A Human Rights Bill for Scotland: our response

About JustRight Scotland

JustRight Scotland is a registered charity (SC047818) established by an experienced group of human rights lawyers. We use the law to defend and extend people's rights, working collaboratively with non-lawyers across Scotland towards the shared aims of increasing access to justice and reducing inequality.

We provide legal advice and representation on human rights and equalities issues across a range of legal areas including: women's legal justice, trafficking and labour exploitation, EU citizen rights, migration and citizenship, disability and trans legal justice.

Whilst our work is specific to Scotland, our work covers both devolved and reserved policy areas, and as such we endeavour to respond to policy consultations across both Scotland and UK, where appropriate.

As public lawyers for people who face systemic inequalities, discrimination, and disadvantage, we use the provisions of the Human Rights Act 1998 (HRA) in our work, daily. In addition to providing direct legal advice to clients, we also run outreach legal surgeries and helplines, deliver rights information, training and legal education, and contribute to research, policy and influencing work.

Our Statement on the Scottish Human Rights Bill Consultation

JustRight Scotland welcomes the Scottish Government's consultation proposals for a Human Rights Bill published on 15th June as an important step towards realising #AllOurRights in Scotland.

By incorporating economic, social, cultural, and environmental rights directly into Scots law, this Bill will protect a range of rights including the rights to food, housing, social security, health, and a healthy environment. This will also be a first for the UK, as the UK Government has consistently resisted recommendations to incorporate these rights. The Bill will also include an equality clause to ensure equal access to the incorporated rights, as far as is possible within devolved powers.

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We welcome this approach and recognise the importance of bringing economic, social, cultural and environmental rights into Scots law, so that they finally become enforceable in our courts in the same way as civil and political rights. However, the Scottish Government committed to going as far as devolution would allow, and we are not convinced these proposals do so.

Further work is needed to ensure the Bill goes as far as possible to protect all our rights, including those of disabled people, black and minoritised people and women. The consultation proposals refer to the treaties upholding rights for these groups as "the equality treaties", ignoring the substantive rights each contains. If the proposals are followed, there will be no duty to comply with these rights and they will not be enforceable in our courts. They will be rights without a remedy.

We recognise that the limits of devolution make it impossible to incorporate these treaties in full, due to limits on the legislative competence of the Scottish Parliament related to equality law. However, there are a number of substantive rights that could be fully incorporated. For example, for disabled people, the rights to independent living, living in the community, and accessibility measures, among others. The consultation does not explain why the limits of devolution prevent incorporation of these rights with a duty to comply.

This Bill is an opportunity to strengthen an area of Scots law that is particularly weak – social care and support for disabled people. We know from our casework just how weak our existing law is, and how important it is for disabled people that this Bill require public authorities to comply with their human rights. It will be disappointing if the Scottish Government does not go as far as it possibly can.

We are also disappointed by the lack of progress on access to justice. The Scottish Government accepted all 30 of the recommendations of the National Taskforce on Human Rights Leadership, an expert group tasked with developing recommendations for the development of human rights in Scotland. The recommendations included a number related to access to justice, which asked the Scottish Government to give further, detailed consideration to various reforms to improve Scotland's administrative and civil justice system and bring it closer to providing the accessible, affordable, timely and effective remedies international human rights law requires.

While over two years have passed since the Scottish Government accepted the Taskforce's recommendations, it appears from the consultation that little work has been done on this. The proposals in this area are limited and will do little to address the systemic barriers that were evidenced in detail to the Scottish Government through the Taskforce process. It is unfortunate that there does not appear to have been joined up work within government departments, particularly the Justice Directorate, to develop proposals or bring forward related Bills, such as the long-awaited legal aid reform bill, notably absent from the Programme for Government once again this year.

While the Scottish Government has acknowledged that more needs to be done on access to justice within the Bill, with only a few months between the closure of the

consultation and a Bill being introduced to the Scottish Parliament, there is inadequate time for development of comprehensive, detailed proposals.

We are therefore calling for:

- **The right to an effective remedy** – one that is accessible, affordable, timely and effective – to be included in the Bill as a substantive right, with a duty to comply. That was omitted from the consultation proposals. Inclusion of this right in the framework Human Rights Bill will ensure it is part of national law and can be used to drive positive change, in the same way as the other substantive rights.

- **Reconsideration in the treatment of CERD, CRPD and CEDAW**, which have disappointingly been relegated to "equality treaties" suggesting they do no more than require equal treatment in relation to the rights set out in ICERSCR and the International Covenant on Civil and Political Rights. In fact, each of these Treaties contain important standalone, substantive rights relevant to these groups that could be incorporated within devolved limits. We also highlight key substantive rights in CRPD that should be directly incorporated.
- **A duty to comply – rather than a procedural duty – for as many rights as possible, including substantive rights within CRPD**. The duty to comply should include delivering MCOs and demonstrating progressive realisation of rights. There are many well-known barriers to accessing justice in Scotland – including lack of information on rights and remedies, prohibitive cost, complexity, unfair deadlines, and lack of legal advice and representation – which are compounded where economic, social, and cultural rights are being breached.
- **A commitment to, and production of a detailed plan for, embedding participation in the design and implementation of the Bill**, with a requirement to involve people whose rights are more at risk. We are disappointed, given the extensive opportunities to more closely involve people and communities whose rights are most at risk in the legislative process, including the design of this consultation, not to see more developed proposals for embedding participation at this stage.

We also ask for continuous engagement in the months ahead, and for the draft Bill to be shared with third sector organisations before it is introduced to the Scottish Parliament.

Overall, we are underwhelmed by the consultation, its lack of ambition and the failure to develop key areas. Nevertheless, we remain committed to encouraging the development of a Bill that goes as far as possible under devolution and will continue to engage with the Scottish Government to support this, as well as submitting what follows - our detailed response to the consultation.

Our Response

Our response to the consultation on a Human Rights Bill for Scotland.

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?

We welcome the proposal to allow for dignity to be a principle to interpreting rights, as a key feature of international human rights treaties.

The idea of human dignity has been part of modern international human rights treaties since the 1940s[1]. It features in core United Nations treaties, regional human rights regimes, and it is a particularly important principle in the European Union, as reflected in the EU Charter of Fundamental Rights.

Dignity is also an important idea that could bring people closer to the human rights participation process, as it explains what human rights legislation aims to achieve.

However, we think the proposals do not go far enough, as they only suggest bringing forward an interpretative clause to allow courts to consider dignity when adjudicating on the rights in the Bill, with reference to the text of international treaties and materials. We believe that courts should be required to consider dignity when adjudicating on the rights of the Bill, and that dignity should be included in a statement of principles applicable to all human rights.

We agree with the Taskforce Recommendation #9 that suggests a purpose clause to

> "*Give maximum possible effect to human rights and recognise that human dignity is the value which underpins all human rights"*.

The purpose clause should include the principles of universality, indivisibility, and interdependence as well as non-discrimination and could help with a consistent understanding and interpretation of the rights.

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

Minimum core obligations (MCOs) are baseline levels of each right to be met immediately for everyone all the time, regardless of resources. Many countries embed the right to a social minimum reflecting the concept of the minimum core – i.e., a social floor, and not a ceiling, that ensures no one falls into destitution. This concept is built on the premise that in a functioning society, individuals must be able to access essentials to participate. Often the threshold for assessing compliance with a minimum core is based on the concept of human dignity.

This approach is used in different constitutions across the world, for example in Germany, in Belgium, in Switzerland, in Colombia and in Brazil.[2]

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[1] Webster A., 2020, Academic Advisory Panel to the National Taskforce for Human Rights *Leadership The Underpinning Concept of Human Dignity*, p.1
[2]Supra note 1 pp.11-12

The Taskforce recommended that following the passage of the Bill, a participatory process be undertaken through which more specific MCOs, appropriate for Scotland, would be set. That process could take a number of years and will likely need to be repeated to update the MCOs periodically.

The Academic Advisory Panel Briefing Paper on the Underpinning Concept of Human Dignity states that dignity is a useful concept to engage with people on human rights, as its shared meaning can help understanding these complex and abstract concepts[3]. At JustRight Scotland we work with people who have experience of being denied dignity in trying to access services on a daily basis, as many of the services they access are not designed to accommodate their needs. Nonetheless, we are concerned the proposals do not address what that process may look like or when it might take place.

Whilst dignity can be one of the concepts used in that process, it cannot, and it should not, be the only one. The process for defining minimum core obligations should present specific results - for example in relation to adequate housing, the process would have to establish minimum core obligations in relation to that right, such as size, heat, light, cooking and washing facilities, natural light, access to outdoor space etc.

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

We believe that General Comments, Concluding Observations, and opinions made by the Committees of the United Nations should be specifically included as interpretative guidance in the Bill. To do so ensures that Scotland keeps pace with, or indeed leads, international law and practice with respect to human rights and can help courts and tribunals understand how these rights look in practice and how they need to be interpreted. For example, the United Nations Convention on the Rights of the Child(Incorporation)(Scotland) Bill includes a part that allows courts and tribunals to consider these international human rights sources when interpreting UNCRC rights[4], we agree the same should be done for rights under this Bill.

International human rights treaties and constitutional documents are “living instruments”. The scope of rights develop as time passes and societal attitudes develop. This is an aspect of human right law which is readily accepted by our courts in the application of the Human Rights Act 1998 (HRA).

In the HRA context, it is the European Court of Human Rights (ECHR) which provides ongoing interpretative guidance on the European Convention on Human Rights, and the courts under section 2 HRA “take account” of, amongst other things, any judgment, decision, declaration, or advisory opinion of that court. If the policy intention is to ensure the context of these rights are properly understood by the courts, then it follows that the courts should be encouraged to take account of these critical sources.

[3] Ibid
[4] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [as passed] part 1.4.

The Scottish judiciary has extensive judicial interpretation experience. Scotland is a common law country sitting within a Union with an uncodified constitution; judicial interpretation is a centuries old tradition. Prior to the coming into force of the HRA in 2000, the Scottish courts were already interpreting rights contained within the ECHR. Section 2 of the HRA brought in a requirement to "take account" of, amongst other things, any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights. It is important to note that the judgments of the European Court of Human Rights, including those against the UK, are not binding on the Scottish courts. They are binding on the UK government by virtue of Article 46 ECHR, but not the courts. This can result in what has been called a "judicial dialogue" between domestic courts and the European Court of Human Rights on the interpretation and application of rights in our domestic landscape.

Therefore, there is already an inherent culture and practice of judicial interpretation of rights conferred by international treaties in the UK, including Scotland.

In relation to General Comments, Justice McCloskey provides a particularly thorough assessment of United Nations Convention on the Rights of the Child General Comment No.14 and how it interplays with the ECHR and domestic primary legislation in MK, IK and HK v Secretary of State for the Home Department[5].
In explaining why the ECHR does not exist in a vacuum but it belongs to a broader international legal framework, he argues that:
"Both UNCRC and, by logical extension, the various measures of domestic and international law […], are to be considered in conjunction with a publication of the United Nations Committee on the Rights of the Children, "General Comment Number 14 (2013) on the Right of the Child."[6]
This is an example of how these matters can be and are already deftly handled by the Scottish judiciary.

We believe that the General Comments serve an important role in providing interpretative guidance and that their status is not a matter of controversy. Similarly, with respect to Concluding Observations, they provide an insight into the state of human rights in a certain country at a certain time.

We also believe the interpretative clause should be specific enough to ensure judges know what they may take into account, while allowing for flexibility to guarantee judges can resolve incompatibilities and make a decision suitable in the Scottish context.

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

The incorporation of international law into domestic law means embedding legal standards as established by international law and making them enforceable at the domestic level[7]. To guarantee the effective implementation of human rights, incorporation needs to retain the international normative content without weakening it

[5] JR/2471/2016 Upper Tribunal Immigration and Asylum Chamber Judicial Review Decision Notice
[6] Supra note 5, para 22
[7] SHRC, 2018, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights*, https://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf

and ensure that if a violation occurs there is an effective remedy in place. It is also important to guarantee a degree of flexibility when incorporating rights, to allow for domestic law to elaborate and go further than the international framework.

Importantly, incorporation of human rights into domestic law should derive from international law, expanded upon by domestic law and be coupled with an effective remedy for a violation of right. To achieve this, the proposals indicate a preference towards direct incorporation. As there are different models of incorporation, we believe the Scottish Government needs to undertake additional analysis to ensure the best model is chosen for Scotland. Without that further analysis we are unable to comment on whether the direct approach to incorporation proposed in the consultation offers the strongest protection to human rights.

However, we believe that only placing a duty to comply to the International Covenant on Economic, Social and Cultural Rights is a significant departure from full incorporation of these treaties. We understand this is a complex area, but we would encourage the Scottish Government to explore ways to adopt a maximalist approach and ensure substantive rights, particularly in relation to the Convention on the Rights of Persons with Disabilities (CRPD), are incorporated into Scots law to the maximum extent permitted by devolution and given a duty to comply.

This is in line with the recommendations issued in 2021 by the National Taskforce for Human Rights Leadership, which specifically called for the incorporation of the Convention on the Rights of Persons with Disabilities to ensure full and equal enjoyment of rights for disabled people.

We are also concerned that the Scottish Government does not explain what a procedural duty would look like, and we would suggest instead imposing an initial duty to have due regard - followed by a duty to comply - as this would enable the possibility of judicial review if decision makers fell short of what is expected of them.

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.

First of all, we believe calling the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) “equality treaties” is inaccurate. These treaties do much more than address equality in relation to the rights set out in ICESCR and the International Covenant on Civil and Political Rights (ICCPR). That is the case for CEDAW and CERD, but it is particularly true for CRPD. There are substantive rights in CRPD that could and should be incorporated into Scots law without going beyond devolved competence.

The Scottish Government has an opportunity to add strength to areas of Scots law where the legal framework for protection of human rights to an adequate standard remains weak.

In addition to economic, social, cultural, and environmental rights, the Taskforce recommended incorporation of:

- the Convention on the Elimination of All Forms of Discrimination against Women (Recommendation 3);
- the Convention on the Elimination of All Forms of Racial Discrimination (Recommendation 4);
- the Convention on the Rights of Persons with Disabilities (Recommendation 5).

It further recommended the incorporation of a right for older people (Recommendation 6) and an equality clause that protects and promotes the full and equal enjoyment of rights of LGBTI+ people (Recommendation 7).

The Scottish Government accepted all these recommendations and committed to fulfilling them to the greatest extent possible under devolution.[8]

The consultation proposals do not fulfil that commitment.

Having relegated them to the "equality treaties", the proposal is that there will be no duty on any public authority or provider of services to comply with these rights. If there is no duty to comply, there is no prospect of holding public authorities to account, or of enforcing these rights. Without a corresponding right to an effective remedy for breach, this cannot be said to be incorporation of these rights.
If the limits of devolution meant that it was impossible for the Scottish Parliament to pass legislation incorporating these rights with a duty to comply, that would be a reasonable explanation for these proposals. However, that does not appear to be the case.

It is acknowledged that some rights in CEDAW and CERD would conflict with the approach taken in the Equality Act 2010 (Equality Act), and therefore cannot be incorporated due to devolution limits (as explained below).

However, there are a number of rights in CRPD, CEDAW and CERD that it appears could be incorporated within devolved limits, in whole or in part, including but not limited to:

CRPD:
Art 5 Equality and non-discrimination; Art 8 Awareness raising; Art 9 Accessibility; Art 17 Protecting the integrity of the person; Art 19 Living independently and being included in the community; Art 29 Participation in political and public life; Art 30 Participation in cultural life; Art 31 Statistics and data collection.

CEDAW:
Art 2 Duty of States, Art 3 Equality; Art 5 Stereotyping and cultural Prejudices, Art 6 Trafficking and Prostitution, Art 7 political and public life, Art 10 Education, Art 12

[8] As confirmed in the guide to the consultation: https://www.gov.scot/publications/human-rights-bill-scotland-guide-consultation/ and as noted by the Scottish Government in its submission to the Universal Periodic Review in October 2022: https://www.gov.scot/publications/universal-periodic-review-2022-scottish-government-position-statement/pages/4/ (see https://www.justrightscotland.org.uk/2023/09/access-to-justice-and-the-new-scottish-human-rights-bill/ - link to intro section which explains this in more detail.

Health, Art 14 Women in rural areas, Art 15 Equality before the law, Art 16 Marriage and family life.

CERD:
Art 2 Obligations to eliminate Racial Discrimination, Art 4 Racist Hate Speech, Art 7 The Role of Education in combatting Racial Discrimination.

The Scottish Government appears to accept that some rights in CEDAW, CERD and CRPD could be incorporated within competence, but nevertheless proposes to apply a blanket approach to these Treaties, omitting a duty to comply even where it would be possible. The reason given is the desire to produce an accessible piece of legislation. That is not convincing.

Clarity of legislation is always important, but it is not clear that incorporating additional rights would overly complicate the Bill.

This legislation is also highly unlikely to be a document an individual will be able to refer to directly to understand their rights. It is unlikely to be used in that way even by "duty-bearers," those with the obligations under the Bill. They are not likely to be able to discern their obligations in specific situations from reading this Bill, without reference to guidance. Guidance will have to be developed to explain the meaning of the Bill in different contexts, as has been done for the Equality Act.

Indeed, clear guidance is going to be critically important to the effective implementation of this Bill.

Moreover, the justification suggests that incorporation of ICESCR rights does not involve assessment of devolved limits, removal of parts of rights and adaptation of language, in order to remain within devolved competence.
For ICESCR, the consultation proposes to incorporate only what is referred to as "core ICESCR rights." They do not clearly define which ICESCR rights are covered. They may be referring to: the right to an adequate standard of living; the right to health; the right to education; the right to social security and the right to take part in cultural life and enjoy the benefits of scientific progress.[9] These rights have elements that are reserved, which will need to be carved out of the Bill for it to be within competence. That is not recognised in the consultation, which seeks to present ICESCR as entirely straightforward in contrast with the other Treaties.
Adaptation of Treaty provisions will be required no matter which model of incorporation is used and which rights are covered. If the Treaty text is included in the Bill, it will need redactions and amendments to create coherent legislation that fits within devolved competence. That is the same, to some extent, for many of the rights across all of the Treaties.

If work can be done to determine where the line between reserved and devolved falls for each of the core ICESCR rights, it can also be done to determine that line for the other ICESCR rights (the right to work; just and favourable conditions of work; trade

[9] These rights are referred to on page 16 of the Consultation, which is referred back to later in the document for more detail on which rights are included, however page 16 does not clearly state that these are the core ICRESCR rights they propose to incorporate, only that ICESCR includes these rights, and that is within a section on Taskforce recommendations.

unions and the right to strike, and protection of the family and maternity) and for the rights in CERD, CEDAW and CRPD.

Therefore, the suggestion that incorporation of any rights contained in CERD, CRPD and CEDAW with a duty to comply would require careful navigation of devolved competence, and adaptation of Treaty text, is not a convincing explanation for the Scottish Government's proposals failing to go as far as they could do.

The Taskforce recognised that it was *"important that the way in which [ICESCR, CEDAW, CERD, CRPD] are incorporated is effective for ensuring the protection and realisation of rights in people's everyday lives."*[10] It recommended that there should be "full incorporation, subject to competence constraints", of these treaties.

That is what the Scottish Government committed to and that is what it should be held to - incorporation with a duty to comply for every right possible, giving those who would benefit from those rights the maximum protection possible.

If it is the Scottish Government's position that certain rights in ICESCR and the whole of CERD, CRPD and CEDAW cannot be incorporated with a duty to comply within competence, it should explain how it arrives at that conclusion. The very limited information in the consultation is inadequate.

As Lady Carmichael noted in a recent Court of Session decision, in a consultation:

> *"The decision maker must give sufficient reasons for any proposal to permit intelligent consideration and response."*[11]

It is not adequate for the Scottish Government to say that in its view competence constraints and the objective of creating accessible legislation means it will only incorporate ICESCR "core rights." Given the legitimate expectation raised by its acceptance of the Taskforce's recommendations, it must give sufficient reasons for how it has arrived at that view. We appreciate actual legal advice cannot be shared, but it can explain its position without reference to any legal advice.

It is also relevant that Scotland is leading the way on incorporation in the UK, with interested parties in Northern Ireland, Wales and England looking on to draw on this experience in pushing for incorporation through their devolved legislators or at a UK level. As a pathfinder, Scotland should set the strongest possible example, going as far as it possibly can.

We set out our own analysis below, explaining why in our view both the Scottish Government and the Scottish Parliament could incorporate a number of substantive rights from CRPD, CERD and CEDAW, within the limits of devolution.

Before doing so, we explain why the proposals to incorporate CRPD, CERD and CEDAW with only a "procedural duty" is inadequate if incorporation with a duty to comply could be possible.

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[10] https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/ at page 30, and recommendations 1(b), 2, 3, 4 and 5.
[11] Outer House, Court of Session [2022] CSOH 68 2022csoh68.pdf (scotcourts.gov.uk) at para 29.

Procedural Duty

For CERD, CEDAW and CRPD, the consultation proposes that only a "procedural duty" would apply to these rights. The consultation notes that the intention is to ensure that duty-bearers (those with obligations under the Bill) consider the rights in CERD, CRPD and CEDAW when delivering ICESCR rights and in other decision-making. Those engaging with the consultation are asked to give their views on that. To do that, we firstly have to understand what the proposal means and what its effect would be.

Disappointingly, there is no explanation of this proposal in the consultation. Not only does it not specify what "procedural duty" they propose, how that would work or what it would require, they do not make it clear that this would mean these rights would not be enforceable. There would be no effective remedy for breach of these rights. Indeed, page 19 of consultation states that the "procedural duty" would ensure that duty-bearers could be held accountable if they did not take the rights into account in their decision-making. Without more detail, that is misleading.

While they have not said what "procedural duty" they are proposing, we have existing examples in national law that we can draw from to engage with the proposals, in the absence of an explanation.

The Public Sector Equality Duty (PSED) in the Equality Act is a duty on public authorities to "have due regard" to the need to eliminate discrimination, advance equality of opportunity and foster good relations between those who share protected characteristics and those who do not. It is *not* a duty to take steps to achieve the elimination of discrimination, equal opportunity, or good relations. It is only a duty to consider, take into account, or think about these needs when making decisions. If a public authority does so, and can demonstrate having done so if challenged, its decision cannot be challenged even if it is detrimental to equal opportunity. It is a process duty, not an outcome duty.

As Professor Katie Boyle advised the Taskforce[12] in 2020:

> *"Due regard is what is known as a procedural duty which confers the right to a process. When decision makers are asked to comply with the duty to have due regard it means that they must take into consideration, or take into account, a particular matter as part of the decision-making process. It provides the right holder with a right that a particular process will occur i.e., that the decision maker has regard to the rights in question as part of the decision-making process.*
>
> *If the decision maker has had due regard as part of the decision-making process, then the duty will be dispensed with, even if this results in no substantive change to the outcome in favour of the rights holder. The duty is*

[12] https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/#:~:text=On%2012%20March%202021%2C%20the,will%20bring%20internationally%20recognised%20human

concerned with the lawfulness of the process and not the lawfulness or the adequacy of the outcome."[13]

Discussing the PSED Professor Boyle noted that:

> *"The public sector equality duty in the UK requires that a decision maker has due regard to promote equality of opportunity between different disadvantaged groups.... **This is not a duty to achieve the outcome of equality of opportunity**, but rather, a duty to have due regard to the need to achieve this outcome.*[14]*"*

Criticism of the weakness of this approach has been noted by the Equality and Human Rights Commission who concluded that there was limited evidence of positive change through the implementation of the public sector equality duty. One of the reasons provided was because there is a tendency to focus on outputs rather than outcomes[15].

Boyle continues:

> *"It is important to note that while the duty to have due regard might be helpful as a means of implementing, or integrating, ESC rights into decision making processes this duty does not incorporate the rights into domestic law because there is no remedy for a failure to comply with the rights framework. The duty would not be transformative in nature and if implemented alone would fall short in terms of the principles of keeping pace and global leadership."* [16]

In justifying its proposals, the Scottish Government has asserted that a procedural duty is "justiciable", meaning that it is possible to challenge a decision in court relying on a procedural duty, and a court will review whether or not the duty was complied with. That is accurate, in the sense that challenges can be made relying on the PSED, and the Court of Session will consider if it has been complied with. However, it will review whether or not the process has been followed, not the merits of the decision.

The due regard duty was explained by the English Court of Appeal in 2008:

> *"The duty is not a duty to achieve a result, namely to eliminate unlawful …discrimination or to promote equality of opportunity and good relations between persons of different … groups. It is a duty to have due regard to the*

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[13] Boyle K., 2020, *The Meaning and Content of Duties to be Considered for Inclusion in the Bill*, paper for the Academic Advisory Panel to the National Taskforce for Human Rights Leadership: 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

[14] Ibid.

[15] Examples of that research include https://www.equalityhumanrights.com/en/publication-download/reviewing-aims-and-effectiveness-public-sector-equality-duty-psed-great-britain; https://www.equalityhumanrights.com/sites/default/files/review-of-public-sector-equality-duty-psed-effectiveness.pdf; https://www.equalityhumanrights.com/en/publication-download/effectiveness-psed-specific-duties-scotland

[16] Supra note 13.

> *need to achieve these goals. The distinction is vital. [….] What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged [group] that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing."*[17]

In a more recent example, in a case concerning cuts to financial support for asylum seekers, the Inner House of the Court of Session held that:

> *"Section 149 of the 2010 Act, which contains the PSED, is relatively precise in describing what is required of a public authority. It is to have "due regard" to certain specified matters. Having "due regard" is explained in the section itself."*

The duty has been analysed in a number of cases in England and Wales, culminating in *Hotak* v *Southwark LBC* [2016] AC 811.

In distilling these cases, Lord Neuberger said (at para 75) that the duty:

> *"'must be exercised in "substance, with rigour, and with an open mind"' ... [It] is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that there has been a rigorous consideration of the duty. Provided that there has been 'a proper and conscientious focus on the statutory criteria' ... '[T]he court cannot interfere ... simply because it would have given greater weight to the equality implications of the decision.'"*[18]

The Court of Session said it was unable to improve upon that formulation of the duty, thereby upholding that approach. The challenge to cuts to child support failed.
In rare cases, a failure to comply with the PSED can result in a decision being reduced (set aside as unlawful).

For example, in September 2022 the Outer House of the Court of Session held that a decision by Scottish Borders Council to close a day care centre was unlawful, as it had failed to carry out an equality impact assessment in relation to that specific closure, and had not complied with the PSED.[19] However, the court's decision only goes as far as striking out the decision of the local authority; they cannot direct a public authority to fulfil a particular outcome. The public authority could simply retake the decision, this time ensuring they comply with the procedural requirements, documenting having taken into account the likely impacts of their decision on

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[17] Baker & Ors, R (on the application of) v Secretary of State for Communities & Local Government & Ors [2008] EWCA Civ 141 (28 February 2008) (bailii.org) at para 31.
[18] Lord Carloway for the Inner House in (FIRST) NATASHA TARIRO NYAMAYARO and (SECOND) OLAYINKA OLUREMI OKOLO Petitioners and Reclaimers against THE ADVOCATE GENERAL, representing THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Respondent https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih29.pdf?sfvrsn=0 at para 83.
[19] OUTER HOUSE, Court of Session [2022] CSOH 68 https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csoh68.pdf?sfvrsn=261fb57a_1

different groups, but coming to the same conclusion, that they will shut the centre. If they have complied with the process requirements, the court cannot interfere with merits of the decision, and it cannot replace the local authority's decision with a decision of its own.[20]

The extent of the distinction between a duty to comply and a procedural duty ought to have been spelled out in the consultation. It should have been made clear that a procedural duty will not enable duty-bearers to be held to account for failure to fulfil a substantive right. The example of the PSED ought to have been provided, along with an explanation of its severe limitations. For people to engage with the proposal they need to have that detailed explanation. Without that, it is not meaningful consultation.

Having explained why incorporating CERD, CRPD and CEDAW with only a "procedural duty" will not give people enforceable rights in national law, below we set out our analysis leading to the view that the Scottish Parliament can incorporate a number of additional rights within competence.

Devolved competence

All Scottish Parliament legislation must be within competence, as required by the Scotland Act 1998, which reserves to the UK Parliament several whole policy areas. The Scottish Parliament cannot pass legislation that relates to those reserved areas,[21] or modify specified Acts of the UK Parliament, including the Human Rights Act 1998.[22]

The UK Secretary of State can also prevent Scottish legislation from becoming law if:
(i) it modifies the law as it applies to reserved matters, and
(ii) they have reasonable grounds to believe it would have an adverse effect on the operation of the law as it applies to reserved matters.[23]

The consultation confirms that the main concern in relation to incorporation of CERD, CEDAW and CRPD is the reservation of "equal opportunities."[24]

In the Scotland Act 'Equal opportunities' means the prevention, elimination, or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language, or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions[25].

The Explanatory Notes to the Scotland Act[26] explain that:

[20] In some cases, the decision of the court to reduce the public authority's decision will prompt the public authority to reconsider, leading to a different outcome. However, this is far from guaranteed.
[21] Section 29(2)(b). SP legislation will not be considered to "relate to" a reserved area if it has merely a loose, incidental, or consequential connection with a reserved matter (*Martin v Most* [2010] UKSC 10; *Imperial Tobacco v LA* [2012] UKSC 61). However, a provision that impinges on a reserved matter will be outwith the competence of the SP even if the main purpose of the legislation relates to a devolved matter.
[22] Section 29(2)(c) and Sch 4 Pt 1, para 2.
[23] Section 35(1)(b).
[24] Scotland Act, 1998, (Schedule 5, Pt 2, head L2)
[25] Ibid
[26] Scotland Act 1998 https://www.legislation.gov.uk/ukpga/1998/46/notes/contents

> *"Current legislation makes provision in relation to the prevention or elimination of discrimination on grounds of sex, marital status, race, or disability. There is no current domestic legislation dealing with discrimination on grounds such as age or sexual orientation. All these matters are, however, reserved."*[27]

This confirms that what is reserved is the whole policy area of equal opportunities, not only what is covered by the Equality Act.

However, there are important exceptions to the reservation of equal opportunities, including two that were added in 2016. As Professor Nicole Busby pointed out in a paper for the National Taskforce,[28] the second additional exception may present an opportunity for greater incorporation than would have been possible before the Scotland Act 2016.

The second additional exception covers:

> *"Equal Opportunities in relation to the Scottish functions of any Scottish public authority or cross-border public authority"*
> *The provision falling within this exception does not include any modification of the Equality Act 2010, or of any subordinate legislation made under that Act, but does include:*
> *a) provision that supplements or is otherwise additional to provision made by that Act;*
> *b) in particular, provision imposing a requirement to take action that that Act does not prohibit."*[29]

In brief, the Scottish Parliament can legislate on equal opportunities in relation to Scottish public authorities, and Scottish functions of cross-border public authorities, in ways that add to or supplement the existing provisions of the Equality Act, provided they do not modify the Equality Act and do not impose a requirement to take action prohibited by the Equality Act.

It is acknowledged that the precise parameters of what would be permitted, supplementing but not modifying and avoiding any requirement to act in a way prohibited by the Equality Act, require careful consideration in relation to each provision that is being considered for incorporation. However, that detailed legal analysis can and should be done.

Preliminary analysis suggests that a number of standalone substantive rights from CRPD, CERD and CEDAW could come within this exception and so be incorporated with a duty to comply, within competence.

<u>CRPD</u>
In considering the CRPD rights referred to above (including the right to independent living, living in the community etc), the following points should be taken into consideration:

[27] Age and sexual orientation were subsequently added to the list of protected characteristics.
[28] Busby N., 2020, *The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW* *AAP+Paper+-+NationalTaskforce+-+Nicole+Busby+-+CEDAW+FINAL+%281%29.pdf (www.gov.scot)
[29] Scotland Act, 1998, (Schedule 5, Pt 2, head L2)

- it is not clear that CRPD rights must be framed in terms of "the prevention, elimination or regulation of discrimination between persons on account of disability." They would be caught by the equal opportunities reservation if framed in those terms;
- even if framed in terms of preventing, eliminating, or regulating discrimination, the Equality Act permits direct discrimination in favour of disabled people. Incorporating CRPD rights, and fulfilling those rights, may not be additional to or supplementing the Equality Act, it may simply be action to support disabled people that is expressly permitted under the Equality Act and;
- even if seen as going beyond the Equality Act, supplementing or adding to the EA's requirements is permitted, provided it does not modify the Equality Act or require anything prohibited by the Equality Act.

The Equality Act permits discrimination in favour of disabled people.[30]

This is a departure from the usual position under Equality Act, whereby discrimination in either direction is usually prohibited. However, in the case of disability, non-disabled people are not a protected group, for obvious reasons, and measures that support disabled people do not disadvantage non-disabled people. Therefore, it is difficult to follow the Scottish Government's stated concern that incorporation of CRPD rights with a duty to comply could result in unlawful discrimination in breach of the Equality Act, and therefor put that section of the Bill outwith devolved competence.

As the Scottish Government has not explained its position on this, it is not possible to engage with it beyond setting out our analysis.

CERD and CEDAW

There are aspects of these Treaties that cannot be incorporated within devolved competence, because the international human rights approach to equality is to promote substantive equality, or equality of outcome, whereas the Equality Act (based on EU law) focuses only on formal equality, or equality of treatment. Requiring the taking of steps to achieve equality of outcome based on sex or race/ethnicity would likely come into conflict with the Equality Act prohibition on positive discrimination (other than for disability) and constitute unlawful discrimination against others.

However, the Equality Act allows positive action in relation to all protected characteristics, including race and sex.

Section 158 of the Equality Act provides:

> *"(1) If a person (P) reasonably thinks that:*
> *(a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,*

[30] Equality Act 2010, Section 13(3): "If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."

(b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
(c) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) This Act does not prohibit a person from taking any action which is a proportionate means of achieving the aim of—
(a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
(b) meeting those needs, or
(c) enabling or encouraging persons who share the protected characteristic to participate in that activity."

The explanatory notes explain:

"This section provides that the Act does not prohibit the use of positive action measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce their under-representation in relation to particular activities, and meet their particular needs. It will, for example, allow measures to be targeted to particular groups, including training to enable them to gain employment, or health services to address their needs.
Any such measures must be a proportionate way of achieving the relevant aim.

The extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or under-representation and the availability of other means of countering them. This provision will need to be interpreted in accordance with European law which limits the extent to which the kind of action it permits will be allowed.

To provide greater legal certainty about what action is proportionate in particular circumstances, the section contains a power to make regulations setting out action which is not permitted under it".[31]

Examples

Having identified that its white male pupils are underperforming at maths, a school could run supplementary maths classes exclusively for them.

An NHS Primary Care Trust identifies that lesbians are less likely to be aware that they are at risk of cervical cancer and less likely to access health services such as national screening programmes. It is also aware that those who do not have children do not know that they are at an increased risk of breast cancer. Knowing this it could decide to establish local awareness campaigns for lesbians on the importance of cancer screening."[32]

[31] Equality Act 2010 Explanatory Notes, para 511-516.
[32] Equality Act 2010 - Explanatory Notes (legislation.gov.uk)

Although we cannot locate any regulations providing greater certainty around the distinction between permitted positive action and prohibited positive discrimination (other than for disability), we do have guidance from the UK Government Equalities Office for voluntary and community service providers, and for the employment context in relation to Section 159 (which allows positive action specifically in recruitment and promotion), which can be used to further clarify what is permitted under Section 158.[33]

The guidance explains:

> *"You can take positive action when three conditions are met:*
> *1) You must reasonably think that a group of people who share a protected characteristic and who are, or who could be, using your services:*
>
> - *Suffer a disadvantage linked to that characteristic,*
> - *Have a disproportionately low level of participation in this type of service or activity, or*
> - *Need different things from this service from other groups.*
>
> *'Reasonably think' means that you can see the disadvantage, low level of participation or different needs, but you do not have to show any detailed statistical or other evidence.*
>
> *2) The action you take is intended to:*
>
> - *Meet the group's different needs*
> - *Enable or encourage the group to overcome or minimise that disadvantage, or*
> - *Enable or encourage the group to participate in that activity.*
>
> *3) The action you take is a proportionate way to increase participation, meet different needs or overcome disadvantage. This means that the action is appropriate to that aim and that other action would be less effective in achieving this aim or likely to cause greater disadvantage to other groups."*

On that basis it appears that at least some elements of the rights in the first part of this response could be incorporated and fulfilled without modifying or conflicting with the Equality Act.

The same analysis may apply to rights for older people, for migrants (including refugees) and for LGBTI+ people.

There is no Treaty to incorporate for these groups, but other international human rights sources can be drawn from and a number of the CERD and CEDAW rights referred to above may also be relevant to these groups.

As the Scottish Government has not explained its position on this, it is not possible to engage with it beyond setting out our analysis.

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[33] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85026/vcs-positive-action.pdf ; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85045/positive-action-practical-guide.pdf

Recognising the Right to a Healthy Environment

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

In July 2022, the UN General Assembly unanimously declared access to a clean, healthy and sustainable environment as a universal human right, and that "climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights, and that such effects will be felt most acutely by those segments of the population who are already in a vulnerable situations."[34]

The Scottish Government has committed to bring the right to a healthy environment into Scots law for the first time and this a welcome step, incorporating recommendation 2 of the National Taskforce for Human Rights Leadership Report, 'To include the right to a healthy environment with substantive and procedural elements into the statutory Framework.'

We agree with and support [in full] the separate response to this Consultation submitted by Environmental Rights Centre for Scotland (ERCS). We also agree with their view when in their report "The Substantive Right to a Healthy Environment" they state that:

> "*securing an enforceable right to a healthy environment recognises the interdependence between human rights obligations and international environmental law obligations. We need human rights law to reduce environmental injustice and close protection gaps in Scotland and abroad"*. [35]

We support the Scottish Government's proposal to use the Aarhus Convention's definition of the environment, with specific reference to ecosystems and biosphere.

However, we disagree with the proposals, which see the right to food not included as a substantive aspect of the right to a healthy environment, on the basis that it will be protected through incorporation of Article 11 ICESCR.

Our response to Question 9 provides more details.

Question 7
If you disagree please explain why.

See question 9.

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

[34] https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf Human Rights Council Tenth Session Resolution 10/4 *Human rights and climate change* https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf

[35] ERCS, 2023, *The Substantive Right to a Healthy Environment: A review of definitions, standards and enforcement mechanisms* https://www.ercs.scot/wp/wp-content/uploads/2023/07/The-Substantive-Right-to-a-Healthy-Environment_June-23_online.pdf

We welcome the formulation of substantive aspects of the right to include clean air, safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems.

However, we disagree with the exclusion of adequate sanitation under safe and sufficient water, and with the exclusion of the right to healthy and sustainably produced food, which are features of the rights to a healthy environment and which we believe need standalone protection too.

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.

We are supportive of ERCS' position that the right to healthy and sustainable food must be included as part of the right to healthy environment, as a standalone feature (as identified by UN Special Rapporteurs), that underpins and interacts with other substantive features of the right.

The Scottish Government proposes to protect healthy and sustainable food through incorporation of ICESCR, which under Article 11 guarantees the right to adequate, culturally appropriate, accessible, and available food.

Nonetheless, we echo ERCS' position in recognising the important distinction between the economic/social right to food as it relates to nutrition, access/affordability, adequacy, and culture, and the right to healthy and sustainably produced food as a constituent part of broader environmental health.

Therefore, we disagree with the proposed approach.

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 agree with the proposed approach to including safe and sufficient water as a substantive aspect of the right to a healthy environment. We also agree with ERCS in calling for the definition to be extended to recognise adequate sanitation.

We believe that if the right to water can be defined as a social right under ICESCR and a feature of the right to healthy environment, then the same should apply for the right to healthy and sustainable food.

Question 11

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

We ask for the Scottish Government to provide dedicated reforms with clear timelines to ensure the right to healthy environment can be enforced.

Incorporating Further Rights and Embedding Equality

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 support the Human Rights Consortium Scotland (HRCS)'s position and agree 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.

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

We are firmly in favour of the proposal to embed participation in the framework of the Bill, although we are disappointed, given the extensive opportunities to more closely involve groups with lived experience in the legislative process, including the design of this Consultation, not to see more developed proposals for embedding participation in this Consultation.

We do believe that for the incorporation of international human rights legislation into Scottish law to be meaningful, holistic, useful and transformative, those who are most likely to rely on the legislation must be included in the process. The participatory dimension of policy work must take place at all stages of policymaking, from development to implementation to monitoring and review. Embedding participation at all stages of the development of the Bill, and throughout the processes for implementation, allows for accurate measures of accessibility, accountability, and transparency. This is primarily important considering the very nature of the Bill as human rights legislation, and the idea that this Bill's ambition is to promote equality and elevate standards of living for those most marginalised and disadvantaged.

Incorporating and embedding participatory processes throughout the numerous stages of the Bill has clear advantages that will promote the effectiveness of legislation.

Some of these advantages are listed below:

1. **Bridge gap between theory and practice:** The incorporation of four major human rights treaties into Scottish law has the potential to be transformative. However, these are international treaties which may apply differently in different contexts. Understanding how local communities interpret certain rights, and how they are able to apply them within their local contexts provides the framework for the effects of the legislation to be felt on every level of society, rather than for the bill to be introduced and only exist within the confines of political discourse and institutions. Participation of individuals and communities who stand to reap the benefits of codified human rights within the process of introducing relevant legislation allows the government to

understand how certain topics are interpreted, applied, and reproduced within the communities they aim to serve.

2. **Allows for dynamic implementation (top down as well as bottom up)**: For the introduction of a Scottish Human Rights Bill to be impactful, communities across the country need to be engaged, particularly within the development and implementation stages of the bill. Traditionally, new legislation is implemented using a top-down approach with participation taking a "governance driven democracy" framework[36]. This translates to governments using government driven institutions for engaging with the public. This can take form through electoral politics, consultations, mandatory surveys, restricted lived experience boards and other "closed" engagement methods[37]. Dynamic implementation using participation as a core foundation for policy creation should be based on "democracy driven governance as opposed to governance driven democracy".[38] Through engagement with non-state actors such grassroots initiatives, local community groups, unions, and civil disobedience movements, the government is able to open space for "bottom-up influencing".

   By widening avenues for interaction and participation, policy makers can co-produce policies with the communities that will be directly impacted by them, making them more impactful in the long-term. This also promotes the government meeting people "where they are" rather than assuming that individuals should take the responsibility to meet the government "where it is"- disregarding power dynamics and resource capacities.

3. **Ownership, responsibility and shared goals:** Through embedded participation, communities, individuals, and disenfranchised groups are able to actively take part in the creation and implementation of legislation that has the potential to drastically change their circumstances.

   Meaningful participation in this can lead to a sense of ownership over legislation, politics, and governance which has the potential to translate to "shared responsibility and shared goals".[39] This ownership can translate to communities being protective over human rights, and identifying directly with legislation that may have previously seemed theoretical.

4. **Ensuring key issues are addressed:** The aim of human rights legislation is to elevate living standards, promote life potential, protect individuals and communities, all the while ensuring progressive policies.

   In order to identify how these are lacking in our current systems, we must turn to those with lived experience of the key issues we seek to address. There is no point in introducing legislation around the rights of marginalised groups if

[36] Vivier, E., & Sanchez-Betancourt, D., 2023, *Participatory governance and the capacity to engage: A systems lens* 43(3), 220–231. https://doi.org/10.1002/pad.2012
[37] Ibid
[38] Ibid
[39] Gibson, P. D., Lacy, D. P., & Dougherty, M. J., 2005, *Improving performance and accountability in local government with citizen participation 10*(1), 1-12.

those groups are not included in creating the legislation and identifying the key gaps which already exist, along with the solutions they would like to see, and the potential problems which might come with implementation. They are also best placed to monitor the progress of the legislation as they are the primary target group for life-standard elevation and the introduction of dignity driven minimum core standards.

5. **Trickle down does not work:** Traditionally, legislation is created by closed political institutions such as parliaments, courts, and policy-maker circles. Often, legislation remains relevant to only those who occupy institutionalised sectors of society- the law does not "trickle down" unless people who will be actively and directly impacted or involved in creation and implementation. There is little logic in introducing a Scottish Human Rights Bill "for" marginalised groups, without including marginalised groups. If people do not know that they possess codified rights, if they are not aware how these rights materialise, or how to access these rights then the bill will merely be a performative exercise. The bill cannot be a victim of bureaucratic gatekeeping, with the hopes that benefits will trickle down. Instead, through participation efforts, all sectors of society must be actively engaged at all levels. Marginalised communities must be made to feel that this Bill is of use to them, and not designed as another exclusionary system which does not provide solutions for their problems.

Methodology

At JustRight Scotland, we host JustCitizens, a migrant advisory panel comprised of a people with diverse experiences of migration to Scotland. Through our JustCitizens participation work, we have also engaged with and participated in convenings about the Scottish Human Rights Bill hosted by the HRCS Lived Experience Board. we have contributed to, and endorse the entirety of their response to this consultation.

Our comments that follow are based on our work with JustCitizens and the Lived Experience Board.

A constant theme characterising discussions of participatory methods in governance both within the Lived Experience Board, as well as general literature on the topic is the need to **engage throughout the process,** rather than just incorporating participation as a tick-box exercise. Engagement throughout policy-formation processes increases accountability, democracy, and the effectiveness of services/policies in serving needs of communities. This, although can be initially resource-heavy, is financially beneficial in the long-term as it ensures that services and policies are fit-for-purpose and don't need to be repealed and reintroduced because they are not working.

Despite the consensus that participation needs to be incorporated in policy-formation, legislation implementation, and service provision, how to best embed participation in a meaningful way seems an underdeveloped area of governance. Traditionally, participation takes place through engagement in electoral processes, consultation opportunities, and limited civil society engagement.

There have recently also been opportunities extended to marginalised communities to be engaged in the form of participation in lived experience boards and different panels. This suggests that participation takes a mostly top-down approach, where participation channels are controlled and constructed by governing bodies without due consultation with the groups that form the members of these panels.

Despite many instances of individuals raising concerns about where their contributions go, it seems like the predominant method of engagement has continued to take the form of panels that begin and end when the governing body dictates, with little accountability to members that populate the panels. There is a skewed power dynamic which operates within this framework which needs to be analysed and reflected upon. It is important to note that consultations and lived experience boards do not automatically equate to participation.

In consideration of this, along with the feedback given by the Lived Experience Board convened by HRCS, we would like to propose models that better represent dynamic interaction between communities and governments and that encourage collaborative top-down, bottom-up engagement.

We would like this to take place without institutions co-opting the struggles of different community groups to fit different agendas, and we encourage this to be a space where disagreement and discussion can take place safely within the common goals of a better and more equal Scotland.

Therefore, we recognise the need for a **circular participatory format**, where individuals and communities are involved throughout the governing process and are able to both feed into policy and hold institutions accountable when they fail at their duties.

In order to do this, we believe there first needs to be significant resource directed towards providing accessible information on human rights of individuals/groups and duties that must be upheld by service providers, public bodies, and governing institutions. Access to justice cannot be an afterthought in this, as information on its own cannot form the basis of accountability- people need to know that they can and will be able to hold duty-bearers accountable.

We believe that community groups, grassroots networks, civil society organisations, unions, and progressive movements need to be involved in this undertaking and will need to continuously be engaged with, given a place at the table, and a role in monitoring and evaluation. Their contributions cannot be lost in reporting and must form the basis of upholding accountability.

We believe that more work needs to be done to better understand what will work best in the context of embedding participation in this Bill. We suggest that a range of tools should be actively considered in this process, with the aim of building a participatory framework in Scotland that works for marginalised groups, as well as the general population.

These include:

- Community-based monitoring;

- Localised assemblies;
- Accessible participatory spaces: libraries, town halls, universities, community spaces, churches, mosques, other religious institutions;
- Digital participation: increasing digital literacy, tackling digital poverty;
- Meeting people where they are: building on already existing networks, localisation, building trust within communities.

We realise that this is a big undertaking but would like to highlight two examples where this has been done on a governance level, and encourage lessons to be learned and practices to be adapted to the Scottish context.

Examples from international practice:

Porto Alegrae, Brazil

Generally, it is widely accepted that the ambitious and generally successful undertaking of participatory budgeting in the world was in Porto Alegrae in 2002. It involved 17,200 citizens at its peak and revolved around allocating $160 million of public money. It was known for its “powerful redistributive impacts” and its embedding of participation in the institutional structures of municipal government. The goal of the project was initially to fight against corruption and clientelism which characterised Brazilian political culture in that period. The goal resonated with marginalised communities, specifically poorer groups who were often left out of political processes. The structure is detailed below:

> *“Participatory budgeting in Porto Alegre involves three streams of meetings: neighbourhood assemblies, thematic assemblies, and meetings of delegates for citywide coordinating sessions (the Council of the Participatory Budget).*
>
> *The neighbourhood assemblies discuss the funding allocations for the 16 districts of the city for the city government's responsibilities including schools, water supply, and sewage. The meetings are divided into 16 ‘Great Assemblies', held in public spaces such as churches and union centres across the city, open to all.*
>
> *City-wide popular assemblies are held in the thematic stream. These were established to deal with issues that are not neighbourhood specific, such as environment, education, health and social services and transportation.*
>
> *The process is broadly considered an enormous success. Women, ethnic minorities, low income and low education participants were overrepresented when compared with the city's population and consequently funding shifted to the poorest parts of the city where it was most needed. It brought those usually excluded from the political process into the heart of decision making,*

significantly increasing the power and influence of civil society, and improving local people's lives through the more effective allocation of resources."[40]

Barcelona, Spain

Decidim (We Decide) is digital democracy tool aiming to promote and enhance citizen participation and democracy in Barcelona. These platforms allow citizens to discuss national interest matters and pose legislative reforms. The platform originally was conceived in 2020 to promote the participatory budgeting (PB) processes in Barcelona, however it has now evolved to incorporate other key areas of citizen concern. This is primarily based upon the fact that *Decidim and the online platform it is hosted on* has its origins in a wider movement aimed to increase political representation and transparency, especially after the election of Ada Colao as city mayor in 2015. Thereafter, there was an initiative in Barcelona's municipal government to improve democratic legitimacy by enhancing the power of technology. This grassroots movement has been referred to as having a "hacker and technopolitics ethos" merging democratic innovation and technology.

"There are a number of processes that the site encourages, including elections, strategic planning, collaborative writing of a regulation or norm, design of urban space, and productions of policy plans. Simultaneously, an effort to technologically innovate and legitimise the participatory process is developing, with an overall goal of citizen control over technology. The software is written in open code for transparency, to increase traceable decision-making and monitoring of proposals."[41]

Although the Scottish context differs from both Porto Alegrae and Barcelona, they serve as reminders that cities and countries throughout the world have built on these examples of participatory democracy and embedded a system that is fit-for-purpose within their own institutions, with the help of those who are traditionally marginalised from processes they rely on.

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 strongly support the principle of an equality provision in the Bill, which underscores the ambition that the Bill will protect the rights of everyone in Scotland and that rights can be accessed by everyone equally, regardless of status.

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[40] LGA, 2016, *Case study: Porto Alegre, Brazil*. Local Government Association. https://www.local.gov.uk/case-studies/case-study-porto-alegre brazil#:~:text=Participatory%20budgeting%20in%20Porto%20Alegre,Council%20of%20the%20Participatory%20Budget).

[41] Participedia, 2023, *Decidim: Participatory budgeting in Barcelona*. https://participedia.net/case/7425

We refer to our response above, which sets out that international treaties are living instruments, and that is a crucial reason why the Scottish judiciary should have access to a range of resources for interpretations of provisions of this Bill, including the legal term "other status" as defined in Article 2 ICESCR and Article 14 ECHR.

In particular, it is important that – whatever the approach taken in this Bill – the drafting is designed to minimise the risk that the equality clause is read to exclude or diminish the rights of those who suffer discrimination on grounds of "other status," because they are not specifically named on the face of the equality provision.

We are aware, through our casework, that people face discrimination on the basis of a wide range of statuses – some of these are recognised as clearly protected against discrimination in our equality and human rights frameworks (such as race, age, sex and disability) and some are not so clearly recognised (such as migration status, care experience, carer status and experiences of incarceration or addiction).
We are also aware that people's experience of discrimination is usually founded not solely on account of a single element of their status, but that overlapping forms of minoritised status can compound – and that this intersectionality of identity and discrimination can yield a greater and different form of harm than that described by a legal framework that seeks to view discrimination through a single status lens at a time.

For the above reasons, we are uneasy about how this series of consultation questions has been framed – respondents might infer from the framing that failure to be named on the face of the equality provision might confer lesser protection, and we are not in favour of any form of drafting that would yield that result.

Having said that, we are also keen to refer to and support the submission of the Equality Network and echo the concern that this classification can create a hierarchy of rights within the Bill, which is at odds with the intersectionality dimension of human rights.

Further, we note that the decision to use 'other status' goes against the original taskforce recommendations and the First Minister's Advisory Group's report. As restated in a recent briefing paper by Professor Nicole Busby and Dr Kasey McCall-Smith, we support and agree that the Bill should *"provide rights for older people and LGBTI communities which are not yet explicitly provided for by a UN treaty."*[42]

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

Please see response above.

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

[42]Busby N., McCall-Smith K., *Incorporation of the CERD and CRPD and Equivalent Rights Provision for LGBTI Communities and Older Persons* AAP+Paper+Nicole+Busby+and+Kasey+McCall-Smith+UN+Treaties.pdf (www.gov.scot)

Please see response above.

Question 17
If you disagree, please provide comments to support your answer.

Please see response above.

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

Yes.

Please see response above.

The Duties

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

We believe that the duties in the Bill should apply to all who provide public services, including private entities and civil society organisations (CSOs) contracted by public authorities.

Evidence from our casework highlights the need to go even further, as rights holders face additional hurdle in seeking justice for breach of rights when there are private actors contracted by a public authority.

In relation to public authorities, we believe the definition of a "public authority" in requires further consideration to ensure it fully captures private entities engaged by public authorities. We welcome the statement on page 29 of the consultation which states that " in relation to private actors, as a starting point we would wish to mirror the UNCRC Bill's proposed approach. This applies the duties of the Bill to bodies carrying out functions of a public nature, including private bodies acting under a contract or other arrangements with a public body"[43] but we think it needs to go further.

To give a Scots law example, the matter was considered in detail by the Outer House of the Court of Session in Ali (Iraq) v Serco [2019] CSOH 34 and by the Inner House in Ali (Iraq) v Serco Ltd [2019] CSIH 54. The question was whether Serco constituted a "public authority" for the purposes of the HRA when it was contracted by the Home Office to provide asylum accommodation to those seeking protection in the UK. The two courts came to opposing conclusions. What the two courts did agree on was that there was no "single test of universal application" which can be applied to the question of whether a function is public in nature (Inner House, para 53). This conclusion comes after the benefit of 20 years of litigation and two leading House of Lords cases (Aston Cantlow v Wallbank [2003] UKHL 37 and YL v Birmingham City Council [2007] UKHL 27). It follows therefore that the existing case

[43] Scottish Government, 2023, *A Human Rights Bill for Scotland* https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2023/06/human-rights-bill-scotland-consultation/documents/human-rights-bill-scotland-consultation-june/human-rights-bill-scotland-consultation-june/govscot%3Adocument/human-rights-bill-scotland-consultation-june.pdf page 29.

law is not definitive on this issue. We would recommend that the agreements and disagreements between the Outer House and the Inner House in the Ali v Serco cases be studied. We believe that inspiration can be drawn from the "factor-based approach" used by the Lord Ordinary in the Outer House[44], which was supported in the House of Lords cases Aston Cantlow v Wallbank and YL v Birmingham City Council.

We favour this approach over the Inner House approach, which made a "fundamental distinction" between the public authority charged with public law responsibility, and the private operator which contracts to provide the service[45].

However, our point remains that the fact the two courts disagreed on how to define a public authority demonstrates that the issue is fraught with difficulty. The reason this is of such vital importance is this: public authorities contracting out the delivery of services is a common practice in the children's sector, the migration sector, the social security sector. Children, women, and men in Scotland receive services operated by private entities.

For the avoidance of doubt, we use these as examples only; we are not casting any aspersions on those entities or the practice more generally. However, if the Inner House approach was applied to these relationships in Scotland – focusing on the "fundamental distinction" and the contracts governed by private law – they may not fall within the scope of the Bill. This leaves a serious, and potentially highly dangerous, accountability gap. It represents an access to justice issue.

A potential solution may be found in an assessment of the Joint Committee of Human Rights (JCHR) reports of the 2003-04 and 2006-07 sessions.
We endorse the SHRC's expert view that favours the JCHR wording referencing "a contract or other arrangement with a public authority which is under a duty to perform the function". This would provide clarity that the public authority and its contractors must abide by the provision of the Bill.

Clarity in this regard is of course beneficial to rights holders, but also public authorities and the private and third sector entities with whom they contract.

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

Disappointingly, there is no explanation of what a procedural duty means in the proposals of the consultation. Not only does it not specify what "procedural duty" they propose, how that would work or what it would require, they do not make it clear that this would mean these rights would not be enforceable. There would be no effective remedy for breach of these rights.

Indeed, the consultation states that the "procedural duty" would ensure that duty-bearers could be held accountable if they did not take the rights into account in their

[44] Outer House, paras 30-32
[45] Inner House, para 54

decision-making (page 19). Without more detail, that is misleading. Please see our response at Question 5 for our in-depth analysis.

We agree that there should be an initial duty to have due regard placed on public bodies. This should be the duty to have due regard. Refer to our response at Question 5 for our in-depth analysis.

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

Please refer to our response at Question 5 to read our analysis as to why we believe these proposals are omitting a duty to comply even where it would be possible.

The consultation proposes to incorporate these rights in a way that sets out a duty to comply which secures protection for rights-holders whilst also allowing duty-bearers such as local authorities time to prepare for full commencement of this new legislative framework. Indeed, this consultation focuses on establishing an initial procedural duty on public bodies followed by a duty to comply with the rights, in the sense of progressive realisation of rights such as Economic, Social, and Cultural Rights and the Right to a Healthy Environment but with the delivery of a range of Minimum Core Obligations (MCOs).

However, even if this process allows duty bearers to prepare for this new framework, how these changes will be applied in practice and how they will be achieved is not clear in the proposed consultation. So far, they only refer to removing any text that relates to an area that is reserved under the Scotland Act 1998. Moreover, MCOs – which include for example ensuring access to basic shelter, appear to be extremely low, without any references to participation work and a participatory process.

We agree that all public bodies - and relevant private actors - should be given a duty to comply with rights in the Bill. We agree that this duty to comply should include delivering MCOs and demonstrating progressively realising rights. Guidance to public authorities should include detail on the definition of progressive realisation, including using maximum available resources.

As above, we consider that this duty should apply after a specified time of no more than two years. This duty to comply should also accompany the duty to have due regard, rather than replace it.

The duty to comply should also apply to the substantive rights within CRPD.

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 the duties set out in the Bill?

We refer to, and agree with, the HRCS in their response to this part of the consultation. We agree that there should be a public bodies' reporting requirement to ensure accountability and transparency. Public bodies should have to consult with people whose rights are most at risk when developing these reports, including to ensure that the content is as accessible as possible.

The Scottish Government should also be required to consult with people whose rights are most at risk when developing guidance on reporting requirements.

Public bodies should also be required to submit their reports to the Scottish Human Rights Commission for monitoring.

We agree that it makes sense for these reporting requirements to complement and strengthen other public body reporting requirements.

Question 23

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

We refer to and agree with Together's position, which states the Scottish Government should try to guarantee consistency with – and build on - the reporting duties in the UNCRC Bill. For example, as in the UNCRC Bill, the Human Rights Bill should require that reports are 'forward- looking' as well as reflecting on past actions to support the desired proactive culture shift anticipated by the Bill.

The reporting duty in the Human Rights Bill could also specify topics upon which listed authorities must report to ensure a comprehensive approach to reporting is taken.

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 are very supportive of the need to show compliance with economic, social, and cultural rights, the right to a healthy environment, and as many rights as possible from CEDAW, CERD, CRPD within devolved competence, through the delivery of Minimum Core Obligations and the demonstration of progressive realisation.

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).

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

We are supportive of this and agree with HRCS and Together's position, which argues for the Human Rights Scheme provisions to be modelled on those for the Children's Rights Scheme. Together, in particular, highlights how the positive impact of the Children's Rights Scheme is already visible, despite the UNCRC having not come into force yet. For example, the Scottish Government has made a commitment to the UNCRC implementation Programme with a focus on areas outlined in the Children's Rights Scheme.

Ensuring Access to Justice for Rights Holders

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?

Independent advocacy plays a crucial role in defending human rights in Scotland and we believe they are crucial in helping people accessing routes to justice and providing essential support.

An independent advocate is usually someone who is not legally qualified, and so is not providing legal advice. They would usually provide support, guidance, and information in a range of ways, including by advocating on their behalf, interacting with the public authority or authorities to seek a remedy for the situation, where there appears to be breach of human rights[46]. Having someone who can advocate for or with them, who is not living through the difficult situation themselves, who can give time, energy, knowledge and experience of applying human rights to the situation and engage with public services, including through a complaint's procedure, can be invaluable.

At the Scottish Just Law Centre, we strongly encourage people to seek out the support of an independent advocate wherever possible. However, people can struggle to access the right independent advocacy service, with different organisations providing advocacy related to particular subject and/or needs. Provision varies considerably from one area to another and, in our experience, often people are not able to secure any independent advocacy support.

We support Scottish Independent Advocacy Alliance and HRCS's position, which asks for independent advocacy to be included in the Bill, and for these services to be included in the Human Rights Scheme, to underpin rights to participation, access to justice and enable everyone to have their voices heard.

Advocacy can also foster greater participation and enable people, who experience or are at risk of experiencing, systemic human rights violations to be involved in decisions that will have an impact in their lives.

Independent advocacy plays a crucial rule in raising awareness and enhancing understanding of human rights, enabling access to justice and empowering rights holders to participate in the decision-making process.

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

We agree with the HRCS position that front-line complaints handling by public bodies needs to be changed to take into account rights and duties in this Bill. These changes, including any by the Scottish Public Services Ombudsman (SPSO) or by

[46] https://www.siaa.org.uk/what-is-independent-advocacy/

bodies not covered by SPSO such as courts and the police, should be co-produced 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?

The Consultation refers only to the Scottish Government having had discussions with the Scottish Public Services Ombudsman (SPSO) about updating its model complaints handling procedures. While the SPSO is an important stakeholder, it is important that the Scottish Government look beyond the existing system for examples of good practice and potential reforms that could be introduced.

As well as drawing up the standard complaint process for public authorities, the SPSO is also the final stage for those complaints. Someone experiencing a breach of their rights can only go to the SPSO if they have completed the public authority complaint procedure, and then only in relation to matters raised in the initial complaint which the SPSO agrees to consider, and they must go to the SPSO within 12 months of the event complained of. The SPSO currently has a four month wait period for a complaint to be allocated to a complaint reviewer. It can then take many months to obtain an outcome, by which time it will be long past the three-month deadline for raising a judicial review.

Perhaps most importantly, the SPSO can only issue recommendations. It cannot issue binding, enforceable decisions. If a public authority fails to comply with a recommendation the SPSO's only power is to make a report to the Scottish Parliament. In the 21 years since it was established, the SPSO has never done so. For the SPSO, this is a positive. It notes on its website that it has never had to make a report to the Scottish Parliament because public bodies usually comply with its recommendations, and it follows up to rigorously check with them that they have done so[47].

However, we are not aware of any independent study reviewing the effectiveness of the SPSO's complaints handling process, in terms of remedying failures. What we can say is that many of our clients, current and former, have attempted to resolve public authority failures through the SPSO and have been left frustrated by the process; by the length of time it takes, the narrow approach taken and, most importantly, by the failure to provide a real remedy.

One of the few proposals in the Consultation related to access to justice is to add human rights to the remit of the SPSO. This would mean the SPSO could consider rights in the Bill as part of any complaint, whether raised by the complainant or not. While access to a free and relatively easy process is essential, the remedy provided by administrative mechanisms must also be effective.

Careful consideration should be given to the SPSO's very limited powers and the effectiveness of its recommendations before deciding that simply adding human

[47] https://www.spso.org.uk/faq-page#t44n11881

rights to its remit will provide an effective administrative route to remedy for breaches of the rights contained in the Bill.

Administrative remedies must also be reviewable. Currently there is no link between the SPSO and the court and tribunal system.

On the one hand, this provides flexibility to the individual, which is positive, as they should not be required to complete an informal administrative process before being able to raise a claim in court. On the other hand, the lack of connectivity means the SPSO's recommendations are not reviewable, and if that process does not result in an effective remedy, the individual has to begin all over again, by raising a court action. However, by then it will be too late to raise one of the most common forms of human rights claim, judicial review.

There needs to be connectivity between the various processes to ensure that the burden on the person experiencing the rights breach is reduced, and that they are not put at risk of being barred from another part of the overall system. If they raise a claim, in whichever part of the system, that ought to be adequate. The system should be sufficiently joined up so that the claim can be sent to another area of the system without having to start again (by what is called remittal), and all time bar clocks should stop running when that initial claim is raised.

The consultation states that further consideration is being given to how pursuing a complaint with the SPSO could interact with court routes to remedy, such as judicial review. Any such proposals should be put out for consultation.

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

We agree with adding human rights to the remit of Scottish scrutiny bodies, ensuring they have capacity for this. It is a positive step towards ensuring that human rights principles are actively integrated into the delivery of public services.

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

The Scottish Human Rights Commission, created through an act of the Scottish Parliament in 2006, is Scotland's National Human Rights Institution as accredited by the United Nations.

Withing its mandate the Commission monitors the enjoyment of human rights in Scotland and the rights granted through:

- the European Convention of Human Rights
- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Rights of Persons with Disabilities;

- the Convention on the Elimination of All Forms of Discrimination Against Women;
- the Convention on the Elimination of All Forms of Racial Discrimination;
- the UN Convention Against Torture;
- the European Social Charter and;
- the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence

To ensure it can fulfil its duties, the Commission has the power to conduct research, publish advice and guidance, review and recommend changes to law, conduct inspections in places of detention, conduct inquiries (under some strict conditions) and to intervene in civil proceedings before a court in certain circumstances.

However, unlike the NHRIs in England and Wales and Northern Ireland, the Scottish Commission does not currently have the powers to provide direct advice or support to victims of human rights violations or to raise legal proceedings in its own name.

We agree with the SHRC when in its report it stated that "*In effect, this means that people in other parts of the UK have greater access to justice routes than people in Scotland through their NHRI"*.[48]

We would also welcome the power to table an annual report on the state of human rights in Scotland to the Scottish Parliament and relevant Committees.

As stated in Recommendation 11 of the Taskforce, we agree with the proposals to give the SHRC additional powers to hold public authorities to account on human rights. Those powers should include the power to raise legal proceeding in its own name, powers to provide legal advice to people, stronger powers of inquiry and power to compel information.

The Commission also needs to be adequately resourced to carry out its mandate.

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

We agree that the Children and Young People's Commissioner Scotland should be given similar powers as the Scottish Human Rights Commission.

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

'Standing' is a term for a set of legal rules which establish who has the right to take a judicial review (JR).

[48] SHRC, 2023, *At a Crossroads - which way now for the human rights system in Scotland?* https://www.scottishhumanrights.com/media/2456/crossroads_what-next-for-human-rights-protection-in-scotland-shrc-june-2023.pdf

Under the Human Rights Act 1998, this is very narrow and requires a potential claimant to establish that they meet a legal test to establish they hold "victim status". Specifically, in human rights cases, only a victim of an alleged violation of the European Convention on Human Rights can bring a challenge before the UK courts and the Strasbourg court. That is why it is important for the SHRC to have powers to take human rights cases in its own name.

However, in most civil cases in Scotland, 'standing' is much wider, as an individual only has to demonstrate to the court that they have 'sufficient interest' in what the case is about, as applied for example in JR proceedings through section 27B(2)(a) of the Court of Session Act 1988.

We note that what constitutes "sufficient interest" is dependent on the context of the case and the considerations are found in case law (e.g., AXA General Insurance Limited and others v The Lord Advocate and others [2011] UKSC 46 and Walton v Scottish Ministers [2012] UKSC 44).

As highlighted in our response to the consultation on the UNCRC (Incorporation) (Scotland) Bill[49], we do not suggest that the Bill should put forward a detailed definition as to what "sufficient interest" means, as to do so may prove overly restrictive and become outdated. However, we are aware that the use of remedies like JR is under negative scrutiny at this moment in time. We believe there is a risk that *standing* to bring JR proceedings and perhaps other remedies becomes limited and, therefore clarity on sufficient interest should be embedded in this Bill and in any new laws and policy recommendations around the ECHR.

Standing in legal proceedings is also central to all public interest litigation (PIL)[50]. Some aspects on present rules on standing are obstructing the expansion of PIL in Scotland because they restrict organisations themselves being party to the case rather than an individual.

In PIL to petition for judicial review, the applicant must demonstrate sufficient interest in the subject matter of the application, and the application must have a real prospect of success. The 'sufficient interest' test, now in statute, allows for more public interest litigation in recognition of the vital role of the courts in preserving the rule of law. However, an increase in organisations lodging judicial review petitions in Scotland has not happened, and among the reasons may be uncertainty around what 'sufficient interest' means and the factors that will be taken into account by the Court of Session in deciding whether the test is met.

We agree with the Scottish Government's approach to keep the normal rules on *standing*, but we ask for added clarity on "sufficient interest."

Question 34

[49] https://www.justrightscotland.org.uk/wp-content/uploads/2021/03/UNCRC-Consultation-Aug-2019.pdf
[50] *Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland* https://hrcscotland.org/wp-content/uploads/2018/11/final-overcoming-barriers-to-pil-in-scotlnd-web-version.pdf

What should the approach be to assessing 'reasonableness' under the Human Rights Bill?

The Taskforce stated that "the reasonableness test developed in international law and other domestic jurisdictions is more exacting than the 'Wednesbury reasonableness test' in the UK,"[51] and we agree with that statement.

Wednesbury review is concerned with the process of reasoning adopted in taking the decision, focusing on the reasons proposed for taking that decision. The standard, which came to be known as "*Wednesbury* unreasonableness" was most famously summarized by Lord Diplock in the 1984 case of *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9:

> *It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*[52]

By contrast, proportionality, in the context of rights, focuses on the outcome of a decision. A perfectly reasoned decision may still have a disproportionate impact on the right of an individual, and so be unlawful.

Also, the burden of proof under Wednesbury lays with the claimant, who has to show that the measure they are challenging is unreasonable. On the other hand, under the proportionality review, is the Government, not the claimant, that has to demonstrate that the measure taken is proportionate.

Proportionality review requires the judge to undertake a value judgment independent of the decision-maker. This is the crux of the standard of review and the reason why it is better suited to afford greater protection of human rights[53].

In the area of economic, social and cultural (ESC) rights litigation on reasonableness, the South African jurisprudence offers an important example with the Grootboom case from the Constitutional Court of South Africa[54]. In this case, which looked at the constitutional right to adequate housing, the Court concluded that the State's housing policy was unreasonable and unconstitutional because it was concerned with the long-term development of housing, but did not offer solutions, by providing shelter, to people currently experiencing homelessness.

Without a consistent standard of reasonableness and without a common understanding of what it means within domestic courts, it is important to take into account positive developments at the international level. For example, a reasonableness test was included in the Optional Protocol to ICESCR. Under article 8.4 the Committee on Economic, Social and Cultural Rights (CESCR) shall consider the "reasonableness" of the steps taken by the State Party in accordance with the rights laid out in the ICESCR.

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[51] https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2021/03/national-taskforce-human-rights-leadership-report/documents/national-taskforce-human-rights-leadership-report/national-taskforce-human-rights-leadership-report/govscot%3Adocument/national-taskforce-human-rights-leadership-report.pdf

[52] *Council of Civil Service Unions v Minister for the Civil Service*

[53] https://www.researchgate.net/publication/311852292_A_Difference_in_Kind_-_Proportionality_and_Wednesbury

[54] Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

Again, we raise a concern that the Scottish Government is not honouring its commitment to implementing the Taskforce recommendations in full, and we disagree with using the Wednesbury Test for duties under this Bill.

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

We strongly disagree and we would like to state our disappointment by the limited scope set of the consultation questions in relation to access to justice.

The National Taskforce issued specific recommendations in its report, and the Scottish Government accepted all 30 of them, committing to implementing them to the greatest extent possible within the confines of the devolution settlement.

Their recommendations on access to justice included:

> *Recommendation 21: Through engagement with key stakeholders, including those who face additional access to justice barriers, further consider accessible, affordable, timely, and effective remedies and routes to remedy that will be provided for under the framework.*
>
> *Recommendation 25: Further consider how the framework could provide for the full range of appropriate remedies under international law to be ordered by a court or tribunal when needed, including targeted remedies which could provide for non-repetition of the breach (such as structural interdicts).*
>
> *Recommendation 26: As part of the development of the framework, to further explore access to justice, taking into account the views of right-holders, in order to consider how the framework could help provide a more accessible, affordable, timely, and effective judicial route to remedy.*

We believe that these proposals are particularly weak on access to justice.

Despite accepting all the Taskforce's recommendations over two years ago, including those on access to justice, and although the Scottish Government was part of the Taskforce and so heard and received all of the extensive evidence provided to it, the consultation document indicates that little to no work has been done to further consider or explore the matters recommended by the Taskforce.

In relation to Taskforce Recommendations 21, 25 and 26, there are very few proposals in the consultation. The limited proposals it does set out are narrow and do not address the considerable barriers to accessing justice that are well known and evidenced in Scotland.

The Scottish Human Rights Bill was included in the 2023/24 Programme for Government, meaning that a Bill should be introduced by April 2024. While the Scottish Government claims that work is ongoing on the access to justice legislative proposals, is very difficult to see how they will go from the almost complete absence of proposals in the consultation, to detailed provisions in a Bill within six months.

Moreover, even if successful, there does not appear to be any time remaining for detailed consultation on such proposals.

While we will continue to advocate for the strongest possible provisions on access to justice in the new Bill, we believe it is simply not possible that the Bill will make all the changes necessary to bring the Scottish civil and administrative justice system into line with the requirements of international human rights law.

We believe it is therefore imperative that the Bill includes the substantive international human right to an Accessible, Affordable, Timely and Effective remedy for breach of the rights contained in the Bill, on the face of the Bill.

The Right to Effective Remedy

The right to access judicial remedies is guaranteed in most international human rights treaties and is broadly considered customary international law. Remedies can provide redress to people who had their rights breached and can prevent future violations in sanctioning perpetrators. Nonetheless, for that to happen, remedies need to be effective.

The right to an effective remedy is enshrined both in the International Covenant on Civil and Political Rights (ICCPR), as well as the European Convention of Human Rights (ECHR), and other regional human rights treaties. In relation to the European Convention, the Court has indicated that a remedy is only effective if it is available and sufficient.

The right to an effective remedy entails the right to reparation and under international human rights law, appropriate reparations are restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

We address these requirements in turn:

Accessible

Scotland's administrative and civil justice system is a complex landscape of regulators, ombuds, tribunals and courts, each with very particular remits, deadlines, and powers, and each with its own set of procedural rules. There is a general lack of interconnectivity between them, such that pursuing one avenue could leave someone time-barred from another.

Navigating the right entry point for a claim, in time and in accordance with the particular rules, while keeping an eye on deadlines for alternative routes, can be challenging even for the legally qualified. For someone without legal representation, particularly someone experiencing a breach of their human rights, it will often be impossible. Adding powers of remittal and appeal could improve connectivity, relieving some of the burden on individuals.

Once in court, procedural rules vary markedly depending on the court and type of claim. Even for a solicitor, it can be challenging to comply with the latest procedural rules and practices, which are often buried in practice directions and annotations.

Our system would benefit from a wholesale review of court rules to improve accessibility, simplify language, and ensure clarity.

Judicial Review is one of the only judicial routes available to secure a remedy for breach of human rights. However, since the Court Reform (Scotland) Act 2014 this critical route to accessing a remedy is closed only three months after a breach of rights begins.

At JRS, we know from our case work that this time limit is unreasonable, often passing before someone becomes aware they may have a legal remedy, locates a solicitor and applies for legal aid. There seems to be little justification for such an extreme time limit, particularly when people have three years to raise a personal injury claim and five years for breach of contract.

Strict statutory interpretation compounds the unfairness - a claim is time-barred three months after the *first day* of the breach, *even if the breach of human rights is continuing*. The discretionary power of judges to allow claims 'late' if they consider it equitable to do so is inadequate, as a discretionary power does not confer a right.

Affordable

An overall system of administrative and judicial civil justice should include simple, fully accessible, free processes that offer a route to a remedy.

Necessary reform of Scotland's civil legal aid system has been anticipated for a number of years, but there is still no sign of a consultation on a legal aid Bill.

The current system of legal aid – based on a market-led approach to meeting user needs, primarily through the judicare system – has failed to provide equal access to justice for service users (and potential service users) who face specific barriers in access, for those requiring legal assistance in specialist areas of law, and across key geographies.

Urgent reform is required to increase payment rates and reduce administrative burden on practitioners, to stem the flow of solicitors withdrawing from civil legal aid work and address advice deserts across the country.

The limited availability of legal representations has been amplified through the Covid-19 pandemic and the current cost of living crisis. We also hear that many solicitors are no longer taking cases under legal aid, as this is no longer a viable income stream, and that is particularly true with complex cases or outside the Central Belt.

This gap has disproportionately restricted access to legal advice for marginalised and vulnerable groups including survivors of gender-based violence, migrants, individuals with disabilities, children, and the elderly. The current system arguably perpetuates, and amplifies, the current inequality in access to justice for some of these groups.

Further, many people who do not qualify for legal aid are not wealthy enough to be able to fund an expensive court action and take on the risk of losing and having to pay the other side's legal expenses.

JRS believes it is simply not good enough to say that the Scottish Government remains committed to reforming the current system of legal aid - introducing this Bill without simultaneously ensuring long overdue reform of Legal Aid is a huge error which renders commitments to access to justice meaningless.

Significant improvement could also be made by expanding the availability of protective expenses orders in human rights claims, including considering a default no expenses position for those with human rights claims or defences, and by waiving court fees for human rights claims.

Timely

The development of fully accessible, quick, and free mechanisms that can be used to secure emergency remedies in cases of breach of economic, social, cultural and environmental rights is needed, with the possibility of appeal to the courts for judicial oversight. Our current system of interim court orders is not likely to be adequate, at least not without significant reform ensuring easy access to immediate, free, legal representation across the country.

Effective

An effective remedy provides appropriate reparation, in the form of restitution, rehabilitation or compensation, and includes guarantees of non-repetition. While the Scottish civil courts have a range of possible remedies at their disposal, court orders are generally limited to granting a remedy in favour of a specific pursuer, rather than addressing a wider structural or systemic issue that led to the claim. Wider, structural orders providing a remedy addressing the root issue would ensure justice for many, avoiding the need for many individual claims. The introduction of group proceedings in the Court of Session 2020 raises the potential for wider, structural remedies, which should be encouraged.

We believe that including the right to an Accessible, Affordable, Timely and Effective remedy in this Bill will enable the Scottish Parliament to thereafter introduce a more detailed Bill or Bills on specific aspects of access to justice. Provided other key provisions are included in the Bill, this will also mean the Scottish Government and Parliament can be pressed to bring forward needed reforms, and if necessary, challenges could be brought in court for breach of the right to an effective remedy.

Alternative Remedies

The current tendency is to issue damages when there is a human rights violation. That is an important response, however we agree with Professor Boyle that "it is not

the only means, nor is it always a necessary component of an effective remedy in international human rights law".[55]

For example, in the case of Rosario Gómez-Limón Pardo, the UN Committee on Economic, Social and Cultural Rights held that there was no need to issue financial compensation in response to the violation of the right to adequate housing, but that suitable housing be provided to Ms Gómez-Limón Pardo and her legal expenses be covered following an unlawful eviction. In addition, the Committee instructed Spain (the state party) to undertake domestic reform to ensure others were able to access an effective domestic remedy for unlawful evictions in order to ensure cessation of the violation.

This new Bill should be used as an opportunity to improve judicial remedies in case of human rights violations, and structural orders, for example, can help with that. Structural orders, also known as structural interdict in Scotland, are a remedial response to a systemic problem, which means issuing a remedy that seeks to resolve a systemic issue by instructing different bodies of the state to stop the violation and guarantee access to effective remedies for those impacted.
The European Court of Human Rights for example now uses a pilot system to deal with systemic cases and has issued structural orders under this pilot. For example, in response to the historic coercion of land in Poland the court held that the state should take measures that would afford a remedy to all those who faced a violation of Article 1 Protocol 1 ECHR. The Polish Government then adopted a new law under which financial compensation was made available to all those impacted meaning an effective remedy was available at the national level.

The Taskforce recommended

> *"further consider how the framework could provide for the full range of appropriate remedies under international law to be ordered by a court or tribunal when needed, including targeted remedies which could provide for non-repetition of the breach (such as structural interdicts)",*

We agree with that statement and ask the Scottish Government to ensure appropriate consideration is given and more detailed proposals presented.

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?

To answer this question we need to recognise there are a number of well-known and well-documented barriers to accessing an effective remedy through Scotland's administrative and civil justice system, including:

- lack of information about rights and routes to remedy;
- limited independent advocacy;

[55] Boyle K, 2020, Academic Advisory Panel Briefing Paper *Access to Remedy – Systemic Issues and Structural Orders* https://dspace.stir.ac.uk/retrieve/83ce5341-cc71-43dd-98ad-72be806d9a10/BOYLE%20Systemic%20Issues%20and%20Structural%20Orders%20Briefing%20Paper.pdf

- complexity and range of potential routes to remedy (range of institutions, powers, remit and rules);
- lack of integration / connectivity between various routes;
- time; emotional drain; risk/uncertainty;
- scarcity of legal advice and representation;
- very strict/unfair deadlines;
- prohibitive cost (own costs and risk of having to pay other side's);
- limited remedies available;
- barriers for NGO's (cost / standing);
- lack of data (e.g., for strategic public interest litigation).

We know about these barriers from our experience as court solicitors, from our case work at JustRight Scotland, from discussions with colleagues at other human rights organisations and law centres, and from research[56].

The Taskforce, which included the Scottish Government, was provided with detailed information about these barriers, from those with lived experience, NGO's, academics and practicing lawyers. Indeed, the Scottish Government commissioned the Human Rights Consortium to facilitate a Lived Experience Board, which met from February 2022, and which provided extensive evidence of the barriers to securing a remedy for breach of human rights people already face[57].
As Professor Katie Boyle has noted, these barriers will be compounded for economic, social, and cultural rights[58].

If someone is living in poverty, does not have adequate housing or food, and their right to health is not being fulfilled, the barriers to securing an effective remedy will be manifold.
At the moment, they would likely have to work out for themselves that they have a legal right that is being breached, and that they may be able to take action. They may be able to find general information online, if they have access to the internet, but many do not, and the proportion of people who do not will be higher for the people most likely to be affected by breaches of ESC rights[59].
Even if they do, there may be language barriers and/or other accessibility barriers. The information available is also patchy, provided by a range of NGO's and charities, with no one-stop-shop. Navigating that to locate reliable, applicable information and guidance for a particular situation is challenging and could be impossible for someone experiencing an ESC rights breach.
If they do manage to identify that they may have a legal right and the possibility of a remedy, they then need to find a solicitor to represent them.

Legal aid can only be obtained through a registered legal aid solicitor, so if they cannot locate a legal aid solicitor, willing and able to take them on as a client, they

[56] https://dspace.stir.ac.uk/retrieve/52a6207c-2284-4c6b-97ce-649ddf9cd749/10-Briefing-The-Access-to-Justice-Journey_18MAY22.pdf
[57] https://hrcscotland.org/human-rights-bill-lived-experience-board-reports/
[58] https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Final-report-The-practitioner-perspective-on-access-to-justice-for-social-rights-1.pdf
[59] https://www.gov.scot/publications/scottish-household-survey-2020-telephone-survey-key-findings/pages/5/#:~:text=93%25%20of%20households%20had%20access,had%20access%20to%20the%20internet

cannot access state funded legal advice. There is a significant and increasing shortage of legal aid solicitors in Scotland, particularly outside the central belt.

The Law Society of Scotland noted that the shortage of legal aid solicitors is causing people to be deprived of civil justice and that the legal aid crisis "specifically impacts society's most deprived and vulnerable, perpetuating further disadvantage"[60].
If they cannot locate a legal aid solicitor, the only possibility may be to represent themselves, but for most that will not be a real option due to the complexity and inaccessibility of Scotland's civil and administrative justice system.

The barriers preventing people from accessing justice were raised and discussed through the Taskforce process, which resulted in a set of recommendations related to access to justice, including recommendations 21, 25 and 26 referred to above.

The consultation states that Scottish Government wants to ensure there are routes to remedy available to people when there has been an individual or systemic infringement of people's human rights and that the remedies are accessible, affordable, timely and effective.

Yet, the very limited proposals on access to justice would not achieve that.
Again, we urge the Scottish Government to follow through on its acceptance of all these recommendations, and offer more detailed proposals for discussion, as soon as possible.

Information on rights

We need much improved access to information about rights and how to secure a remedy for rights breaches. The information should not only be widely available, but actively promoted. Everyone should come into contact with this information, in various ways depending on their life experience. That should include the education system for those going through it, but it should also include places people visit regularly for day-to-day purposes, such as doctors, chemists, supermarkets, post offices, banks, public transport hubs, libraries, and community centres.

Unfortunately, the public realm is ever shrinking, and public services are considerably and increasingly privatised. That means reaching people where they are is likely to involve reaching agreement with private providers to display information. However, general information only goes so far. It can be very difficult to apply general information to specific situations. What many people will need is to speak to someone who can assist them.

CAS

They may be able to obtain initial advice from the Citizens Advice Service helpline or from visiting one of its offices if they live nearby. One of the great strengths of CAS is that it has a presence on many high streets across Scotland, and it is often the only places people can physically visit to speak to someone who can provide advice.

[60] https://www.lawscot.org.uk/for-the-public/what-a-solicitor-can-do-for-you/legal-aid/

However, CAS is limited in the advice it can provide. The availability of legally qualified staff varies from office to office. The specialist topics noted on its website are: universal credit, money advice, defined contribution pensions, NHS complaints and members of the armed forces. For other matters, CAS may be limited to signposting people to other organisations, such as Shelter for housing information[61]. The consultation does not put forward proposals in relation in relation to information, advocacy or general advice about human rights or the rights that will be covered in The Bill. This is disappointing given the discussion of the issues through the Taskforce and evidence from the Lived Experience Leadership Board.

Legal Advice / Legal Representation /SLAB

As discussed above, we are in a legal aid crisis and those most affected include those most likely to suffer breach of their economic, social and cultural rights. The shortage of legal aid solicitors must be addressed by reforming the system to reduce the administrative and bureaucratic burden on solicitors and increase the level of financial recovery for work done, in terms of rates and what is chargeable. In other words, it needs to be made sustainable.

The consultation contains only two sentences on legal aid, noting its importance and noting the Scottish Government remains committed to reforming the current system. However, there are no proposals for reform. A legal aid bill was also disappointingly absent from this year's Programme for Government. It therefore seems the Bill will move forward without any measures being taken to address legal advice and representation deserts in Scotland. Without measures to effectively address the lack of affordable legal advice and representation, people will be denied access to justice for breach of rights in this Bill as they are for other rights.

In addition to reforming legal aid, significant improvement could be made to access to justice by introducing new rules protecting those pursuing human rights claims from the possibility of having to pay the other side's costs. This was recently done for personal injury claims, recognising the imbalance between an individual pursuer in a personal injury claim, and the defending company or employer, who will usually be covered by insurers. A similar power imbalance exists for individuals pursuing human rights claims against the state, or government.

Detailed consideration ought to be given to the introduction of special rules for human rights claims, to protect people from the risk of having to pay the other side's legal costs.

Court fees should also be waived for those pursuing human rights claims.

Complexity / Inaccessibility

The Scottish administrative and civil justice system is a highly complex landscape of regulators, ombuds, tribunals and courts, each with their own particular remits, deadlines, procedural rules, and powers. Even selecting an entry point can be

incredibly challenging for someone experiencing a breach of rights, particularly for those who does not have an independent advocate or legal representation.
From our casework, we are aware of many clients who have attempted to resolve things through a public authority's complaints procedure, who did not secure a meaningful resolution and who therefore had to pursue a legal remedy with our assistance. There will be many more who could not do so, as they did not have the time or emotional resources it takes to pursue a complaint, and/or because they couldn't find a legal aid solicitor with capacity.

It is also our experience that public authorities can be defensive when asked to reconsider their actions, rather than viewing a complaint as an opportunity to reflect and resolve situations without the need for court action. Asking the same entity that breached your rights to find itself wanting and require itself to take the action it refused to take, it inherently an uphill struggle.

We are also aware that the complaint process can take months, often longer than the three-month period within which a Judicial Review must be raised (as discussed below). The complaints process is not joined up with the court or tribunal system, and so time spent trying to resolve things in that more informal could mean they are too late to raise it in court if it is not resolved.
While the general proposal to try to improve the public authority complaints process is positive, the consultation does not contain any meaningful proposals for reform of the public authority complaint process.

The consultation also notes that scrutiny bodies play an important role in upholding human rights and driving culture change, and again suggests that human rights be expressly added to their mandates.
However, if significant reliance is being placed on scrutiny bodies, we should have confidence that the inspectorates and regulators we have cover all areas of public life. There is no suggestion that any mapping exercise has been done to identify gaps in the scrutiny body landscape. From our experience, we are aware that the remit of the inspectorates can be unclear, and in practice they can apply a more restrictive approach to the types of matters they will review than their website might indicate. They also apply time limits, with some only considering things that happened in the past 6 months. If we are relying on them to play an important role, we should be clear as to what each cover.

The consultation does not have a lot to say on judicial remedies, focusing instead on administrative routes to remedy. While it is very important that people have free, highly accessible routes to securing an effective remedy, it is equally as important that they are able to pursue a judicial remedy.

With significant improvement in administrative routes to remedy, the need to pursue a remedy in court would reduce in many cases.
However, we cannot assume that we will have accessible, affordable, timely and effective administrative remedies. Significant reform is required to achieve that. Even then, there will always be a need for judicial remedies, and so a requirement that those judicial remedies are also accessible, affordable, timely and effective.

<u>Time Limits</u>

There is no discussion of time limits for court claims under the proposed Bill. Claims under the Human Rights Act (HRA) must be brought within a year, and this Bill should at least mirror that.

However, we should not assume that the HRA position is the right one. In the UNCRC Bill we saw the Scottish Parliament mirror the one-year time limit in the HRA, but also agree that any period prior to a person turning 18 should be disregarded, and so young people have a year from the date on which they turn 18 to bring a claim[62].

It could also adopt a more flexible approach for claims under this Bill.

The one-year limit in the HRA is very short compared to Scotland's general approach to civil claims. People have three years to raise personal injury claims in court, and five years to raise breach of contract claims. One year is a very short period of time, particularly where breaches of rights may have placed someone in a highly precarious situation, rendering them unable to engage with a judicial process, and/or have caused trauma.

The one-year time limit in the HRA is softened to a degree by provision for courts to exercise their discretion and allow a claim later if it considers it equitable to do so. This was also mirrored in the UNCRC Bill. However, that leaves victims of human rights breaches with little certainty, as it depends on the discretion of the court. They face the burden of meeting yet another strict legal test, having to present evidence justifying the delay and funding that procedure before it is even confirmed that they can bring forward their claim.

The discretionary possibility that claims may be allowed after one year does not adequately address the harshness of the one year limitation. A discretion does not confer a right. Given that the state is generally the defender in human rights claims and will generally have retained relevant records for at least three years, it is hard to see significant prejudice to the state of having to defend human rights claims related to events that occurred within the previous three years.

Most HRA claims are raised through Judicial Review (JR).

The one-year limit in the HRA and UNCRC Bill are qualified, in that any stricter time limit will apply. Since Scotland followed the approach taken in England and Wales, introducing a three-month time limit for seeking permission to raise a Judicial Review, HRA claims through JR must be raised within three months of the breach[63]. Three months is an exceptionally short period for anyone to raise a court action, but it is particularly burdensome for anyone who:

- does not already know they may have a legal remedy;

[62] Supra note 4, section 7.

[63] Section 27A of the Court of Session Act 1988 was introduced by the Court Reform (Scotland) Act 2014, following the Scottish Civil Courts Review (the Gill Review) and provides that a JR application must be made "before the end of the period of three months beginning with the date on which the grounds giving rise to the application first arise."

- does not already have a solicitor;
- requires legal aid;
- is experiencing the adverse impact of the breach of their rights.

We know from our own casework that three months is an unreasonable deadline, with many clients having exceeded that by the time they find their way to us. Real consideration should be given to whether the three-month time limit should remain.

Such a restrictive limitation on accessing justice should have a very strong justification. It is not clear that adequate consideration was given to this at the time of the introduction of these new rules. Prior to the introduction of the three-month limit Scotland had no specific limit on the time for bringing a JR. A claim could be brought at any time subject to the defender's right to challenge the claim as too late, based on rules related to the fairness of the process. If events had occurred decades prior, witnesses were deceased and documents destroyed, there may have been an argument that it would have been unfair to put the claims to the defender. To go from that to a three-month time limit was a dramatic change.

Strict statutory interpretation compounds the unfairness – a claim is time-barred three months after the *first day* of the breach, *even if the breach of human rights is continuing*.

If this is not urgently reformed, someone denied adequate housing, food or the right to a healthy environment will similarly be barred from pursuing a remedy through judicial review even although their rights continue to be breached. The discretionary power of judges to allow claims 'late' if they consider it equitable to do so is inadequate, as a discretionary power does not confer a right.

Similarly, the three-month rule has been interpreted to mean the three months runs from the date of the decision, even if you are unaware of that decision. If a decision is made and recorded in a letter, but that letter is not sent or does not reach you for more than three months, you have already lost the possibility of JR.

None of this sits well with long established principles of Scots law related to time bar, but the introduction of that legislative provision along with strict statutory interpretation has meant this is where things currently stand.

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?

We believe that it is entirely proper to have the Scottish courts adjudicate on whether a provision of an Act of the Scottish Parliament ("ASP") is incompatible with the rights secured in the Bill.

We favour the inclusion of a "strike down" power in the Bill, as opposed to a declaration of incompatibility, as it is a stronger remedy. As practitioners who primarily represent rights holders, our view is that declarations of incompatibility are

a weaker remedy than the strike down" power because they do not invalidate the law, and so allow the breach to continue.

Whilst most declarations of incompatibility have been remedied promptly, there have been some key examples of declarations which have been largely ignored by Parliament, for a number of years. For instance, a declaration of incompatibility was issued in 2007 regarding the blanket ban on prisoner voting contained in section 3(1) of the Representation of the People Act 1983.18 This was in response to a 2005 European Court of Human Rights case. It took 10 years to change the law with respect to UK General Elections. This is an unacceptable delay in any circumstance and is certainly not a reflection of the Scottish Government's aspiration to ensure human rights are robustly secured in Scotland.

The UNCRC General Comment No.5 states that "Incorporation should mean that…the Convention will prevail where there is a conflict with domestic legislation or common practice.[64]"

And now for example, the UNCRC Incorporation Bill includes that all new Scottish Parliament law must comply with the UNCRC. If it does not, courts can 'strike down' legislation passed prior to the Bill receiving Royal Assent and issue a 'declarator of incompatibility' on legislation after the Bill receives Royal Assent.

We welcome the availability of the "strike down" power for legislation which predates the coming into force of the Act. We believe it is a stronger remedy than the declaration of incompatibility.

Implementing the New Scottish Human Rights Act

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

We agree with the HRCS recommendation to bring the legislation into force within 6 months after Royal Assent and the duty to comply no more than 2 years later. These are reasonable timescales that allow for development of guidance, public sector capacity, and Minimum Core Obligations

In particular, timescales need to be specified in the Bill and given due priority.

Question 39
What are your views on our proposals to establish MCOs through a participatory process?

We agree with HRCS position that it is essential for MCOs to be developed through a participatory process, and this should be particularly with groups whose rights are most at risk. Consideration should be given to whether this process is led by Scottish Government or by the Scottish Human Rights Commission.

[64] Committee on the Rights of the Child General Comment N.5 (2003)

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.

The Scottish Government should provide details of UN guidance on MCOs and examples of MCOs in Scotland before this Bill is introduced to Parliament.

MCOs should be subject to review through a participatory process every 10 years.

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

We refer to and agree with the HRCS and Together responses, and consider the Human Rights Scheme could be a clear way for individuals, organisations and MSPs to know what the Scottish Government is doing to keep on progressing the realisation of human rights. It could be a fundamental tool for holding the Government to account on keeping to their duties and commitments on human rights. We reiterate that Scottish Ministers should have to consult with people whose rights are most at risk when developing the Scheme and reporting against it annually.

As mentioned in our response to Question 26, we believe any such Scheme should be modelled on the Children's Rights Scheme as set out in the UNCRC Bill. We observe that the experience of Wales illustrates the positive impact of the Children's Rights Scheme and provides a rich body of experience upon which to draw.

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?

We refer to and agree with the HRCS position which is to broadly agree with the Scottish Government proposal.

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 SI introduced to the Scottish Parliament.
We will also be asking the Scottish Parliament to engage with people whose rights are at risk in determining any enhancements to their legislative scrutiny around human rights compliance.

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?

We agree with HRCS position that statutory and non-statutory guidance is essential.

There are valuable lessons from preparations for implementation of the UNCRC Incorporation Bill, including engagement with stakeholders on draft statutory and non-statutory guidance.

This needs to be developed with the meaningful participation of people whose rights are most at risk and written and published in a way that it is accessible to both rights-holders as well as duty-bearers. 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?

We are disappointed by the lack of development in this area, despite considerable learning from UNCRC Bill. We are keen to see further, more detailed proposals, from Scottish Government in this area, ahead of debate of draft legislation.

Question 44
What are your views on monitoring and reporting?

Referring to our response to questions 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 also mentioned in response to question 13, the SHRC has a role in monitoring government and public body rights reporting.

We call on Scottish Government to place a reporting duty on the Scottish Parliament, mirroring the provision in the UNCRC Bill.

Summary and Conclusion

We welcome the long-awaited consultation on this Bill, and we are committed to engaging with the Scottish Government on next steps after the consultation closes. We recognise the limits of devolution, nonetheless, we continue to hold the Scottish Government to its pledge to incorporate these rights to the maximum extent possible within devolved competence and believe that these proposals fall short of that ambition.

This is why we are calling for:

- **The right to an effective remedy** – one that is accessible, affordable, timely and effective – to be included in the Bill as a substantive right, with a duty to comply.

- **Reconsideration in the treatment of CERD, CRPD and CEDAW**, which have disappointingly been relegated to “equality treaties,” including direct incorporation of key substantive rights in CRPD.

- **A duty to comply – rather than a procedural duty – for as many rights as possible, including substantive rights within CRPD**.
- **A commitment to, and production of a detailed plan for, embedding participation in the design and implementation of the Bill.**

Finally, we have expressed our disappointment overall with the lack of detail in this Consultation, particularly with respect to access to justice, right to remedy and embedding participation, and our concern at the limited time remaining to develop and consult on detailed proposals for these aspects of the Bill.

We also ask therefore for continuous engagement in the months ahead, and for the draft Bill to be shared with third sector organisations before it is introduced to the Scottish Parliament.

Submitted on 5 October 2023

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