording greater legal certainty and removing a potential barrier to accessing justice.

Q17. If you disagree, please provide comments to support your answer.

We refer to our responses to questions 16 and 17.

Q18. Do you think the Bill framework needs to do anything additionally for LGBTI or older people?

The Scottish Government should be led by the views of civil society organisations who represent groups who are not specifically listed within Article 2, for example disabled people, LGBTI people, older age groups, and Care Experienced people as a direct treaty model as currently framed would not result in specific naming of these groups on the face of the Bill. There could be significant benefit in these groups being visible in the Bill given the particular consideration needed to address barriers to their rights.

We understand that Equality Network is calling for an explicit reference to LGBTI people on the face of the Bill, beyond ‘other status’ on the basis that *‘anything less than full inclusion would seem to be creating a hierarchy of rights where there is some ambiguity as to who has the protection of this Bill.’* They have also emphasised that reference to sexual orientation, gender identity, trans status, gender reassignment and intersex status/ variations in sex characteristics must be appropriately defined within guidance where ‘LGBTI’ is named. To not do so will leave communities vulnerable to having their human rights left unrealised. We agree and support these calls.

As referenced in our response to Question 4, SHRC has identified⁶⁶ that, in the absence of a specific treaty for LGBTI people, additional protections could include: *the right of “LGBT+” people to freely live and manifest their sexual orientation and gender identity, the right of LGBT+ people to live a dignified life that is free from violence, hatred and discrimination of any type, the right of “LGBT+” people to live in an environment where their civil, political, economic, social and cultural rights can be fully realised.*

We understand that disabled people’s organisations will be calling for ‘disability’ to be a named characteristic in the equality clause and we agree and support this call.

We also acknowledge that Who Cares? Scotland and Together have called for the Bill to explicitly recognise that Care Experience is a lifelong characteristic which can present barriers in realisation of rights throughout a person’s lifetime. The Guidelines for the Alternative Care of Children⁶⁷ recommend that States, agencies and facilities, schools and other community services should take appropriate measures to ensure that children in alternative care are not stigmatised during or after their placement.⁶⁸ Agencies and facilities should have a clear policy and should carry out agreed procedures relating to the planned and unplanned conclusion of their work with children to ensure appropriate aftercare and/or follow-up.⁶⁹ However, this focus on the experience as Care Experienced children does not address the lifelong impact of Care Experience.

We refer to the recent report on the protection of Care Experienced People’s Rights in the Scottish Human Rights Bill.⁷⁰ The report emphasises the lifelong impact of Care Experience and its impact on people’s earnings, opportunities, and reliance on public services across their lives.⁷¹ Leaving it for the Courts to determine whether ‘Care Experience’ falls within ‘other status’ would place an unnecessary and unfair burden on Care Experienced people. Explicit inclusion would put the issue beyond doubt.⁷² The UN has recognised that “*the current international legal framework remains fragmented and incomplete to address specific protection gaps for older*

⁶⁶ Scottish Human Rights Commission (2022) Building a new human rights framework for Scotland: Key legal features para [3.7.1](#)

⁶⁷ Adopted by [Resolution of the General Assembly](#) on 18th December 2009 A/RES/64/142

⁶⁸ Ibid, Para 95

⁶⁹ Ibid. para 131

⁷⁰ Who Cares? Scotland and HRCS (2023) [the protection of Care Experienced People’s Rights in the Scottish Human Rights Bill](#)

⁷¹ E.g., Care Experienced people in Scotland are: Almost twice as likely to have poor health, More than twice as likely to have experienced homelessness, Over twice as likely to have no educational qualifications and less than half the chance of having a degree, Over one and a half times more likely to have financial difficulties, Over one and a half times more likely to experience severe multiple disadvantage (homelessness, substance use, mental health, offending)

⁷² The report also discusses other ways in which Care Experienced people can have their rights more effectively implemented. These include; recognising the needs of Care Experienced people in the public authority guidance for the implementation of the Bill, recognition through international law and the Bill’s human dignity clause and recognition in the Human Rights Scheme, the Scottish Government’s National Performance Framework, and other targets.

*persons to enjoy their human rights.*⁷³ The Open Ended Working Group on Ageing has been mandated to address gaps in the existing international framework and to develop proposals for a legally binding instrument to strengthen the protection of the human rights of older persons. The Bill should offer a sufficiently flexible framework whereby any future treaties on the rights of older persons could be swiftly incorporated. In the meantime, as discussed in Q4, specific rights for older people could be drawn from the United Nations Principles for Older Persons. Naming 'older persons' in the equality clause may also be of benefit, if accompanied by clear guidance on interpretation.

The Consultation has not so far explored these options for protecting, respecting and fulfilling the rights of older people, disabled people, LGBTI people and Care Experienced people. We invite the Government to engage fully with rights holders with lived experience and to consider the full potential of the exception to the reservation on equal opportunities in this regard.

Part 7: the duties (Q 19 – 26)

Q19. What is your view on who the duties in the Bill should apply to?

Our position on the proposal

Our starting point is that the duties should apply to public bodies and those carrying out public functions in relation to devolved functions, to the maximum possible extent within the devolution settlement. The purpose of this is to enable rights holders to hold private actors to account for human rights violations (**IO 1**). It must be clear to duty bearers and rights holders which public and 'hybrid' bodies are covered and when they are covered (**IO 8**). Effective accountability will require coherence, so the new duties must be complementary to existing duties.

The Committee on Economic, Social and Cultural Rights⁷⁴ has made clear that protecting rights means that States Parties:

- effectively safeguard rights holders against infringements of their economic, social and cultural rights involving corporate actors, by establishing appropriate laws and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations;
- ensure access to effective remedies to victims of corporate abuse of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means;
- take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.

⁷³ <https://www.ohchr.org/en/older-persons>

⁷⁴ Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights 20th May 2011 E/C.12/2011/1

Further clarity needed

The UNCRC (Scotland) Bill,⁷⁵ (as amended) defines ‘public authority’ as any person whose functions are of a public nature, including functions carried out under a contract or other arrangement with a public authority. A person is not a public authority if the nature of the act is private, but functions are not excluded solely because they are not publicly funded.⁷⁶ It is unlawful for a public authority to act or fail to act, in connection with a ‘relevant function,’ in a way which is incompatible with the UNCRC.

In response to the UNCRC judgement at the Supreme Court, ‘Relevant function’ will now be amended⁷⁷ to limit the scope to (i) functions that could competently be conferred on the public authority in question by the Scottish Parliament, and (ii) only functions which are conferred by common law (in devolved areas) or by enactment enacted by the Scottish Parliament, or enacted by virtue of the Scottish Parliament delegating its power to make legislation.

Clause 6 (1C) provides that the action or failure is not unlawful if the public authority was required or entitled to act in the way it did by enactments, or words inserted by enactments, made by or under the authority of the UK Parliament.

This definition has attempted to address some of the gaps that have emerged over time under s.6 Human Rights Act 1998.⁷⁸ Whilst we appreciate the reasons why Clause 6 had to be amended, we are concerned that it will become even harder for rights holders to navigate and to understand whether a hybrid body operating in Scotland can be held to account for rights violations under the new Bill in fields such as security and prisoner transport, child care provision, social care provision, health and environmental protection.

We agree with HRCS that: *People should be able to expect their human rights to be respected, protected and fulfilled by every public body, whether or not it is within devolved or reserved competence. This is particularly true because people do not always know whether the public body they are dealing with is Scotland-only or UK wide.*

Additional recommendations

The current case law on ‘exercising a public function’ under the HRA is restrictive and unclear. It is essential that the new Bill provides clarity on whether private actors providing public functions have an obligation to respect, protect, and fulfil human rights. It must be clear both to duty bearers and rights holders.

One approach towards achieving clarity about ‘who is covered’ would be to have a schedule, which could be amended by secondary legislation, setting this out in more detail, following the approach of the Freedom of Information Act 2000 and the

⁷⁵ Clause 6

⁷⁶ Clause 6 (3A) (3B) and (4)

⁷⁷ See [Scottish Parliament website](#) for full explanation

⁷⁸ See, for example *Ali v Serco* [2019] CSIH 54 and *YL v Birmingham City Council* [2008] 1 AC 95

Equality Act 2010. The definition must also translate in the context of the right to a healthy environment, where most polluters are private bodies, having regard to the Aarhus definition of public authority,⁷⁹ which includes legal persons having public responsibilities or functions, or providing public services, in relation to the environment under control of the state.⁸⁰

Alternatively, there should be statutory guidance which clearly explains the statutory definition and lists the factors to be taken into account in determining whether the body is exercising a public function.

Consideration should also be given to necessary amendments to procurement legislation as well as model services contracts to build in a shared understanding that the private body is under an obligation to protect, respect and fulfil human rights, to mitigate business impacts on human rights.⁸¹

Q20. What is your view on the proposed initial procedural duty intended to embed rights in decision making?

Our position on the proposal

We support the proposal that duty-bearers will have to actively consider the rights in the CERD, CEDAW and CRPD when delivering services – such as housing, social care or social security. However, we have some concerns regarding the procedural duty.

Further clarity needed

The Scottish Government must define the term ‘procedural duty’ to remove barriers for responders in participating meaningfully in the consultation process. The Taskforce used the term ‘due regard,’ which is not mentioned within the Consultation. It is unclear whether this is a question of semantics or deliberate step away from the Task Force recommendation. **(IO 8).**

We are unclear how the procedural duty would be scrutinised and enforced, which body would have oversight, and crucially whether it would be justiciable by rights holders **(IO 6 and 7).**

Additional recommendations

A ‘due regard’ formulation could have the advantage of having meaning in Scots law, which is understood, at least by public bodies and the Courts⁸² **(IO 8).** Public Sector Equality Duty in

An alternative formulation might be ‘to have regard’ or to ‘take into account,’ but these would appear to be weaker formulations. We would encourage the

⁷⁹ Aarhus Convention, Article 2 (2)

⁸⁰ See for example, the ICO findings on E.ON UK- Available at <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617169/fer0678164.pdf>

⁸¹ We acknowledge the work of McCall-Smith, K and Paduano, C (2023) University of Edinburgh ‘How can the forthcoming Scottish Human Rights Bill best address the issues arising in the context of Business and Human Rights (unpublished)

⁸² Under the Equality Act 2010

development of the form and substance of the ‘procedural duty’ to be informed by the shared learning from the PSED review.⁸³ This work is complementary to the incorporation project and must not be de-prioritised. Consideration should be given to formulation of ‘specific duties’ to support compliance with the procedural duty.

The Consultation paper states that in relation to ICESCR and the right to a healthy environment, the procedural duty would be ‘initial’ and would ‘move to’ a ‘subsequent’ duty to comply. This approach implies that the procedural duty in these areas, would fall away and be replaced by the duty to comply over time.

We understand the rationale for this approach to be that procedural duties are embedded within the duty to comply, for example there are procedural aspects of the duty to take steps to progressively realise the rights under ICESCR including adoption of legislative and policy measures. Part of the difficulty in assessing this justification is the lack of detail around how the procedural duty will be framed and enforced. Once these points are clarified, it should become clearer whether or not it will add anything to the procedural aspect implied within compliance with ICESCR, to ensure that ICESCR and the right to a healthy environment are truly embedded in decision making processes.

In the meantime, we support the Taskforce recommendation that these duties should be complementary and mutually reinforcing, in line with a maximalist approach **(IO 1)**.

“The reasoning behind this suggested approach is to provide clarity for duty-bearers that the framework includes both obligations of conduct or process, as well as those of result or outcome. Together the duties may ensure proactive rights-based decision-making that could better meet rights-respecting outcomes for people.”⁸⁴

The ultimate aim of ICESCR is to ensure the full and equal enjoyment of the rights recognised therein in conditions that advance human freedom and dignity for all.⁸⁵ Parties must ensure that ‘everyone has access to the resources and services they need to live a life of dignity, and they must also eliminate the conditions that perpetuate systemic patterns of inequality preventing people from participating as equals in all spheres of society’. Imposing complementary and mutually reinforcing duties would appear to be the most robust way of achieving these aims and emphasising the need for structural and systemic change to tackle disadvantage. **(IO 1)** and to ensure coherence and legal certainty for rights holders **(IO 8)**.

The Bill must be accompanied by an extensive capacity building programme. It is essential that duty bearers are given sufficient financial and practical resource including clear guidance to ensure that these duties will make a tangible difference to the lives of all people in Scotland, especially those whose rights are most at risk **(IO 1 and 2)**.

Q 21. What is your view on the proposed duty to comply?

⁸³ Public Sector Equality Duty – operation review: [consultation analysis](#) (2022)

⁸⁴ National Taskforce for Human Rights Leadership Report p 38

⁸⁵ Committee on Economic, Social and Cultural Rights (2019) The pledge to leave no one behind, E/C.12/2019/1, para 9

Our position on the proposal

We emphasise that whichever model of incorporation is adopted, the Bill must: adopt a maximalist approach (**IO 1**), result in tangible improvements for rights holders (**IO 2**), keep step with developments in international human rights (**IO 5**) and ensure legal certainty (**IO 8**).

We agree that all public bodies and private actors exercising public functions should be given a duty to comply with rights in the Bill. It is crucial that this includes delivering MCOs and demonstrating progressively realising rights.

Further clarity needed

Firstly, we are unclear why the term ‘duty to comply’ was used, as opposed to more recognisable language of rights such as the ‘duty to act compatibly’ or to ‘guarantee the rights.’⁸⁶

In relation to the special protection treaties, we are not clear on the reasoning behind the decision not to include a duty to comply, insofar as possible within devolved competence.

This approach does not accord with the maximalist approach (**IO 1**) and will limit the opportunities to see tangible improvements in the lives of rights holders (**IO 2**) whose remedies will be more limited in relation to the procedural duties (**IO 6**). A ‘dual duty’ approach would also have the benefit of being clearer for rights holders and duty bearers (**IO 8**).

Additional recommendations

In relation to the special protection treaties, we recommend that further consideration should be given to a duty to comply, as far as possible within devolved competence, in line with the maximalist approach (**IO 1**). In doing so, it will be important to revisit the decision not to make reference to civil and political rights on the face of the Bill as many of the rights within these treaties, whilst being within devolved competence, do relate to civil and political rights, such as liberty and security (Article 14 CRPD), measures relating to political and public life (Article 7 CEDAW) and equal rights in relation to marriage, property and inheritance (Article 5 ICERD). If these were to be removed or watered down, alongside articles relating to reserved areas, it would undermine the interrelatedness and interdependence of rights and would not be in line with a maximalist approach.

We appreciate the difficulties in navigating the equal opportunities reservation within the Scotland Act 1998. We understand this to mean that the Scottish Parliament can encourage equal opportunities, but not prohibit or regulate them. However, we understand that the Scottish Parliament is empowered – notwithstanding the general reservation of equal opportunities – to legislate on equalities in relation to the

⁸⁶ E.g., s.6 Human Rights Act 1998 and s.6 UNCRC (Scotland) Bill

devolved functions of public authorities, so long as the legislation supplements and does not contravene the Equality Act 2010.⁸⁷

Whilst we support a procedural duty, without a duty to comply, there will be more limited opportunities to see tangible improvements in the lives of rights holders (**IO 2**) whose remedies may be more limited in relation to the procedural duties (**IO 6**). We appreciate the efforts of the Scottish Government to navigate the equal opportunities exception and to find a model which reduces the risk of legal challenge. However, we would encourage the Government to adopt a maximalist approach by scrutinising the special protection treaties to see what further protections could be specifically guaranteed within the duty to comply.

CRPD

The CRPD Committee has raised concerns about the insufficient incorporation and uneven implementation of the Convention across all policy areas and levels within all regions including the devolved governments.⁸⁸ The Committee has recommended incorporation of the Convention into its legislation, recognising access to domestic remedies for breaches of the Convention, and adopting an appropriate and comprehensive response to the obligations enshrined in the Convention in its policies and programmes across the State party, including all devolved governments.⁸⁹

The Committee has made specific recommendations relevant to Scotland, and incorporation of CRPD may provide additional impetus for progress in these areas, which include:

- adopting a strategic and measurable plan of action for improving the living conditions of all persons with disabilities (para 9);
- addressing levels of poverty in families with children with disabilities (para 21);
- Strengthening measures to prevent bullying, hate speech and hate crime against children with disabilities (para 21);
- Identifying gaps in accessibility standards (para 25);
- Addressing barriers faced by disabled people in the justice system (para 13);
- Recognition of the right to independent living (para 44).

One of the aims of the Scottish Mental Health Law Review⁹⁰ was to recommend reforms required in light of human rights considerations including CRPD. If this can be done on a voluntary basis within devolved competence, it is unclear why there could not be a duty to comply with all devolved aspects of CRPD.

⁸⁷ See Busby, N (2020) The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW

⁸⁸ CRPD/C/GBR/CO/1 (2017) Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, para 6

⁸⁹ Ibid, para 7 (a)

⁹⁰ Available at:

<https://webarchive.nrscotland.gov.uk/20230327160310/https://www.mentalhealthlawreview.scot/>

We are concerned that limiting incorporation of CRPD to a procedural duty would undermine the spirit of the Convention which aims to identify and eliminate barriers faced by disabled people. We emphasise that not being a disabled person is not a protected characteristic, which affords greater breadth in what can be achieved for disabled people in terms of the equal opportunities' reservation.

CRPD contains substantive rights for disabled people in, at least partially, devolved areas including, but not limited to:

- Article 5 Equality and non-discrimination including the requirement to make 'reasonable accommodation'
- Article 7(3) Participation of disabled children
- Article 9 The right to accessibility of the physical environment transportation, information and communication, and services open to the public
- Article 11 Situations of risk
- Article 12 Equal recognition before the law
- Article 13 Access to justice
- Article 14 Liberty and security of the person
- Article 16 Freedom from exploitation
- Article 17 The right to respect for physical and mental integrity.
- Article 19 The right to live independently and be included in the community
- Article 20 Personal mobility
- Article 24 Inclusive education
- Article 26 Habilitation and Rehabilitation

Overall, we support incorporation of CRPD to the maximum extent possible, ideally by applying a procedural duty as well as a duty to comply, in particular in relation to as many of the substantive rights as possible including the right to independent living, access to justice, personal mobility and to habilitation and rehabilitation.

CEDAW

The CEDAW Committee has raised concerns about the fragmented and uneven legislative framework on the rights of women and girls in the UK. The Committee has recommended that the UK should reinforce its human rights framework across its territory, including by incorporating the Convention into its national law, and to utilise the Convention as a strategic mechanism for empowering women.⁹¹

The Committee has expressed concern regarding the lack of systematic collection of data, disaggregated by sex, gender, ethnicity, disability and age, in particular with regard to intersecting forms of discrimination, to identify areas in which women lack substantive equality with men, inform policymaking and assess the impact of

⁹¹ Committee on the Elimination of Discrimination Against Women (2019) Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland, CEDAW/C/GBR/CO/8 para 9

measures taken.⁹² Incorporation of CEDAW, alongside the other three treaties, with robust procedural duties may encourage public bodies to take steps to better understand and address intersecting forms of discrimination.

The CEDAW Committee has identified issues of particular concern in Scotland and incorporation could prompt more robust action to tackle these, including the rate of imprisonment of women.⁹³

Incorporation of CEDAW has the potential to enhance and move beyond the formal equality provisions of the Equality Act. The central purpose of CEDAW is:

*to eliminate all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms. States parties to the Convention are under a legal obligation to respect, protect, promote and fulfil this right to non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of de jure as well as de facto equality with men.*⁹⁴

The availability of 'temporary special measures' within Article 4 CEDAW is central to achieving this purpose. Procedural duties, working alongside a duty to comply in devolved areas of CEDAW would encourage public bodies to proactively take steps to achieve substantive equality of outcome and to address how the development and advancement of women can be achieved. The Bill presents an opportunity to build on the formal equality model and work towards substantive equality, using both existing frameworks under the Equality Act (such as positive action, the Fairer Scotland Duty and the PSED) alongside the new toolkit of powers and duties under the Bill.

Whilst we acknowledge that substantial areas of CEDAW are within reserved competence, there are some important areas of rights protection which could be protected at least partially within devolved competence. These include, but are not limited to equal rights in the following fields:

- Article 5: modification of social and cultural patterns of conduct and family education
- Article 6: suppression of all forms of trafficking⁹⁵
- Article 7: political and public life
- Article 10: education
- Article 11: employment in relation to 1c) vocational training and 2c) provision of childcare
- Article 12: health
- Article 13: economic and social benefits
- Article 14: rural women and disadvantaged groups
- Article 15: civil law, access to courts and tribunals

⁹² Ibid, para 25

⁹³ Ibid, para 57

⁹⁴ Committee on the Elimination of Discrimination against Women, General recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, para 4

⁹⁵ Which may become more critical in light of the impact of the Illegal Migration Bill on Scottish anti-trafficking legislation

- Article 16: marriage and family relations

Overall, we support incorporation of CEDAW to the maximum extent possible, ideally by applying a procedural duty as well as a duty to comply.

In order to effectively robustly tackle gender -based violence in a holistic way, the Government should also give consideration to the benefits of incorporating the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), which was ratified by the UK Government on 1st November 2022.

ICERD

The overarching purpose of ICERD is to eliminate racial discrimination in all its forms and manifestations, to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination, and to combat racial discrimination through practical measures.⁹⁶

The Committee on the Elimination of Racial Discrimination has recommended that the UK and devolved governments ensure that “*the principles and the provisions of the Convention are directly and fully applicable under domestic law.*”⁹⁷ The need for access to justice in the UK has also been emphasised by the Committee.⁹⁸

Other specific issues raised by the Committee, applicable in Scotland, include:

- systematically collecting and publishing disaggregated data on the enjoyment of rights by members of ethnic minorities in all fields of life (para 14);
- taking more robust measures to tackle hate crime (para 16);
- fair and effective access to legal aid to seek justice (para 21);
- reviewing the impact of stop and search powers on persons belonging to “visible ethnic minority groups,” and take effective measures to ensure that such powers are used in a lawful, non-arbitrary and non-discriminatory manner on the basis of reasonable suspicion, with rigorous monitoring and review mechanisms (Para 27).

We are aware it has been argued that the framework including the Equality Act (and the PSED in particular) as well as the Race Equality Framework Action Plan offers a similar level of protection as there would be under incorporation of ICERD.

However, we support incorporation as a means of encouraging progress towards substantive equality, as required through positive obligations within ICERD, and providing new levers and tools for accountability and enforcement, arising from Articles 6 and 7 in particular. We would hope, in particular, that incorporation of ICERD will embed systemic collection and disaggregation of equalities data.⁹⁹

⁹⁶ ICERD preamble

⁹⁷ ICERD/C/GBR/CO/21-23. Para 8

⁹⁸ Ibid, para 21

⁹⁹ EHRC Is Scotland Fairer? 2018 p5

Whilst we acknowledge that some areas of ICERD are within reserved competence, there are some important areas of rights protection which could be protected at least partially within devolved competence. These include, but are not limited to the following fields:

- Article 3: condemning racial segregation
- Article 4: criminal offences around dissemination of ideas based on racial superiority and incitement of racial hatred
- Article 5: equal rights e.g., in relation to marriage, property and inheritance, economic, social and cultural rights, housing, health, education, cultural activities, public life
- Article 6: effective remedies
- Article 7: combating prejudice, particularly in the fields of teaching, education, culture and information

We support incorporation of CEDAW to the maximum extent possible, ideally by applying a procedural duty as well as a duty to comply.

Further comments

Overall, we advocate for the duty to comply and the procedural duty to apply in tandem to all rights in the four treaties that fall within devolved competence. For this to operate successfully in either model of incorporation, there will need to be clear and accessible information to clarify which rights are substantive, enforceable by individuals and within devolved competence (**IO 1, 8 and 6**).

Whichever form the duties ultimately take, implementation must be informed by the input of rights holders, especially those whose rights are most at risk, as well as robust mechanisms of accountability and a range of remedies, discussed further below, to ensure that incorporation leads to tangible change for rights holders (**IOs 7 and 2**).

We accept that the short -term priority following commencement of the Bill, should be to introduce the procedural duty as soon as possible, followed by a duty to comply ideally within 2 years.

Public bodies will need clear guidance on what the duty entails, the specific requirements, alongside adequate resourcing to ensure they are ready to comply in time for the sunrise clause.

Q22. Do you think certain public authorities should be required to report on what actions they are planning to take, and what actions they have taken, to meet the duties set out in the Bill?

Our position on the proposal

We support proposals for a reporting duty within the Bill, as an important aspect of accountability (**IO 7**).

Accountability can be defined from a human rights perspective as referring to the relationship of Government policymakers and other duty bearers to the rights holders

affected by their decisions and actions.¹⁰⁰ It has three constituent elements- responsibility, answerability and enforceability.

Responsibility requires that those in positions of authority have clearly defined duties and performance standards, enabling their behaviour to be assessed transparently and objectively.

Answerability requires public officials and institutions to provide reasoned justifications for their actions and decisions to those they affect, including the public at large, voters who invest public officials with authority and institutions mandated to provide oversight.

Enforceability requires public institutions to put mechanisms in place that monitor the degree to which public officials and institutions comply with established standards, impose sanctions on officials who do not comply, and ensure that appropriate corrective and remedial action is taken when required.

We agree with SHRC that: *“for accountability to be effective, there must be suitable laws, policies, administrative procedures, redress mechanisms and effective remedies in order to secure human rights. Accountability also requires transparency and effective monitoring of human rights standards.”*¹⁰¹

Further clarity needed

It is also essential to consider which bodies this duty should apply to, and ensuring flexibility to add, remove or amend bodies.¹⁰² One approach might be to list these in a schedule, using the format of the Scotland specific duties under the Equality Act.¹⁰³ This would also present an opportunity to identify which bodies will be covered by both the PSED and the new reporting duties.

The proposals are unclear as to how, and by whom, the reporting duties would be monitored and enforced.

Additional recommendations

Reporting duties must also be accompanied by robust monitoring and enforceability mechanisms to ensure that this exercise results in genuine answerability and enforceability as well as embedding a human rights culture (**IO 7 and 2**). This presents a further opportunity for participation (**IO 9**) by including people whose rights are most at risk when developing guidance on reporting requirements.

It is an essential aspect of answerability that duty bearers¹⁰⁴ under the new legislation must be required to report on what actions they are planning to take, and what actions they have taken, perhaps building on the model under the UNCRC Bill.

¹⁰⁰ OHCHR: Who will be accountable? Human rights and the post – 2015 development agenda, p10

¹⁰¹ Scotland’s Second Human Rights National Action Plan: <https://www.snaprights.info/snap-2>, page 13

¹⁰² Clause 16 (2) UNCRC (Scotland) Bill

¹⁰³ EHRC: [Public authorities in Scotland: who is covered by the Specific Duties under the Public Sector Equality Duty?](#)

¹⁰⁴ Principles 17-21, Guiding principles on business and human rights, Protect, Respect and Remedy Framework A/HRC/17/31

However, clarity is needed over who scrutinises the reports, or holds public bodies to account where they fall short. The reporting duty should be accompanied by an effective monitoring process.

In designing monitoring and scrutiny processes, it is essential that regard is had to the reporting duties under the UNCRC Bill as well as the role of EHRC in monitoring and regulating the PSED to avoid overlap, ensure consistency of approach and minimise the need for duplication. This could be supported through clear guidance for public bodies.

As proposed by HRCS, Consideration should be given to a Scottish Parliament reporting duty, mirroring the approach taken in the UNCRC Bill.¹⁰⁵

Q23 How could the proposed duty to report best align with existing reporting obligations on public authorities?

We refer to our response in Q22. Specifically, in designing monitoring and scrutiny processes, it is essential that regard is had to the reporting duties under the UNCRC Bill as well as the role of EHRC in monitoring and regulating the PSED to avoid overlap, ensure consistency of approach and minimise the need for duplication. This could be supported through clear guidance for public bodies.

Q24. What are your views on the need to demonstrate compliance with economic, social and cultural rights, as well as the right to a healthy environment, via MCOs and progressive realisation?

Our position on the proposals

We agree with the proposal that the duty to comply with the economic, social, and cultural rights and the right to a healthy environment set out in the Bill should require duty-bearers in Scotland to deliver a minimum core of the right.

This requirement should operate in tandem with the requirement for duty-bearers to progressively realise the right, beyond the minimum core, which must be spelled out on the face of the Bill.

MCOs must remain a minimum 'floor' of realisation and must not become a 'ceiling.' here must also be a clear 'non-retrogression' principle on the face of the Bill.

Further clarity needed

The Consultation proposes a participatory approach for defining what falls within the minimum core of each right but beyond that there is a need for further clarity around the proposed process.

Additional recommendations

¹⁰⁵ Clause 16B

In pursuit of the IOs of legal certainty and the need to establish a floor, not a ceiling (**IOs 8 and 4**), before consideration of MCOs, it is important to note that the Committee has been clear¹⁰⁶ that the Covenant imposes various obligations which are of immediate effect. Whilst it is important to recall that these relate to the time period immediately after entry into force for the state concerned (1976 in the case of the UK), the distinction remains a useful one in the context of incorporation. There is an immediate obligation (i) to guarantee that relevant rights will be exercised without discrimination, and (ii) to take deliberate, concrete and targeted steps with a view to achieving progressively the full realisation of the rights recognised.

In addition, there are a number of provisions which are capable of immediate application by judicial and other organs. These include:

- Article 3: equality between men and women
- Article 7: (a) (i): equal pay for work of equal value
- Article 8: trade union rights
- Article 10 (3): child protection
- Article 13 (2) (a): free, compulsory primary education
- Article 13 (3): parental choice in context of schooling
- Article 13 (4): liberty to establish and direct educational institutions
- Article 15: freedom to take part in cultural life and enjoy the benefits of scientific progress

It is also important to emphasise that any deliberately retrogressive measures would require the most careful consideration and justification and must be addressed in an effective and timely manner.¹⁰⁷

Turning to MCOs, being the minimum essential levels of each of the rights incumbent upon every State party, it is again important to emphasise that the duty to meet these obligations is not new and has been a requirement in the UK since 1976. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.¹⁰⁸

This process should take, as its starting point, the work of various committees through the General Comments.¹⁰⁹ SHRC has helpfully compiled a paper¹¹⁰ which collates in one single document the full range of minimum core obligations applicable to countries that have ratified the ICESCR. This document forms a useful starting point for developing further clarity on these in the Scottish context.

¹⁰⁶ Committee on Economic, Social and Cultural Rights General Comment No. 3: The nature of States parties' obligations E/1991/23

¹⁰⁷ *ibid*, para 11

¹⁰⁸ Committee on Economic, Social and Cultural Rights General Comment No. 3: The nature of States parties' obligations E/1991/23 para 10

¹⁰⁹ Scottish Human Rights Commission(2023), Minimum Core Obligations – The Practice of the UN Committee on Economic, Social and Cultural Rights

¹¹⁰ Scottish Human Rights Commission, (2023), Minimum Core Obligations – The Practice of the UN Committee on Economic, Social and Cultural Rights

In our view, here are key criteria for the next steps, as follows:

- The process should be rigorous, transparent and led by a credible independent body with sufficient expertise in ESCRs, through development of clear human rights indicators, benchmarks and targets, potentially linked to the Sustainable Development Goals and other international materials **(IO 7)**.
- There must be accessible and meaningful participation and engagement with duty bearers and rights holders including those whose rights are most at risk, as well as expert practitioners in their respective socio-economic public policy fields of education, health, housing, social protection etc. **(IO 9)**
- There must be recognition of the interdependence of these rights, in particular in relation to cultural rights, for example the right to culturally appropriate food and accommodation.¹¹¹
- There must be adequate participation in an ongoing review and monitoring process to ensure progressive realisation and non-retrogression and to ensure that the content of MCOs can be progressively adjusted over time¹¹² **(IO 7 and IO 6)**. In so doing it will be important to apply human rights consistent indicators, benchmarks and targets¹¹³ to measure progress which should be formulated and monitored using the proposed participatory approach and disaggregated data.
- The MCOs must be founded upon principles of non-discrimination **(IO 2.)**
- To maximise confidence in the system it will be important to have transparent, public scrutiny by a wide range of stakeholders including the Commission, Parliament and civil society. This should also be based on participatory methodologies embracing not just quantitative data but also testimony from the lived experience of rights holders in particular those whose rights are most at risk in Scotland **(IOs 9 and 7)**.
- There must be processes to ensure regular review of the progress, with parliamentary and independent scrutiny built in, in relation to MCOs and ‘re-setting’ them at intervals as progress is achieved.
- There must be effective remedies for failure to meet an MCO, to progressively realise a rights, and to address any retrogressive steps.

There must also be a clear link between the MCOs and approaches to budgeting to ensure that resources are allocated to urgently address areas of life in which human rights are most at risk in Scotland. There must be clear duties to make use of the maximum available resources to achieve equity, by targeting funding to improve lives of those whose rights are most at risk **(IO 2)**. These duties could be drawn from the work of the ESCR Committee, which has explained that this entails:¹¹⁴

- identifying those groups that are most marginalized and disadvantaged with respect to the enjoyment of Covenant rights,

¹¹¹ For more detailed analysis see Mitchell, L, Webster, E and Camps, D: [The Right to Cultural Life in Scotland](#), published by HRCS and Article 27

¹¹² HRCS has recommended this should be through a participatory process every 10 years

¹¹³ [OHCHR \(2012\) Human rights indicators - a guide to measurement and implementation](#)

¹¹⁴ Committee on Economic, Social and Cultural Rights (2019) The pledge to leave no one behind, E/C.12/2019/1, para 12

- analysing how public bodies own actions and omissions affect the realization of Covenant rights,
- adopting a participatory, all-inclusive, transparent national strategy and plan of action to advance the full realization of Covenant rights,
- analysing and taking measures to protect all persons against violations of Covenant rights by private parties such as corporations over which they can exercise jurisdiction,
- monitoring progress towards the full realization of Covenant rights and to take corrective measures to ensure that relevant legislation, policies and programmes are well targeted and effectively implemented.

Q25. What are your views on the right to a healthy environment falling under the same duties as economic, social and cultural rights?

Our position on the proposal

As outlined in our response to Q8, we agree with the proposed formulation of the substantive and procedural aspects of the right to a healthy environment, bringing Scots law into line with international standards **(IO 3)**.

Additional recommendations

As outlined in our response to Q4 and Q20 we are concerned by the indication that the procedural duty would be ‘initial’ and ‘moving towards’ a duty to comply which suggests that the procedural duty in relation to the right to a healthy environment would fall away. We reiterate the Taskforce recommendation that ultimately these duties should be complementary and mutually reinforcing. In addition, it is not clear how this formulation accords with the Consultation’s own proposal that there would be both procedural and substantive aspects to the right to a healthy environment.

Whilst we support the aims of embedding the right to a healthy environment alongside ESCRs, given the climate crisis, it is essential that the rights are immediately enforceable and are not considered to be subject to caveats such as progressive realisation and maximum available resources.

Q 26. What is your view on the proposed duty to publish a Human Rights Scheme?

Our position on the proposals

We agree that the publication of a Human Rights Scheme, potentially along a similar model to that within Clause 11 UNCRC (Scotland) Bill, would be a positive step towards achieving accountability **(IO 7)** and building a human rights culture **(IO 2)**.

Further clarity needed

The Consultation indicates that Human Rights Scheme could serve as a way for Scottish Ministers to publish their plans for implementation and report on progress. However, there is a need for further detail of the scheme's requirements and goals.

Additional recommendations

It is essential that the Human Rights Scheme should be shaped by contributions from people with lived experience and those whose rights are most at risk (**IO 9**), in order to achieve coherence as an aspect of accountability: (**IO 7**) and to be a building block in a human rights culture in Scotland (**IO 2**). The scheme could learn from, build on and align with, where possible, the approach taken in SNAP 2.

We support the HRCS recommendations that the Scheme should also include:

- requirements around improvements to data collection and publication;
- access to appropriate individual and collective independent advocacy (not only with regards to access to justice);
- provision of rights advice; inclusive communications;
- Scottish Minister's engagement with UK Ministers around human rights;
- provision of services aimed at rehabilitation from torture;
- the extent to which participation of people whose rights are most at risk is informing implementation of the Bill;
- emerging case law and interpretation of rights;
- timescale and plans to develop/review MCOs;
- plans or proposals to ensure access to justice is accessible, effective, timely, affordable and supportive;
- Human Rights Impact Assessments.

It could also present an opportunity to explore and review human rights budgeting measures to ensure that allocation of funding is non-discriminatory, and that additional funding is available for the benefit of historically marginalised and disadvantaged groups.

Part 8: ensuring access to justice for rights-holders

Our position on the proposals in Part 8 in general

We support the general approach of the Consultation which draws from the UN General Assembly basic principles and guidelines on remedies for serious international human rights violations,¹¹⁵ which require restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The Committee on Economic, Social and Cultural Rights has urged the UK to ensure that the Covenant is given full legal effect in its domestic law, that the Covenant rights are made justiciable, and that effective remedies are available for victims of all

¹¹⁵ OHCHR (2005) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

violations of economic, social and cultural rights.¹¹⁶ The committee references Article 8 of the Universal Declaration of Human Rights, according to which “*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*” and this is central to our consideration of this part of the Consultation.

The Committee elaborates that:

- Judicial remedies are not required in every case,
- Administrative remedies may be appropriate but they must be accessible, affordable, timely and effective,
- An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate,
- whenever a Covenant right cannot be made fully effective without some role for the judiciary, (for example in relation to discrimination) judicial remedies are necessary,
- there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimension,
- The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and inter-dependent,
- judicial training should take full account of the justiciability of the Covenant.

CRPD contains more specific requirements relating to access to justice (Article 13). A Thematic Report on access to justice¹¹⁷ emphasised that persons with disabilities require:¹¹⁸

- equal and effective access to justice (i.e., available and accessible complaint mechanisms, investigation bodies and institutions, including independent judicial bodies capable of determining the right to reparation and awarding redress);
- adequate, effective and prompt redress and reparation for harm suffered; and
- access to relevant information concerning violations and reparation mechanisms.

The Thematic Report made a number of recommendations, including that States should collect and analyse disaggregated data on human rights violations against persons with disabilities and on how the justice system is providing access to a fair trial and effective remedies.¹¹⁹

CEDAW Article 2 stipulates that States parties must take all appropriate measures to guarantee the substantive equality of men and women in all areas of life, including

¹¹⁶ Committee on Economic, Social and Cultural Rights Concluding Observations United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories 12th June 2009 E/C.12/GBR/CO/5

¹¹⁷ Thematic Report from the OHCHR to the Human Rights Council, 37th Session A/HRC/37/25 Right to access to justice under Article 13 of the Convention on the Rights of Persons with Disabilities

¹¹⁸ Ibid, para 43

¹¹⁹ Ibid, para 67

through the establishment of competent national tribunals and other public institutions, to ensure the effective protection of women against any act of discrimination.

Article 15 requires Parties to accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.¹²⁰

ICERD Article 5 provides that '*States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice.*'

ICERD Article 6 provides that '*States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.*

General Recommendation 26¹²¹ elaborates that the right to seek just and adequate reparation: "*is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.*"

Further clarity needed

We support the overarching goal that administrative as well as judicial remedies need to be accessible, affordable, timely and effective. However, there are areas of uncertainty within Part 8 which require fuller explanations and further information, in

¹²⁰ The CEDAW Committee has made a number of recommendations¹²⁰ including: Ensure that independent review, carried out in accordance with international standards, is available for all decisions by administrative bodies; Ensure that a decision rejecting an application is reasoned and that the claimant is able to appeal to a competent body against the decision, and that the implementation of any prior administrative decisions is suspended pending further judicial review; Put in place programmes, policies and strategies to facilitate and guarantee the equal participation of women at all levels in those specialized judicial and quasi-judicial mechanisms; To ensure that the composition and activities of NHRIs are gender-sensitive, facilitate women's access to individual petition processes within ombudsperson offices and national human rights institutions on a basis of equality and provide the possibility for women to lodge claims involving multiple and intersecting forms of discrimination; Provide national human rights institutions and ombudsperson offices with adequate resources and support to conduct research.

¹²¹ Committee on the Elimination of Racial Discrimination General recommendation 26 on Article 6 of the Convention 24th March 2000

order to facilitate meaningful participation in shaping and implementing the legislation. These include:

- More detailed proposals are needed on how the Bill will ensure that both judicial and administrative remedies are accessible, affordable, timely and effective. (See also specific areas of uncertainty identified under each question below.)
- How will public interest litigation will be supported through the provisions of the Bill?
- How will financial and practical barriers to access to justice under the Bill be addressed through policy and fiscal measures as well as legislative reform?
- How will the Government collect and analyse disaggregated data on human rights violations against people sharing protected characteristics, especially persons with disabilities as required by CRPD, and on how the justice system is providing access to effective remedies?
- Which Courts and Tribunals will be able to provide remedies to rights holders?
- How will administrative and judicial mechanisms for redress interact?
 - Will there be a choice for rights holders, or will they have to conclude administrative measures before taking a judicial challenge?
 - What will the time limits/ prescription periods be?
 - How will these time limits be effectively managed where there is an administrative/ complaint handling route ongoing?
 - What appeal rights will there be from complaints mechanisms?

Additional recommendations

Wider access to justice reforms are needed in the Scottish civil and administrative justice system in order to make sure that rights holders are able to access a remedy for a breach of their rights in practice, and we have expanded upon the need for some of these reforms in the rest of the questions in Part 8. What can be done on the face of the Bill is to ensure there is an express right to an accessible, affordable, timely and effective remedy, as a means by which gaps in access to justice can themselves be challenged.

Q 27. What are your views on the most effective ways of supporting advocacy and/or advice services to help rights-holders realise their rights under the Bill?

Our position on the proposals

Our starting point is that rights holders must be empowered by free and readily available access to information, advice, representation and independent advocacy where most needed (**IO 6 and 9**). The Thematic Report on access to justice¹²² emphasised that persons with disabilities require:¹²³ access to relevant information concerning violations and reparation mechanisms.

¹²² Thematic Report from the OHCHR to the Human Rights Council, 37th Session A/HRC/37/25 Right to access to justice under Article 13 of the Convention on the Rights of Persons with Disabilities

¹²³ Ibid, para 43

Further clarity needed

There is a need to distinguish between one to one and collective or group advocacy. It is also important to address the role of information, legal education, advice and representation as elements of effective access to justice. It will need to be clear to the public what the new duties mean and when they commence.

Additional recommendations

- Particular consideration should be given to the well-documented practical, emotional and financial barriers in taking individual or group cases to court ¹²⁴
 - There should be further analysis of who may benefit most from independent advocacy in order to prioritise resource,
 - The Bill should distinguish the right to independent advocacy on a one-to-one and a group basis,
 - Accompanying guidance should the role and remit of independent advocates in this context,
- Further and distinct consideration should be given to the role of access to information and legal advice and representation in implementing the Bill, as well as capacity building within the legal profession and the judiciary, to ensure that the profession and the courts are equipped to handle the complexity and volume of cases,
- The legal aid system must be fully resourced and equipped to meet demand under the new Bill. It is even more important that the results of the public consultation on legal aid in Scotland are used to inform robust improvements, ¹²⁵
- The Government must specifically consider and address the particular barriers faced by disabled people in accessing justice under existing mechanisms in Scotland in order to inform the access to justice provisions within this Bill and to meet the particular requirements of the CRPD,
- There is a need for greater clarity about which duties are justiciable under the new legislation, alongside education, training and guidance materials which clarify normative aspects of justiciability e.g., the circumstances in which it is appropriate for a court to intervene. For example, it is anticipated that there will be arguments that it is for public bodies to best decide how to allocate resources.
- It must be made clear that courts and tribunals can and must determine issues relating to: a breach of minimum core obligations, failure to progressively realise rights, and any retrogressive steps.

Q 28. What are your views on our proposals in relation to front-line complaints handling mechanisms of public bodies?

Our position on the proposals

As outlined above, rights holders, require adequate, effective and timely remedies. The Thematic Report on access to justice emphasised that persons with disabilities

¹²⁴ See Lived Experience Board, Block 2 (May 2022) [Long-form report](#)

¹²⁵ [Legal Aid Reform in Scotland: Scottish Government Consultation Analysis](#)

require:¹²⁶ available and accessible complaint mechanisms, adequate, effective and prompt redress and reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

Further clarity needed

The consultation paper does not offer a definition of ‘complaint handling mechanisms,’ or a list of those which will be included. There is no analysis of existing complaint handling routes and the experiences of rights holders within the current framework. Any reforms in this area should be informed by the reports of the Lived Experience Board and through a participative process having regard to the views of rights holders who have experience of navigating existing complaints mechanisms. **(IO 9).**

Additional recommendations

The CEDAW Committee¹²⁷ has also indicated that a decision rejecting an application should be reasoned and that the claimant is able to appeal to a competent body against the decision, and that the implementation of any prior administrative decisions is suspended pending further judicial review. This should be built into the operation of the legislation. The role and timescales involved in the complaints process in relation to overlapping judicial remedies and complaint handling bodies should be clear.

The range of remedies available through complaints handling mechanisms must be sufficiently broad to put things right for rights holders. **(IOs 8 and 6).**

Q 29. What are your views in relation to our proposed changes to the Scottish Public Services Ombudsman’s remit?

Our position on the proposals

Enforceability is an essential element of accountability.¹²⁸ **(IO 7)** which requires public institutions to put mechanisms in place that monitor the degree to which public officials and institutions comply with established standards, impose sanctions on officials who do not comply, and ensure that appropriate corrective and remedial action is taken when required.

The thematic Report on access to justice emphasised that persons with disabilities require:¹²⁹ available and accessible complaint mechanisms, investigation bodies and institutions, including independent judicial bodies capable of determining the right to reparation and awarding redress.

¹²⁶ Thematic Report from the OHCHR to the Human Rights Council, 37th Session A/HRC/37/25 Right to access to justice under Article 13 of the Convention on the Rights of Persons with Disabilities para 43

¹²⁷ Committee on the Elimination of Discrimination Against Women, General recommendation No. 33 on women’s access to justice, CEDAW/C/GC/33

¹²⁸ OHCHR: Who will be accountable? Human rights and the post – 2015 development agenda, page 10

¹²⁹ Thematic Report from the OHCHR to the Human Rights Council, 37th Session A/HRC/37/25 Right to access to justice under Article 13 of the Convention on the Rights of Persons with Disabilities para 43

It is a crucial aspect of effective access to justice **(IO 6)** that there are effective administrative complaint handling mechanisms open to rights holders which provide accessible, affordable, timely and effective remedies. The bodies tasked with complaint handling must be adequately resourced in terms of financing as well as expertise.

We do not take a position on which body or bodies should be tasked with this role, but it is essential that if there are overlapping remits and routes to remedy, this should be easy to navigate for rights holders, with clear and publicly available Memoranda of Understanding **(IO 8)**.

Further clarity needed

It would be useful to see analysis of the SPSOs existing remit and their capacity/expertise to take on an additional human rights remit. This could also analyse the overlapping remit with other bodies as well as how their proposed new powers would interact with the existing and new powers of SHRC, to avoid confusion for rights holders.

Any reforms in this area should be informed by the reports of the Lived Experience Board and through a participative process having regard to the views of rights holders who have experience of navigating SPSOs procedures. **(IO 9)**.

Additional recommendations

There should be sufficient publicly available and accessible information and advice to support rights holders to recognise when their complaint may raise a human rights issue under the Bill as well as signposting to ensure that their routes to remedy, and any relevant time limits, are clear. **(IOs 1 and 8)**.

Any complaints handling body with a human rights remit should be required by the new legislation to monitor complaints to identify systemic issues or repeat perpetrators and to raise concerns to SHRC.

Q 30. What are your views on our proposals in relation to scrutiny bodies?

Our position on the proposals

We assume that the majority of Scotland's existing scrutiny bodies would be considered public bodies under the Bill. They would therefore have a combination of procedural and substantive duties under the Bill and will have to build their capacity and expertise in these areas as a priority. Embedding human rights within the remit of scrutiny bodies would contribute towards building a human rights culture **(IO 1)**.

Further clarity needed

We are not clear which scrutiny bodies the proposals would apply to and how they would exercise these additional functions in practice.

Additional recommendations A publicly available mapping exercise would facilitate constructive, informed participation in this part of the consultation. Scrutiny bodies must be able to offer adequate, effective and prompt redress and reparation for harm suffered.¹³⁰

Q 31. What are your views on additional powers for the Scottish Human Rights Commission?

Our position on the proposals

We support proposals to extend the powers of SHRC in order to fully embed a human rights culture in Scotland. This should include the power to raise strategic litigation/public interest cases as a means of redress for systemic issues.

Additional recommendations

Consideration of additional powers should be informed by the Paris Principles.¹³¹ The SHRC has identified powers which are held by other NHRIs but not by the SHRC. These include:

- the power to raise proceedings in their own name (including interdicts);
- a broader inquiry power which might enable them to conduct an inquiry into a single body, as opposed to all duty bearers of that type;
- provision of advice and support to individuals;
- issuing binding guidance;
- to compel information, and
- to make unannounced visits.

Inclusion of the powers identified above within the SHRC's remit would greatly strengthen their role as human rights guarantor in Scotland. There is a need for further analysis of the comparative benefits of Scotland having an NHRI with quasi-judicial competence, being authorised to hear and consider complaints and petitions concerning individual situations, where cases are brought before it by individuals, their representatives, third parties, non-governmental organisations, associations of trade unions or any other representative organisations. Regard should be had to the additional Paris Principles which concern this competence, as follows:

(a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality,

¹³⁰ Thematic Report from the OHCHR to the Human Rights Council, 37th Session A/HRC/37/25 Right to access to justice under Article 13 of the Convention on the Rights of Persons with Disabilities para 43

¹³¹ <https://ganhri.org/paris-principles/>

(b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them,

(c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law; and

(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

As indicated above, the CEDAW Committee has also emphasised the importance of ensuring that the composition and activities of NHRIs are gender-sensitive, facilitate women's access to individual petition processes within ombudsperson offices and national human rights institutions on a basis of equality and provide the possibility for women to lodge claims involving multiple and intersecting forms of discrimination. We appreciate the need for careful navigation of the equal opportunities' reservation in this area.

The CEDAW Committee further emphasises that national human rights institutions and ombudsperson offices require to be provided with adequate resources and support to conduct research. It is essential that any extension to powers is proportionately reflected through additional resource and capacity.

Q 32. What are your views on potentially mirroring these powers for the Children and Young People's Commissioner Scotland where needed?

Our position on the proposals

We refer to our response to Q31. The Children and Young People's Commissioner Scotland should have their powers supplemented in parallel, in order to fully embed a human rights culture in Scotland. The two Commissions have a history of positive cooperation and there are already clear distinctions between their remits, given that CYCPS' role involves safeguarding the rights of under 18s only.

Additional recommendations

It is essential that any extension to powers is proportionately reflected through additional resource and capacity.

Q 33. What are your views on our proposed approach to 'standing' under the Human Rights Bill? Please explain.

Our position on the proposals

Overall, it is essential that people whose rights are at risk are able to access justice and accountability through the courts (**IOs 6 and 7**). We support proposals which will address the practical barriers in taking individual or group cases to the Court,¹³² and

¹³² See Lived Experience Board, Block 2 (May 2022) [Long-form report](#)

which will facilitate strategic litigation by civil society organisations representing the concerns of their stakeholders as well as by CYCPS and SHRC. The Human Rights Act approach requires ‘victim status,’ meaning that where the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if s/he is, or would be, a victim of that act.¹³³ This test is then disapplied in the case of the Equality and Human Rights Commission.¹³⁴ A similar legislative approach could be taken to empower CYCPS and SHRC in this regard. This model could also be considered for ‘Civil Society Organisations’ to clarify the circumstances in which they may be presumed to have sufficient interest, however there would need to be careful consideration given to how to define this term.

Further consideration will be needed to analyse the normative aspects of this approach and to build capacity. This is because some of the rights are framed as an individual right and in practice, may require evidence relating to at least one victim, in order to avoid the expense and delay involved in arguments that the case is ‘academic’ and cannot be evidenced.

Q 34. What should the approach be to assessing ‘reasonableness’ under the Human Rights Bill?

Our position on the proposals

Overall, it is essential that people whose rights are at risk are able to access justice and accountability through the courts (**IOs 6 and 7**). We also support proposals which will address the legal barriers in taking human rights challenges under the Bill¹³⁵ and which will facilitate strategic litigation by Civil Society Organisations representing the concerns of their stakeholders.

We acknowledge that within our judicial review system, there are already a variety of approaches to the intensity of review, including: Wednesbury unreasonableness, proportionality,¹³⁶ procedural impropriety¹³⁷ and ‘manifestly without reasonable foundation.’¹³⁸ In addition, there is some evidence of courts considering not just the procedure but also unfairness of outcome.¹³⁹ It may be that, given the range of issues which could be litigated under the new Bill, there will be a need for flexibility and a hybrid approach involving both procedural as well as substantive fairness.

The approach to procedural fairness could draw from the analysis of the CESCR to cases involving economic, social and cultural rights which considers the following:¹⁴⁰

- The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights,

¹³³ S.7 Human Rights Act 1998

¹³⁴ S.30 Equality Act 2006

¹³⁵ See Lived Experience Board, Block 2 (May 2022) [Long-form report](#)

¹³⁶ For example, in Article 8 immigration cases such as *GM (Sri Lanka)* [2019] EWCA Civ 1630

¹³⁷ For example *R. (on the application of Ireneschild) v Lambeth LBC* [2007] EWCA Civ 234;

¹³⁸ For example, in Article 14 cases involving a ‘suspect ground’ *Stec* (2006) 43 EHRR 74

¹³⁹ For example: *R (UNISON) v Lord Chancellor* [2017] UKSC 51

¹⁴⁰ Boyle, K, Scottish Human Rights Commission (2018) [Models of Incorporation and Justiciability for Economic, Social and Cultural Rights](#), see also [Committee on Economic, Social and Cultural Rights \(2007\) An evaluation of the obligation to take steps to the maximum of available resources under an Optional Protocol to the Covenant, E/C.12/2007/1 para 8](#)

- Whether discretion was exercised in a non-discriminatory and non-arbitrary manner,
- Whether resource allocation is in accordance with international human rights standards,
- Whether the State party adopts the option that least restricts Covenant rights,
- Whether the steps were taken within a reasonable timeframe,
- Whether the precarious situation of disadvantaged and marginalised individuals or groups has been addressed,
- Whether policies have prioritised grave situations or situations of risk, and
- Whether decision-making is transparent and participatory.

Q 35. Do you agree or disagree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders?

Further clarity needed

It is not clear from the Consultation which courts and tribunals will be able to grant which remedies. The Bill could follow the broad approach taken in relation to Human Rights Act jurisdiction and the UNCRC (Scotland) Bill, whereby a court or tribunal may grant such relief or remedy, or make such order, within its powers as it considers effective, just and appropriate.¹⁴¹ This would be accompanied by a duty on the Scottish Ministers to make regulations setting out the relief or remedies the court or tribunal may grant.¹⁴²

In doing so, it must be acknowledged that the remedies must be fit for purpose for the broader range of human rights issues which may now be litigated.

Q 36. If you do not agree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders, what additional remedies would help to do this?

There should be further exploration of the potential to embed a substantive right to a timely and effective remedy on the face of the Bill, supported by Article 8 UDHR as well as the international sources outlined above.

Rights holders should be able to bring proceedings, both in relation to procedural duties and duties to comply, and to rely upon the rights in other proceedings along the lines of s.7 HRA. There must be no increased barriers to raising a judicial review as a vital avenue for accountability, and time limits must realistically reflect the practical and financial barriers facing rights holders seeking to access a remedy.

The Taskforce recommended further consideration of targeted remedies which could address the need for non-repetition of the breach (such as structural interdicts).¹⁴³ We recommend that further consideration is given to the development of structural remedies including interdicts, within the full range of courts and tribunals in Scotland, as well as the proposal¹⁴⁴ that court procedures could be developed so that where tribunals identify a systemic issue affecting a number of cases, this could be referred

¹⁴¹ Clause 8 UNCRC (Scotland) Bill and the Human Rights Act 1998 (Jurisdiction) (Scotland) Rules 2000

¹⁴² Clause 7 (5) UNCRC (Scotland) Bill

¹⁴³ Taskforce Recommendation 25

¹⁴⁴ See Boyle, K, (2018), Models of Incorporation and Justiciability for Economic, Social and Cultural Rights, for the Scottish Human Rights Commission,

to the Court of Session which could then address the issue through structural remedies affecting a group of collective cases.

Consideration should also be given to the relative benefits of the Columbian system of ‘*accione de tutela*,’ which is a participative process seeking to include rights holders affected by an issue.¹⁴⁵

Minor, yet impactful, changes to our existing justice structures could be made to support the recognition that often in human rights cases, where the financial compensation may be at the lower end, an important aspect of the remedy is the symbolic public declarator that human rights have been breached. An ideological and culture change will be needed in the new rights landscape (**IO 2 and 6**). This could be reflected in minor changes in areas such as:

- the financial aspect of the legal aid merits / reasonableness test;¹⁴⁶
- the legal aid wider public interest test;¹⁴⁷
- exemptions to the pursuer’s offer/ defender’s tender system in the Sheriff Court;¹⁴⁸
- longer prescription periods, and
- relaxation of rules around ‘bare declarators.’¹⁴⁹

Q 37. What are your views on the most appropriate remedy in the event a court finds legislation is incompatible with the rights in the Bill?

Our position on the proposals

Overall, we welcome that there will be further consideration of remedies that bring solutions and change for individuals as well as remedies that directly lead to systemic change. We recommend:

- an Interpretative obligation whereby Scottish Parliament legislation must be read and given effect in a way which is compatible with the Bill, along the lines of s.3 HRA;
- a “declaration of incompatibility” in respect of legislation judged to be incompatible with the Act, following the model under s. 4 HRA, and
- A power to allow the Scottish Government and Parliament time to consider how best to bring the incompatible law into line with the Act, similar to s. 102 of the Scotland Act 1998.

Part 9: implementing the new Scottish Human Rights Act (Q38 – 44)

¹⁴⁵Boyle, K (2020) Access to Remedy – Systemic Issues and Structural Orders

¹⁴⁶ <https://www.slab.org.uk/guidance/overview-of-reasonableness-factors/>

¹⁴⁷ <https://www.slab.org.uk/guidance/strategic-or-wider-interest-of-the-case/>

¹⁴⁸ <https://www.lawscot.org.uk/members/journal/issues/vol-62-issue-04/pursuers-offers-proceed-with-care-1/>

¹⁴⁹ For discussion see, for example, *Bernard Hill v the Law Society of Scotland* A2440/02, Edinburgh Sheriff Court para 9 and 10

Q 38. What are your views on our proposals for bringing the legislation into force?

Our position on the proposals

We recognise that the incorporation project in Scotland is ambitious and that public bodies will need time to prepare. However, it is important to recall that the UK agreed to implement the rights and obligations in the treaties many years ago (ICERD in 1969, for example). The independent advisory group on Human Rights Leadership (FMAG) was established five years ago so these discussions are not new, and reforms are urgent for people in Scotland whose rights are most at risk.

Further clarity needed

Rights holders, duty bearers and those operating in the advice, representation and independent advocacy sector require clarification of the timescales for the staged and full implementation of the Bill, in order to prepare for implementation,

Additional recommendations

We note that HRCS has called for commencement within 6 months after Royal Assent; and the additional duty to comply no more than 2 years later and we broadly support these approximate timescales as reasonable and proportionate.

We also support the calls from Together for an audit, taking a three-stage approach:

1. Identify Acts of the UK Parliament (and amendments to Acts of the UK Parliament) that are within devolved powers and impact on human rights. Make necessary amendments to bring them into the scope of the Human Rights Bill.
2. Commission a comprehensive audit of the extent to which all devolved legislation complies with the relevant treaties/rights (to include Acts of both the UK and Scottish Parliament).
3. Make amendments identified through the audit. Review and update the audit on an ongoing basis through the Bill's "Human Rights Scheme" taking into account evolving international standards, guidance and recommendations.

This audit work should commence immediately, and this process does not need to wait for the Bill to be passed in its final form.

Q 39. What are your views on our proposals to establish Minimum Core Obligations through a participatory process?

We reiterate our response to Q24, specifically:

This process should take, as its starting point, the work of various committees through the General Comments.¹⁵⁰ SHRC has helpfully compiled a paper¹⁵¹ which

¹⁵⁰ Scottish Human Rights Commission(2023), Minimum Core Obligations – The Practice of the UN Committee on Economic, Social and Cultural Rights

¹⁵¹ Scottish Human Rights Commission, (2023), Minimum Core Obligations – The Practice of the UN Committee on Economic, Social and Cultural Rights

collates in one single document the full range of minimum core obligations applicable to countries that have ratified the ICESCR. This document forms a useful starting point for developing further clarity on these in the Scottish context. In our view, here are key criteria for the next steps, as follows:

- The process should be rigorous, transparent and led by a credible independent body with sufficient expertise in ESCRs, through development of clear human rights indicators, benchmarks and targets, potentially linked to the Sustainable Development Goals and other international materials **(IO 7)**.
- There must be accessible and meaningful participation and engagement with duty bearers and rights holders including those whose rights are most at risk, as well as expert practitioners in their respective socio-economic public policy fields of education, health, housing, social protection etc. **(IO 9)**
- There must be recognition of the interdependence of these rights, in particular in relation to cultural rights, for example the right to culturally appropriate food and accommodation.¹⁵²
- There must be adequate participation in an ongoing review and monitoring process to ensure progressive realisation and non-retrogression and to ensure that the content of MCOs can be progressively adjusted over time¹⁵³ **(IO 7 and IO 6)**. In so doing it will be important to apply human rights consistent indicators, benchmarks and targets¹⁵⁴ to measure progress which should be formulated and monitored using the proposed participatory approach and disaggregated data.
- The MCOs must be founded upon principles of non-discrimination **(IO 2.)**
- To maximise confidence in the system it will be important to have transparent, public scrutiny by a wide range of stakeholders including the Commission, Parliament and civil society. This should also be based on participatory methodologies embracing not just quantitative data but also testimony from the lived experience of rights holders in particular those whose rights are most at risk in Scotland **(IOs 9 and 7)**.
- There must be processes to ensure regular review of the progress, with parliamentary and independent scrutiny built in, in relation to MCOs and 're-setting' them at intervals as progress is achieved.
- There must be effective remedies for failure to meet an MCO, to progressively realise a rights, and to address any retrogressive steps.

Q 40. What are your views on our proposals for a Human Rights Scheme?

We reiterate our response to Q26, specifically:

It is essential that the Human Rights Scheme should be shaped by contributions from people with lived experience and those whose rights are most at risk **(IO 9)**, in order to achieve coherence as an aspect of accountability: **(IO 7)** and to be a building block in a human rights culture in Scotland **(IO 2)**. The scheme could learn from, build on and align with, where possible, the approach taken in SNAP 2.

We support the HRCS recommendations that the Scheme should also include:

¹⁵² For more detailed analysis see Mitchell, L, Webster, E and Camps, D: [The Right to Cultural Life in Scotland](#), published by HRCS and Article 27

¹⁵³ HRCS has recommended this should be through a participatory process every 10 years

¹⁵⁴ OHCHR (2012) [Human rights indicators - a guide to measurement and implementation](#)

- requirements around improvements to data collection and publication
- access to appropriate individual and collective independent advocacy (not only with regards to access to justice)
- provision of rights advice; inclusive communications
- Scottish Minister's engagement with UK Ministers around human rights
- provision of services aimed at rehabilitation from torture
- the extent to which participation of people whose rights are most at risk is informing implementation of the Bill
- emerging case law and interpretation of rights
- timescale and plans to develop/review MCOs
- plans or proposals to ensure access to justice is accessible, effective, timely, affordable and supportive
- Human Rights Impact Assessments

It could also present an opportunity to explore and review human rights budgeting measures to ensure that allocation of funding is non-discriminatory, and that additional funding is available for the benefit of historically marginalised and disadvantaged groups.

Q 41. What are your views on enhancing the assessment and scrutiny of legislation introduced to the Scottish Parliament in relation to the rights in the Human Rights Bill?

Our position on the proposals

We support the proposal to require Public Bills to be accompanied by a statement of compatibility about the extent to which the proposed Bill complies with the specific requirements provided for in the Human Rights Bill, as an important means of building a human rights culture, bringing Scots law into line with international standards and keeping step **(IO 2, 3 and 5)**.

Additional recommendations

We would welcome exploration of a range of other potential options for pre-legislative scrutiny including:

- coordination by the Parliament's Equalities and Human Rights and Civil Justice Committee (EHRCJ), potentially with input from people whose rights are most at risk **(IO 9)**;
- a duty on the Presiding Officer in relation to the compatibility of proposed legislation with international human rights standards, along the lines of s.31 Scotland Act 1998;
- the use of "human rights rapporteurs";
- requiring Ministers to carry out Human Rights Impact Assessments for any Bill or SI introduced to the Scottish Parliament;¹⁵⁵

¹⁵⁵ See Clause 14 UNCRC Bill.

- duties to collect and disaggregate data to better inform impact assessments and policy development.

Q 42. How can the Scottish Government and partners effectively build capacity across the public sector to ensure the rights in the Bill are delivered?

Further clarity needed

There is a lack of detail in the proposals in this area.

Additional recommendations

We support HRCS calls for statutory and non-statutory guidance developed in partnership with people whose rights are most at risk, for the development of a plan around human rights capacity building for duty bearers and for reflection and learning from other rights-related duties (such as the PSED).

Q 43. How can the Scottish Government and partners provide effective information and raise awareness of the rights for rights-holders?

Further clarity needed

There is a lack of detail in the proposals in this area. We recommend that the Scottish Government engages with the work of the lived experience boards in this area and considers following a similar model to ensure that public human rights information and education programmes are led by lived experience experts and are fit for purpose. **(IO 9)**

Q 44. What are your views on monitoring and reporting?

We reiterate our views as expressed in relation to Question 22. Specifically:

We support proposals for a reporting duty within the Bill, as an important aspect of accountability **(IO 7)** (see further explanation in response to Q22).

It is also essential to consider which bodies this duty should apply to, and to ensure flexibility to add, remove or amend bodies.¹⁵⁶ One approach might be to list these in a schedule, using the format of the Scotland specific duties under the Equality Act.¹⁵⁷ This would also present an opportunity to identify which bodies will be covered by both the PSED and the new reporting duties.

Reporting duties must also be accompanied by robust monitoring and enforceability mechanisms to ensure that this exercise results in genuine answerability and enforceability as well as embedding a human rights culture **(IO 7 and 2)**. This presents a further opportunity for participation **(IO 9)** by including people whose rights are most at risk when developing guidance on reporting requirements.

¹⁵⁶ Clause 16 (2) UNCRC (Scotland) Bill

¹⁵⁷ EHRC: [Public authorities in Scotland: who is covered by the Specific Duties under the Public Sector Equality Duty?](#)

It is an essential aspect of answerability that duty bearers¹⁵⁸ under the new legislation must be required to report on what actions they are planning to take, and what actions they have taken, perhaps building on the model under the UNCRC Bill. However, clarity is needed over who scrutinises the reports, or holds public bodies to account where they fall short. The reporting duty should be accompanied by an effective monitoring process.

In designing monitoring and scrutiny processes, it is essential that regard is had to duties under the UNCRC Bill as well as the role of EHRC in monitoring and regulating the PSED to avoid overlap, to ensure consistency of approach and to minimise the need for duplication. This could be supported through clear guidance for public bodies.

As proposed by HRCS, Consideration should be given to a Scottish Parliament reporting duty, mirroring the approach taken in the UNCRC Bill.¹⁵⁹

¹⁵⁸ Principles 17-21, Guiding principles on business and human rights, Protect, Respect and Remedy Framework A/HRC/17/31

¹⁵⁹ Clause 16B