

25 September 2020

Dear Professor Miller and Cabinet Secretary Somerville

A great many civil society organisations in Scotland fully support and have been actively campaigning for the incorporation of a range of international human rights treaties into Scots Law. A group of these organisations has come together to form the Civil Society Working Group on Incorporation. We are writing to you to outline our joint position on some key principles we would want to see in the proposed statutory framework for human rights in Scotland (in the attached briefing), which we have and will be promoting to our members, partner organisations and networks. We hope that the following will be a helpful contribution to the work of the National Taskforce for Human Rights Leadership.

Our organisations have engaged with many aspects of this process since the result of the EU Referendum and the First Minister's Standing Council on Europe. We are pleased with the huge progress that has been made in four years with the First Minister's Advisory Group on Human Rights Leadership recommendations<sup>1</sup>, the Governmental Taskforce and the introduction of legislation to incorporate the United Nations Convention on the Rights of the Child (UNCRC)<sup>2</sup>. We also welcome the Programme for Government commitments to incorporation of the UN Convention on the Elimination of Discrimination Against Women and considering the incorporation of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Elimination of all forms of Racial Discrimination.

Individual civil society organisations may focus their efforts on incorporation of specific treaties, aspects or group of rights based on their particular perspectives and work. However, we are united in our call for the fullest possible incorporation of international human rights treaties and committed to the fundamental human rights concepts of the indivisibility, interdependence, and inter-relatedness of all human rights<sup>3</sup>.

We believe that an Act of the Scottish Parliament to make rights real for the people of Scotland is both an opportunity and a responsibility and one that we want to get right. This is why we believe that the aim should be to incorporate all of the human rights treaties to which the United Kingdom is a signatory to ensure that the law is comprehensive, clear and that no one is left behind. This ambition should be factored into the timescales of this legislation.

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<sup>1</sup> First Minister's Advisory Group on Human Rights Leadership: <https://humanrightsleadership.scot/>

<sup>2</sup> Scottish Government Programme for Government 2020-21: <https://www.gov.scot/programme-for-government/>

<sup>3</sup> Office of the High Commissioner of Human Rights: <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>

This is an ambitious and challenging task and one in which we as civil society organisations and representatives, are willing to play our part in making a reality. We hope that the Scottish Government and the National Taskforce will give itself the time and resources to ensure that this process is rigour and robust and enable the meaningful participation of stakeholders. This is particularly important given the impact that COVID 19 has had and will continue to have not only on governmental and parliamentary capacity and priorities but also the capacity and priorities of civil society organisations.

We look forward to engaging with you further as this legislation develops.

**Yours sincerely**

**Amnesty International UK**

**Close the Gap**

**Engender**

**Equality Network**

**Health and Social Care Alliance Scotland (the ALLIANCE)**

**Human Rights Consortium Scotland**

**Inclusion Scotland**

**Nourish Scotland**

**Poverty Alliance**

**Scottish Environmental LINK**

**Scottish Independent Advocacy Alliance (SIAA)**

**Scottish Women's Aid**

**Shelter Scotland**

**Together – Scottish Alliance for Children's Rights**

**Zero Tolerance**

## **Essential Features of an Act of Parliament to incorporate international human rights into Scots Law: Briefing**

The signatories to this letter call for the following essential features in the incorporation of international human rights law into Scots law.

1. Restating the **Human Rights Act 1998 (HRA)** in this new piece of legislation is important to ensure consistency and clarity between new and existing human rights law. The HRA is a vital and important part of our legal architecture which is embedded in our devolved institutions as well as providing a clear and successful model of incorporation.
2. **Incorporation of all UN treaties.** Our starting point is that all UN treaties to which the UK is a signatory should be incorporated into Scots Law, they are:
  - International Covenant on Civil and Political Rights (ICCPR)
  - International Covenant on Economic, Social and Cultural Rights (ICESCR)
  - International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
  - Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
  - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)
  - Convention on the Rights of the Child (CRC)
  - Convention on the Rights of Persons with Disabilities (CRPD)
  - Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)

Many elements of ICCPR and CAT are already legislated for in the UK, however, we welcome further analysis to identify gaps which can be addressed by this new legislation such as the right to rehabilitation from torture under CAT.

Further to this, we would call for consideration of incorporation or reference to the following sources of international and regional human rights law:

- EU Charter of Fundamental Freedoms or its principles
- Istanbul Convention
- European Social Charters (1961 and 1996)
- Potentially additional treaties or sources of international human rights law as identified.

For those groups that do not yet have an international treaty to draw on, such as LGBTI communities and older persons we would expect relevant rights and protections to be covered in an equality clause or similar, with reference to relevant jurisprudence and comments from treaty monitoring bodies.

3. **Full and Direct Incorporation:** While we accept that the Scottish Parliament can only legislate for human rights within devolved competence, we expect the legislation to take

a “maximalist approach”<sup>4</sup> to this understanding i.e. that there will be full and direct incorporation of all treaties and any elements of articles removed must be kept to an absolute minimum and only after transparent consideration and consultation. Importantly, it should be noted that this is not derogation; as the UK as signatory to these treaties, maintains these obligations.

It is important that there is flexibility in case of changes to legislative competence but also so that human rights based approaches and procedures can be developed and mainstreamed through Scotland’s institutions and levels of government e.g. approaches to integration and access to rights for asylum seekers, refugees and all migrant groups.

Given the complexity of constitutional law and Scottish Parliament competencies in relation to equality law, we understand that an “equality clause” that addresses this issue will be necessary and this also offers the opportunity to put the concept of intersectionality into law. Intersectionality is a human rights legal concept and theory, developed by Professor Kimberlé Crenshaw through the practice and development of human rights law, which demonstrates how people experience human rights abuses through multiple aspects of their identity. So, for example, while we eagerly anticipate the incorporation of the UN Convention on the Rights of the Child, we know that it will be further strengthened by the Convention on the Rights of Persons with Disabilities (for disabled children), the Convention on the Elimination of All Forms of Discrimination against Women (for girls and young women), and the Convention on the Elimination of Racial Discrimination (for children of colour).

4. **Legal powers of the Act:** We broadly agree with the approach proposed by the FM’s Advisory Group relating to the legal powers of the Act but with some important additions:
  - a. **International law and jurisprudence** - there must be an obligation on courts and tribunals when interpreting the rights to have regard to international law and jurisprudence, including; the UN treaties, treaty body decisions, but also General Comments and recommendations, final views on individual complaints and inquiries, which are collectively referred to as jurisprudence and serve as important interpretative tools. It should also state that they may have regard to comparative law and future advances in these laws (“keeping step”).
  - b. **Overarching law** - There must be an obligation that courts and tribunals, in so far as it is possible to do so, read and give effect to primary and subordinate legislation of the Scottish Parliament in a way which is compatible with the rights given effect by the Act
    - **Duties** – There must be a duty to “pay due regard” to the rights in the Act. This duty will apply to all public bodies, including the Scottish Government. A schedule within the Act will outline the duty’s requirements. There must also be a “duty to comply” with the rights after a specified period.

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<sup>4</sup> Deputy First Minister John Swinney referred to the Scottish Government taking a “maximalist approach” to incorporation of the UNCRC: <https://www.gov.scot/news/strengthening-childrens-rights/>

- There needs to be stronger compliance of businesses carrying out public functions – supposedly already have duties of compliance under the Human Rights Act but recent cases have not found private companies to have
- c. **Legal representation and independent advocacy** – this Act must recognise the rights to legal assistance via Legal Aid, independent advocacy and independent advice, and a requirement on public bodies (Scottish Government, local authorities) to adequately resource these services so they are accessible to people building on best practice and recent recommendations<sup>5</sup>.
- d. **Remedies** – we strongly support consideration of remedies that bring solutions and change for individuals as well as remedies that directly lead to systemic change. The Act needs to meet international obligations to provide an effective remedy.
- a “declaration of incompatibility” in respect of legislation judged to be incompatible with the Act. This type of remedy is provided under the Human Rights Act and is currently contained in the UNCRC (Incorporation) (Scotland) Bill. This may not meet the international obligation to provide an effective remedy unless the Scottish Parliament consistently ensures that the law is brought into line with the court’s judgement. Statutory guidance may be produced to ensure Parliament develops the practice of giving effect to judgements.
  - A power similar to section 102 of the Scotland Act 1998 should be introduced to allow the Scottish Government and Parliament time to consider how best to bring the incompatible law into line with the Act.
  - A “strike down” power, as provided under the Scotland Act 1998 provides an effective remedy and has been included in the UNCRC (Incorporation) (Scotland) Bill in relation to legislation that precedes the enactment of this Bill when it becomes an Act.
  - The broad range of remedies already within our legal system should be available to be applied as appropriate.
- e. **Court** - a power to bring proceedings under the Act, and that the rights and duties contained within it can be relied upon in other proceedings. There must be no increased barriers to raising a judicial review, a vital avenue for accountability and access to justice.
- As well as courts, certain rights violations can and should be addressed through different complaints procedures, oversight and decision-making bodies, and steps must be taken to work with various regulatory bodies, Ombudsperson etc to enable this either directly within the competencies of the Scottish Parliament or by promoting the approach.
- f. **Standing to take proceedings** – Clearly, as is the case under the HRA, a rights-holder whose rights have been infringed must be able to bring court

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<sup>5</sup> Improving Access to Accountability of Public Services: Peoples & Stakeholder Engagement: <https://www.gov.scot/publications/scotlands-second-national-open-government-action-plan-2018-20-commitment-4-improving-access-accountability-public-services-public-stakeholder-engagement/>

proceedings. But there must also be a broader test of “sufficient interest” to enable appropriate bodies such as non-governmental organisations (NGOs) or charities to bring proceedings. In the environmental context under the Aarhus Convention there is a presumption that NGOs have standing. That is a presumption that should be adopted and can be extended to other contexts, along with the development of a broader “sufficient interest” test.

- g. **Changes to legal powers** – The Scottish Human Rights Commission and the Children and Young People’s Commissioner Scotland<sup>6</sup> should have their legal powers changed to enable them to raise strategic litigation/public interest cases and for these functions to be appropriately resourced.
- h. **Pre-legislative scrutiny** – The Act should make provision for an enhanced pre-legislative scrutiny. Current statements of compatibility in relation to every Bill in the Scottish Parliament are limited to compatibility with the European Convention on Human Rights (ECHR) and do not take into account the full range of international human rights law. We would welcome exploring a range of other potential options to pre-legislative scrutiny not just confined to coordination by the Parliament’s Equalities and Human Rights Committee (EHRiC), but also looking at the use of “human rights rapporteurs” and/or a distinct human rights committee or specialist pre-legislative committee.

5. **Monitoring, Reporting and Scrutiny:** As recommended by the FM’s Advisory Group, there must be adequate monitoring, reporting and scrutiny of Scottish Ministers and public bodies both to the Scottish Parliament and to regional and international human rights bodies but ultimately to the Scottish public. This would involve changes to the legal powers of the Scottish Human Rights Commission, and potentially other regulatory bodies, ombudspersons, etc and this additional capacity must be adequately resourced. This must include:

- Ensuring a monitoring process with independent input or oversight that includes communities (of interest as well as geographical) in Scotland.
- There must be statutory guidance for duty bearers issued along with this legislation and a process of human rights impact assessments (HRIAs) that are complementary to and learn from the challenges of equality impact assessments (EQIAs), children’s rights and wellbeing impact assessments (CRIAs), and similar.
- Ensuring participation of rights holders in designing the implementation mechanisms

Finally, we believe that the participation of rights holders as well as duty bearers is vital for this legislation to be properly implemented. For this legislation to make rights real, rights holders need to know and be able to claim their rights and duty bearers need to be enabled

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<sup>6</sup> Subject to the changed powers of the Children and Young People’s Commissioner Scotland via the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill currently at Holyrood. <https://beta.parliament.scot/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill>

to fulfil their obligations. We are encouraged by the participation and engagement events hosted by the Taskforce and would expect to see a continuation of this engagement through the legislative process and for resulting statutory guidance to articulate and explain the right to participation under the incorporated treaties and how public bodies can best enable this in their work. This should also include continued work at every level of government on human rights budgeting which will support this process in allocation of resources.

We will continue to engage enthusiastically in this process, advocate for these principles with our members, stakeholders, political parties and duty bearers and develop and publish evidence and analysis to support a human rights statutory framework that works for groups and individuals across Scotland.