

SHRC

Scottish
Human Rights
Commission

EXECUTIVE SUMMARY

Building a new human rights framework for Scotland

Key legal features



About the Commission

The Scottish Human Rights Commission is Scotland's National Human Rights Institution. Established by the Scottish Commission for Human Rights Act 2006, we fulfil a broad statutory mandate to protect people's rights and hold government and public bodies accountable for their human rights obligations.

The Commission is accountable to the people of Scotland through the Scottish Parliament and is accredited as an A-Status National Human Rights Institution within the United Nations (UN) human right system. We report directly to the UN on human rights issues in Scotland.



Introduction

For more than a decade, the Commission has been calling for all human rights, particularly economic, social and cultural rights, to be brought into Scots Law. We have worked with civil society and a range of lawyers and international experts, hosted lectures and workshops and been an active member of the First Minister's Advisory Group on Human Rights Leadership and the National Taskforce for Human Rights Leadership.

The Commission welcomed the moment when, in its Programme for Government, in September 2021, the Scottish Government committed to incorporate a new range of international human rights into Scots law.

The Commission fully supports this commitment, which is a major milestone for human rights in Scotland.

We believe this is an opportunity to build on international best practice, learn from other countries and go further to enshrine the strongest possible protections for human rights within the competence of the Scottish Parliament. Additionally, it's a chance to create the most effective mechanisms for implementation and accountability.

The Commission also agrees with Scotland's National Taskforce on Human Rights Leadership that the new legislation should be:

- + **Internationalist**; firmly linked to the obligations the UK has committed to by signing up to international treaties.
- + **Maximalist**; offering full and equal access to enjoyment of these rights and the maximum protection possible to everyone, within the competence of the Scottish Parliament.
- + **Multi-institutional**; sharing human rights leadership and responsibility between a range of public, Government and judicial bodies in Scotland.
- + **World-leading**; aspiring to create a bold new human rights framework which inspires other nations to do the same.

Over the next few pages the Commission will summarise its vision for the legal features of the proposed new Human Rights Bill in Scotland.

The Commission's analysis is grounded in international human rights law and the best practice of countries that have already legislated to provide substantial protection for economic, social, cultural and environmental rights.



A new era for human rights in Scotland

The Human Rights Act 1998 (HRA) has had a significant positive impact on promoting a human rights culture in the design and delivery of services across Scotland.

However, economic, social, cultural and environmental rights are not explicitly covered by the HRA or the European Convention on Human Rights (ECHR).

These rights are essential to living a dignified life and so it's vital they are incorporated into national law alongside civil and political rights, to guarantee that all rights have equal status and enforceability in Scotland.

All human rights are universal, indivisible, interdependent and interrelated, making up one cohesive body of law.

Incorporating economic, social, cultural and environmental rights into national law will lay an essential foundation for the development of more specific policies. It will bring these rights closer, making them more relevant for policy developers, legislators, duty bearers and rights holders. It will also ensure that breach of these rights is justiciable, so people can seek legal remedies through the courts.

Read on for a more detailed look at the legal features we believe should be at the heart of this new human rights framework.

An internationalist approach

The new legislation should guarantee the domestic protection of treaties ratified by the UK and keep pace with international rights developments.

To ensure a truly internationalist approach, it must also include the following:

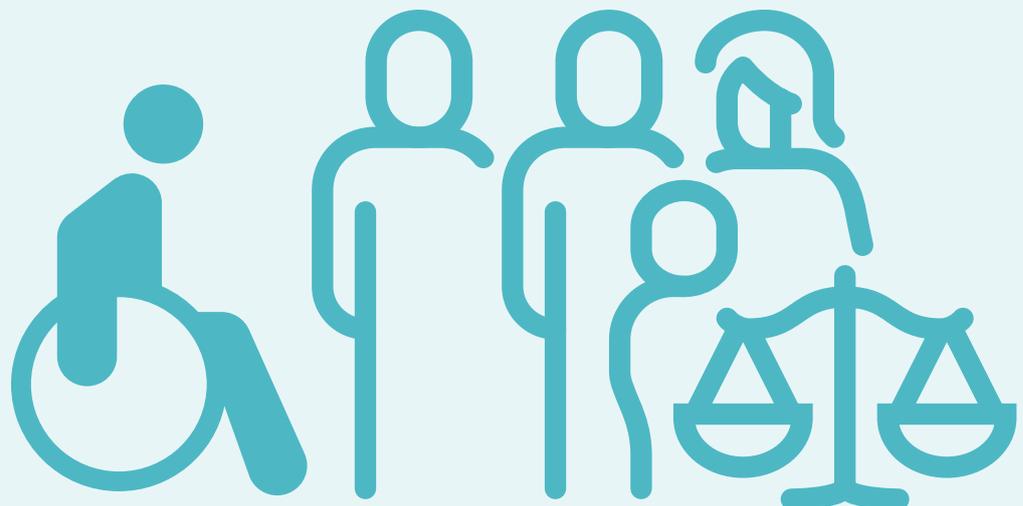
- + Incorporation of all the rights enshrined in the international human rights treaties;
- + An obligation to interpret such rights in accordance with international law;
- + An obligation to take into account the international standards produced by treaty monitoring bodies, such as general comments, statements and concluding observations;
- + Provisions ensuring the obligations in international law for both public bodies and private actors are enshrined in the legislation.



What does maximalist mean?

The new legislation should aim to achieve the most effective promotion and protection of human rights possible within Scotland's constitutional arrangements.

To ensure a maximalist approach, the Bill should incorporate all the rights set out in the ratified treaties, as well as additional rights for older people, LGBT+ people and the right to a healthy environment. It should also, to the greatest extent possible, guarantee to protect and realise the rights of those historically marginalised.



Multi-institutional human rights law

The new human rights framework should create a system where human rights leadership and responsibility are shared among the Scottish Parliament, government at all levels, courts, regulators, ombudspersons, inspectorates and Scotland's National Human Rights Institution – the Commission.

For a multi-institutional approach to be successful, it needs:

- + Clear and strong obligations need to be placed on scrutiny bodies, local authorities, and Scottish public bodies;
- + The Scottish Parliament should be given an important role in ensuring that further legislation is compatible with the Human Rights Bill;
- + Courts should be able to grant all forms of reparations under international human rights law – and required to assess compliance under a standard of review appropriate for the adjudication of human rights;
- + Scotland's National Human Rights Institution should be given an appropriate mandate and powers to ensure it can play a strong role in human rights promotion and protection.



A world-leading role for Scotland

The new Human Rights Bill must aspire to be bold, progressive and inspirational to the international community.

Many countries in the world have incorporated economic, social, cultural and environmental human rights in their domestic legal framework. Some have strong mechanisms for accountability and access to justice. Others have strong mechanisms to prevent harm, ensuring systematic human rights violations don't occur.

Scotland should draw on these best practice examples and ensure that the new Human Rights Bill:

- + Places a duty to respect human rights on all private actors, along with further duties on those private actors that directly provide human rights services;
- + Guarantees human rights to LGBT+ people and older people, although these rights have not yet been recognised in a binding international legal document;
- + Requires judicial and non-judicial routes to remedy that are accessible, affordable, timely and effective;
- + Puts in place mechanisms that require planning, coordination, and prioritisation to ensure the progressive realisation of rights;
- + Requires that minimum core obligations are defined through a participative process and detailed in further legislation;
- + Ensures that human rights budgeting will be applied;
- + Puts in place a strong monitoring mechanism.



What should be the key aims of S

1 Ensure a rights-based country.



One of the fundamental aims of the new legislation is to ensure all legislation, policy, planning, and services in devolved areas are compliant with the incorporated rights.

To achieve this, rights and duties must be clear and easily accessible to all, including duty-bearers, who must understand what they need to do to make rights real, and to rights holders, so they can identify and assert their rights.

Obligations that are inherent to economic, social and cultural rights, such as “minimum core”, “progressive realisation” and “maximum available resources” must be clearly defined on the face of the Bill, or through a clear mechanism. The range of duty-bearers must also be identified.

2 Make rights justiciable.



The bill must provide people with the ability to receive redress when their internationally protected rights are violated.

Access to an effective remedy for when rights are breached, which is required under human rights law, will require clear interpretive duties be included in the Bill. It will also require consideration of the appropriate standard of review applicable to these claims and the remedies available to courts, tribunals and administrative decision-makers. In addition, there must be a commitment to tackle the major barriers to access to justice for human rights claims in Scotland, including legal and procedural complexity, the lack of legal aid and/or free advice and representation services, high costs associated with litigation and the considerable time, emotional resources and energy required to pursue a human rights claim.

Scotland's new Human Rights Bill?

3 Advance the rights not found in binding treaties.

The Bill is also a chance to protect rights not yet found in binding international human rights instruments but already under discussion, such as proposals to create a right to a healthy environment. Additionally, it's an opportunity to advance rights not found in full in international law, such as particular rights for older people and for LGBT+ people.



4 Protect best practices.

In addition to incorporating new international human rights, the Bill is an opportunity to enshrine existing best practice not yet legally protected in Scotland into law, for example, legislative consultation or the creation of human rights action plans.



What essential legal features should

THE RIGHTS

- + Incorporate the rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), to the fullest extent possible within the limits of the Scottish Parliament's legislative competence.
- + Incorporate the rights enshrined in the International Convention on the Elimination of Racial Discrimination (ICERD), to the fullest extent possible within the limits of the Scottish Parliament's legislative competence.
- + Incorporate the rights enshrined in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to the fullest extent possible within the limits of the Scottish Parliament's legislative competence.
- + Incorporate the rights enshrined in the Convention on the Rights of Persons with Disabilities (CRPD), to the fullest extent within the limits of the Scottish Parliament's legislative competence.
- + Incorporate the right to a safe, clean, healthy and sustainable environment as a human right, in line with the UN Human Rights Council resolution and international best practice, including the protections enshrined in the Aarhus Convention.

Should the Bill contain?



- + Incorporate the rights of older people recognised in article 25 of the EU Charter of Fundamental Rights, as well as the rights derived from the United Nations Principles for Older Persons, drawing on the Inter-American Convention on Protecting the Human Rights of Older Persons as a reference, to further the rights of older people in Scots Law.
- + Incorporate specific rights for LGBT+ persons that are drawn from international human rights standards, including:
 - ▶ The right of LGBT+ people to freely live and manifest their sexual orientation and gender identity.
 - ▶ The right of LGBT+ people to live a dignified life free from violence, hatred and discrimination of any type.
 - ▶ The right of LGBT+ people to live in an environment where their civil, political, economic, social and cultural rights can be fully realised.
- + Include an equality clause which provides equal access to the rights contained within the Bill for everyone.



What essential legal features should

PURPOSE AND INTERPRETATION

Include a purpose clause that:

- 1 Recognises the value of human dignity, as well as the universality, indivisibility, interdependence and interrelatedness of all human rights.
- 2 Makes clear the purpose of the Bill is to incorporate international human rights standards and to keep pace with evolving international human rights law, to the fullest extent possible within the competence of the Scottish Parliament.

Include an interpretative clause which obliges duty-bearers and adjudicators to:

- 1 Interpret the rights in the framework by the purpose clause, ensuring they fulfil the human dignity, universality, indivisibility, interdependence and interrelatedness of all human rights.
- 2 Interpret the rights in accordance with international human rights laws ratified by the UK, particularly ICESCR, ICERD, CEDAW and CRPD.
- 3 Take into account international legal standards, such as General Comments, Statements, Reports, Recommendations and Concluding Observations.
- 4 Allow duty-bearers and adjudicators to take into account comparative legislation and judicial decisions.

Should the Bill contain?



THE DUTIES

- + Set out a clear duty to comply with the rights and obligations contained in the framework.
- + Set out a clear duty to progressively realise the rights contained in the Bill and clarify the key elements of that obligation, as developed by the UN Committee on Economic, Social and Cultural Rights.
- + Set out clearly the obligation to use maximum available resources to progressively realise the rights in the Bill, including:
 - A definition of resources;
 - The conditions of resource mobilisation, allocation, and expenditure;
 - The grounds of non-compliance;
 - The obligation to ensure the use of human rights budgeting.
- + Set out the scope of Minimum Core Obligations, as follows:
 - 1 An obligation should be placed on relevant duty-bearers to ensure the minimum essential levels of economic, social, and cultural rights for people to live a dignified life.
 - 2 These essential levels must be defined in further secondary legislation, after a participatory process that takes careful consideration of the views of those with lived experience, technical expertise and policy makers.
 - 3 The secondary legislation should be reviewed at least every 10 years, to ensure that essential levels are a reflection of the technological, societal, financial and environmental reality in Scotland. The process should continue to ensure the views of those with lived experienced, technical expertise and policy makers provide the basis for any changes.
 - 4 The legislation should include an impossibility test, that allows duty bearers to avoid responsibility for failing to meet minimum core obligations only "if the duty-bearer can demonstrate that, in spite of all of its efforts, it could not comply with achieving the minimum core obligations."

What essential legal features should

- + Clearly set out a prohibition on retrogression in accordance with international legal standards developed by treaty monitoring bodies.
- + Set out the Respect, Protect and Fulfil duties, as developed in international human rights law, to provide additional legal certainty and clarity regarding overall obligations on duty-bearers.
- + Put an obligation on all businesses to respect the rights incorporated in the Bill, plus an obligation on all service providers, public and private, to comply with its rights and obligations.



Should the Bill contain?



A MULTI-INSTITUTIONAL APPROACH

- + Introduce a new standard of review for the adjudication of incorporated rights, taking into account international legal standards and comparative best practices.
- + Include the full range of remedies according to international law, allowing judges to order measures of restitution, compensation, rehabilitation, satisfaction, and/or guarantees of non-repetition when appropriate to the facts of the case.
- + Ensure the Scottish Parliament plays an important role in the protection and realisation of human rights by providing:
 - 1 For the Equality, Human Rights and Civil Justice Committee to perform pre-legislative scrutiny of all proposed legislation being introduced. Determine the compatibility of such proposed legislation with the Human Rights Bill.
 - 2 For an assessment of resources available to the Equality, Human Rights and Social Justice Committee to ensure they are sufficient to deliver on its revised mandate.
 - 3 A requirement for a broader statement of compliance from the Presiding Officer and the member in charge of legislation covering all applicable international obligations.
 - 4 For additional checks for human rights compliance for amendments and subordinate legislation.
 - 5 A requirement for effective and transparent Human Rights Impact Assessments of primary and secondary legislation.
 - 6 Expert analysis of human rights issues must be available to MSPs for all aspects of their Parliamentary work.
 - 7 For a human rights based approach to Parliament's scrutiny of the Scottish budget.
 - 8 For internal structures to ensure it can fulfil its responsibility to protect and realise human rights. These should ensure rigorous, regular and systematic monitoring of the Scottish Government's performance of its responsibilities to secure human rights in areas of devolved competence.

What essential legal features should

- + Clearly set out a duty on all Scottish Regulators, Inspectorates and Ombudspersons to ensure the institutions they regulate or oversee comply with the new statutory framework, as well as to ensure they mainstream human rights within their own work.
- + Strengthen Scotland's National Human Rights Institution, the Commission, by expanding its mandate, including by adding a protection mandate, expanding its powers and guaranteeing adequate resources to enable it to fulfil that mandate, all in collaboration with the Commission to protect its independence.



Should the Bill contain?



IMPLEMENTATION AND MONITORING

- + Include an obligation to provide Accessible, Affordable, Timely, and Effective routes to remedy for human rights breaches (the AATE framework), covering all routes, including administrative or quasi-judicial and judicial. The specific elements of this AATE framework could be laid out in the legislation or detailed in further secondary legislation.
- + Provide for the creation of a human rights advice service to ensure everyone has access to appropriate and accurate information about their protected rights and their routes to remedy, if or when needed.
- + Make resources available for a public awareness campaign on the new human rights legislation.
- + Create a Human Rights Scheme to support the progressive realisation of the rights incorporated in the Bill.
- + Put Scotland's National Action Plan for Human Rights on a legislative basis.
- + Guarantee regulators, inspectorates, ombudspersons and Scotland's National Human Rights Institution are provided with the appropriate powers and resources to ensure effective human rights monitoring.
- + Guarantee the provision of human rights education, in accordance with the principles enshrined in the United Nations Declaration on Human Rights Education and Training, including introducing human rights education into the Curriculum for Excellence, and making it compulsory for law students. Additionally, the Commission considers the Scottish Government should immediately start to draw up plans to guarantee effective capacity building of both right-holders and duty-bearers.

You can read more about the Commission's work to strengthen human rights law in Scotland in the 'Projects and Programmes' section of our website at www.scottishhumanrights.com.

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