

Response to Scottish Government Consultation: A Human Rights Bill for Scotland

5 October 2023

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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1. Executive Summary

1. The Scottish Human Rights Commission (the “Commission”) welcomes the opportunity to provide this response to the current consultation on the Scottish Government’s proposals for a Human Rights Bill for Scotland. Our advice is given pursuant to section 3 (1) (b) of the Scottish Commission for Human Rights Act 2006.¹
2. Human rights become real when public actors and services uphold, promote and are accountable for violations of human rights. Protecting human rights in law provides an essential foundation for holding government and other public bodies to account and securing redress for human rights denials experienced by people in Scotland.
3. The ambition of the Scottish Government’s proposed Human Rights Bill is very welcome.
4. It also presents a moment to reflect on the whole system – legislation, policy and resources – required to make human rights real.
5. Having advocated for an improved legal framework for over a decade, the Commission welcomes the proposals for a Human Rights Bill as a significant milestone.
6. It has recently become clearer however that devolution presents challenges for human rights incorporation in the Scotland, as illustrated, for instance, by the experience of the UNCRC (Incorporation) (Scotland) Bill and subsequent Supreme Court judgement of October 2021.
7. To support policy development on human rights incorporation, the Commission has sought an Opinion from Senior Legal Counsel. This highlights certain challenges for Incorporating international human rights treaties within the devolved legal system; that in some respects the feasibility of the model proposed is uncertain; and that other incorporation models are available.

¹ Scottish Commission for Human Rights Act 2006, s. 3 states that, for the purposes of its general duty to promote and encourage best practice in relation to human rights, the Commission may provide advice and guidance.

8. The Commission believes it is crucial to make access to justice for human rights in Scotland easier to navigate for people. New laws to incorporate human rights into law in Scotland should therefore be stable, transparent and accessible to rights-holders.
9. At the same time, human rights laws must be clear and secure in their terms so that government and public bodies understand their duties and can be effectively held to account for implementing them.
10. Further reflection on the approach to be taken to incorporation is accordingly strongly recommended by the Commission.
11. This must include further consideration of how the Bill could provide equal strength to the rights of disabled people, women and people facing racial discrimination. These groups have specific protections in human rights law that must be given the same weight as the economic, social and cultural rights of the population at large.
12. In terms of our own role in supporting human rights in Scotland, a weight of evidence supports the extension of additional powers to the Scottish Human Rights Commission. Whilst the proposed Human Rights Bill for Scotland presents one catalyst for this development, there are reasons independent of incorporation favouring the conferral of such additional powers on the Commission.
13. The Commission has published separately papers containing the Opinion of Senior Legal Counsel on the incorporation approach, and on proposed new powers for the Scottish Human Rights Commission. Both can be accessed at www.scottishhumanrights.com. These should be read alongside this consultation response.
14. The following paper provides specific responses to the technical questions on incorporation posed by the Scottish Government.
15. The Commission remains committed to fulfilling our mandate in this process - by providing analysis and advice with the aim of supporting better legal protection and stronger enjoyment of human rights in Scotland.

2. SHRC Responses to the Consultation Questions

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

The value of human dignity plays an important role underpinning international human rights law. The Commission therefore agrees with the intention of the Consultation document that dignity should underpin an interpretative duty in the proposed Bill. Further clarification is required as to the exact approach proposed to be followed by the Bill in this area.

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

The Commission considers that the principle of dignity has a potential important role as a guiding value in the interpretation of incorporated rights. However, further clarification is needed of what is meant by establishing dignity as a 'key threshold' for defining the content of MCOs under the Bill.

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

Interpretative clauses can play an important role in ensuring that judicial and administrative bodies adjudicate human rights in line with international commitments and national constitutional traditions.

We highlight that the Taskforce recommended a provision in the Bill that acknowledges that nothing within it shall affect any provisions from domestic law or international law which are more conducive to the realisation of the rights within the framework.

It also recommended that the framework be interpreted in alignment with international standards. In order for this to be achieved, the Taskforce recommended that courts and tribunals should pay regard to international law. This was indicated to include decisions, General Comments, Statements and Concluding Observations from treaty monitoring bodies, as well as judgements, decisions, declarations or advisory opinions of the European Court of Human Rights and other sources.

Furthermore, the Taskforce also recommended that courts and tribunals may consider comparative law where relevant. This will be particularly relevant, as Scotland will be able to learn from the experience of other countries that have had positive experiences with adjudicating economic, social, cultural and environmental rights.

The Commission has indicated in the past that UN Treaty Body Committee General Comments **‘are the authoritative view of the Committee which oversees a particular human rights treaty as to the substance of the rights.’¹** They provide an authoritative explanation of the normative content of the rights set out in the UN Conventions, including:

- the general and specific obligations on States and public authorities;
- immediate and progressive obligations on States and public authorities; and
- examples of what would constitute a violation of any given right and the limited circumstances in which these could be justified.

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

The selection of a model for incorporation will be a matter for the Scottish Government to consider carefully in the context of the devolved settlement.

It has recently become clearer that devolution presents challenges for human rights incorporation in Scotland, as illustrated, for instance, by the experience of the UNCRC (Incorporation) (Scotland) Bill and subsequent Supreme Court judgement of October 2021.

Further reflection on the approach to be taken to incorporation is accordingly recommended by the Commission.

In our view, the key goal of incorporation should be to extend effective protection and enjoyment of human rights for people in Scotland through a clear and stable legal framework that is accessible to rights-holders while extending scope for duty-bearers to be held to account.

The Commission has published a Legal Opinion from senior legal counsel on this issue which can be found at www.scottishhumanrights.com

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.

In principle, rights included in international treaties to which the UK is a party and which are not impacted by the equal opportunities reservation could be incorporated into Scottish law .

The Commission sought an expert opinion on this issue from Professor Aileen McHarg. In Professor McHarg’s view, some rights within CERD, CRPD, and CEDAW fall within the competence of the Scottish Parliament ; others do not; while in some cases it is unclear . James Mure KC, in his opinion for the Commission, reached a

similar conclusion. Both analyses can be found in the Commission's publication *Towards a Model of Incorporation* at www.scottishhumanrights.com

Mr Mure KC indicated that 'given the Scottish Government's ambition to incorporate international human rights standards set down in treaties already signed and ratified by the United Kingdom, the Consultation could have offered reasons for not including such rights which are in the treaties and not impacted by the equal opportunities reservation within the proposed Bill.'

He also says 'to take a further example, article 4 of the CERD deals with incitement to racial discrimination and article 6 obliges states to assure to everyone effective protection and remedies against acts of racial discrimination. Where these matters concern devolved matters such as justice or education, I see no reason why they should not be incorporated into Scots law.'

The Commission acknowledges that ongoing litigation concerning the devolved settlement therefore has a bearing in this context.

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

The approach to the environment should align with the right to a safe, clean, healthy and sustainable environment as recognised by the UN Human Rights Council Declaration.

Further analysis and consideration is needed concerning the scope to incorporate rights arising under the Aarhus Convention (The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) Specifically, the Aarhus Convention guarantees:

- The right of everyone to receive environmental information that is held by public authorities. This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment.
- The right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment.
- The right to review procedures to challenge public decisions that have been made without respecting such rights or environmental laws in general.

Question 7 If you disagree please explain why.

N/A

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

In principle the approach to the human right to a healthy environment should reflect both its procedural and substantive components. These have been elaborated as follows by the UN Special Rapporteur on Human Rights and the Environment David Boyd:

- the substantive component of the right includes inter-dependent environmental features “which include clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems”
- the procedural entitlements comprise: access to environmental information, public participation in environmental decision-making, environmental and socio-cultural assessments, and access to justice in environmental matters and effective remedies, in accordance with the Aarhus Convention and the UN Framework Principles on Human Rights and the Environment.

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.

The right to food has been recognised as part of the right to an adequate standard of living by the UN Committee on Economic Social and Cultural Rights.

The Committee has further indicated that “sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations. The precise meaning of “adequacy” is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while “sustainability” incorporates the notion of long-term availability and accessibility.”²

As such conditions are not on the face of ICESCR, including food as a substantial aspect of the right to a healthy environment could promote clarity and legal certainty

for duty-bearers and rights holders. Further analysis and reflection is however required to clarify the implications of adopting such an approach within the Bill.

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.

The UN Committee on Economic Social and Cultural Rights has interpreted the right to an adequate standard of living, in combination with the right to the highest attainable standard of health, as including a right to water.³ The Committee has indicated that the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.⁴

The United Nations General Assembly has also recognised the right to “safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”⁵

The UN Special Rapporteur on Human Rights and the Environment David Boyd, has also categorised access to safe water and adequate sanitation as part of the substantial aspects of the right to a healthy environment. The incorporation approach adopted should in principle align with these developments.

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

The Commission is not in a position to respond to this question.

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?

The First Minister’s Advisory Group and the National Taskforce recommended that the rights protected under the Human Rights Act should be restated. As envisioned by FMAG, this would allow for all rights to be found in one single place, providing clarity for the people of Scotland. There may be some complexities in doing so, given the devolution arrangement, and greater clarity is needed about what might be the legal effects of such a clause.

However, the Bill could recognise that the rights incorporated are interrelated to and interdependent on civil and political rights, as found in the Human Rights Act. The

Bill might also indicate that it does not seek to modify any rights protected under the Human Rights Act.

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

Participation is based on a fundamental principle of human rights, which considers individual autonomy and self-determination to be part of basic human dignity. Participation of individuals in decision-making helps to ensure that systems are responsive to the particular needs of disadvantaged groups. This in turn helps duty bearers comply with anti-discrimination and equalities duties. Mechanisms to satisfy these procedural requirements of participation, access to information and transparency, as well as due process in decision-making, are required. A failure to include these may amount to violations of these international obligations.

Participation is not merely good practice, but an obligation firmly rooted in international legal standards. The International Covenant on Civil and Political Rights was the first to include specific reference to participation – related to the right to participate in public affairs, stand for office and the right to vote (Article 25). Numerous other international conventions also reference different elements of participation, including for specific groups such as women, children, disabled people, minorities and indigenous people.

There are several participation-related provisions in domestic law and policy, both in UK law and Scots law. Some of these arise in general legislation, which is applicable to everyone, for example:

- Equality Act 2010 - Public Equality Duty.

The General Duty of the Equality Act 2010 requires public authorities, in the exercise of their public functions to: *'encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.'*

- The Community Empowerment (Scotland) Act 2015

The Community Empowerment Act, passed in 2015, provides a set of powers to communities as follows:

- To strengthen community planning to give communities more of a say in how public services are to be planned and provided;
- To enable communities to identify needs and issues and request action to be taken on these, and;
- To extend the community right to buy or otherwise have greater control over assets.

Other examples focus on the rights of specific groups of people, such as:

- Public Bodies (Joint Working) (Scotland) Act 2014; Social Care (Self-Directed Support) (Scotland) Act 2013;
- Adults with Incapacity (Scotland) Act 2001
- Children and Young People's (Scotland) Act 2014;
- Mental Health (Scotland) Act 2015;
- Social Security (Scotland) Act 2018

The National Taskforce recommended that consideration be given to include an explicit right to participation, drawn from the principles of international human rights law, within the Bill. This was based on the premise that inclusion within the framework of a right to effective participation would ensure that there would be efforts by all to strive to continuously improve the means of effective participation by individuals and the public generally in the implementation of the framework.

It is important to stress that participation is a necessary component to effectively realise rights, particularly economic, social, cultural and environmental rights. Beyond the interpretations issued by treaty monitoring bodies, this approach is found in the UN Declaration on the Right to Development, which recognises that active, free and meaningful participation is essential for the achievement of the right to development.

As a procedural right or guarantee, participation is understood to be needed to ensure the adequacy of the provision of a service, a good, or the creation of a policy. It is to be found as part of the normative content of economic, social and cultural rights, either as part of the condition on acceptability or as part of the wider framework that underpins human rights.

Based on such considerations, the Government may wish to consider placing a specific duty, mirroring the approach taken in some Scottish legislation in the past, which makes some degree of participation a requirement. For example, The Community Empowerment (Scotland) Act 2015 (as described above) or the Islands (Scotland) Act 2018, which requires Scottish Ministers to consult members of island communities and other persons when preparing the National Islands Plan (section 4.1.c).

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?

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

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.

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

The Commission does not offer comment on the equality provision.

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

The final approach to incorporation should strengthen protection, effective access and remediation for human rights of older persons and LGBT+ people, along with members of other protected groups, and in line with international instruments to which the UK is a party.

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

In principle, all governmental and public bodies, but also other bodies carrying out devolved public functions and those engaged in delivering essential public services should be bound by the duties of the Bill to the extent their activity can adversely affect the enjoyment of human rights within the scope of the bill. This could include non-governmental and in some cases private or other bodies, though the exact content of duties of governmental and other bodies might necessarily vary. Further reflection is however required in relation to how this objective can be achieved, taking into account the existing scheme of the HRA 1998 and the wider scheme of devolution.

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

The Commission sees potential merit in a procedural duty but seeks further clarification its proposed scope and implications. It is unclear from the consultation document whether it is intended as a 'duty to have regard to' the rights protected, or a 'duty to prepare' and it is therefore difficult to provide further comment at this stage.

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

In principle a duty to comply should be central to the effectiveness and impact of incorporating legislation. A duty to comply should have the outcome that rights are respected while at the same time requiring that knowledge and understanding of human rights are embedded in policy making processes and by public authorities in the context of public service delivery.

Regarding ICESCR, a duty to comply should mirror the international legal obligation of progressive realisation,. For the purpose of clarity and legal certainty, the Bill could, for instance, include the conditions of progressive realisation, as well as clarify the other obligations attached to progressive realisation. This includes specifying that progressive realisation is subject to the maximum of available resources, in

terms of resource mobilisation, resource allocation, and resource expenditure. Resource mobilisation involves a process through which a duty-bearer raises its own resources to provide for its population (in other words, recourse creation).⁶ The Commission has published a series of evidence papers on the principles of Human Rights Budgeting which could inform the consideration of this element of the duty to comply⁷. Finally, it could also be clarified that inherent in the obligation to progressively realise rights, is the obligation not to take retrogressive steps (non-retrogression). This means that there is an overall obligation to ensure that the existing levels of enjoyment of human rights do not deteriorate.

Regarding CEDAW, CERD and CRPD, it is relevant that Scottish Public Authorities are already under a duty to comply, and not a procedural duty, with the Public Sector Equality Duty under section 149 and Part 3 of schedule 19 of the Equality Act 2010. Taking this foundation into account, the Bill should strengthen protection, effective access and remediation for the human rights of women, minorities and persons with disabilities as well as human rights of older persons and LGBT+ people, along with members of other protected groups, in line with international instruments to which the UK is a party.

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?

Such a reporting duty could prove valuable if supported by adequate guidance, training and resources, and scrutiny. As explained earlier, the obligation of progressive realisation requires deliberate, concrete and targeted steps, which need to be coordinated, coherent and comprehensive. To ensure this, duty-bearers need to plan carefully, look at how to use their available resources, to progressively realise rights and meet their minimum core obligations as a matter of priority. Reporting on such plans can promote transparency and accountability of all duty-bearers. The elements of the reasonableness test, as explained as well in the section below on the Human Rights Scheme, can also serve as an important guide on what should be reported by duty-bearers.

Further consideration, however, is needed in relation to the scrutiny of such reports. Public reporting, which is not subject to any oversight or evaluation whatsoever might not achieve the policy intended.

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

Alignment with existing reporting duties for instance under Equality Act 2010 Public Sector Equality Duty (PSED) could be provided for via regulations.

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?

Further clarification in the bill or accompanying guidance will be required regarding compliance with MCOs and progressive realisation to provide a clear framework for rights-holders and duty bearers.

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

The right to a healthy environment is recognised as part of ESC rights by some human rights instruments, with a related duty of progressive realisation.⁸ The proposed approach could potentially help duty-bearers in Scotland look at all economic, social, cultural and environmental rights coherently, and ensure they are respected, protected and fulfilled over time.

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

The Commission agrees with the need to publish a Human Rights Scheme, which could promote coherence in planning and transparency of Government actions, in order to both progressively realise the rights contained in the Bill and meet their minimum core obligations. The Commission's further views on the proposed Human Rights Scheme are elaborated in question 40 below.

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?

It is disappointing that the consultation document does not offer proposals to comment on. However, the Commission has recently published a paper *Access to Justice for Everyone*, which outlines in detail the complexity of the current access to justice system in Scotland around economic, social and cultural rights, and the barriers to accessing justice as experienced by people in Scotland. We refer the Scottish Government to that paper and would welcome further discussion. The paper is available at www.scottishhumanrights.com

Legal advice is prerequisite to effective accessibility of remedies for human rights violations. It is clear that without investment in effective advocacy, and access to appropriate legal advice for all, there is a risk that the rights proposed under this Bill will not be real for many people.

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

Front-line complaint handling mechanisms play an important role in ensuring access to justice for day-to-day human rights issues. Existing complaint handling mechanisms should be able to receive human rights complaints raised by rights-holders in relation to the provision of services, goods or policies which may affect them.

Such complaint handling mechanisms should adhere to the standard of accessibility, affordability, timeliness, and effectiveness, expected from all routes to remedy. In this sense, for example, such mechanisms should seek to be:

- Transparent, ensuring that information about their existence is widely available, in different forms and languages, in order to ensure the population is aware of the existence of such mechanisms;⁹
- Simple and not unreasonably complicated;¹⁰
- Prompt,¹¹ ensuring that there are no unwarranted delays,¹² and guarantee that the mechanism can address urgent cases.¹³

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

The Bill's proposals relating to the remit of the SPSO raise complex issues and require further clarification. The Commission will seek to support and work collaboratively with the SPSO pursuant to the objectives of this Bill as passed.

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

The Commission agrees that Regulators, Inspectorates and Ombudspersons (RIOs) should contribute valuably to advancing respect for human rights in Scotland by embedding human rights standards or approaches in their ways of working. RIOs play a significant role in driving the culture within public services.

Currently, although RIOs are obliged to comply with human rights standards, their monitoring and inspection activities may not be grounded in human rights. Addressing this area through enhanced duties could in principle help to close accountability gap. The Commission considered this issue in an earlier publication: *At a Crossroads: What next for the Human Rights System in Scotland? (June 2023)* available at www.scottishhumanrights.com

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

The Commission has provided views on this in separate paper *A Stronger Human Rights Commission (October 2023)*, available at www.scottishhumanrights.com.

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

The statutory powers and duties of the Children and Young People’s Commissioner for Scotland (CYPCS) as Scotland’s independent Children’s Rights Institution should be adequate to fulfil its mandate.

In particular, the CYPCS’ enabling legislation and the SHRC’s enabling legislation have important differences, with different powers afforded to each institution. For example, while the SHRC is barred from giving advice to the general public, the CYPCS is not; while the CYPCS can make investigations into any public authority, the SHRC is required to investigate all public authorities of similar nature when doing an inquiry; among many other differences. Therefore, a power by power analysis, which looks at the enabling legislation of each institution is needed.

More generally, analysis and coordination are required to avoid duplication or unnecessary overlap with the mandates of SHRC and other relevant bodies. This is an issue which the Commission considers in more detail in its earlier paper *At a Crossroads: What Next for the Scottish Human Rights System? (June 2023)* available at www.scottishhumanrights.com

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

The approach to standing under the Bill should take account of existing statutory rules on standing and sufficient interest test¹⁴; as well as any specific rights or requirements under relevant human rights treaties. In addition, the approach to standing of SHRC should be clarified in light of proposed new powers. Rules on standing should be adequate to permit a proper role for public interest litigation and representative and collective actions, in line with their important role in facilitating access to justice and human rights.¹⁵

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

The standard of review regarding reasonableness in the context of measures for the realisation of economic, social, cultural and environmental rights requires careful consideration. A reasonableness test developed in international law and other domestic case-law might be more expansive and comprehensive than the

'Wednesbury' reasonableness test in the UK. Specific attention should be placed on the criteria developed by the Committee on Economic, Social and Cultural Rights in interpreting the justiciability of the Optional Protocol of the Covenant.

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

The Commission considers that current remedies are not sufficient, under international human rights standards. While the Scottish Courts are currently able to issue a wide range of remedies, two specific types of remedies – expected as part of international legal standards – are not available.

A. Measures of rehabilitation

Measures of rehabilitation can include medical and psychological care as well as legal and social services that might be necessary to repair the human rights violation caused. This is at times essential given the traumatic effects that human rights violations can have on victims.

B. Guarantees of non-repetition

This form of remedy is intended to ensure that current violations are not perpetuated over time. They intend to respond to structural situations, that require measures that go beyond the sole victim of the case in question. They are called structural interdicts in some countries, and when implemented correctly, they can prevent further human rights violations and ensure that others do not require to access the judicial system to ensure their rights. In general, guarantees of non-repetition should include, where applicable, any or all of:

- Reviewing, reforming, or striking down laws contributing to or allowing human rights violations;
- Requiring policies to be reviewed or changed in order to comply with human rights standards;
- Requiring appropriate authorities to create new policies in order to satisfy human rights obligations and prevent future harm.

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?

As indicated above in question 35.

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

Subject to relevant amendments of the UNCRC Bill, after the UK Supreme Court referral case, one approach would be to mirror section 20 of the UNCRC Incorporation (Scotland) Bill, allowing courts to issue strike down declarators when an Act of the Scottish Parliament is found incompatible with the rights and requirements of the Human Rights Bill.

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

See response to question 20.

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

The Commission supports the proposals to establish MCOs through a participatory process as foreseen by the National Taskforce. The Commission previously provided further analysis and ideas on this theme in evidence to the Equalities, Human Rights and Civil Justice Committee of the Scottish Parliament.¹⁶

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

The Commission agrees with the proposals. Consideration should be given to using the scheme to support the planning of the Scottish Government on how to progressively realise rights and extending the requirement to a wider range of duty-bearers, to ensure that all those responsible for the realisation of human rights are required to carefully plan, coordinate and progress rights within their own areas of remit.

For this, the Scheme could be aligned with the proposed reasonableness standard of review, ensuring policy coherence. For such purposes, the Scheme should include reporting on:

- a) The measures taken to ensure the minimum essential levels for a person to live a dignified life (minimum core obligations);
- b) The concrete and targeted plans to fulfil the rights in the framework;
- c) The proposed coordinated, coherent and comprehensive measures that are in place to realise the rights in the framework;

- d) The measures taken to ensure the maximum available resources needed to realise rights, including in relation to resource mobilisation, allocation, and expenditure (through human rights budgeting, for example);
- e) The measures that are being proposed to respond to, as a matter of priority, the precarious situation of disadvantaged and marginalised individuals or groups and those at high risk; and
- f) That plans have been put in place after transparent and participative decision-making processes.

The Commission considers that scrutiny of the Scheme is also fundamental for its effectiveness. The obligation on Scottish Ministers to lay the Scheme before Parliament will ensure there is transparency over the measures to respect, protect and fulfil rights. However, further scrutiny and accountability is needed. The Scottish Government should consider what role the Scottish Parliament, particularly the Equalities, Human and Civil Justice Committee could play in scrutinising the Scheme and providing further recommendations to Scottish Ministers. The role of the Commission, as Scotland's National Human Rights Institution, should also be carefully considered.

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?

The Scottish Parliament has the potential to play a more important role in the protection of human rights in Scotland.

There is increasing recognition of the importance of national parliaments in protecting and promoting human rights. The United Nations,¹⁷ Council of Europe,¹⁸ European Union,¹⁹ and the Commonwealth²⁰ have all focused attention on the role of national parliaments. The developing understanding of what makes parliaments effective human rights guarantors provides significant opportunities for the Scottish Parliament to strengthen its role within the new human rights framework.

Legislature can play one of the most significant roles in ensuring that ESC rights are incorporated and enforced, including by designing and delivering legislation which sets out ESC rights as legal standards. In addition, the legislature can play an important role as an accountability mechanism in the review of legislation before it is passed to ensure that it is compliant with human rights. The Finnish legislative model demonstrates how the Parliament can act as an important accountability mechanism and guarantor of human rights by conducting pre-legislative scrutiny.²¹

The Commission is keen to explore this area of development further with both the Scottish Government and the Scottish Parliament as this Bill progresses.

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?

Human rights education and training is essential for the new Bill to have an effective and transformative impact in Scotland. As acknowledged by the UN Declaration on Human Rights Education and Training, education and training is needed for the promotion, protection and fulfilment of all human rights, in accordance with the principles of universality, indivisibility and interdependence of human rights.²²

Human rights education and training concerns all parts of society, at all levels, and in all forms.²³ It should therefore build the capacity of both duty-bearers and right-holders. Human rights education and training comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights.²⁴

In particular, for the effective protection and realisation of human rights, the Scottish Government should ensure the existence of adequate training in human rights of civil servants, judges, law enforcement officials, as well as promote adequate training in human rights for teachers, trainers and other educators, as well as private personnel acting on behalf of a duty-bearer.²⁵

Furthermore, although capacity building initiatives should be encouraged in all segments of society, the UN recognises that National Human Rights Institutions can play an important role, including a coordinating role, in promoting human rights education and training. This role includes raising awareness and mobilising relevant public and private actors. For such purposes, countries should strengthen national human rights institutions and ensure they are independent, effective and sufficiently resourced to deliver and coordinate human rights education and training.²⁶ For the Commission to undertake a significant role in providing human rights education in Scotland, it will need strengthened resources for that purpose.

Continuous training for specific personnel within the organisations responsible for delivering the content of the rights of the Bill (the duty-bearers), should also be carefully considered. In particular, recognising the essential role of RIOs, significant additional resource will be required to ensure they have the necessary expertise and capacity available to allow them to perform an enhanced role in human rights scrutiny.

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

The UN Declaration on Human Rights Education and Training reaffirms that everyone has the right to know about their human rights and fundamental freedoms.²⁷ This acknowledges that for rights to be meaningful, people need to know about their existence. A rights-holder who effectively does not know she has a right

is not able to make someone accountable when such a right is breached. Even more critically, a duty-bearer who is unaware it has an obligation to act in a way that ensures human rights are respected, protected, and fulfilled, cannot realistically uphold its obligations.

Accordingly the Commission has expressed its agreement with the National Taskforce in relation to the recommendation for a public awareness campaign to support public information and understanding around the Bill.

In relation to the provision of advice and information, see question 27 above.

Question 44 What are your views on monitoring and reporting?

Human rights monitoring is central to the effective implementation and progressive realisation of human rights. Human rights monitoring seeks to gather information about the human rights situation in a country over time through readily available methods, with the goal of engaging in advocacy to address human rights violations. It also involves a process of documenting human rights violations and practices so that the information can be categorised, verified, and used effectively.²⁸

Human rights monitoring should be based on principles of:

- Accuracy
- Confidentiality
- Impartiality
- Group-based sensitivity

The Commission highlights that the Taskforce previously indicated that it was essential for effective human rights monitoring that there was both qualitative data, including the lived experience of rights-holders, and quantitative data, disaggregated where necessary. The Scottish Parliament could play a role in providing scrutiny as to whether government action is delivering the intended outcomes, including in relation to strengthened pre-legislative assessment and scrutiny of the proposed Human Rights Scheme.

Most importantly, regulators, ombudsman, inspectorates and Scotland's national human rights institution (the Commission) have a key role to play in monitoring human rights compliance. This would be possible if they are provided with the appropriate powers and duties as described above. In our June 2023 paper *At a Crossroads: What Next for the Human Rights System in Scotland?* the Commission explores models which would enable it to take on a stronger Treaty monitoring role around the enjoyment of human rights for particular groups of people. We encourage the Scottish Government to consider this paper in the context of delivering a stronger system of human rights monitoring and reporting.

Public authority monitoring and reporting

As has been previously acknowledged by the Taskforce, it is essential, both for accountability and effectiveness, that there is monitoring and reporting by public authorities of the steps they have taken, and plan to take, to fulfil human rights outcomes. The Taskforce also indicated that it was important that such monitoring and reporting does not simply lead to increased and burdensome paperwork but helps to secure human rights-based policy and practice decision making.

The Commission considers that careful consideration should be placed on how monitoring and reporting is also related to the proposed Human Rights Scheme. Appropriate bodies should be empowered to determine the appropriateness of the reporting and the overall human rights performance of duty-bearers.

Human Rights Budget Monitoring

Human rights budget scrutiny or analysis involves examining the public budget to assess a government's compliance with its human rights obligations. This is done with the central goal of making public budgets more effective in helping to realise human rights, to ensure that everyone can live a life of human dignity. This involves exploring both the budget process: to ensure that it is participative, transparent and accountable; as well as examining a government's resource generation, allocation and spend with reference to the agreed human rights standards.²⁹

Human Rights Budget Scrutiny helps to ensure that the process by which a budget is developed, implemented and evaluated is fit for purpose; engages those who it affects; and complies with international obligations, both procedural and rights. It allows governments to be held to account for delivering (or failure to deliver) on their human rights obligations through appropriate resource generation, allocation and spend.

This was previously acknowledged by the Taskforce. Well-functioning budget scrutiny is required to be undertaken by a range of actors including legislators, auditors, citizens, civil society, national human rights institutions and the media. It will be critical that in the implementation of the new framework these various actors play different roles at different stages of the budget process. Consideration must be given in the next stage of the process as to how this can be best facilitated as part of the framework implementation, and particularly, which bodies should have a role in ensuring human rights budget scrutiny.

The Commission therefore considers that the new human rights framework must guarantee regulators, inspectorates, ombudspersons and Scotland's national human rights institution (the Commission) are provided with the appropriate powers and resources to ensure effective human rights monitoring.

The Commission has also provided further analysis in relation to reporting duties in question 22.

Further reading on papers referred to in this consultation response are available at www.scottishhumanrights.com

ENDNOTES

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- ¹ Scottish Human Rights Commission, 2018, 'Social Security (Scotland) Bill Stage 2 Briefing Amendments – The Right to Social Security' available at <http://www.scottishhumanrights.com/news/commission-calls-for-due-regard-duty-to-advance-right-to-social-security/>
- ² UN Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11) paragraph 7
- ³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11
- ⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11
- ⁵ UN General Assembly, Resolution 64/292, on "The human right to water and sanitation" (2010) A/RES/64/292
- ⁶ For further analysis, see: UN Committee of Experts on International Cooperation in Tax Matters, The Role of Taxation and Domestic Resource Mobilization in the Implementation of the Sustainable Development Goals (2018) E/C.18/2018/CRP.19; further on definitions at [Domestic Resource Mobilization | U.S. Agency for International Development \(usaid.gov\)](#)
- ⁷ [Human Rights Budgeting | Scottish Human Rights Commission](#)
- ⁸ See further at [ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS "PROTOCOL OF SAN SALVADOR" \(oas.org\)](#)
- ⁹ UN Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, paragraph 49.h
- ¹⁰ Committee on Economic, Social and Cultural Rights, General Comment No.17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), 12 January 2006, paragraph 52
- ¹¹ UN Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, paragraph 64
- ¹² UN Committee on Economic, Social and Cultural Rights, General Comment No.17 (2006) The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), 12 January 2006, paragraph 52
- ¹³ UN Human Rights Committee, General Comment No. 31, "Nature of the General Legal Obligation on States Parties to the Covenant," 26 May 2004, paragraph 19.
- ¹⁴ Court of Session Act 1988 section 27B(2)(a) as amended by section 89 of the Court Reform (Scotland) Act 2014
- ¹⁵ Commission in its 2020 paper "Adequate and Effective Remedies for Economic, Social and Cultural Rights"
- ¹⁶ Read full report of evidence session at [Official Report \(parliament.scot\)](#)
- ¹⁷ UNGA Res 68/272 'Interaction between the United Nations, national parliaments and the Inter-Parliamentary Union' (19 May 2014) UN Doc A/RES/68/272 (www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/272)

Report of the Secretary-General on the Interaction between the United Nations National Parliaments and the Inter-Parliamentary Union (UNGA/A/68/827) (2 April 2014); UNGA Resolution 67/1 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (24 September 2012); UNCEDAW Committee, Statement on the relationship of the Committee on the Elimination of Discrimination against Women with parliamentarians (2010)

¹⁸ PACE Resolution 1823 (2011) "National parliaments: guarantors of human rights in Europe"; Council of Europe, 'Brighton Declaration adopted at the High-level Conference on the future of the European Convention on Human Rights' (20 April 2012) (www.coe.int/t/dghl/standardsetting/cddh/CDDHDOCUMENTS/CDDH_2012_007_en.pdf); Council of Europe, 'Brussels

Declaration adopted at the High-level Conference on the 'Implementation of the European Convention on Human Rights, our shared responsibility" (27 March 2015) (http://justice.belgium.be/fr/binaries/Declaration_EN_tcm421-265137.pdf).

¹⁹ DROI policy paper on enhancing cooperation between the European Parliament and EU national parliaments on EU human rights policy.

²⁰ See: The Mahe Declaration 2014, Pipitea Declaration 2015, and Kotte Declaration 2016 on actions by parliamentarians to promote and protect human rights.

²¹ See Scottish Human Rights Commission, Models of Incorporation and Justiciability for Economic, Social and Cultural Rights Authored by Dr Katie Boyle (2018)

²² United Nations Declaration on Human Rights Education and Training, Resolution adopted by the General Assembly on 19 December 2011, A/RES/66/137, article 1.2

²³ United Nations Declaration on Human Rights Education and Training, Resolution adopted by the General Assembly on 19 December 2011, A/RES/66/137, article 3.2

²⁴ United Nations Declaration on Human Rights Education and Training, Resolution adopted by the General Assembly on 19 December 2011, A/RES/66/137, article 2.1

²⁵ United Nations Declaration on Human Rights Education and Training, Resolution adopted by the General Assembly on 19 December 2011, A/RES/66/137, article 7.4

²⁶ United Nations Declaration on Human Rights Education and Training, Resolution adopted by the General Assembly on 19 December 2011, A/RES/66/137, article 9

²⁷ Article 1

²⁸ See <https://www.endvawnow.org/en/articles/994-what-is-human-rights-monitoring.html#:~:text=Human%20rights%20monitoring%20seeks%20to,to%20address%20human%20rights%20violations>.

²⁹ Scottish Human Rights Commission, Human Rights Budget Work: What, Why and How? Collated Briefing Paper, (2019)