

## Just Fair written evidence to ‘A Human Rights Bill for Scotland: consultation’

### Introduction

Just Fair is a UK-wide charity that is working to realise a fairer and more just society by monitoring and advocating for economic, social and cultural rights (ESCR) in the UK.<sup>1</sup> We want to live in a more just and compassionate UK, where everyone is guaranteed the basic requirements of a dignified and flourishing life.

We welcome this opportunity to respond to the Scottish Government’s consultation on ‘A Human Rights Bill for Scotland’.

At the outset, we want to congratulate the Scottish Government, not only for the exciting vision they propose in the consultation of a fairer Scotland, where people’s rights are better realised, but also for the careful thinking and planning that has gone into creating it.

We also want to put on record our support and admiration for the participatory process they have undertaken and that has produced this document. The careful consideration of rights and how to realise them in the unique context of Scotland evidences the wide-ranging advice the Government has received from people in Scotland and further afield, those with learned experience, those with lived experience and those with a mixture. The Government has clearly listened and the consultation, and the wider process is all the more robust for this.

We hope that the model that is being created in Scotland can serve to inspire other Governments, both within the wider UK and further afield to ensure that more people have their rights respected, protected and fulfilled.

What follows in our response is very much aimed at being helpful advice to provide additional guidance for the crucial work you are doing. We are very supportive of this project and believe it will result not only in people in Scotland having greater ownership of their rights, but also seeing tangible benefits in their everyday lives in areas such as health, housing, education and food.

We also want to record our thanks to our friends and colleagues in Scotland, particularly the Human Rights Consortium Scotland, for their help and support in the production of this submission.

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<sup>1</sup> <https://justfair.org.uk/>

*“Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”*

Eleanor Roosevelt, Chair of the Universal Declaration on Human Rights Drafting Committee, 1958

## **Question 1: What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?**

The Scottish Government has heard a lot of expert testimony, including from Dr Elaine Webster<sup>2</sup> on ‘human dignity’ being an underpinning concept for the proposed Human Rights Bill, and in particular ‘human dignity’ rather than just ‘dignity’.

Without reproducing Dr Webster’s paper here, she makes a strong and convincing argument that there is enough definition in existence in international law for such a concept of human dignity to have a basis to start from in a Scottish Bill,<sup>3</sup> while also fitting well within the Scottish legal tradition<sup>4</sup> to ensure that Scotland can take a sense of ownership of the term and shape it as part of your human rights journey.

We believe that including the concept of ‘human dignity’ within a preamble to the Bill as an interpretive tool would be consistent with the foundations of international human rights law. However, we would urge caution in ensuring that the framing of the concept is future proofed.

Concepts that provide a social floor for the protection of dignity have worked well in contexts such as Germany (Germany (Existenzminimum), Switzerland (conditions minimales d’existence), Colombia (minimo vital) and Brazil (mínimo existencial), where key determining factor is whether or not the dignity of the right holder has been violated.<sup>5</sup>

However, how the concept of ‘human dignity’ is used by the judicial system as an interpretative tool will depend somewhat on the parameters set and judicial attitudes. It must be ensured that it is understood that ‘human dignity’ does not mean that unless you are destitute your human rights are being met. Inclusion of the term ‘human dignity’ must be framed in such a way that it sets a higher bar than mere protection from destitution and allows the judiciary to continue to build upwards on the concept and develop it in a progressive way which fits with the unique circumstances of Scotland’s legal and constitutional traditions.

One way to assist with this would be to ensure that rather than ‘allowing’ courts to consider dignity when interpreting the rights, there should be a provision that they are ‘required to’. Another would be to ensure that the Bill includes a purpose clause (or preamble) that includes dignity, universality, participation and other key human rights principles. We agree with the analysis of the Human Rights Consortium Scotland that this will ensure a shared and consistent understanding and interpretation

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<sup>2</sup> Webster, E., ‘The Underpinning Concept of ‘Human Dignity’’, Academic Advisory Panel to the National Taskforce for Human Rights Leadership, June 2020, available here:

<https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-elaine-webster---dignity/aap-paper-elaine-webster---dignity/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BElaine%2BWebster%2B-%2BDignity%2BFINAL%2B%25281%2529.pdf>

<sup>3</sup> Ibid., p. 6

<sup>4</sup> Ibid., p.13

<sup>5</sup> Boyle, K., ‘The Meaning and Content of Duties to be Considered for Inclusion in the Bill’, Academic Advisory Panel to the National Taskforce for Human Rights Leadership, June 2020, available here:

<https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-katie-boyle---meaning-and-content-of-duties/aap-paper-katie-boyle---meaning-and-content-of-duties/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BKatie%2BBoyle%2B-%2BMeaning%2Band%2BContent%2Bof%2BDuties%2B-%2BJuly%2B2020%2B%25281%2529.pdf>

of rights in the Bill and that it will be helpful for public awareness, and will help build a culture of human rights, guarding against narrow duty compliance.<sup>6</sup>

Such a framing would still be in keeping with Webster's persuasive suggestion,

*"to understand 'human dignity' as demanding responses (from those acting on behalf of the state) which project in two different directions: some provisions are concerned that 'human dignity' should not be undermined, and some are concerned that 'human dignity' should be promoted."*<sup>7</sup>

Additionally, as illustrated by the Scottish Human Rights Commission, the underpinning value of dignity is an enabling tool that allows bodies such as the UN Committee on Economic, Social and Cultural Rights to interpret rights in a more progressive way,

*"For example, in relation to the right to housing, the Committee determined that the inherent dignity of the human person requires that the term "housing" be interpreted in a way that takes account of various considerations. Most importantly, that the right to housing should be ensured to all persons irrespective of income or access to economic resources and must be read as referring not just to housing but to adequate housing."*<sup>8</sup>

## **Question 2: What are your views on our proposal to allow for dignity to be a key threshold for defining content of MCOs?**

We agree with the proposal for dignity to be a key threshold for defining Minimum Core Obligations (MCOs) but would highlight our concerns above (there must be a safeguard to ensure that 'human dignity' does not mean that unless you are destitute your human rights are being met). Using 'dignity' as a touchstone and threshold for defining the content of Minimum Core Obligations would allow it to tie into not only international law, but also Scot's Law. However, 'dignity' must be framed in such a way that it sets a high bar for MCOs to be developed in a progressive way which fits with the unique circumstances of Scotland's legal and constitutional traditions.

Another important point here is time. When reading the Human Rights Bill Lived Experience Board Reports,<sup>9</sup> particularly in relation to access to justice<sup>10</sup> and accountability,<sup>11</sup> the theme of the time it takes for change to be made, and the time spent waiting repeatedly recur. Time in turn is an issue of dignity. For dignity to be protected and promoted it ought to be a principle infused through all the work, including by ensuring that change is actually made and made in a timely manner.

We recognise an important balance has to be struck between undertaking a thorough consultation (which again we congratulate the Scottish Government on), effectively considering proposals, and moving in a timely manner so that momentum is not lost, nor faith in the process. However, we

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<sup>6</sup> Human Rights Consortium written response, 'A Human Rights Bill for Scotland: Consultation', 2023

<sup>7</sup> Webster, E., 'The Underpinning Concept of 'Human Dignity'', Academic Advisory Panel to the National Taskforce for Human Rights Leadership, June 2020, p. 9

<sup>8</sup> Scottish Human Rights Commission, "Building a new human rights framework for Scotland: Key legal features", September 2022, p.52

<sup>9</sup> Convened by the Human Rights Consortium Scotland from February-December 2022. All reports available here: <https://hrcscotland.org/human-rights-bill-lived-experience-board-reports/>

<sup>10</sup> Human Rights Bill Lived Experience Board, 'Long report of Block 2: Access to Justice,' May 2022

<sup>11</sup> Human Rights Bill Lived Experience Board, 'Block 3 June 2022: (Very) long report'

would sound a note of caution here, it is important to ensure that a clear timetable and (participatory) process for defining the MCOs is set out as soon as possible.

**Question 3: What are your views on the types of international law, materials and mechanisms to be included within the proposed interpretative provision?**

We agree with both the National Taskforce<sup>12</sup> and the Scottish Human Rights Commission<sup>13</sup> that any interpretive clause should ensure that the Bill is read in line with international standards and that this should include, *“decisions, General Comments, Statements and Concluding Observations from treaty monitoring bodies, as well as judgements, decisions, declarations or advisory opinions of the European Court of Human Rights and other sources.”*<sup>14</sup>

We also agree with the National Taskforce’s recommendation that, *“There should also be provision within the framework that nothing within it shall affect any provisions from domestic law or international law which are more conducive to the realisation of the rights within the framework.”*<sup>15</sup>

This clause would be important in helping to ensure that international legal measures remain a floor and not a ceiling for Scotland. We would however suggest that the interpretative clause might more usefully read, ‘should be required to take into account’. This would be more stringent than the formulation ‘should be read’, but not as stringent as ‘should follow’. We believe that this would strike the correct balance for courts in ensuring that Scot’s law uses international standards as a base but would also leave enough flexibility to interpret laws in a way that reflects Scotland’s unique situation and allows courts to bring legal certainty where international standards may be read in slightly differing ways.

**Question 4: What are your views on the proposed model of incorporation?**

*Model of incorporation*

We broadly believe that the model of incorporation suggested by the Scottish Government makes good sense for the effective realisation of rights in Scotland. This model, which we will refer to as ‘transposition’, seeks to reproduce all four treaties (CERD, ICESCR, CEDAW and CRPD) in the Bill with the removal of any text that relates to areas that are reserved to the UK Parliament. This is a model

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<sup>12</sup> National Taskforce for Human Rights Leadership Report, March 2021, available here: <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/>

<sup>13</sup> SHRC, ‘Building a new human rights framework for Scotland: Key legal features’, September 2022, available here: <https://www.scottishhumanrights.com/media/2454/shrc-building-a-new-human-rights-framework-for-scotland-key-legal-features.pdf>

<sup>14</sup> Ibid., at p.53

<sup>15</sup> National Taskforce for Human Rights Leadership Report, March 2021, p.33

that was envisaged by the First Minister's Advisory Group on Human Rights Leadership (FMAG)<sup>16</sup> back in 2018 and has traced its way through various high calibre advisory papers<sup>17</sup> since then.

## *Devolution limitations*

We understand that the right to work has not been envisioned as being included in the Bill due to the limits that the devolved settlement necessarily imposes, and that this decision is based on expert advice from many sources.<sup>18</sup>

However, the decisions to carve out both the right to work and the right to just and favourable conditions of work wholesale may have consequences in terms of setting up a scheme of disjointed ESCR protections which will reveal itself in time, including the consequences of breaking the link with sources of international law, such as General Comments from CESCR. Human rights are universal and indivisible, and as Scotland seeks to provide legal systems that recognise this, it is unfortunate that it cannot be done in its fullest sense.

We are not suggesting that we should let the perfect be the enemy of the good. Throughout this process you have heard powerful first-hand testimony on the difference protection of ESCR, even if limited by current devolution powers, could make in people's lives.<sup>19</sup> We must not risk that.

We would ask you to consider carefully how a maximalist approach, within the confines of the current devolution settlement, can be achieved. While some rights may not be suited to inclusion wholesale at the moment, there are ways in which the Duty Bearers can realise these rights in more limited ways within the devolution settlement. We believe that there would be great merit in undertaking a specific piece of work after this consultation on how to ensure the right to work (and just and favourable conditions of work) and any other rights that have necessarily been carved out can be realised in more limited and specific ways within the current devolved settlement.

In addition, in terms of planning for the future, we would urge you to recall the seventh recommendation of the First Minister's Advisory Group on Human Rights Leadership, *"Integration of any further devolved powers into the framework as proposed in Recommendation 1 and, if independence, a written constitution including a Bill of Rights for Scotland."*<sup>20</sup> For example if employment was devolved in the future, then the right to work and to just and favourable conditions of work must be integrated into the current Bill.<sup>21</sup> Changes to the constitutional

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<sup>16</sup> First Minister's Advisory Group on Human Rights Leadership, 'Recommendations for a new human rights framework to improve people's lives: Report to the First Minister', December 2018, p. 32, available here: <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

<sup>17</sup> See for example 'All Our Rights In Law: views from the wider public' Report to the National Taskforce on Human Rights Leadership, National Taskforce for Human Rights Leadership Report, SHRC, 'Building a new human rights framework for Scotland: Key legal features', and 'Minimum Standards for Delivering Economic, Social and Cultural Rights' Dr Kasey McCall-Smith

<sup>18</sup> See for example First Minister's Advisory Group on Human Rights Leadership, 'Recommendations for a new human rights framework to improve people's lives: Report to the First Minister' and National Taskforce for Human Rights Leadership Report

<sup>19</sup> *"Be bold. Be brave. Be courageous. This is a tremendous opportunity to shape a different future for people."* 'All Our Rights In Law: views from the wider public' Report to the National Taskforce on Human Rights Leadership, p.42

<sup>20</sup> First Minister's Advisory Group on Human Rights Leadership, 'Recommendations for a new human rights framework to improve people's lives: Report to the First Minister', December 2018, p. 30

<sup>21</sup> *Ibid.*, p.47

settlement which gave more powers to the Scottish Parliament could mean much more scope to incorporate rights more fully and in keeping with the principle of indivisibility. At this stage we would urge you to draft the Bill in a way that is cognisant of these potential future changes and keeps the door open to improvements to the project of human rights incorporation.

## *Right to healthy environment*

We agree that the right to a healthy environment should be included in this Bill and this is discussed in more depth in questions 6-8 below. In short, we endorse the use of the Aarhus Convention<sup>22</sup> definition of the environment and recommend that the Convention's Preamble, and Article 1 and 2 should be reflected in the Bill. We are concerned about the exclusion of adequate sanitation under safe & sufficient water. We recommend considering whether the aspects of the right to food set out in General Comment 12<sup>23</sup> by the Committee on Economic, Social and Cultural Rights (CESCR) could be laid out and protected as part of the right to an adequate standard of living in the Bill, while the right to healthy and sustainably produced food as a constituent part of broader environmental health is given protection under the right to a healthy environment. We propose a similar approach to the right to water.

Such an approach would better undertake a maximalist approach, trying not simply to fit topics into neat boxes for convenience but better recognise the full scope of the topic.

## *Duties*

We agree that there should first be a procedural duty on public bodies (and as far as possible private actors<sup>24</sup> – see our response to question 19 for more) in relation to ICESCR, substantive rights in CRPD<sup>25</sup> and the right to a healthy environment. For more on this, please see our response to question 20.

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<sup>22</sup> Full title, 'United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998'. Available here:

<https://unece.org/DAM/env/pp/documents/cep43e.pdf>

<sup>23</sup> CESCR, General Comment 12 'The right to adequate food', 1999, available here:

<https://www.refworld.org/pdfid/4538838c11.pdf>

<sup>24</sup> As many public bodies as possible within devolution, and all private bodies carrying out public functions whether individuals directly employed by contracted companies or those engaged by the contracted companies. Consideration should be given as to whether provision could be made for the termination or prevention of future procurement of private company contracts if that company is found to have breached the provisions of the Act.

<sup>25</sup> The rights we consider meeting the threshold of substantive rights or having substantive elements are:

- 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.

We agree that there should be a period of time where only the duty to have due regard should apply. After this date, we agree that a duty to comply should apply to ICESCR, substantive rights in CRPD and the right to a healthy environment. This duty to comply should not replace a duty to have due regard but should be in addition to this. For more on this, please see our response to question 21.

**Question 5: 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.**

At the outset of this question we would like to flag that while we understand the use of the term ‘equalities treaties’ and the accessible and positive way this encapsulates CERD, CEDAW and CRPD, we are not convinced that it is a term we would encourage. We are concerned that use of such a term could potentially undermine the full scope and obligations of these treaties, with particular regard to the substantive rights they confer.

We are much more comfortable with the term ‘special protections treaties’ formulated by the Human Rights Consortium Scotland<sup>26</sup> and will use this term in the remainder of this submission.

This question brings us to the nub of a very difficult balance to be struck. On one hand, the Scottish Government is constrained as to what it can achieve in this Bill by the current devolution settlement. On the other hand, if this important project is to be judged to be successful, then rights must be realised in a way that makes a change in the lives of people in Scotland, particularly those who have experienced violations of their rights. To do so, the Bill must incorporate all the rights in the special protections treaties to the greatest extent possible within devolution and as strongly as possible.

We do not think that at present the balance has been struck quite correctly. We are particularly concerned that the decision to not place a ‘duty to comply’ on the special protections treaties is a significant departure from full incorporation that the people of Scotland have been promised. We know that altering powers the Scottish Government has under the devolution settlement is outwith the control of the Scottish Government, but we agree with the Human Rights Consortium Scotland that the consultation does not give sufficient assurance that the approach suggested is maximalist within devolution.<sup>27</sup> It is unclear from the consultation document what the ‘procedural duty’ being considering might look like, but we would strongly urge the Government to take a maximalist approach.

As in our response to question 4, we would also urge you to draft the Bill in a way that is cognisant of potential future changes to the devolution settlement and keeps the door open to improvements to the project of human rights incorporation.

One thing we would suggest as an absolute minimum is that substantive rights within UNCRPD are identified and both a duty to have due regard and also a duty to comply (as recommended above for ICESCR and the right to a healthy environment) are put in place. The rights we consider meeting the threshold of substantive rights or having substantive elements are:

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- Article 26 Habilitation and rehabilitation.
  - Article 20 Personal mobility.

<sup>26</sup> Human Rights Consortium written response, ‘A Human Rights Bill for Scotland: Consultation’, 2023

<sup>27</sup> Human Rights Consortium written response, ‘A Human Rights Bill for Scotland: Consultation’, 2023



- 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 26 Habilitation and rehabilitation.
- Article 20 Personal mobility.
- Article 24 Inclusive education.

While we recognise that, as a UK-wide organisation we come with a very different perspective than Scottish CSOs, we agree with the Human Rights Consortium’s assessment that without this enhancement of the Scottish Government’s proposals, the Scottish Government will not be carrying out its commitment to implement the Taskforce’s recommendations, nor will it truly be delivering human rights for disabled people.<sup>28</sup>

We understand that in relation to the UK Supreme Court ruling<sup>29</sup> on UNCRC (Scotland) Bill, (that the Bill would be limited to applying only to Acts passed by the Scottish Parliament) the Scottish Government is considering undertaking an audit of legislation to identify gaps and actions that can be taken to close those gaps. We strongly support this move, and we believe that a similar activity should be taken should the same limitations apply to the Human Rights Scotland Bill and that this should be a feature of wider planning around the implementation of this Bill. Such an undertaking would be very prudent in our opinion.

We agree with the Human Rights Consortium Scotland that such an audit needs to consider:

- Where UK Acts – and amendments to UK Acts – that are within devolved competence impact on people's human rights.
- Where Acts of the Scottish Parliament are not compatible with human rights obligations.<sup>30</sup>

The outcomes of this audit should then lead to new legislation to address any compliance gaps.

## **Question 6: Do you agree or disagree with our proposed basis for defining the environment?**

The right to a healthy environment is internationally well established. As the Taskforce noted, *“More than 100 countries in the world have already included a human right to a healthy environment in*

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<sup>28</sup> Human Rights Consortium Scotland written response, ‘A Human Rights Bill for Scotland: Consultation’, 2023

<sup>29</sup> REFERENCE by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, October 2021. Available here:

<https://www.supremecourt.uk/cases/docs/uksc-2021-0079-judgment.pdf>

<sup>30</sup> Human Rights Consortium Scotland written response, ‘A Human Rights Bill for Scotland: Consultation’, 2023

*their constitutions.*<sup>31</sup> While the Northern Ireland Human Rights Commission in their 2008 advice to the Secretary of State for Northern Ireland recommended including a right to environmental protection based on the South African constitution, we are pleased to see that the Scottish Government has understood that thinking around environmental rights have progressed, and become more pertinent since this time and so propose a more robust model.

Evidence of this progressed understanding around environmental rights, and in particular the interdependence of rights is clear throughout the evidence the Government has received in this process, including this instructive observation from the Taskforce report,

*“A significant finding of the three roundtables on the right to a healthy environment was that recognising this right can be a step change in supporting more coherent protection of all human rights, both from the perspective of rights-holders and duty-bearers.”*<sup>32</sup>

In addition to this, international law has moved on. In 2005 the UK ratified (and so agreed to be bound by) the Aarhus Convention.<sup>33</sup> In October 2021 the UN Human Rights Council approved a Declaration recognising the right to a healthy environment as a human right. In August 2023 the UNCRC released a new General Comment on children’s rights and the environment.<sup>34</sup>

If Scotland is to be a leader in human rights, then the robust inclusion of a right to a healthy environment is crucial. For this reason, and for the ‘knock on effects’ a robust realisation of the right to a healthy environment could have for other rights (such as including the rights to life, health, food, water and development)<sup>35</sup> we endorse use of the Aarhus definition<sup>35</sup> of the environment. We agree with the assessment of the Environmental Rights Centre for Scotland (ERCS) that the Aarhus Convention’s Preamble, and Article 1 and 2 should be reflected in the Bill.

**Question 7 (related to Q6): If you disagree please explain why.**

Not applicable.

**Question 8: What are your views on the proposed formulation of the substantive and procedural aspects of the right to a healthy environment?**

We support the formulation in the consultation document on the substantive aspects of the right a healthy environment to include clean air, safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems. As will be clear from our answers above, we are supportive of the dedication the Scottish Government has shown to ensuring that international

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<sup>31</sup> National Taskforce for Human Rights Leadership Report, March 2021, p. 73

<sup>32</sup> Ibid., p.27

<sup>33</sup> Full title, ‘United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998’.

<sup>34</sup> UNCRC, ‘General comment No. 26 on children’s rights and the environment, with a special focus on climate change’, 22 August 2023. Available here:

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F26&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F26&Lang=en)

<sup>35</sup> Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 2012, p. 7. Available here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/189/72/PDF/G1218972.pdf?OpenElement>

human rights standards are used as a basis for this Bill, and for interpretation of the rights contained therein. We are therefore also supportive of the efforts that have been made within the proposal set out in the consultation to adopt standards such as the UN Framework Principles on Human Rights and the Environment and the Aarhus Convention, as guiding frameworks for the development of this right within the Bill.

We also agree with the Environmental Rights Centre for Scotland (ERCS) that, “*is important to identify and recognise the six substantive features as both interdependent, and in need of standalone protections as recommended by the UN Special Rapporteur on Human Rights and the Environment.*”<sup>36</sup> Furthermore, in keeping with the principle of using international legal standards as a guiding framework for development, we recommend the Scottish Government takes into account the resulting report from the UN Special Rapporteur on human rights and the environment’s call for input<sup>37</sup> on, “[Promoting Environmental Democracy: Procedural elements of the human right to a clean, healthy and sustainable environment.](#)”

We are concerned about the exclusion of adequate sanitation under safe & sufficient water, and believe that this issue is particularly pertinent, given ongoing issues across the UK,<sup>38</sup> which have also impacted Scotland.<sup>39</sup> This is an area where the Bill could make a real and tangible impact in people’s lives, and show how Scotland’s chosen path in terms of human rights leadership set it apart from other nations and jurisdictions in the UK. We would urge the Government to rethink this.

In terms of procedural elements, we would once again urge the Government to look to international legal standards and in particular the Aarhus Convention requirements, including access to environmental information, public participation in environmental decision-making, access to justice and effective remedies.

**Question 9: 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.**

As an organisation specialising in ESCR, the definition of food we are more familiar with is through the International Covenant on Economic, Social and Cultural Rights, as understood as a component of the Article 11 right to an adequate standard of living. It is also through this lens that we have followed the evolving meaning of the right.<sup>40</sup> In our recent independent England and Wales civil society report<sup>41</sup> to the Committee on Economic, Social and Cultural Rights it was through this lens

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<sup>36</sup> Environmental Rights Centre for Scotland, written evidence to ‘A Human Rights Bill for Scotland: consultation’, 2023

<sup>37</sup> This call closed on 2 October 2023

<sup>38</sup> See for example ‘Full list of sewage discharges on Blue Flag beaches in England (Including the Isle of Wight)’, Environment Agency, March 2023  
<https://docs.google.com/spreadsheets/d/14YWydmUTlgSM9ALo25yov4hi7meL8EKdorzrpaEJmhk/edit#gid=671146623>

<sup>39</sup> See for example: <https://theferret.scot/sewage-pollution-scottish-beaches/>

<sup>40</sup> See for example CESCR, General Comment 12 ‘The right to adequate food’, 1999

<sup>41</sup> Available here: <https://justfair.org.uk/wp-content/uploads/2023/01/Just-Fair-Report-to-CESCR-PSWG-Jan-2023.pdf>

that we evidenced violations of the right to food including food insecurity and reliance on food banks<sup>42</sup> and the particular impact it has on communities with protected characteristics.

However, we recognise that food is a huge subject area, and that thinking has evolved and progressed. We would suggest that it does not need to be an 'either/or' approach as the consultation question seems to propose.

Rather we would recommend considering whether the aspects of the right to food set out in CESCR's General Comment 12<sup>43</sup> could be laid out and protected as part of the right to an adequate standard of living in the Bill, while the right to healthy and sustainably produced food as a constituent part of broader environmental health is given protection under the right to a healthy environment.

We believe that while the right to food must be protected as a component of ESCR, there is also value in additionally including in the right to a healthy environment the right to healthy sustainable food. The right to food must be recognised as a standalone feature, that underpins and interacts with other substantive features of this right.

Such an approach would better undertake a maximalist approach, trying not simply to fit topics into neat boxes for convenience but better recognise the full scope of the topic. We also believe that such an approach would be in keeping with international law. For example, General Comment 12, which was published in 1999 recognised the need for the, *"adoption of appropriate economic, environmental and social policies,"*<sup>44</sup> to realise the right to food.

We believe that it is necessary to protect both elements of the right to food in the current Bill and we note ERCS's reasoning that, *"Over the last five decades the damage caused by the global food system to nature, climate and health has become more acute, widespread and visible."*<sup>45</sup> To protect the full spectrum of human rights for this and for future generations, we urge the Scottish Government to extend their impressive creative problem solving to the right to food by considering such an approach. We encourage you to be a leader in this area.

**Question 10: 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.**

We are supportive of this approach, not least the proposal that the right to water as an aspect of ICESCR does not preclude its inclusion as a distinct feature of the right to a healthy environment. As noted above in our response to question 9,<sup>46</sup> we would recommend such a creative approach which recognises the multifaceted application of water be applied to the right to food.

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<sup>42</sup> Ibid., p. 14-15

<sup>43</sup> Available, accessible, adequate

<sup>44</sup> CESCR, General Comment 12 'The right to adequate food', 1999, para 4

<sup>45</sup> Environmental Rights Centre for Scotland, written evidence to 'A Human Rights Bill for Scotland: consultation', 2023

<sup>46</sup> That is whether the aspects of the right to food set out in [General Comment 12](#) of the Committee on Economic, Social and Cultural Rights (CESCR) could be laid out and protected as part of the right to an adequate standard of living in the Bill, while the right to healthy and sustainably produced food as a constituent part of broader environmental health is given protection under the right to a healthy environment.

As reasoned in our response to question 8, we are concerned about the exclusion of adequate sanitation under safe & sufficient water, and we would urge the Government to rethink this approach and extend the definition to recognise adequate sanitation. Not only could this approach change the lives of people in Scotland in a tangible way, but it could provide leadership for the better realisation of rights across other nations and jurisdictions in the UK.

**Question 11: Are there any other substantive or procedural elements you think should be understood as aspects of the right?**

In relation to this issue, we would again urge the Scottish Government to take into account the resulting report from the UN Special Rapporteur on human rights and the environment's call<sup>47</sup> for input on, "[Promoting Environmental Democracy: Procedural elements of the human right to a clean, healthy and sustainable environment.](#)"

Some things that would also help the realisation of this rights would be:

- Dedicated reforms with clear timelines to make the Right to a Healthy Environment fully enforceable.
- Clarity that the substantive features of the right are interdependent and require standalone protections.
- Each feature defined according to expert guidance and international best practice, and adhere to the highest standards, with appropriate enforcement mechanisms to ensure compliance.
- Rights must be enforceable in a court of law, with appropriate mechanisms in place to effectively hold public bodies and polluters to account.

We are also more generally supportive of the response of the Environmental Rights Centre for Scotland (ERCS)<sup>48</sup> and recognise their specific and detailed knowledge of this area.

**Question 12: 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?**

We believe that it should be eminently feasible to include a restatement or acknowledgement of the Human Rights Act (HRA) commitments within a preamble to the Bill. We do not consider that such an action could be in anyway constructed as a modification. However, we understand that if the UK Government did take up a legal challenge on the basis that they believed the inclusion of the HRA commitments in a preamble or similar represented a modification, then it could necessitate the Scottish Government arguing expressly that there was no modification and no expectation that the Human Rights Act should be interpreted or impacted by the Bill.

We also respect that people within Scotland are best placed to make this call. For this reason, we offer no protest to the proposal of the consultation not to restate the Human Rights Act in this Bill.

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<sup>47</sup> This call closed on 2 October 2023

<sup>48</sup> Environmental Rights Centre for Scotland, written evidence to 'A Human Rights Bill for Scotland: consultation', 2023

However, we agree with the Scottish Human Rights Consortium that, *“the Human Rights Act 1998 duties and rights should be fully included in implementation of this Bill, including being part of guidance, public body training and capacity building, and information and awareness raising.”*<sup>49</sup>

In addition, in relation to the United Nations Convention against Torture, while we accept the proposal in the consultation not to include this in the current Bill, the Scottish Government should be required to deliver services aimed at rehabilitation from torture, and effective remedy under this Bill should include fair and appropriate levels of compensation.

We would also recall our response to question 4 and in particular, we would urge you to bear in mind the seventh recommendation of the First Minister’s Advisory Group on Human Rights Leadership, *“Integration of any further devolved powers into the framework as proposed in Recommendation 1 and, if independence, a written constitution including a Bill of Rights for Scotland.”*<sup>50</sup> We urge you to draft the Bill in a way that is cognisant of these potential future changes to the powers of the Scottish Government and keeps the door open to improvements to the project of human rights incorporation.

### **Question 13: How can we best embed participation in the framework of the Bill?**

Participation is mainstreamed throughout<sup>51</sup> the most recent of the human rights treaties that the current consultation seeks to incorporate – CRPD. This illustrates the growing realisation within human rights fields of the adage *‘nothing about us without us is for us’*. We cannot hope to make meaningful change in people’s lives if we do not involve them in the decisions about what that change should look like. Including those with direct experience of rights violations in decisions about how we can better protect rights is crucial for better decision making and for embedding a human rights culture in a system. Real success comes when there is a bringing together of different types of expertise through collaboration, co-production and meaningful involvement.<sup>52</sup>

As noted above, we applaud the Scottish Government for the deliberative way they have been consulting across Scotland for the present project, and we believe that embedding participation within the Bill would be a way to ensure that this participative process is continued.

We therefore agree that participation should be embedded throughout the framework, and specifically we agree with the Human Rights Consortium Scotland<sup>53</sup> that:

- Participation should be a core principle within the purpose clause/preamble.
- The Human Rights Scheme should include a requirement on Scottish Ministers to consult people whose rights are at risk.
- In determining the content of Minimum Core Obligations, there should be a programme of participation of people whose rights are most at risk.

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<sup>49</sup> Human Rights Consortium Scotland written response, ‘A Human Rights Bill for Scotland: Consultation’, 2023

<sup>50</sup> First Minister’s Advisory Group on Human Rights Leadership, ‘Recommendations for a new human rights framework to improve people’s lives: Report to the First Minister’, December 2018, p. 30

<sup>51</sup> See for example Article 3 re general principles and also Articles 29 and 30.

<sup>52</sup> See for example Greater Manchester Poverty Action and Just Fair, ‘A Practical Guide for Local Authority Implementation of the Socio-Economic Duty in England’ 2021, p.7. Available here: <https://justfair.org.uk/wp-content/uploads/2021/06/Socio-Economic-Duty-Guide-Final.pdf>

<sup>53</sup> Human Rights Consortium Scotland written response, ‘A Human Rights Bill for Scotland: Consultation’, 2023

- The Scottish Human Rights Commission (SHRC) should have a duty to embed the participation of people whose rights are most at risk in all that they do, and particularly with regard to their monitoring role, as outlined in response to Q31.
- Courts should be required to consider the complainants' views in determining remedy.<sup>54</sup>

**Question 14: What are your views on the proposed approach to including an equality provision to ensure everyone is able to access rights, in the Bill?**

We agree that there should be an equality provision to ensure everyone is able to access rights in the Bill. Equality provisions are key to unlocking the rights within law to ensure that everyone can realise their rights, and to make sure that duty bearers are properly considering how to respect, protect and fulfil rights. Treaties such as ICESCR<sup>55</sup> and the ECHR<sup>56</sup> include their own non-discrimination provisions, illustrating the importance of such mechanisms.

We understand that the Scottish Government is limited in what can be proposed by the equality reservation in the Scotland Act 1998 and the need to consider how this will operate within the wider Equality Act framework.

As however, in our responses to questions 1,4,5, and 12 above, we encourage the Scottish Government to consider ways to futureproof this legislation by ensuring you 'hold the door open' to increasing protections if that becomes an option. The proposed formulation may be currently necessary but should not be an endpoint to discussion.

In particular, to properly realise rights, we would encourage the Scottish Government if possible, in the future to ensure a freestanding right to non-discrimination, something not currently available through the Human Rights Act.<sup>57</sup> We would also encourage a mechanism to ensure that people can seek remedy for the discrimination they may face based on multiple characteristics. We note that while 'combined discrimination' is recognised in the Equality Act 2010,<sup>58</sup> this provision has not been brought into force. In addition, we don't believe that even if it was brought into force, it would remedy the way certain people experience discrimination because it is based on an exhaustive list of characteristics<sup>59</sup> and capped at only two grounds, which appears somewhat arbitrary. Rather we would urge the Scottish Government to explore fresher thinking<sup>60</sup> on this area in terms of how Scotland could, in the future, better protect people from all forms of discrimination.

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<sup>54</sup> Though such a feature must be implemented carefully and with safeguards in place (including support for complainants) to ensure that there is equality of outcomes for complainants. This is to ensure that those who for example are better informed, better able to self-advocate or have access to advice and representation do not have better outcomes than other complainants.

<sup>55</sup> Article 2(2)

<sup>56</sup> Article 14

<sup>57</sup> See for example, Equality Commission for Northern Ireland, 'Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland', March 2021, p. 5. Available here: <http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/ad-hoc-bill-of-rights/written-briefings/ecni-submission-to-ad-hoc-assembly-committee-on-bor.pdf>

<sup>58</sup> Equality Act, 2010, chapter 2, para 14 'Combined discrimination: dual characteristics'

<sup>59</sup> Age, disability, gender reassignment, race, religion or belief, sex, or sexual orientation.

<sup>60</sup> See for example Atrey, S., 'Intersectional Discrimination', OUP, 2019

**Question 15: How do you think we should define the groups to be protected by the equality provision?**

ICESCR was drafted in 1960s, and the ECHR in the 1950s. Both are in need of updating to reflect our progressed understanding of human rights and equality. However a key strength of each was that their non-discrimination provisions were open ended, allowing them to some degree to remain 'living documents'. For example while neither document included 'disability' in the list of protected characteristics, we now read this in. We would urge the Scottish Government to consider carefully following the example of these two key human rights treaties in creating an open-ended list.

**Question 16: 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?**

Disagree.

**Question 17 (related to Q6): If you disagree, please provide comments to support your answer.**

We agree with the use of the term 'other status' and as noted above in question 15, believe it is an incredibly important term to include. However, we would urge the Scottish Government to specifically name some additional groups who currently face particular barriers to the realisation of their rights, to ensure duty bearers take specific note of the measures that must be put in place to better realise their rights.

We would suggest at least including LGBT+, older people and other status. This accords with the evidence the Human Rights Consortium Scotland has submitted.<sup>61</sup> There is great value in providing these specific groups with visibility in the Bill.

Currently the UN human rights treaty body system does not have treaties covering the rights of LGBT+ or older people,<sup>62</sup> and this is a huge normative gap.

In relation to 'older people', we know that the UNCRC (Scotland) Bill when enacted will contain specific protections for children and young people and we would like for a similar spotlight to be put on older people. Due to the gap in international human rights treaties, often the rights of older people are considered under the UNCRPD, and while there may at times be overlap, the UNCRPD was not designed to realise the full spectrum of the rights of older people.

We once again encourage Scotland to lead the way on both the rights of older people and the rights of people in the LGBT+ community.

We would also have some theoretical concern that if a list of characteristics becomes too long, everyone could claim special protection, rather than it being focused on those who face particular barriers to the realisation of their rights. But to be clear, we don't think that including older people, LGBT+ or other groups, for example those with dependents (protected under Section 75 of the Northern Ireland Act) would lead to such a danger.

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<sup>61</sup> Human Rights Consortium Scotland written response, 'A Human Rights Bill for Scotland: Consultation', 2023

<sup>62</sup> Though mechanisms such as the [United Nations Principles for Older Persons](#) (1991) and the [Yogyakarta Principles](#), 2006 and [Yogyakarta Principles plus 10](#), 2017 provide important guidance.



Finally, we strongly agree with the Human Rights Consortium Scotland that consideration should be given to specifically attaching a requirement on Scottish Ministers to publish guidance around interpretation of 'other status'.<sup>63</sup> This will allow them to specify evidence and criteria that public bodies should apply in considering other groups whose rights are at risk, for example Care Experienced people.

**Question 18: Do you think the Bill framework needs to do anything additionally for LGBTI or older people?**

As noted in our response to question 17 above, we would urge the Scottish Government to specifically name some additional groups who currently face particular barriers to the realisation of their rights in the equality provision to ensure duty bearers take specific note of the measures that must be put in place to better realise their rights.

We would suggest at least including LGBT+ and older people. This accords with the evidence the Human Rights Consortium Scotland has submitted.<sup>64</sup> There is great value in providing these specific groups with visibility in the Bill.

Currently the UN human rights treaty body system does not have treaties covering the rights of LGBT+ or older people,<sup>65</sup> and this is a huge normative gap.

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We once again encourage Scotland to lead the way on both the rights of older people and the rights of people in the LGBT+ community.

**Question 19: What is your view on who the duties in the Bill should apply to?**

We urge the Scottish Government to realise people's rights to the fullest extent possible by ensuring that the duties apply to as many public bodies as possible within devolution. This should ideally include public bodies both within reserved and devolved competencies, as for a rights holder it makes very little difference who is failing to realise their right. We urge the Scottish Government to discuss this with the UK Government and urge them to incorporate all of our international human rights at a UK level.

In addition, the duties should at least apply to all private bodies carrying out public functions whether the individuals are directly employed by contracted companies or those engaged by the contracted companies.

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<sup>63</sup> Human Rights Consortium Scotland written response, 'A Human Rights Bill for Scotland: Consultation', 2023

<sup>64</sup> *Ibid.*

<sup>65</sup> Though mechanisms such as the [United Nations Principles for Older Persons](#) (1991) and the [Yogyakarta Principles](#), 2006 and [Yogyakarta Principles plus 10](#), 2017 provide important guidance.

We would also urge the Scottish Government to consider what provision could be made for the termination or prevention of future procurement of private company contracts if that company is found to have breached the provisions of the Act as a way of reinforcing the provision.

## **Question 20: What is your view on the proposed initial procedural duty intended to embed rights in decision-making?**

We understand that this consultation is very wide ranging in its scope, and the difficulties that will necessarily have been part of putting together such a comprehensive document. However it is difficult for us to reflect on the initial procedural duty when the consultation hasn't given detail on exactly which type of duty it is proposing.

However, we do agree with the suggestion in the consultation document that there should be an initial procedural duty placed on public bodies, and we would strongly recommend that this initial duty is a duty to have due regard. This duty has the advantage of already being well understood and has a proven track record. In Wales we have already seen that it has had positive impact<sup>66</sup> in the better realisation of the rights of children and young people through the Rights of Children and Young Persons (Wales) Measure 2011.

We therefore believe that an initial 'bedding in' period where a procedural duty such as 'due regard' applies would have advantages to give public authorities time to get used to new duties and to build capacity, train staff, and change decision making processes. We ask the Scottish Government to be very definite about timelines in the text of the Bill to ensure there is clarity on this. We believe that the timescale for commencement of an initial procedural duty should be no more than six months from Royal Assent.

What can be achieved by a 'due regard' duty is limited. The Welsh example is evidence that accountability under a 'due regard' model can be lacking,<sup>67</sup> and so rights are not fully realised. Indeed, the UNCRC is not considered to be 'incorporated' in Wales,<sup>68</sup> and more work would need to be done beyond the 'due regard' duty in the 2011 Measure to reach this milestone. It is crucial that the shift in the duty from 'due regard' to 'comply' happens in a timely manner if the Bill is to make meaningful change in Scotland and for people to have their rights realised on the ground.

Therefore it is important that a clear timeline is given for the end of the initial phase and the shift to full duties (the 'duty to comply') is written into the Bill. We agree with the Human Rights Consortium Scotland that the Bill should include a date for the duty to comply coming into force of no more than two years after the Bill's commencement.<sup>69</sup> This will also allow a reasonable period for development of Minimum Core Obligations.

## **Question 21: What is your view on the proposed duty to comply?**

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<sup>66</sup> Hoffman, S. and O'Neill, S., 'The impact of Legal Integration of the UN Convention on the Rights of the Child in Wales', EHRC, 2018, p.46. Available here:

[https://www.equalityhumanrights.com/sites/default/files/the\\_impact\\_of\\_legal\\_integration\\_of\\_the\\_un\\_convention\\_on\\_the\\_rights\\_of\\_the\\_child\\_in\\_wales\\_eng.pdf](https://www.equalityhumanrights.com/sites/default/files/the_impact_of_legal_integration_of_the_un_convention_on_the_rights_of_the_child_in_wales_eng.pdf)

<sup>67</sup> Ibid., p. 36-45

<sup>68</sup> Ibid., p. 48-49

<sup>69</sup> Human Rights Consortium Scotland written response, 'A Human Rights Bill for Scotland: Consultation', 2023

We believe that all public bodies, and those outlined in our response to question 19<sup>70</sup> should be given a duty to comply with the rights in the Bill. In our answer to question 20 we have outlined that a duty to have due regard does not equate to incorporation on international rights treaties, it must go beyond this.

We would also urge the Scottish Government to ensure that the duty to comply extends to the substantive rights in CRPD which we outlined in our response to question 5.

To provide certainty and clarity for both duty bearers and rights holders, we would strongly urge the Scottish Government to include a specified time within the text of the Bill for the shift from the duty to have due regard to the duty to comply, and that this should be no more than 2 years from commencement. We agree with the Human Rights Consortium Scotland that the duty to comply should accompany the duty to have due regard, rather than replace it.<sup>71</sup> In proposing such a ‘dual approach’ to the introduction to the right to adequate housing in Wales, Professor Hoffman has noted,

*“By advancing two possible models for incorporation of the right to adequate housing it is not intended to suggest they are mutually exclusive. They are not. There is nothing to prevent both models being used in combination: a dual approach. Legislation could deploy Model A [due regard] to promote a proactive approach to the right to adequate housing in policy development (including legislation). Where this is insufficient to ensure right-compliant implementation of housing policy Model B [duty to comply] could be deployed to provide redress for individuals or groups adversely affected.*

*A dual approach, which combines Model A and Model B has the advantage that Ministers and local authorities are encouraged by the due regard duty (Model A) to proactively pursue policies to give effect to the right to adequate housing. However, where the actions of Ministers or local authorities in the housing field unreasonably or disproportionately affect the right to adequate housing as it is experienced by an individual or group there is a route to a remedy (Model B).”<sup>72</sup>*

We agree with the proposal set out in the consultation document that the duty to comply should be twofold; delivery of Minimum Core Obligations and demonstrating progressive realisation of the rights. Both of these elements are necessary for incorporation of the rights to have taken place.<sup>73</sup> The Scottish Government has a strong record of producing practical, high-quality guidance,<sup>74</sup> and we would encourage them to ensure guidance to public authorities includes detail on the definition of

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<sup>70</sup> As many public bodies as possible within devolution, and all private bodies carrying out public functions whether individuals directly employed by contracted companies or those engaged by the contracted companies. Consideration should be given as to whether provision could be made for the termination or prevention of future procurement of private company contracts if that company is found to have breached the provisions of the Act.

<sup>71</sup> Human Rights Consortium Scotland written response, ‘A Human Rights Bill for Scotland: Consultation’, 2023

<sup>72</sup> Hoffman, S., ‘The right to adequate housing in Wales: Feasibility Report’, June 2019, p.26. Available here: <https://sheltercymru.org.uk/wp-content/uploads/2023/02/RightToHousing-Full-ENG.pdf>

<sup>73</sup> CESCR General comment No. 3 ‘The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)’, 1990, particularly paras 9-10. Available here: [tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCESCR%2FGEC%2F4758&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCESCR%2FGEC%2F4758&Lang=en)

<sup>74</sup> See for example: ‘Fairer Scotland Duty: guidance for public bodies’, 2022. Available here: <https://www.gov.scot/publications/fairer-scotland-duty-guidance-public-bodies/documents/>

progressive realisation, including using maximum available resources, in line with international legal standards.

**Question 22: 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 duties set out in the Bill?**

We agree that there should be a requirement for public bodies to report on what actions they are planning to take and what actions they have taken to meet duties set out in the Bill and that these requirements should largely mirror those set out in the UNCRC (Scotland) Bill. This type of mainstreaming can be hugely beneficial in ensuring that when decisions and laws are being made those in greatest need of support to realise their rights are prioritised. Such a process would also act as a form of internal scrutiny mechanism and should result in fewer violations of rights and so less need for people and groups to take legal action to have their rights realised. Effective reporting can be a transformational activity if done thoroughly and with buy in from decision makers.

In a practical guide to implementing the socio-economic duty that we co-wrote with Greater Manchester Poverty Action; we highlighted 6 key steps that local and public authorities could take to support effective implementation which have relevance here. They are:

1. Conduct meaningful impact assessments to understand the consequences of socio-economic disadvantage (or in this case the failure to realise rights).
2. Use data effectively as a tool for decision-making and accountability.
3. Encourage strong and visible leadership.
4. Promote the principles of working in partnership with people with lived experience of socio-economic disadvantage (or in this case of rights violations).
5. Engage with residents, civil society, and voluntary and community sector organisations.
6. Ensure access to justice and monitoring impact and compliance.<sup>75</sup>

To ensure that monitoring is as effective as possible, it is crucial to ensure that those most impacted by violations of their rights are meaningfully consulted when developing guidance on reporting requirements and undertaking reporting.

We are in strong agreement with the Human Rights Bill Lived Experience Boards in relation to this issue, particularly that:

- Public bodies should not just report on the activities they have done or will do, but about the lived experience of rights and where there are gaps.
- Reports should be written in an accessible way, so that rights holders can use them. Added to this, they should also be published in a range of different formats and mediums.
- Public bodies, and the Scottish Government, should not be able to ‘mark their own homework’ when it comes to these rights implementation reports.<sup>76</sup>

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<sup>75</sup> Greater Manchester Poverty Action and Just Fair, ‘A Practical Guide for Local Authority Implementation of the Socio-Economic Duty in England’ 2021. Available here: <https://justfair.org.uk/wp-content/uploads/2021/06/Socio-Economic-Duty-Guide-Final.pdf>

<sup>76</sup> Human Rights Bill Lived Experience Board, ‘Long report of Block 2: Access to Justice,’ May 2022

On this final point we would also strongly urge the Scottish Government to include a requirement for public bodies to submit their reports to the Scottish Human Rights Commission for monitoring. We will return to this in question 31.

We would also urge the Scottish Government to think carefully about what else happens to the report when it is written and published? It cannot just be filed away. The reviewing of monitoring reports are important opportunities to discover gaps in protection and learn how to better realise rights. The review process should be used to the fullest extent possible to assess development and track progress with the goal of better developing the way Scotland protects human rights.

**Question 23: How could the proposed duty to report best align with existing reporting obligations on public authorities?**

We agree that it makes sense for these reporting requirements to complement and strengthen other public body reporting requirements. We note that following the entry into force of the Fairer Scotland Duty, the Equality and Human Rights Commission reported that many public bodies were integrating this Duty into existing processes and that there was benefit to this approach, *“respondents felt that the FSD sat well alongside their other duties, that they complemented each other, and that there were no tensions between the different duties or responsibilities.”*<sup>77</sup> We would suggest that insofar as possible, the Scottish Government does not re-invent the wheel, but rather adds to and strengthens existing processes.

**Question 24: 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?**

We agree that a duty to comply with the rights in the Bill should be placed on public bodies and those outlined in our response to question 19.<sup>78</sup>

As noted in our response to question 20, a duty to have due regard does not equate to incorporation of international rights treaties. While a duty to have due regard can be useful in laying necessary groundwork, to achieve incorporation of rights it is necessary to go beyond this.

As outlined in our response to question 21, the duty must be twofold; delivery of Minimum Core Obligations and demonstrating progressive realisation of the rights. General Comment Number 3 of

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<sup>77</sup> EHRC, ‘Evaluating the socio-economic duty in Scotland and Wales’, 2021, p. 16. Available here: <https://equalityhumanrights.com/sites/default/files/evaluating-the-socio-economic-duty-in-scotland-and-wales.docx>

<sup>78</sup> As many public bodies as possible within devolution, and all private bodies carrying out public functions whether individuals directly employed by contracted companies or those engaged by the contracted companies. Consideration should be given as to whether provision could be made for the termination or prevention of future procurement of private company contracts if that company is found to have breached the provisions of the Act.

the CESCR makes it clear that both of these elements are necessary for incorporation of the rights to have taken place.<sup>79</sup>

It may be worth the Scottish Government considering whether as well as demonstrating compliance, public bodies might be encouraged to make statements that highlight how they believe certain decisions or initiatives will help to better realise the rights contained in the Bill.

**Question 25: What are your views on the right to a healthy environment falling under the same duties as economic, social and cultural rights?**

We agree that there should be the same duties for the right to a healthy environment as for ICESCR (and special protection treaties). This would properly reflect the indivisibility of rights.

**Question 26: What is your view on the proposed duty to publish a Human Rights Scheme?**

We agree with the proposed duty to publish a Human Rights Scheme. Please see our response to question 40 for more detailed information on what we believe a Human Rights Scheme should contain. In short, in addition to the proposed requirements listed in the consultation document<sup>80</sup> we agree with the HRCS that the scheme should also include:

- requirements around improvements to data collection and publication.
- access for all 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.

**Question 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?**

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<sup>79</sup> CESCR General comment No. 3 'The nature of States parties' obligations (art. 2, para. 1, of the Covenant)', 1990, particularly paras 9-10. Available here: [tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCESCR%2FGEC%2F4758&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCESCR%2FGEC%2F4758&Lang=en)

<sup>80</sup> Scottish Government, 'A Human Rights Bill for Scotland: Consultation', 2023, p. 49-50

We commend the consultation document for clearly illustrating a comprehensive understanding of advocacy, *“When we talk about advocacy, we are referring to advocacy, information and advice provided to and for rights holders in relation to the rights in the Bill.”*<sup>81</sup>

Access to justice for the rights contained within the Bill is not a simple process of adding onto services and systems that already exist. As noted by Professor Boyle, *“Comparative international experience tells us that access to justice for economic, social, cultural, and environmental rights requires a degree of disruption to the legal system.”*<sup>82</sup>

But the change that is possible, makes undertaking the process worth it. We commend how lived experience has clearly informed the thinking in this consultation, and believe that this quotation gets to the very heart of why access to justice must be reformed and rethought in a much more eloquent way than we could hope to express,

*“And so they don’t [pursue a complaint], because they’re already consumed with the problems that are going on in their day to day life. And actually having that energy, not to mention, money and time to pursue a formal complaint that is going to take up all of your emotional energy, it will be really stressful, and you’ve already got enough problems.”*<sup>83</sup>

As noted by the Taskforce,<sup>84</sup> The Scottish Human Rights Commission,<sup>85</sup> CESCR<sup>86</sup> and the present consultation, remedies must be accessible, affordable, timely and effective.

Given this impressive understanding and the crucial nature of access to justice for making rights real, we are disappointed by the narrow scope of the questions in part 8 of the consultation. We would encourage the Scottish Government to go back to this area for further consideration, to look at the evidence they have received through the current consultation and throughout this whole process and consider how access to justice can be better realised. In particular we would urge the Scottish Government to carefully examine the recent discussion paper produced by the Scottish Human Rights Commission and authored by Professor Katie Boyle on access to justice.<sup>87</sup>

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<sup>81</sup> Ibid., p. 38

<sup>82</sup> Boyle, K., ‘Academic Advisory Panel Briefing Paper Access to Justice for Economic, Social, Cultural and Environmental Rights Principles of Adjudication’, September 2020, p. 1. Available here: <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-katie-boyle---access-to-justice/aap-paper-katie-boyle---access-to-justice/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BKatie%2BBoyle%2B-%2BAccess%2Bto%2BJustice.pdf>

<sup>83</sup> Scottish Government, ‘A Human Rights Bill for Scotland: Consultation’, 2023, p. 37

<sup>84</sup> National Taskforce for Human Rights Leadership Report, March 2021, p. 48

<sup>85</sup> SHRC, ‘Adequate and Effective Remedies for Economic, Social and Cultural Rights Background briefing paper for the National Taskforce on Human Rights Leadership’, December 2020, p. 5. Available here: <https://www.scottishhumanrights.com/media/2163/remedies-for-economic-social-and-cultural-rights.pdf>

<sup>86</sup> CESCR, ‘General Comment No. 9: The domestic application of the Covenant’, 1998, para 9. Available here: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2F1998%2F24&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2F1998%2F24&Lang=en)

<sup>87</sup> Boyle, K., ‘Access to Justice for Everyone: How might a new Human Rights legal framework improve access to justice in Scotland today? A discussion paper’, SHRC, September 2023. Available here: <https://www.scottishhumanrights.com/media/2496/access-to-justice-for-everyone-a-discussion-paper.pdf>

With regards the financial cost in relation to effective access to justice, we would urge the Scottish Government to read Alma Economics<sup>88</sup> cost-benefit analysis of the introduction of the right to adequate housing in Wales. The headline of this analysis was that incorporating the right to adequate housing in Wales will save money for current and future generations. £11.5 billion of advantages will be realised across the public purse and society, against estimated costs of £5 billion over a 30-year period.<sup>89</sup>

That being said, we believe that the Bill should include access for all to independent advocacy, and access to these services should be included in the Human Rights Scheme. We believe the Human Rights Consortium Scotland has persuasively laid out the value of independent advocacy in their response, which includes,

1. Enhancing understanding of rights: Independent advocates educate and inform individuals about their rights, addressing the common issue of people being unaware of their rights.
2. Enabling access to justice: Advocates facilitate routes to remedy for rights violations, ensuring that effective remedies are accessible to all, as mandated by Article 8 of the Universal Declaration on Human Rights.
3. Facilitating the right to participation: Advocates support and empower rights-holders to actively participate in decision-making processes, enabling duty bearers to fulfil their obligations around participation and leading to better decision-making.
4. Empowering rights-holders: Advocates work alongside marginalised individuals and groups, empowering them to participate equally in decision-making about their lives and policy and law-making processes, thus promoting the sharing of power and rights realisation.<sup>90</sup>

In addition, we are strongly convinced of the need for a central point of contact that people can be signposted to when they need to access justice to ensure on a very practical level that people know who to go to when they need help. We believe that part of the step-change necessary in the provision of rights advice in Scotland, is the co-production and resourcing of a National Hub for Human Rights Education, Information and Advice. Organisations who are the first point of contact for people who have experienced a violation of rights, such as welfare advisors and citizens advice organisations, should be well-trained on recognising potential violations and know how to support people to engage with such a National Hub. The system must be as easy to navigate as possible.

### **Question 28: What are your views on our proposals in relation to front-line complaints handling mechanisms of public bodies?**

We agree with the consultation document that front-line complaints handling by public bodies needs to be changed to take into account rights and duties in this Bill. We agree with the Human Rights Consortium<sup>91</sup> that in order for these changes (including any by the Scottish Public Services Ombudsman (SPSO) or by bodies not covered by SPSO such as courts and the police) to really impact

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<sup>88</sup> Alma Economics, 'The right to adequate housing in Wales: cost-benefit analysis' September 2022. Available here: <https://www.taipawb.org/wp-content/uploads/2022/09/Alma-Economics-Back-the-Bill-Final-Phase-2-report.pdf>

<sup>89</sup> Ibid., p.2

<sup>90</sup> Human Rights Consortium Scotland written response, 'A Human Rights Bill for Scotland: Consultation', 2023

<sup>91</sup> Ibid.



how people experience their rights, they must be made on the basis of meaningful engagement and co-production with people whose rights are most at risk.

## **Question 29: What are your views in relation to our proposed changes to the Scottish Public Services Ombudsman's remit?**

Based on the information in the consultation document, it seems that the suggestion would be to make the Scottish Public Services Ombudsman (SPSO) the main non-court route for access to justice for a violation of rights under the Bill. We are extremely aware that as a UK-wide rather than a Scotland-based civil society organisation (CSO) we do not have as much experience with the specific functioning of the SPSO currently and so will refrain from commenting on the rights or wrongs of this approach and leave that to those more qualified to do so.

However, if the Scottish Government does wish to proceed with this approach, then certain changes must be made:

- We agree with the consultation that the SPSO would need to have an expanded remit to consider rights issues.
- In order to meet the international legal standard of access to justice being adequate, more consideration is needed around remedy through the SPSO being accessible, affordable, timely and effective.
- Specific consideration, taking into account international legal principles, should be given to the range of remedies the SPSO can make, ensuring taking a complaint is timely, and the role of the SPSO in raising systemic issues with the SHRC.<sup>92</sup>
- If the SPSO is the main non-court route for access to justice for rights in the Bill, then we do not believe that to meet the 'effective' criteria that SPSO recommendations can be non-binding in nature in future. We understand that desire to ensure that the SPSO can work constructively with public bodies to achieve better compliance, however we do not think the correct balance has been struck in this instance. For justice to be effective it must also be capable of having 'teeth' when needed.
- We do not agree that the SPSO should be able to take investigations, but rather think that this is a power the Scottish Parliament should grant to the SHRC.
- In order to ensure that justice is 'accessible' we would urge the Scottish Government to rethink the proposed requirement that people would have raise a complaint with SPSO before taking a human rights case to court. To ensure accessibility, we must remove as many barriers as possible for people seeking redress. The proposed system would in effect create a 'double complaint mechanism', which is in our view unnecessarily burdensome and potentially traumatising. Furthermore, we consider that it may also heighten the risk of victimisation for having made a complaint. People complaining about rights violations are vulnerable to victimisation and need protections in place for this, both to ensure that they are not re-violated and also so that people feel able to pursue complaints with less fear of reprisals. Requiring them to go through the process twice increases the risk of victimisation

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<sup>92</sup> Economic, social and cultural rights violations can be systemic in nature, impacting many more people than just the claimant. In order to realise rights, careful consideration must be given for how structural injustice can be addressed. Professor Katie Boyle has given international examples of mechanisms in her paper, 'Academic Advisory Panel Briefing Paper Access to Justice for Economic, Social, Cultural and Environmental Rights Principles of Adjudication', September 2020

(actual and/or perceived). This in turn increases the likelihood that people will not pursue complaints with foundation because of the risks or perceived risks they face in doing so.

### **Question 30: What are your views on our proposals in relation to scrutiny bodies?**

We broadly agree with the proposals in the consultation document to add human rights to the remit of Scottish scrutiny bodies including by requiring scrutiny bodies to share information with each other, and with the SHRC, the Children and Young People's Commissioner Scotland (CYPCS), and others on human rights issues.

We urge the Scottish Government to consider carefully what resources and support these bodies would need to ensure they have proper capacity to undertake these new activities effectively. Access to justice is a non-negotiable aspect of incorporation to ensure that people are able to access a remedy for rights violations. While this may require some initial outlay in financial terms, the mid/long term benefits are clear in terms of rights protections in addition to lower long term financial costs to society.<sup>93</sup> Short term economics is the threat to rights protections being adequate, not the cost of access to justice.

### **Question 31: What are your views on additional powers for the Scottish Human Rights Commission?**

The Scottish Human Rights Commission was created through an Act of the Scottish Parliament.<sup>94</sup> This means that the Scottish Parliament has the ability to amend the powers of the SHRC by amending the 2006 Act. Unlike some other areas that this consultation deals with, the Scottish Government and the Scottish Parliament have much more freedom in this area in terms of the devolution settlement. We would strongly encourage the Scottish Government therefore to make the most of this opportunity to ensure it takes a maximalist approach to realising rights, based on international and national best practice.

We agree with the Taskforce's recommendations that the SHRC, "*should be given additional powers including taking test cases and conducting investigations, and any further extended powers should be considered.*"<sup>95</sup>

The SHRC helpfully undertook an analysis<sup>96</sup> of the powers that National Human Rights Institutions across the world enjoy, particularly in places where economic, social, cultural and environmental rights have been incorporated into domestic legislation. These include:

- Providing general and/or legal advice to rights-holders.
- Raising proceedings in its own name.

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<sup>93</sup> Alma Economics, 'The right to adequate housing in Wales: cost-benefit analysis' September 2022. Available here: <https://www.taipawb.org/wp-content/uploads/2022/09/Alma-Economics-Back-the-Bill-Final-Phase-2-report.pdf>

<sup>94</sup> Scottish Commission for Human Rights Act 2006, available here: <https://www.legislation.gov.uk/asp/2006/16/contents>

<sup>95</sup> National Taskforce for Human Rights Leadership Report, March 2021, p. 35

<sup>96</sup> SHRC, 'Building a new human rights framework for Scotland: Key legal features', September 2022, p. 89. Available here: <https://www.scottishhumanrights.com/media/2454/shrc-building-a-new-human-rights-framework-for-scotland-key-legal-features.pdf>

- Issue binding guidance.
- Issue general guidance.
- Issue annual reports.
- Investigate.
- Hold public hearings and require authorities to be present.
- Require authorities to provide information.
- Scrutinising laws.
- Requiring regular reporting.
- Benchmarks and indicators.
- Education and Advocacy.

We urge the Scottish Government to consider carefully which of these powers it could confer to the SHRC. We think that as a minimum, in addition to their current powers,<sup>97</sup> the SHRC should have a broader power to hold investigations and the power to raise proceedings in its own name. The power to raise proceedings is particularly important in addressing systemic human rights violations because by their nature, systematic violations impact multiple individuals and can require far-reaching remedies to ameliorate. A well-resourced SHRC is well-placed to identify such systematic violations, and it makes sense to alleviate the burden on individuals to take cases when an NHRI can do so, particularly for systematic violations which impact multiple people. The SHRC mandate should be expanded and should include protection<sup>98</sup> and participation of people whose rights are most at risk of human rights violations.

However, ensuring that the SHRC has the resources needed to use its powers effectively to hold public authorities to account is as important as the formal granting of powers.<sup>99</sup> Resources must be increased and regularly reviewed to ensure they are sufficient for the SHRC to adequately undertake its work.

**Question 32: What are your views on potentially mirroring these powers for the Children and Young People’s Commissioner for Scotland where needed?**

We agree that CYPCS should be given the same or similar powers under this Bill as the SHRC.

**Question 33: What are your views on our proposed approach to ‘standing’ under the Human Rights Bill? Please explain.**

We agree with the Scottish Government’s proposed approach that organisations with ‘sufficient interest’ should be able to bring cases. Such an approach will enable organisations to bring claims on behalf of individuals. This means that group interests may be advanced more clearly as organisations may be in a position to highlight multiple examples of similar violations. It means that responsibility for holding decision makers to account is not left on the shoulders of those who are already experiencing the difficulties of rights violations (see the powerful statement we quoted from the consultation document in our response to question 27) and may be vulnerable to further violations

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<sup>97</sup> To publish advice, guidance and ideas, conduct research and provide education and training. The Commission may also review and recommend changes to law, policy and practice.

<sup>98</sup> SHRC, ‘Building a new human rights framework for Scotland: Key legal features’, September 2022, p. 92

<sup>99</sup> Ibid.

or victimisation as a result of then raising complaints. If a person has suffered a violation of their rights, it seems an odd approach to justice that we require them to take action by themselves and shoulder this extra burden.

We were also struck by the example of Brazil<sup>100</sup> in Professor Boyle's paper where those who already have good access to rights were more easily able to access justice – and believe that expanding the definition of standing under the Bill could help prevent the exacerbation of existing inequalities.

In addition, such an approach to standing would also help overcome practical barriers around funding and other commitments that individuals experiencing rights violations may have if asked to take a case by themselves.

We believe that the Scottish Government should give further consideration to defining 'sufficient interest' so that this is clear for courts and for NGOs who are considering taking a case.

### **Question 34: What should the approach be to assessing 'reasonableness' under the Human Rights Bill?**

Ultimately, we agree with the Human Rights Consortium Scotland that the chief consideration is that people who experience violations of rights in the Bill must be able to access justice and accountability through the courts.<sup>101</sup>

We note that both the Taskforce<sup>102</sup> and the SHRC<sup>103</sup> have urged the Scottish Government to adopt an international legal definition of reasonableness rather than the Wednesbury test. This seems like a sensible approach to us.

We would suggest that any definition of reasonableness, if it is to vary from existing domestic definitions, would be well placed to be based on the criteria set out by CESCR.<sup>104</sup> That is:

1. The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights.
2. Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner.
3. Whether the State party's decision (not) to allocate available resources was in accordance with international human rights standards.
4. Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights.
5. The time frame in which the steps were taken.
6. Whether the steps had taken into account the precarious situation of disadvantaged and marginalised individuals or groups and, whether they were non-discriminatory, and whether they prioritised grave situations or situations of risk.

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<sup>100</sup> Boyle, K., 'Academic Advisory Panel Briefing Paper Access to Justice for Economic, Social, Cultural and Environmental Rights Principles of Adjudication', September 2020, p. 5

<sup>101</sup> Human Rights Consortium Scotland written response, 'A Human Rights Bill for Scotland: Consultation', 2023

<sup>102</sup> National Taskforce for Human Rights Leadership Report, March 2021, p. 50

<sup>103</sup> SHRC, 'Building a new human rights framework for Scotland: Key legal features', September 2022, p. 71

<sup>104</sup> CESCR Statement, 'An Evaluation of the obligation to take steps to the "Maximum Available Resources" under an optional protocol to the Covenant', 2007, para 8. Available here: [https://www2.ohchr.org/english/bodies/cescr/docs/e\\_c\\_12\\_2007\\_1.pdf](https://www2.ohchr.org/english/bodies/cescr/docs/e_c_12_2007_1.pdf)

This roots the definition in the international treaty which governs the rights which are to be incorporated.

### **Question 35: Do you agree or disagree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders?**

We do not agree that existing judicial remedies are sufficient in delivering effective remedy for rights holders. In addition to incorporating UN principles for remedy<sup>105</sup> into domestic law, we also consider that greater focus and attention needs to be paid to ensuring structural<sup>106</sup> and hybrid remedies are available.

As noted by Boyle et al,

*“Domestic remedies for social rights violations usually take three broad forms: individual (they help address a violation for one person), programmatic (they address a systemic issue that impacts lots of people), and hybrid (they achieve a mixture of both individual and systemic relief). A singular focus on any one of these could produce problems: courts that focus solely on individual cases may jeopardise relief for a broader class of petitioners, while leaving intact a systemic feature of a legal system that may require attention, thereby being unable to ensure non-repetition of the rights violation. Likewise, delivering only systemic relief may leave individual petitioners without access to a remedy. The world over, hybrid remedies that combine individual and systemic relief have been the most ‘effective’ kind, while also being capable of engaging with structural constitutional principles like the separation of powers and parliamentary sovereignty that seek to constrain judicial power in jurisdictions like the United Kingdom.”<sup>107</sup>*

However structural remedies are relatively unknown in the UK. Seeking to introduce the rights contained within ICESCR without ensuring access to structural remedies (and also hybrid remedies) would result in a huge access to justice gap. Violations of ESCR rights by their nature have a tendency to impact groups and communities of people. For example dangerous mould in local authority housing stock which makes people ill is likely to impact many people rather than a single individual. A structural remedy could be more appropriate to ensure cessation of the breach and while individual remedies may be needed to ensure restitution for the people impacted.

By introducing structural and hybrid remedies, Scotland would be ensuring much more genuine realisation of rights for people, particularly in terms of the key aspect of effective remedy if things go wrong. Boyle et al note that,

*“hybrid remedies may also take the form of collective litigation in situations involving multiple complainants and multiple duty bearers. Such ‘dialogic’ forms of judicial remedies are especially suited to claims involving social rights. Resolving violations of social rights may often require an*

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<sup>105</sup> Scottish Government, ‘A Human Rights Bill for Scotland: Consultation’, 2023, p. 45

<sup>106</sup> We have explored some of this in relation to our responses to questions on the powers of the SHRC and also on standing (questions 31 and 33) where we have suggested that allowing the SHRC to initiate proceedings in their own name, and that standing should be based on sufficient interest.

<sup>107</sup> Mukherjee, G., ‘Effective remedies & structural orders for social rights violations’ part of the Access to Justice For Social Rights Addressing The Accountability Gap project by Professor Katie Boyle, Dr Diana Camps, Kirstie English, Aidan Flegg, and Gaurav Mukherjee, May 2022. Available here: [https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Boyle-Effective-Remedies-Briefing\\_18MAY2.pdf](https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Boyle-Effective-Remedies-Briefing_18MAY2.pdf)

*institutional expertise that courts do not have. In such cases courts may consider the meaning and content of rights but defer back to the decision maker in relation to the remedy. The court can also play an important role in mitigating inter-institutional confrontation where more there may be more than one department responsible (this can include between executive departments at the national level or indeed disputes about obligations between the national and devolved level). Dialogic forms of judicial remedies can be innovative in nature in an exploration of how best to address systemic issues. In such kinds of remedies, courts can act as an intermediary between different rights holders and duty bearers to find an effective remedy that requires multiple duty bearers to respond as part of a structural interdict (a hybrid remedy that can offer individual and systemic relief potentially involving multiple applicants and multiple defendants).”<sup>108</sup>*

Such an approach is innovative, and it would allow the Scottish Government to evidence that in your journey to incorporate rights, it is the individual rights holders and how they experience their rights systemically in Scotland that remain front and centre of all your considerations.

**Question 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?**

We would strongly urge the Scottish Government to ensure that courts can apply structural and hybrid remedies if things do go wrong for rights holders.

In addition to the response above on dialogic forms of judicial remedy, Boyle et al have highlighted that while structural remedies in social rights cases take a variety of forms in litigation across jurisdiction, two of these may be adapted in the context of cases brought before courts in the UK:<sup>109</sup>

**a) The Declaration & Retention of Jurisdiction Model:**

In remedies of this nature, courts make a declaratory finding, while also retaining jurisdiction until the individual litigant or a litigant group obtains the necessary relief. Retention of jurisdiction may also occur where there is a systemic issue that requires legislative or executive intervention, without which there is a likelihood of repetition of the violation.

We encourage the Scottish Government to introduce ongoing supervision where decision makers have been found to have violated a right. In addition to providing relief and remedy to the individual(s) impacted we consider it important that a mechanism exists whereby lessons are learnt, and changes made to avoid repeat violations are included as part of any outcome.

We would suggest that in Scotland such supervision could be delivered either by the court or a Parliamentary committee or a specific supervisory body could be created for this purpose.

In a recent paper for the SHRC,<sup>110</sup> Professor Boyle notes an instructive and innovative example of the use of a structural remedy to deliver access to justice, including the use of supervision and ensuring non-repetition of the rights violation.

In the case of the Xákmok Kásek Indigenous Community in Paraguay, the Inter-American Court of Human Rights issued a structural order to address the situation of those who had been unable to

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<sup>108</sup> *Ibid*

<sup>109</sup> *Ibid*

<sup>110</sup> Boyle, K., ‘Access to Justice for Everyone: How might a new Human Rights legal framework improve access to justice in Scotland today? A discussion paper’, SHRC, September 2023, p.36

take possession of their ancestral land and who were in the meantime left without access to adequate food, medicine and sanitation. Boyle explains that in terms of a structural remedy the court:

- ordered the return of the Xákmok Kásek Community's land.
- instructed a public act of acknowledgement of the wrongdoing by the state.
- instructed the state to amend the domestic law to create an effective system for indigenous peoples to reclaim ancestral lands at the domestic level.
- the court also undertook to supervise compliance with judgment.

**b) The Collaborative Model:**

In remedies of this kind, courts innovate with models of problem solving that may take the form of expert committees, amici, and oversight boards which may design or monitor the remedy granted including the participation of those impacted as key stakeholders in the design of the remedy.

In this vein, we support the Human Rights Consortium Scotland's recommendation<sup>111</sup> that courts should be required to give the person taking the rights case an opportunity to have a say in what remedies are granted.<sup>112</sup>

As noted in our response to question 35, such an approach is innovative would allow the Scottish Government to evidence that in your journey to incorporate rights, it is the individual rights holders and how they experience their rights in Scotland that remain front and centre of all your considerations.

**Question 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?**

In short, courts should ideally be able to 'strike down' laws or issue declarators of incompatibility for any part of Scottish Parliament law that is not compatible with rights in the Bill. If the mechanisms we have discussed in questions 22-26 are in force, then we would hope that laws would in the vast majority of circumstances be compatible with the Bill, because human rights are effectively mainstreamed throughout the formation and passing of legislation. However, in those circumstances where incompatible legislation passes through these safeguards, there must be a decisive way for courts to ensure access to justice if people are to have faith that their rights will be realised.

The UNCRC Incorporation Bill requires that all new Scottish Parliament law must comply with the UNCRC. If it does not, courts can 'strike down' legislation in any proceedings in which they determine a provision of relevant legislation is not compatible with the UNCRC requirements and issue a 'declarator of incompatibility' on provisions of future legislation they determine not compatible with the UNCRC requirements. These parts of the UNCRC Incorporation Bill will be part of the reconsideration process in the Scottish Parliament due to the Supreme Court ruling. However, based

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<sup>111</sup> Human Rights Consortium Scotland written response, 'A Human Rights Bill for Scotland: Consultation', 2023

<sup>112</sup> Though as we cautioned in our response to question 14, such a feature must be implemented carefully and with safeguards in place (including support for complainants) to ensure that there is equality of outcomes for complainants. This is to ensure that those who for example are better informed, better able to self advocate or have access to advice and representation do not have better outcomes than other complainants.

on what is possible within the limits of the current devolution settlement, we would encourage the Scottish Government to consider a similar approach to the Human Rights Bill.

In addition, we note that in terms of structural remedies, Boyle et al outline a model of suspended declarations of invalidity.<sup>113</sup> A remedy of this nature comprises a declaration of constitutional incompatibility or invalidity on a government act or omission. Thereafter, such a declaration is suspended for a definite period, pending government action to correct the error that led to the situation. This approach is also very much worthy of consideration within the Scottish context.

### **Question 38: What are your views on our proposals for bringing the legislation into force?**

We agree with the consultation document, the FMAG<sup>114</sup> and the Taskforce recommendation<sup>115</sup> that there should be a 'sunset period' to allow public bodies to prepare for their new duties. However, as highlighted in the consultation document, the Lived Experience Advisory Board stressed the real need for action, particularly in the context of a cost-of-living crisis and rising inequality.

As highlighted in our response to question 20, we urge the Scottish Government to ensure that clear timescales are specified in the Bill. A duty to have due regard should commence of no more than six months after Royal Assent and the additional duty to comply no more than two years later. We believe this would strike the correct balance between allowing time for preparation (including the development of guidance, building capacity and defining Minimum Core Obligations) and ensuring people's rights are realised in a timely way.

### **Question 39: What are your views on our proposals to establish Minimum Core Obligations through a participatory process?**

We agree that it is essential that MCOs are developed through a participatory process, and this should be particularly with groups whose rights are most at risk of rights violations. Recent reports, such as those submitted to the Universal Periodic Review process by the Scottish Government (to inform the wider UK report), the SHRC and civil society organisations could help to identify those experiencing the greatest or most persistent rights violations.

We urge that careful thought is given to whether the process is led by Scottish Government or by the Scottish Human Rights Commission. If it to be led by the SHRC, then the Scottish Government must ensure that they are properly resourced to carry this work out effectively.

As noted by the Human Rights Consortium Scotland (HRCS),<sup>116</sup> many MCOs might reflect provision that is already in our law, but public bodies can be held accountable for delivering these through the human rights framework. This is a powerful added value that will help make rights real for those experiencing violations.

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<sup>113</sup> Mukherjee, G., 'Effective remedies & structural orders for social rights violations' part of the Access to Justice For Social Rights Addressing The Accountability Gap project by Professor Katie Boyle, Dr Diana Camps, Kirstie English, Aidan Flegg, and Gaurav Mukherjee, May 2022.

<sup>114</sup> First Minister's Advisory Group on Human Rights Leadership, 'Recommendations for a new human rights framework to improve people's lives: Report to the First Minister', December 2018, p. 34

<sup>115</sup> National Taskforce for Human Rights Leadership Report, March 2021, p. 36, recommendation 12

<sup>116</sup> Human Rights Consortium Scotland written response, 'A Human Rights Bill for Scotland: Consultation', 2023



We urge caution that major decisions relating to the impact and planning for this Bill should not simply be avoided and left to be resolved through this MCO development process after the Bill has passed.

Finally, MCOs should be subject to review through a participatory process. We are happy to support the HRCS recommendation that this should take place every 10 years.<sup>117</sup> We consider that this strikes a reasonable balance between ensuring things are not in a state of constant review, while also ensuring the MCOs reflect the reality people live in.

## **Question 40: What are your views on our proposals for a Human Rights Scheme?**

We think that the proposal to have a Human Rights Scheme is a vital one to the success of the Bill. We believe that those most impacted by human rights violations should be consulted by Scottish Ministers when developing both the scheme and subsequent reports, and like the model in the UNCRC (Scotland) Bill, reporting should take place annually.

An impactful Human Rights Scheme, working in conjunction with mechanisms outlined in questions 22-26 would do much to ensure that violations of rights do not happen in the first place, and so the need for rights holders to take legal action to seek redress would be lessened. While we recognise that people must be able to access justice when their rights are violated, we are very much in favour of 'frontloading' mechanisms to ensure that violations don't occur in the first place. Such a system is in everyone's interest.

In addition to the proposed requirements listed in the consultation document<sup>118</sup> we agree with the HRCS that the scheme should also include:

- requirements around improvements to data collection and publication.
- access for all 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.

## **Question 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?**

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<sup>117</sup> Ibid.

<sup>118</sup> Scottish Government, 'A Human Rights Bill for Scotland: Consultation', 2023, p. 49-50

We broadly agree with the Scottish Government proposal to require all Public Bills (Government, Member and Committee Bills) to be accompanied by a statement of compatibility with rights in the Bill and engage with Scottish Parliament around other enhancements to legislative scrutiny related to human rights.

We would encourage the Scottish Government to consider though, how a required statement would not only cover the ‘floor’ of compatibility, but better reflect the Taskforce’s recommendation that the statement also, “*demonstrate where the proposed Bill contributes to the advancement of such rights.*”<sup>119</sup>

We agree with the HRCS<sup>120</sup> that statements of compatibility should include a requirement to demonstrate that consultation with people whose rights are at risk has been undertaken in order to assess a Bill’s compatibility with human rights.

Mirroring the UNCRC Bill, Ministers should be required to carry out Human Rights Impact Assessments for any Bill or Statutory Instrument introduced to the Scottish Parliament.

A lot of the work on statements of compatibility and Human Rights Impact Assessments could be combined with the requirements to produce similar documents under other legislation (like the UNCRC Bill or the Human Rights Act) to produce a single statement/impact assessment that would more accurately reflect not only the interdependent nature of human rights, but also the joined up working across government departments needed to realise rights.

In discussions with the Scottish Parliament, we encourage the Scottish Government to consider what role the Equality and Human Rights Committee in the Scottish Parliament could play in important pre-legislative scrutiny.<sup>121</sup>

## **Question 42: How can the Scottish Government and partners effectively build capacity across the public sector to ensure the rights in the Bill are delivered?**

Capacity building across the public sector is vital to ensure that rights are properly realised. However, we would also like to make it very clear the Bill should not wait for an unspecified time while capacity is built (not least because capacity building is an ongoing process.) As in our response to question 20, we urge the Scottish Government to ensure that clear timescales are specified in the Bill. A duty to have due regard should commence of no more than six months after Royal Assent and the additional duty to comply no more than two years later.

Furthermore, capacity building can begin immediately, as the HRCS aptly points out, “*We already know what our international human rights are - building capacity should not, and does not need to, wait for the Bill to be passed.*”<sup>122</sup>

We agree that statutory and non-statutory guidance is essential and that such guidance should be developed with the meaningful participation of those who have experienced rights violations. As

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<sup>119</sup> National Taskforce for Human Rights Leadership Report, March 2021, p. 38, recommendation 14

<sup>120</sup> Human Rights Consortium Scotland written response, ‘A Human Rights Bill for Scotland: Consultation’, 2023

<sup>121</sup> See for example discussions in the Northern Ireland context in Human Rights Consortium, ‘Economic and Social Rights in Northern Ireland: Models of Enforceability’, 2020, p.13. Available here: <http://www.humanrightsconsortium.org/wp-content/uploads/2020/11/ESR-in-NI-Models-of-Enforceability-Report.pdf>

<sup>122</sup> Human Rights Consortium Scotland written response, ‘A Human Rights Bill for Scotland: Consultation’, 2023

noted in our response to question 21, the Scottish Government has a strong record of producing practical, high-quality guidance.<sup>123</sup> We are confident in the quality of the guidance that will be produced for this Bill.

Finally, we welcome the development of a plan around human rights capacity building for government and public bodies.

### **Question 43: How can the Scottish Government and partners provide effective information and raise awareness of the rights for rights-holders?**

A key focus of the work of Just Fair is capacity building and building the capacity of civil society, with the goal that rights holders will be more confident and have more capacity to know their rights and assert their power.<sup>124</sup> We know that across the UK people working in communities are doing the work of human rights defenders, though often they don't realise that their work can be viewed through this lens. We also know that building the capacity of rights holders is challenging and resource intensive. But it is the only way to truly ensure that people's rights are realised where it matters most, in the small places, close to home.<sup>125</sup>

We are therefore disappointed by the lack of development of this area in the consultation document and urge the Scottish Government to revisit this crucial aspect of the Bill as a priority. Learning from the experience of the Human Rights Act, it has been noted that a key reason for ongoing public debate about its future is that it was never properly 'bedded down' in the public consciousness and people have not felt ownership of it.<sup>126</sup> Taking ownership of rights is a key part of ensuring legislation to protect them is successful.<sup>127</sup>

We agree with the HRCS that a key first step must be to co-produce and fund a National Network for Human Rights Information, Education, Legal Services and Advice.<sup>128</sup>

### **Question 44: What are your views on monitoring and reporting?**

As noted in our responses to question 22 and 40, the Human Rights Scheme and the reporting requirements on public bodies need to bring accountability on fulfilling rights in the Bill. As outlined in our response to questions 13 and 31, the SHRC also has an important role in monitoring and scrutinising government and public body rights reporting.

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<sup>123</sup> See for example: 'Fairer Scotland Duty: guidance for public bodies', 2022. Available here:

<https://www.gov.scot/publications/fairer-scotland-duty-guidance-public-bodies/documents/>

<sup>124</sup> Just Fair, 'Turning the tide: Our strategy for 2023-25', available here: <https://justfair.org.uk/wp-content/uploads/2023/03/Just-Fair-Strategy-2023-25.pdf>

<sup>125</sup> Eleanor Roosevelt, Chair of the UDHR Drafting Committee, 1958

<sup>126</sup> See for example, Donald, A., Watson, J., McClean, N., Leach, P. and Eschment, J., 'Human Rights in Britain since the Human Rights Act 1998: a critical review', particularly p. 173-182. Available here: [https://www.equalityhumanrights.com/sites/default/files/research\\_report\\_28\\_human\\_rights\\_in\\_britain\\_since\\_the\\_human\\_rights\\_act\\_1998\\_-\\_a\\_critical\\_review.pdf](https://www.equalityhumanrights.com/sites/default/files/research_report_28_human_rights_in_britain_since_the_human_rights_act_1998_-_a_critical_review.pdf)

<sup>127</sup> Smith, A., 'Bills of Rights as Process: The Canadian Experience', SSRN, 2009. Available here:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1515797](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1515797)

<sup>128</sup> Human Rights Consortium Scotland written response, 'A Human Rights Bill for Scotland: Consultation', 2023

We would urge the Scottish Government to give consideration to a Scottish Parliament reporting duty, mirroring the approach taken in the UNCRC Bill.

We agree with the HRCS,<sup>129</sup> that at every stage of monitoring and reporting, it should not be reporting on activity itself. Instead, it should be reporting on activity or decisions that have led to the realisation of rights, as determined, and evidenced through participation of people whose rights are most at risk. This is a key distinction.

#### **Further information and contact**

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<sup>129</sup> Human Rights Consortium Scotland written response, 'A Human Rights Bill for Scotland: Consultation', 2023