

Parallel Report to the United Nations Human Rights Committee on the 8th examination of the United Kingdom of Great Britain and Northern Ireland under the International Covenant on Civil and Political Rights (ICCPR)

4th February 2024

The Scottish Human Rights Commission (SHRC) is the National Human Rights Institution (NHRI) for Scotland, accredited with A-status by the International Coordinating Committee of NHRIs. SHRC was established by an Act of the Scottish Parliament in 2008. It has a general duty to promote awareness, understanding and respect for all human rights and to encourage best practice, including through education, training and awareness raising, and by publishing research. SHRC has a number of powers including:

- The power to conduct inquiries into the policies or practices of Scottish public authorities.
- Recommending such changes to Scottish law, policy, and practice as it considers necessary.
- The power to enter some places of detention as part of an inquiry.

- The power to intervene in some civil court cases.

SHRC is one of the three NHRIs in the UK. SHRC is a member of the UK's National Preventive Mechanism (NPM) designated in accordance with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

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Introduction and Overview

1. The Scottish Human Rights Commission (hereafter ‘the Commission’ or ‘SHRC’) welcomes the opportunity to make the following submission to the Human Rights Committee (hereafter ‘the Committee’) in advance of the United Kingdom’s forthcoming examination at its 140th Session. This document expands upon and updates our previous List of Issues (LoI) report sent to the Committee in January 2020.¹

Scope of report

2. The Commission was established by an act of the Scottish Parliament. The exercise of our mandate is focused on areas devolved to Scotland within the UK’s devolution settlement. The Equality and Human Rights Commission has a human rights mandate in Scotland across areas of reserved competence and as the equality law regulator.
3. As reserved law and policy applies directly to people and communities in Scotland and invariably interacts with devolved policy, the Commission maintains its awareness of reserved policy.
4. An overview of the devolution settlement is provided at [ANNEX B](#).

Structure

5. This report examines the key themes of the List of Issues Prior to Reporting (LoI) communicated to the UK Government in May 2020 as they relate to people in Scotland. We have considered the UK’s State report which includes information provided by the Scottish Government.² We further raise ongoing or emergent concerns for the Commission as related to our work programme. For ease, we have elected to mirror the themes of the LoI.

6. This report has been informed by evidence from the Commission’s research database and our engagement with a wide range of Scottish policy process and participatory work between 2016 and 2024.³ It specifically builds upon:
- Research undertaken for our report to the Universal Period Review in 2022⁴
 - Research for the Council of Europe’s Baseline Assessment of the Istanbul Convention in 2023⁵
 - Forthcoming research being undertaken by the Convention on key spotlight priorities of concern: Human Rights in Places of Detention; Access to Justice; The human rights of people with learning disabilities, especially the right to liberty.

Part A. General information on the national human rights situation, including new measures and developments relating to the implementation of the Covenant

Significant developments

COVID-19

7. The COVID-19 pandemic represented unprecedented disruption to individuals and for state and non-state actors. This includes delays to court proceedings, long periods of social isolation, lack of access to essential services such as schools and medical appointments and reduced access to essential support such as social care. Both the Scottish and UK Parliaments passed emergency legislation that permitted interference with human rights in light of national emergency.⁶
8. The Commission undertook a range of briefing and advisory activity with Government and other public authorities to emphasise the need to ensure that measures were strictly lawful, necessary, proportionate and time limited.⁷ Given the speed at which emergency legislation was promulgated, the Commission was unable to provide specific and targeted advice in advance. However, while we consistently recognised the need for emergency powers, we welcomed the Scottish Government's commitment to review the legislation and to lift restrictions as soon as they were deemed to be no longer necessary to protect against the coronavirus. All emergency powers under the Act required to be renewed every six months by Parliamentary approval.
9. While the Commission was frequently sought out by the Scottish Government to provide advice on broad human rights themes or standards, it remains unclear to what extent input from the NHRI affected decision-making. On 25 February 2021, the then-Chair of the Commission reflected that:

“On balance, I would not say that there has been a systematic, thorough, and coherent equalities and human rights impact assessment of every decision that has been made in relation to the pandemic – I could not say that to be honest. However, in broad terms, consideration has been given to human rights, although obviously more could be done.”⁸

10. The Commission’s work over the course of the pandemic raised the following:
 - Privacy rights engaged in the scoping of ‘Vaccine Certificates’ and the implications of digital contact tracing technology.⁹ This also included consideration of the proportionality of their use, impacts on freedom of movement, freedom of belief and data processing.
 - The restrictions on liberty and freedom of movement for all people under ‘lockdown’ and social distancing, in particular the acute isolation for young people in student accommodation¹⁰ and the long-term restrictive guidance for clinically vulnerable people.¹¹
 - The removal of essential social care support for individuals who required additional care to participate in all areas of public life and for their personal care.¹²
 - Changes to policing¹³ and the management of criminal trials, including the possibility of suspending jury trials.¹⁴
11. These represent a small number of the discrete issues on which the Commission provided public advice or commentary.
12. The Scottish Government committed to an independent inquiry in 2020. The SNP manifesto for the 2021 Scottish Parliament elections committed to a “statutory, person-centred and human rights based public inquiry.”¹⁵ However the Commission and many civil society voices raised significant concern about the inquiry’s approach to human rights and equalities.¹⁶ Following the resignation of the first Chair of the inquiry for personal reasons, the Terms of Reference were revised to make explicit reference

to a human rights-based approach.¹⁷ The independent inquiries at UK and Scotland levels are both ongoing.

13. The COVID-19 pandemic continues to have an impact on public policy, service delivery and for many individuals. Economic consequences of global disruption have now bled into what has been termed a 'cost of living crisis' in the UK, with a range of global and domestic factors.¹⁸

The Commission recommends that the Scottish Government ensure that lessons are learned from the pandemic and independent COVID-19 Inquiry in Scotland and that steps are taken to integrate human rights protections into pandemic and emergency preparedness.

Awareness of the Covenant Domestically

14. It is regrettable that awareness of the covenant remains low in Scotland. The First Minister's Advisory Group on Human Rights Leadership called for enhanced capacity-building around human rights in general to support development of a new Scottish Human Rights Bill (see [below](#)).
15. As civil and political rights are not currently included in the Scottish Government's proposals, care must be shown to ensure that these rights are not inadvertently deprioritised through any capacity building activities. Work will also be needed to support public bodies and state agents to understand the different responsibilities in domestic law to the subject matter of the international conventions incorporated in different ways.
16. The Commission's research into Public Attitudes in Scotland (2023) shows that support for human rights in Scotland has increased by 6% since 2017 to 48%.¹⁹ While support had risen, there was also a rise in the proportion of people in Scotland who are worried about human rights (60%) and only 22% would know where to go to raise a concern about human rights, a fall of 5% since 2017.

The Commission recommends that the Scottish Government enhance public awareness of, and the capacity of state agents towards, rights protected under the Covenant.

The National Human Rights Institution

17. The Scottish Human Rights Commission is Scotland's National Human Rights Institution (NHRI) with a statutory mandate set out in the Scottish Commission for Human Rights Act 2006.²⁰ In addition to general duties to promote awareness, understanding and respect for human rights in Scotland, we have specific powers to:

- Publish advice and guidance
- Conduct research
- Provide education and training
- Review and recommend changes to law, policy, and practice
- Conduct inspections in places of detention
- Conducting inquiries
- Intervening in civil proceedings before a court in certain circumstances.

18. The Commission has been assessed three times by the Sub-Committee on Accreditation (SCA) and consistently been awarded an A-status accreditation. However, the SCA has expressed concerns and expectations in relation to the Commission's restricted mandate, governance structure, and funding. The Commission does not have the powers to raise legal proceedings in its own name or to provide advice to victims of human rights violations. The mandate and resource of the SHRC has not been revisited since 2006.

19. The SHRC has recognised that many groups and individuals do not have access to advice, justice or who are dissatisfied with

their experience of human rights standards.²¹ The Scottish Parliament is currently considering the impacts of calls for new bodies and mandate holders.²² In addition, the New Human Rights Bill for Scotland²³ offers an opportunity to review the Commission's functions and powers.²⁴ However, the Commission would strongly resist any new powers being restricted to the rights incorporated via this Bill. This would be significant concern in respect of access to justice for violations of civil and political rights.

The Commission recommends that the Scottish Government and the Scottish Parliament consider whether the mandate, powers, and resourcing of the NHRI are sufficient to protect the human rights of all in Scotland.

B. Specific information on the implementation of articles 1–27 of the Covenant, including with regard to the previous recommendations of the Committee

Constitutional and legal framework within which the Covenant is implemented (art 2)

The Human Rights Act

20. The Scotland Act 1998, which established the Scottish Parliament, requires both the Scottish Parliament and Scottish Government to observe and implement all of the UK's international human rights obligations. Civil and Political Rights in the UK are incorporated from the European Convention on Human Rights via the Human Rights Act 1998. The Human Rights Act applies to all of the UK.
21. The ECHR is further embedded in Scotland directly through the Scotland Act 1998, which sets out that Scottish legislation which is incompatible with the ECHR is 'not law' and that public bodies may not act incompatibly with convention rights. In this way, some civil and political rights have a quasi-constitutional status in Scotland.
22. However, the Human Rights Act does not mirror exactly nor extend to all rights in the ICCPR.²⁵ Furthermore, the UK Government has not ratified the Optional Protocol to the ICCPR, allowing individual complaints, thereby providing other routes of redress for Covenant rights. We continue to note with concern the number of reservations the UK Government maintains against the ICCPR.²⁶
23. Since the List of Issues, proposals by the UK Government to replace the Act with a new Bill of Rights have been withdrawn,²⁷ a move the Commission strongly welcomes. These proposals would have weakened the protections in the Human Rights Act

and put the UK in breach of its international obligations. We are clear in our view the HRA works well as it stands, and that no convincing case has been made for reform.²⁸

24. While legislation replacing the HRA will not be pursued in the short term, the UK Government has indicated that it will seek to pursue reforms to “address specific issues with the Human Rights Act and the European Convention including through the Illegal Migration Bill, the Victims and Prisoners Bill, and Overseas Operations Act 2021 and indeed the Northern Ireland Legacy Bill.”²⁹
25. The proposals for replacement of the Human Rights Act are part of a wider trend towards regression of human rights protections and standards. As human rights have been increasingly politicised, moves to restrict their scope of application have resulted in both individual denials of human rights and cultural significance, especially post the UK’s departure from the EU. There remains ongoing political debate about the UK’s commitment to remaining a member of the European Convention on Human Rights.
26. The UK’s Exit from the EU did not maintain the EU Charter of Fundamental rights in UK law, reducing sources of rights protection and opportunities to challenge rights violations in domestic arenas.
27. The Commission has publicly outlined its opposition to the Illegal Migration Act.³⁰ The Act characterises people arriving by irregular means as ‘illegal entrants’ and makes them ineligible for refugee or other secure status. This ignores the fact there are no safe or legal routes available to enable refugees to come to the UK from the vast majority of conflict or crisis zones. Vulnerable people who arrive in the UK will be criminalised, locked up and eventually removed. This includes the UK Government’s plans for the offshoring of asylum claims to Rwanda through the Rwanda Partnership,³¹ which have been found by the UK Supreme Court

to be incompatible with Article 3 and the principle of non-refoulement.³²

28. At time of writing, the UK Parliament is considering the Safety of Rwanda (Asylum and Immigration) Bill,³³ which seeks to limit the rights of individuals to challenge relocation on the basis that Rwanda is not *in general* a safe country, instead required to prove an individual personal risk. In introducing the Bill, the Home Secretary was unable to confirm to parliament that the Bill is compatible with the ECHR. If passed, the legislation and / or attempted removal risks challenge in the European Court of Human Rights.

The Commission recommends that the UK, at every level of government, desists with all policy activities which restrict or undermine the level of protection for civil and political rights as set out in the present Covenant and the ECHR.

Scottish Incorporation Agenda

29. There is cross-party¹ support for stronger human rights laws in Scotland and the Scottish Government has committed³⁴ to introducing new legislation incorporating a range of UN treaties into Scots law. The legislation would include:
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);

¹ The Scottish Parliament passed motions in support of the Act in [2014](#), [2017](#) and again on 4 March [2021](#). There have been many recent expressions of support for strengthening human rights in the Scottish Parliament, for example during consideration of the [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#).

Increased focus on international human rights standards has also been reflected in references to international human rights instruments in Scottish domestic legislation. Examples include the [Community Empowerment \(Scotland\) Act 2015](#); s. 1 of the [Land Reform \(Scotland\) Act 2016](#); and the [Social Security \(Scotland\) Act 2018](#), and s.1(1) of the [Children and Young People \(Scotland\) Act 2014](#).

- the Convention on the Elimination of All Forms of Racial Discrimination (CERD);
 - the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
 - The Convention on the Rights of Persons with Disabilities (CRPD)
 - Developing further protections for environmental rights, older persons, and lesbian, gay, bisexual, and trans (LGBT+) people
30. These proposals would enable domestic courts to review compliance with international standards and the Scottish Government has indicated this will include new obligations for public bodies, including Scottish Government and Scottish Parliament, to demonstrate compliance across devolved policy, such as duties to conduct human rights impact assessments and a proposed Human Rights Scheme.
31. Civil and political rights under the covenant have not been included in proposals, despite advocacy from some in civil society.³⁵ The National Preventative Mechanism has also encouraged inclusion of UNCAT and OPCAT in the Bill.³⁶
32. Proposals for the Bill have recently been consulted on and the Scottish Government is committed to introducing legislation in the first half of 2024.³⁷ In response to the consultation, the Commission recommended that careful consideration should be given to the legal approach to incorporation, emphasising the need to avoid a weakening of international treaty protections and preventing undue complexity in Scotland's human rights system. The response highlighted alternative models for incorporating international human rights treaties into domestic law, beyond the 'full and direct' approach proposed by the Scottish Government.³⁸
33. Implementation of new domestic human rights obligations will require significant guidance and capacity building for public bodies, which will require to be resourced. A system of human-rights based indicators to monitor impacts of policies for all

groups is currently lacking. The Scottish Government has a National Performance Framework linked, in part, to the sustainable development goals; however, it is not possible to determine progress due to a lack of inbuilt targets. While there was a commitment in 2018 to develop a human rights outcome this has not been delivered.

34. The Commission submission to the Committee's list of issues raised ongoing and significant concern about the shortage of disaggregated data to monitoring human rights compliance.³⁹ There continues to be a lack of available official disaggregated data, especially intersectional data that can accurately depict the experience of further marginalised groups.

The Commission recommends that the Scottish Government improve the accountability for human rights compliance through the most maximalist incorporation of human rights possible, especially given proposed new duties for public bodies.

Accountability for past human rights violations (arts. 2, 6, 7 and 14)

35. We highlight evidence supplied by the NIHRC, EHRC and NPM in respect of the relevant issues raised in the Lol.

Non-discrimination (arts. 2, 3 and 26)

36. While the Scottish Parliament has some responsibility in respect of equal opportunities the framework for non-discrimination is reserved to the UK level. The Equality Act 2010 is the predominant legislative framework across Great Britain,² regulated by the Equality and Human Rights Commission. Scotland has some limited power to go beyond the measures in the Equality Act and has introduced Scotland Specific Duties for

² A separate equality regime exists in Northern Ireland.

Scottish Public Authorities. A review of the Scotland Specific Duties has been underway for the last three years. Following a public consultation in 2022⁴⁰, the Scottish Government provided an update on next stages of the review in October 2023 with some limited proposals for change.⁴¹

37. Issues in social care provision – limited resource and capacity in state provision and the high costs of private support – undermine the rights of disabled people and older people to choose where they live and to access requisite support in the communities that they live in. Monthly delayed discharge figures show that at the October 2023 census, there were 1,815 people unable to be discharged from Scottish hospital care and the average (median) length of delay was 27 days.⁴² Figures typically increase over winter months.
38. Public Bodies in Scotland, including the Scottish Government are required to undertake equality impact assessments as part of all policy development processes. The Scottish Government also produces an equality and fairer budget statement (EFBS) as part of documents supporting the national budget process. The EFBS is a post-hoc rationalisation of prospective spending decisions and is not a cumulative analysis.⁴³

The Commission recommends the Scottish Government use devolved flexibilities to enhance equality and non-discrimination across all rights in the Covenant and the forthcoming Scottish Human Rights Bill.

Public participation of disabled people

39. The Commission's role in monitoring the UNCRPD through the UK Independent Mechanism (UKIM) has found that action to address the marginalisation of disabled people in Scotland has been insufficient to counter the human rights impacts of policy decisions throughout the pandemic and economic situation.⁴⁴ The COVID-19 pandemic compounded pre-existing challenges across the Scottish social care system which undermine rights to independent living, liberty and public participation. There were

reports of reduction and / or removal of care packages during the pandemic³ resulting in people being left without essential care.⁴ However the full scale of cessation and reduction is not known due to the limited data available.

40. There have been some steps taken to improve accessible communication, information and processes for disabled people.⁴⁵ However, there remains a lack of centralised function with Scottish Government and DPOs have described a lack of consistency in the accessibility of communications and information needed to engage with devolved agencies and public policy-making.⁴⁶ The Scottish Government continues to implement a digital-by-default programme for public services, outlined in the 2021 Updated Digital Strategy for Scotland. There is little evidence to date of the impact of these strategies for disabled people.

The Commission recommends the Scottish Government ensure that ongoing processes consider the specific participation of disabled people and their rights, including the COVID-19 Public Inquiry and Human Rights Bill process.

Rights of Gypsy/Travellers

41. The Commission shares the concerns of the concerns the Council of Europe Commissioner For Human Rights, Dunja Mijatović,⁴⁷ about the need for cultural heritage and housing rights of Gypsy/Traveller communities to be protected and fulfilled.⁴⁸ Research continues to show that Gypsy/Traveller communities

³ A Freedom of Information request showed that in the region of 4,000 care packages had been ceased or reduced across Scotland compared to January 2020. Research in Glasgow found almost 2,000 people's care packages were affected. For more information, see Scottish Human Rights Commission (2021), [Comments on the UK's 40th Report on the Implementation of the European Charter](#).

⁴ The report detailed how the removal of care plans during COVID-19 had a direct and detrimental effect on people's rights, including potential unlawful interferences and non-compliance with rights contained in the European Convention on Human Rights and the CRPD.

are reluctant to engage with public agencies due to longstanding discriminatory practices. As a result, data, and evidence directly from the communities is subject to significant gaps.⁴⁹

42. The Commission welcomed the Gypsy/Traveller Action Plan 2019-2021,⁵⁰ but noted that an impact evaluation was required with meaningful participation from Gypsy/Travellers' Communities. This was subsequently expanded and extended to 2023 to account for delays associated with the Covid-19 impact.⁵¹
43. Victims of the 'Tinker Experiment'⁵ in Scotland continue to campaign for a public apology for their own and their families' experiences of forced assimilation beginning in the 1940s. The Scottish Government are undertaking desk-based research to better understand the experiment and what occurred. To date, the Commission is not aware that lived experience research has been undertaken. Victims of the experiment have expressed concerns around how the ongoing research will listen to the views of victims and the delays to a public apology.
44. At present, there is limited disaggregated data available on the number of looked after children in Scotland. As a result, there is no available data on the number of Gypsy/Travellers in secure care or those who are looked after.
45. Gypsy/Traveller children and young people have the lowest attendance and highest exclusion record of any ethnic group. Transition to senior school is also low.⁵² The Scottish Government has produced guidance for local authorities, schools, early learning and childcare settings to help support children, young people and their families to engage in education.⁵³ Data reveals that gypsy travellers experience

⁵ From conversations with community members the Commission recognises this term has been used as a derogatory term to the community. However, community members request that in relation to the 'Tinker Experiment' this term be used to highlight the injustices they have faced.

significantly worse health outcomes and excess mortality,⁵⁴ with life expectancy estimated to be as low as 55 years.⁵⁵

The Commission recommends that the Scottish Government take steps to support the Gypsy/Traveller communities in Scotland to realise their rights and to build trust with communities, including working with them to consider a reconciliation process for past harms.

Hate Crime

46. The Hate Crime and Public Order (Scotland) Act⁵⁶ was passed by the Scottish Parliament in 2021, following a review of hate crime legislation which recommended changes to legislation to consolidate and modernise existing law and expand the use of 'stirring up offences'. The Scottish Government launched a refreshed Hate Crime Strategy in March 2023.⁵⁷
47. 5,738 charges containing at least one element of hate crime were recorded by the Procurator Fiscal in 2022-23.⁵⁸ This included:
- 3,145 charges relating to race crime, the most commonly reported type of hate crime, although a decrease of 2% compared to 2021-22;
 - Sexual orientation aggravated crime increased by 2% in 2022-23 to 1,884;
 - Disability aggravated charges increased by 3% to 722 in 2022-23, the highest on record.
 - 55 charges reported in 2022-23 with an aggravation of transgender identity, down from 86 charges reported in 2021-22 however the second highest number of charges reported since the aggravation came into force in 2010.
48. A publicity campaign to encourage the reporting of hate crimes was launched by the Scottish Government and Police Scotland in 2020.⁵⁹ Despite this, under-reporting of all hate crime remains a particular concern.⁶⁰ Civil Society engagement undertaken as part of the Universal Periodic Review (UPR) process noted that low

level harassment is often not reported to the police but impacts on peoples' sense of safety in their homes and communities.⁶¹

49. The media continues to be a platform for hate speech, with social media increasing public harassment faced by women,⁶² LGBT+⁶³, Scottish Gypsy/Travellers⁶⁴ and other minority ethnic⁶⁵ and religious communities.⁶⁶ Research on Islamophobia noted many believed the media promoted Islamophobia.⁶⁷ Responsibility for regulation of internet communications sits with the UK Parliament. The Online Safety Act was passed by the UK Parliament in October 2023.⁶⁸ The Act aims to regulate harmful content on social media and other platforms; however, some have argued that it will not go far enough in protecting people from harm.⁶⁹

The Commission recommends that the Scottish Government work with communities to improve confidence in the reporting of hate offences.

Sexual and reproductive rights and voluntary termination of pregnancy (arts. 2, 3, 6, 7 and 26)

50. The Abortion Act 1967 permits abortion to be accessed in Scotland where approved by two physicians for an approved purpose. As a COVID-19 contingency measure, access to early medical abortion at home (EMAH) was expanded to enable pregnant women⁶ to self-manage abortion, where clinically appropriate.⁷⁰ Following an evaluation of the service,⁷¹ the Scottish Government has permanently retained the service.⁷² Women in remote and rural communities find it particularly difficult to access sexual and reproductive care across the board and changes to provision of maternity services in some rural areas have resulted in women having to travel significant distances to

⁶ Not all individual people who may become pregnant / who require termination of pregnancy care will identify as women. However given the highly gendered nature of abortion we have elected to use the term women in this submission.

receive care. In 2021, 150 women who are ordinarily resident in Scotland accessed abortion in England.⁷³

51. Following litigation at the UK Supreme Court concerning 'buffer zones,' the Scottish Parliament is currently considering legislation to limit the exercise of certain protest activities surrounding termination of pregnancy sites. The Commission has undertaken detailed analysis of proposals,⁷⁴ and is satisfied that such legislation would be in pursuit of a legitimate aim within the terms of the Human Rights Act and European Convention. It will be for parliament to carefully assess the proportionality of prohibited behaviour through the Bill process.

The Commission recommends the Scottish Government ensures equal access to abortion care for women in all parts of Scotland.

Prohibition of torture and cruel, inhuman, or degrading treatment or punishment, right to liberty and security of person, and counter-terrorism measures (arts. 2, 4, 7, 9, 10, 14 and 19)

52. The Commission is a member of the National Preventative Mechanism (NPM) and chair of the NPM Scotland Subgroup, which exists to improve collaboration and pursue joint work as a cohesive body to meet the UK's obligations under OPCAT in Scotland. While the members of the NPM, including the Commission, have a statutory basis, the lack of permanent statutory foundation for the NPM has been a longstanding concern of the SPT⁷⁵ and CPT.⁷⁶
53. In UK law, torture is criminalised under s.134 of Criminal Justice Act 1988. While the provision was drafted to safeguard consistency between existing common law and the UN CAT,⁷ the

⁷ Although CAT has not been directly incorporated into domestic law.

existence of a general defence for torture in section 134(4) of the Criminal Justice Act 1988 may permit actions proscribed by the Covenant and by CAT. Section 134(5)(b)(iii) further permits reliance on lower standards that operate outside the UK.

54. For further information on the operation of UK policy with regards to torture, please see the NPM submission to the Human Rights Committee.

Use of restraint and seclusion in schools

55. An investigation by the Children and Young People’s Commission in 2018 found that an absence of policies or at times conflicting policies had contributed to confusion about how to handle and respond to children expressing their feelings non-verbally and that use of restraint and seclusion was not adequately monitored.⁷⁷ Judicial review proceedings followed in 2019,⁷⁸ following which the Scottish Government committed to produce human rights based guidance.⁷⁹⁸ In 2020, the Scottish Care Review further noted that “...all restraints and use of seclusion must be recorded and reported on so that Scotland can understand its use and monitor progress towards its cessation.”⁸⁰
56. The Scottish Human Rights Commission, the Children and Young People’s Commission and other statutory bodies have urged the Scottish Government to identify a suitable legislative vehicle through which to put in place a coherent statutory framework on restraint and seclusion across all settings in which children are under the care and/or supervision of the State.⁸¹

⁸ Although draft guidance was consulted upon on 2022 ([Physical intervention in schools: draft guidance - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/draft-guidance-physical-intervention-in-schools-2022/pages/10/)) this guidance is non-statutory and was criticised as unfit for purpose by stakeholders. The Scottish Government has not yet responded to the consultation results. A Private Members Bill has been consulted on in the Scottish Parliament which aims to legislate to put guidance on a statutory basis and improve monitoring and recording of incidents ([daniel-johnson-final-cd.pdf \(parliament.scot\)](https://www.parliament.scot/bills/daniel-johnson-final-cd.pdf)).

Use of restraint and seclusion in mental health settings

57. In 2020 the Independent Mental Health Law Review published a wide-ranging review of mental health, incapacity, and safeguarding law in Scotland. The Review proposed several actions to reduce coercion including restraint⁹ in mental health settings. This includes a systematic improvement programme to reduce coercion, additional safeguards in the Mental Health Act when restraint is used, a national register of restraint enshrined in legislation, and monitoring and reporting by the Mental Welfare Commission on the use of restraint.⁸²
58. The Scottish Government responded to the review, committing to an initial scoping programme with the aim of “reducing the use of coercion and restrictive practices, such as seclusion and restraint, over time.”⁸³ They further committed to develop a strategic action plan to strengthen the collective scrutiny of mental health services. Work on these actions is to be undertaken between 2023-2026.

The Commission recommends that the Scottish Government bring forward a statutory framework to ensure a consistent approach to the use, monitoring and recording of restraint and seclusion in all settings.

Liberty of People with Learning Disabilities

59. Many people who have learning disabilities and autism in Scotland are being denied their rights to autonomy, choice, and control over their place of residence and with whom they live, risking individual violations of their rights under articles 10 and 12 of the Covenant, among others. They are also being denied

⁹ Restraint includes chemical, mechanical and physical forms of control, coercion and enforced isolation.

access to community-based services on an equal basis with others.

60. Government data confirms that 705 people were placed out-of-area in Scotland as at 2017,¹⁰ 79 people were placed outside of Scotland and 67 people experienced delayed discharge in hospital settings.⁸⁴ More than 22% had been in hospital for more than ten years, and another 9% had been in hospital for five to ten years. Only 12% had been admitted less than a year, although this data does have limitations as explained in the full report. The majority of those placed out-of-area or delayed in hospital had behaviour that staff found challenging. This was often a reason for social care service breakdown.⁸⁵
61. The Commission is currently undertaking work to scrutinise implementation of the Coming Home Implementation Plan, including an analysis of existing data and emergent gaps against UNCRPD Article 19 Human Rights Indicators⁸⁶ to be published in 2024. DPOs⁸⁷ and third sector organisations⁸⁸ have raised concern without more significant reform, existing legal mechanisms in Scotland will continue to allow people with learning disabilities to be denied their right to liberty based on disability.⁸⁹

The Commission recommends the Scottish Government act to fill gaps in service provision and suitable accommodation as well as concerns about legislative frameworks which can be used to deprive liberty.

The Commission recommends that the Scottish Government urgently address the commitments of the Coming Home implementation plan.

¹⁰ 'Out-of-area' is defined as living within a placement not within the individual's funding authority. This could include living in either an NHS or a private hospital. See: Scottish Government (2019), [Coming Home – A Report on Out-of-Area Placements and Delayed Discharge for People with Learning Disabilities and Complex Needs](#).

Right to life and conditions of detention (arts. 6, 9, 10 and 14)

Detention conditions in prisons

62. There has been slow action to respond to a large number of concerns and recommendations from UN, Council of Europe and domestic human rights bodies relating to places of detention. A wide range of issues have been raised across these processes. In 2023, an Irish court refused to grant an extradition order because of evidence that detention in Scottish prisons may violate rights under Article 3 ECHR.⁹⁰

Minimum cell size and prison overcrowding

63. The Chief Inspector of Scottish Prisons' annual report for 2022-2311 shows that overcrowding remains a considerable issue for the Scottish Prison Estate. 10 of the 17 prisons in Scotland currently operate at more than 100% capacity.⁹¹
64. Overcrowding has been a longstanding concern of the CPT, who have warned that the prescribed minimum cell size (excluding sanitation) of 6m² of personal space for one person in a single cell and a minimum cell size of 8m² for a double cell with two people excluding sanitary areas are not always adhered to.⁹² As of January 2024, a response to a parliamentary question revealed that there are 2,230 prisoners living in shared cells which have less than 4m² of living space per person.⁹³
65. Work to address overcrowding has primarily focused on reducing the prisons population through sentencing policies and community justice. The Scottish Government has committed to investing in substantial expansion of community justice

¹¹ SHRC provide support and expert advice to HMIPS inspectors on human rights issues and may attend an inspection on an intelligence led case where appropriate. We have no unannounced inspection powers and do all of our inspection work in partnership with HMIPS.

services.⁹⁴ Of particular note in this policy approach are the Community Justice (Scotland) Act 2016 and the Presumption Against Short Periods of Imprisonment (Scotland) Order 2019. Despite the presumption, over 2022-23 an average of 971.8 people in prison were serving a sentence of under 12 months.⁹⁵

66. The 2016 Act established a public body 'Community Justice Scotland' to promote the National Strategy for Community Justice. However, a number of parties have pointed out that in order to deliver the policy intent, significant investment is needed for justice social work⁹⁶ as well as third sector organisations.⁹⁷ Local Government and Social Work authorities have highlighted that funding for justice social work has fallen short for a number of years.⁹⁸
67. The use of 1m² holding cubicles, known often as "dog boxes", at the reception HMP Barlinnie ceased in 2023 after being the subject of human rights recommendations since 1996. There remains an urgent need to modernise the prison estate and improve certain facilities, including outdoor exercise facilities. There have been significant delays and growing costs associated with the prison estate programme. Planned development work across the prison estate however will not increase prison capacity⁹⁹ and HMIPS has warned that 'if current levels of resourcing and population remain static, humane containment will inevitably become the main focus of prisons.'¹⁰⁰
68. The Release of Prisoners (Coronavirus) (Scotland) Regulations 2020 came into force in May 2020¹⁰¹ after the Coronavirus (Scotland) Act 2020 granted Ministers powers to instruct early release of prisoners from custody where it was considered necessary to support the continued operation of the prison service, or to protect the health of prison staff and prisoners.¹⁰² In September 2020, a Freedom of Information release showed that a total of 348 prisoners were released under this regulation.¹⁰³

69. In May 2020, the Commission publicly expressed concern that the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020 that allowed prison officials to relax requirements to meet some basic needs due to the emergency posed potential violations of Article 3 EHRC.¹⁰⁴ Instances of harms brought to the attention of the Commission in this period included:
- people being confined to their cell for 24 hours a day, for extended periods of time, with no access to shower facilities or time out of cell including access to outdoor exercise.
 - prisoners being confined in their cells for COVID-19 related reasons being given only limited telephone contact with their lawyer.
 - some prisoners being unable to maintain any form of telephone contact with their families.
70. Although COVID-19 restrictions have since been relaxed, there remain concerns about prisoners' access to a comprehensive regime and the amount of time spent in cells. Recent prison inspection reports and Independent Prison Monitoring reports for 2022/23 revealed that not all prisoners were getting access to a full hour of exercise in the fresh air daily due to a range of factors¹⁰⁵.

Remand

71. Scotland has a particularly high rates of prisoners on remand.¹⁰⁶ As of 12 January 2024, of a total custody population of 7861, 1,861 (23.7%) were untried. A further 223 were convicted awaiting sentencing. The proportion of prisoners on remand was higher for women (28.61%) and young people aged 18-20 (38.41%).¹⁰⁷ Ongoing court backlogs – an issue for many years but significantly exacerbated by the pandemic - also means that people are more likely to be remanded for lengthier periods of time.
72. In December 2022, the Commission expressed concern about the 'crisis' in remand in Scotland and set out our view that reforms

must be expedited.¹⁰⁸ Those remanded in prison have fewer opportunities to access support services and purposeful activity such as education, work and rehabilitation programmes, which results in increased time spent in cell, negatively impacting on health and wellbeing.¹⁰⁹

73. New remand provisions have been introduced with the Bail and Release from Custody (Scotland) Act 2023 which aim to increase safeguards on the use of remand. Some organisations in Scotland have raised concerns about the lack of explicit reference to safeguards for children within the bill.¹¹⁰

Segregation and solitary confinement and purposeful activity

74. A report from the NPM Scotland Subgroup in 2021 highlights that the Scottish Government has acknowledged concerns of the CPT regarding use of disciplinary sanctions of 14 days' segregation for those inmates in the SRU.¹¹¹ The NPM Scotland Subgroup reported that while the inappropriate use of segregation was being considered, at that time it was not possible to identify outcomes which resulted in changed practices. The report noted that there had at that stage been limited attention on the issue in HMIPS reports.
75. The Mental Welfare Commission has also called for an urgent audit of the use of segregation for prisoners "so mentally unwell that there is no alternative to safely manage their care in custody."¹¹²
76. In response to the NPM Scotland Subgroup report, HMIPS published a thematic review of segregation in Scottish Prisons which found a number of serious concerns about the use of SRU.¹¹³ Between 1 April 2021 and 31 March 2022, 1,242 SRU stays were recorded. The most common reason for someone to stay in an SRU is through the use of a Rule 95, whereby a prisoner is removed from association in order to maintain good order and discipline (GOAD), protect the interest of any prisoners, or to ensure the safety of other prisoners.

77. A single day data analysis found that on 28 September 2022, the longest continuous SRU stay was 1,017 days – almost three years. Eight individuals had been held continuously in SRUs for over a year, including seven who had been in an SRU for over 600 days, and four who had been in an SRU for over two years. The mid-year report from HMIPS for 2023 also warned that prisoners in the general population are spending too long locked in cells without access to purposeful activity.¹¹⁴
78. The NPM Scotland Subgroup has written to the Scottish Government to highlight that that HMIPS’s review raises a number of very serious concerns which, in our judgement, risk crossing the threshold into Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, up to and including allegations of direct physical assault by staff.¹¹⁵

Imprisonment rate amongst certain minority groups

79. Weekly data on the Scottish Prison Population does not allow for a detailed analysis of the characteristics of the population. Weekly statistics are disaggregated by sex and additional figures for 16–17-year-olds and 18–20-year-olds are provided. On 12 January 2024, 4.1% of the population was women and 97.9% were aged 21 or over. Three people aged 16-17 were held in the prison estate.
80. The Children (Care and Justice) (Scotland) Bill currently being considered by the Scottish Parliament would, if passed in its current form, mean that no child under the age of 18 can be placed in Young Offenders Institutions (whether on pre-trial or pre-sentencing remand, or following sentencing).¹¹⁶ This would also expand the scope of the Children’s Hearing System.
81. Longitudinal statistics on prison populations are published on annual basis. In 2022-2023, the rate of imprisonment for the White ethnic groups was 3.2 per 1,000, 2.6 per 1,000 for Asian ethnic groups, and 4.5 per 1,000 for Mixed or Multiple ethnic groups. Imprisonment rates for African, Caribbean, and Black and for Other Ethnic groups were considerably higher at 8.7 and 8.5

per 1,000.¹¹⁷ Around 9.9% had a recorded self-reported disability on arrival.¹¹⁸

The Commission recommends the Scottish Government and other agencies involved in prison management take all measures necessary to ensure that the prison estate and its management conform to international standards, including investment in alternatives to detention, address court backlogs and expediate prison redevelopment to ensure that all prisons in Scotland are fit for purpose.

Violence in Prisons

82. Prison inspection reports show that there is a high degree of variability in reported violence between institutions. HMIPS's review of HMP Addiewell carried out in November 2022¹¹⁹ found that 40% of prisoners said they had been abused, threatened, bullied or assaulted by staff.¹² The report further provided that when "inspectors arrived onsite and talked to prisoners and staff, many of these concerns appeared justified, particularly in relation to safety."
83. Human Rights Bodies have noted the reporting, medical examination, investigation, and sanction/prosecution of violence in Scottish Prisons is inconsistent.¹³ Despite these recommendations, neither the Scottish Prison Service nor the Scottish Government currently publishes comprehensive disaggregated data on all complaints and reports received of

¹² Additionally 60% of prisoners said they had witnessed staff abusing, threatening, bullying, or assaulting another prisoner and just 29% of prisons said that they felt safe all or most of the time.

¹³ Recommendations have also been made to consistently investigate the use of force, and to regularly collect and publish data on the use of force. Treaty bodies have highlighted specific concerns about issues relating to children, women, ethnic minorities and people with disabilities, with greatest concern for individuals holding two or more of these characteristics (e.g. children who are ethnic minorities and have a disability)

torture or ill-treatment in prisons. Body cameras are not currently routinely worn by frontline prison staff.

84. Guidance from the Chief Medical Officer for Scotland for managing reports of sexual violence states that “There has been limited research on sexual abuse in prisons and the nature and extent of the problem in Scotland is unknown.”¹²⁰

Deaths in Custody and Investigations

85. Between 2012 and 2022, there were 350 deaths in prison custody in Scotland, an average of 31.8 deaths per year. Just under half of were attributed to suicide or were drug-related deaths. Research shows that 24 young people under the age of 25 died in prison in Scotland between 2009 and 2019, two of whom were under the age of 18.¹²¹ Half of these young people were on remand at the time of death. One young person under the age of 18 also died in secure care during the same period.¹²²
86. An Independent Review of Deaths in Custody was published in 2021, co-chaired by the SHRC, HMIPS and third sector organisations Families Outside.¹²³ The Independent Review examined the handling of deaths in prison custody and delivered 27 recommendations, including that an independent body carry out an investigation into every death in custody. The Commission believes there should be a coherent system of responding to deaths in custody, including in mental health detention.¹²⁴ Although the procedures in mental health detention differ, any system that responds to deaths should be informed by the Deaths in Custody Review recommendations.
87. Despite the Scottish Government accepting the recommendation in 2021,¹²⁵ Gillian Imery, External Chair of the Deaths in Prison Custody Action Group, has warned the Scottish Criminal Justice Committee that there is slow progress in implementing the Review’s recommendations.¹²⁶ Only five of the Review’s 27 recommendations and advisory points have been completed as of January 2024. The Commission shares this view and has called

on the Scottish Parliament Committee to play a more active role in scrutiny of implementation.¹²⁷

88. The Fatal Accident Inquiry (FAI)¹⁴ process was specifically outwith the scope of the Review. However, it is very clear that the current FAI system is not providing what it should for families, nor is it delivering systemic change and improvement that is needed. There are frequently long periods elapsing between a death and an FAI being held. Additionally, more than 90% of all FAIs make no findings of defect or recommendations. Families are rarely represented.

The Commission recommends that all allegations of violence in Scottish detention settings are promptly and systematically investigated and that any instance of violence is examined by an appropriate healthcare professional in line with the Istanbul Protocol.

The Commission recommends that the Scottish Government should commit to exploring reform of the FAI system in relation to deaths in custody, ensuring the experiences of families whose relatives have died inform any change recommended and that any reform is informed by and grounded in human rights law and best practice.

Access to healthcare, including mental healthcare

89. Access to healthcare and in particular mental health care in prisons remains an area of significant concern. HMIPS's thematic review of segregation published in 2023 noted that:

“a substantial proportion of SRU prisoners appear to have mental health difficulties. While often these could be managed in a prison setting, serious concerns remain regarding how well supported and trained staff are to manage and alleviate these. Given the

¹⁴ An FAI is the legal process that seeks to explain the circumstances of a person's death. FAIs are held into deaths that are sudden, suspicious, unexpected, accidental or unexplained or which have occurred in circumstances that may give rise to public concern.

stretched resources and regimes of SRUs, very little work was taking place to provide mental health and psychological interventions to provide support for these prisoners to assist them to settle in a mainstream prison environment. Indeed, many staff and prisoners reported mental health declining as prisoners stayed longer in SRUs.”

90. Recent research published by the Scottish Government shows continued unmet mental health needs in Scottish prisons, with the prevalence of mental health conditions higher in the younger age groups.¹²⁸ The MWC have identified persistent inadequacies in the provision of mental healthcare in prisons noting that little has changed in the decade between 2011 and 2021.¹²⁹
91. The Covid-19 pandemic further compounded poor mental health outcomes for people in detention, with restrictions resulting in the suspension of in-person family visits, disruptions to daily activities such as education programmes, and increased time spent in cells.¹³⁰ Young people described the absence of positive face-to-face contact and affection, boredom and loneliness as key issues affecting their well-being during that time.¹³¹ Although an early release programme for prisoners was instigated to reduce the prison population, those on remand were not eligible and only one young person was released under this initiative.¹³²
92. More broadly, research shows that suggests that people residing in prison suffer from health inequalities relative to the general population.¹³³ A 2017 Scottish Parliament Inquiry into healthcare in prisons¹³⁴ documented slow progress in driving forward improvements to prisoner healthcare, citing longstanding issues around retention in healthcare staff, particularly GPs, clinical psychologists, and mental health nurses. In 2022, the Scottish Government published four studies which identified a number of barriers to physical health service provision in prisons, including workforce issues, inconsistencies in health care provision at points of transition in the prison journey (e.g. reception, liberation and inter-prison transfer), issues with information sharing, and

missed secondary care appointments due to the unavailability of transfers.¹³⁵

The Commission recommends that the Scottish Government act urgently to ensure that all prisoners in Scotland have access to appropriate physical and mental healthcare in line with the right to health and other international standards.

Women's estate

93. The Commission's work on places of detention in Scotland has surfaced ongoing concerns about the treatment and conditions in prisons of women in custody,¹³⁶ many of which have experienced male violence and /or have serious mental ill-health.¹³⁷ While women are significantly less likely to receive a custodial sentence than men, the rate of women in prison in Scotland is significantly higher than comparable countries.¹³⁸
94. Women in places of detention are at a high risk of state perpetrated or enabled gender-based violence.¹³⁹ The Scottish Prisons' Service (SPS) has a strategy for women in custody which aims to support "a culture that is sensitive to the gender specific needs of women."¹⁴⁰ SPS has also recently updated its policy on the housing of transgender prisoners, which sets out an individualised approach to risk management.¹⁴¹
95. As part of the 2022-23 Scottish Budget, the Scottish Government announced continued funding for upgrades to the women's estate as part of a larger package of capital funding for the Scottish Prison Service. The national women's unit at HMP Corton Vale was closed in April 2023. All prisoners were subsequently transferred to new facilities, in line with The New Model of Custody following the Commission on Women Offenders in 2012.¹⁴²
96. The New Model of Custody aims to reflect international human rights standards, including the United Nations standards for the treatment of women in prison and the work and recommendations from the CPT, as well as UNCRPD and UNCRC.¹⁴³ SPS state

that they aim to ensure both the physical environment and available services are gender specific and trauma informed.

97. Two Community Custody units (CCUs) and a smaller HMP & YOI Stirling have been opened in place on the national women's unit.¹⁴⁴ The CCUs focus on contact with the community and local services. While there has not yet been any analysis of the impact of the new model, HIMIPS's Annual Independent Monitoring Report for one of the CCU's, the Bella Centre, found that women were generally positive and felt supported by staff in the centre, and that transfer had in general been a positive experience.¹⁴⁵
98. There is currently no high secure forensic care for women in Scotland.¹⁴⁶ International and domestic human rights bodies have criticised the inappropriate use of prisons and SRU facilities when women should be in a hospital setting.¹⁴⁷ An Independent Review of Forensic Mental Health Services specifically recommended that "A high secure service for women should be opened in the State Hospital within nine months of the publication of this Review."¹⁴⁸ Nearly 3 years from publication, this recommendation has not been implemented.

The Commission recommends that the Scottish Government fully implement long called-for improvements to the women's pathways across in medium secure, low secure and community forensic settings. This should include a high secure service.

Immigration Detention

99. Removal or deportation in line with immigration rules is a reserved matter, and individuals with a 'failed' asylum claim or those without legal migration status may be housed in immigration detention centres. Dungavel Immigration Removal Centre is currently the only immigration detention centre in Scotland. It is operated by the UK Government and overseen by the HM Inspectorate of Prisons for England and Wales. Despite having a capacity of 125, only 28 people were detained there during the last inspection visit in 2021.¹⁴⁹ The Commission

remains concerned about the excessive length of immigration detention and the lack of statutory time limit and has raised this issue repeatedly over a number of years.¹⁵⁰

100. Whilst the inspection report highlighted some positive improvements, concerns were stated about males with a history of violence towards women being detained alongside women, meaning women had to be escorted around the site.¹⁵¹ It also highlighted that many detainees had been held for lengthy periods without prospect of timely removal and acknowledged the negative impact this has on mental health.¹⁵²
101. Dungaval previously housed under-18s, but since 2010 only adult asylum seekers should be housed in immigration detention. However, figures obtained by the BBC¹⁵³ show that children being placed in Dungaval after 2010 and there are outstanding concerns about age disputed young people.

The Commission recommends that a statutory time limit for immigration detention is introduced, with access to judicial oversight, and that access to healthcare and other forms of support for people detained in removal centres is ensured for the full duration of their detention. In addition, the state should take urgent steps to ensure no vulnerable adult is put at further risk by the nature of their detention.

Elimination of slavery, servitude, and trafficking in persons (arts. 2, 7, 8, 24 and 26)

102. The Human Trafficking and Exploitation (Scotland) Act 2015 created an offence of Human Trafficking in Scots law and established a statutory aggravator where the trafficking involves a child.¹⁵⁴ The Act required the Scottish Ministers to develop a Scottish Trafficking and Exploitation Strategy for Scotland.¹⁵⁵ Implementation of the Strategy is being delivered through partnership working across all Action Areas and the Child Trafficking Strategy Group.¹⁵⁶

103. Specified public authorities in Scotland are obliged to notify the Home Office about all potential victims of human trafficking and slavery through the National Referral Mechanism (NRM).¹⁵⁷ There has been widespread criticism¹⁵⁸ about the NRM, both in terms of time taken to process referrals and flaws in the decision making. In 2020, the median time taken from referral to a Conclusive Grounds decision was 339 days (while it should be done no later than 45 days).¹⁵⁹ A 2021 Freedom of Information Request from After Exploitation revealed that 255 out of 325 negative decisions were reversed.¹⁶⁰
104. The majority of people trafficked into Scotland are women.¹⁶¹ In 2022 there were 621 (405 adult) referrals to the NRM made in Scotland, 108 of which were for sexual purposes (where a purpose was recorded) and of these 78 were women¹⁶² and girls, and 30 were men and boys.¹⁶³
105. Under the Human Trafficking Act, the Lord Advocate has issued Guidelines which make clear that there is unlikely to be public interest in prosecuting victims of human trafficking accused of criminal activity carried out as a consequence of trafficking or exploitation.¹⁶⁴ Non-prosecution of trafficking victims is legislated for under Section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015,¹⁶⁵ however victims of trafficking have continued to face criminal charges in Scotland. Between 2016 and 2020, 155 potential trafficking survivors faced criminal charges (predominantly linked to drug offences), 21 of whom were children.¹⁶⁶ In 2021, the Children and Young People's Commissioner raised concern about trafficked children being prosecuted in the adult justice system.¹⁶⁷
106. The Scottish Government has also introduced guidance for businesses to identify and prevent human trafficking and exploitation across their operations¹⁶⁸ and has recently consulted on extending obligations to Scottish public bodies for the publication of modern slavery statements as part of work to improve transparency in supply chains.¹⁶⁹

The Commission recommends that the Scottish Government and Crown Office and Procurator Fiscal Service take all steps necessary to end the prosecution of adults and children who have experienced human trafficking.

Treatment of aliens, including migrants, refugees, and asylum seekers (arts. 2, 9, 10, 13, 14 and 26)

Immigration rules

107. While immigration law is reserved to the UK Parliament, many aspects of policy related to the treatment of migrants and refugees in Scotland are devolved, for example in the areas of education, health, housing. Visa requirements are set out by the Home Office in line with UK-wide legislation. As outlined above, the Commission is concerned about legislation reforming the immigration system in the Illegal Migration Act and related legislation. Accommodation is offered to asylum seekers on a no-choice basis and any asylum seeker who refuses accommodation may have their government support withdrawn.
108. While it has no powers to grant asylum, the Scottish Government published the New Scots Refugee Integration Strategy,¹⁷⁰ the second national strategy for refugee integration, supported by the New Scots Refugee Integration Delivery Project. Funding for the Delivery Project was provided by the EU's Asylum, Migration, and Integration Fund up to December 2022.
109. The Scottish Government has also acted as 'super sponsor' through the UK Government's Homes for Ukraine scheme for individuals seeking international protection in the ongoing conflict. The Scottish Government temporarily paused the scheme in July 2022 due to pressure on the availability of both temporary and longer-term accommodation. Ukrainian refugees were offered temporary accommodation in hotels and on two chartered ships docked in Glasgow and Edinburgh.

110. Despite current Scottish Government Policy articulating a generally pro-immigration stance, migrants and minority communities report that they encounter racist and discriminatory treatment at similar levels to the rest of the UK. Research has suggested the disconnect between rhetoric and experience contributes to racism being more easily discounted or under-reported in Scotland.¹⁷¹

No Recourse to Public Funds

111. No Recourse to Public Funds (NRPF) is a condition that may be applied to an individual's leave to enter or remain in the UK. Migrants with NRPF conditions cannot access services provided and/or funded by the government listed in the Immigration and Asylum Act 1999 and the Immigration Rules.¹⁷² Funds not listed may be accessed, for example Scottish Legal Aid Board-funded legal aid, free school lunches, early learning childcare support, or access to some NHS services. However, given the vast number of prohibited funds and perceived complexity many eligible applicants may be dissuaded or require significant support to apply.
112. The use of NRPF conditions for those with temporary migration status causes particular risk of poverty and destitution for some migrants.¹⁷³ They were ineligible for most coronavirus financial support and cannot access UC and other income-related benefits.¹⁷⁴ Women with NRPF and their children with immigration status contingent on an abusive partner are unable to access support necessary to ensure their safety.
113. The Scottish Government and Local Authorities (COSLA) have developed an "Ending Destitution Together Strategy" to provide some support for people in Scotland with NRPF conditions.¹⁷⁵ The strategy draws from human rights standards and encourages Scottish public bodies to make decisions to protect human rights. The Commission has made it clear that the Scottish Government must do what it can therefore within the areas of devolved competence to ensure the rights of migrants in Scotland are

protected.¹⁷⁶ The pandemic demonstrated clearly that there is more room for collaboration between the Scottish Government, third sector and local authority partners to minimise risk of homelessness and destitution even where immigration status presents a challenge.

114. Significant concerns have been raised by UN experts¹⁷⁷, as well as UK human rights organisations, about unaccompanied asylum seeking children going missing from hotels.¹⁷⁸ ECPAT notes that 4600 children have been accommodated in hotels since July 2021, with 440 missing episodes and 200 children who have never been found.¹⁷⁹ The Commission has been unable to identify any disaggregated data to quantify the scale of this issue in Scotland.

The Commission recommends that all Scottish Public Bodies work together to ensure that the maximum support possible is available to individuals subject to NRPF, who are in acute situations of vulnerability, while working with the UK Government end the use of the condition.

Access to justice, independence of the judiciary, and fair trials (arts. 2 and 14)

Access to justice challenges in Scotland

115. The access to justice landscape in Scotland is highly complex fragmented, difficult to navigate, and often inaccessible. Learning from individual complaints raised through existing systems do not often result in structural change.¹⁸⁰ A review of complaints mechanisms for ESC rights published by the Commission highlights broad issues with awareness, journey complexity and processes that undermine the right to effective remedy.¹⁸¹ Remedies are primarily geared at individual resolution as opposed to structural change.
116. A further concern is the high cost of accessing justice via courts. Various fees are payable for submitting applications to the court

and for lodging documents at different stages of the court procedure. The fees are set out in Scottish Statutory Instruments, which are updated annually by Fee Amendment Orders.¹⁸² There has been an increase in court fees applying to all court users, with some court users eligible to apply for a fee exemption.

117. The 3-month time limit for judicial review renders it extremely difficult for individuals to challenge violations of their rights. Time limits for courts do not fit neatly with non-judicial complaints mechanisms, limiting options to seek redress. Public-interest litigation is comparatively rare in Scotland and there are limited opportunities for NGOs to take strategic litigation due to standing rules, processes, and costs.¹⁸³ The Scottish Human Rights Commission cannot take cases in our own name nor behalf of individuals.¹⁵

The Commission recommends Scottish Government ensure that access to effective and appropriate remedies for human rights violations can be improved in Scotland, including the introduction of remedies which result in systemic change.

Stop and search

118. In its previous Concluding Observations, the Committee expressed concern about the use of stop and search powers in Scotland, and particularly about non-statutory searches undertaken on a large scale by Police Scotland that appeared to involve the selective application of such measures in a manner that was allegedly unlawful and disproportionate.¹⁸⁴
119. In 2021/22, 30,807 stop and searches were carried out in Scotland, of which 3,851 (10%) were conducted on children and young people aged 0-17. Analysis of this data shows that around

¹⁵ From July 2024, the Commission will be able to take cases in relation to the children and young people under the UNCRC Incorporation Scotland Act.

two thirds of those instances were negative searches.¹⁸⁵ Additionally, the vast majority of stop and searches in 2021/22 were conducted on people identifying as White Scottish/White Other British (91.3%). A further 3.1% were for those who identified as White Minority Ethnic, 1.8% who identified as Asian, 1.2% who identified as African, Caribbean, or Black, 0.8% as Mixed or Multiple ethnicities, 0.7% as Other. Ethnicity was not provided or unknown in 1.2% of cases.¹⁸⁶ Between 2017/18 and 2021/22, the proportion of stop and searches being carried out on minority ethnic individuals has remained fairly stable at around 5-10%.¹⁸⁷

Historic Abuse

120. The Scottish Human Rights Commission welcomed the introduction of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021, which established a redress scheme for survivors of in care abuse.¹⁸⁸ Although broadly supportive of the scheme, the SHRC raised concerns around eligibility criteria and the requirement to choose between redress payments and pursuing civil action.¹⁸⁹ The Commission remains concerned about the eligibility criteria around the scheme, which excludes certain groups of survivors – such as those who were placed in shorter-term respite care - from accessing redress.¹⁹⁰
121. Although there has been considerable progress in recent years, there are some areas of the Historic Abuse Action Plan¹⁹¹ where commitments remain outstanding. For example, work on ensuring appropriate commemoration, shaped by the views of survivors, was a key commitment of the Action plan, and further action on management and access to records is required.¹⁹²

SHRC recommends that the Scottish Government take steps to ensure the eligibility criteria for the financial redress scheme are monitored, taking into account the views of survivors, and are not overly restrictive. The Scottish Government should also set out what steps it will take to ensure the range of commitments in the Historic

Abuse Action Plan are delivered, and in what timeframe it expects to do so.

Children in Conflict with the Law

122. The age of criminal responsibility in Scotland is currently 12.¹⁹³ The UN Committee on the Rights of the Child has called for the age of criminal responsibility to be raised to 14.¹⁹⁴ Children under the age of 16 who are accused of a criminal offence are generally referred to a Children's Hearing Panel. The Children (Care and Justice) (Scotland) Bill will, if passed, extend referrals to 16-and-17-year-olds for both behaviour and welfare grounds. The systems aim to ensure a child-welfare approach to justice for children and young people.¹⁹⁵
123. Serious cases where the child is over the age of 12 can be prosecuted in courts at the direction of the Lord Advocate.¹⁹⁶ COPFS is responsible for setting prosecution guidance. The current protocol for joint reporting requires that people over the age of 15 are generally dealt with in the criminal justice system in cases of serious sexual offences. The Children, Care and Justice Bill proposes reforms to the prosecution and sentencing of children in conflict with the law in order to ensure that their treatments is consistent with the UNCRC.¹⁹⁷ Currently secure care is the primary form of deprivation of liberty for children, whether for their own or others safety. However, as the Children and Young People's Commissioner Scotland highlights, a small number of children continue to be imprisoned, not all for serious or violent crimes.¹⁹⁸

The Commission recommends that the sentencing of children and young people in conflict with the law reflects human rights standards articulated by the UN CRC.

Court delays

124. Due to the impact of the COVID-19 pandemic, all jury trials were paused from 17 March 2020 and almost all summary criminal trials were adjourned and moved into ten 'hub' sheriff courts from

the 25 March 2020. The Scottish Parliament agreed temporary legislative powers in The Coronavirus (Scotland) Act 2020 which allowed the Scottish Courts and Tribunals system to increase the use of digital working.¹⁹⁹ Various restrictions remained in place until April 2022, which directly impacted the operating capacity of courts. At its peak in January 2022, a 43,606 backlog of scheduled trials had built up.²⁰⁰

125. While the COVID-19-related court backlog has “significantly reduced”²⁰¹ the time between pleading and trial for solemn cases – including serious assault, murder, and rape trials – has on average doubled since 2020. 70 per cent of cases indicted and awaiting trial relate to serious sexual offences.²⁰² Cases of serious sexual violence make up 80 to 85 per cent of cases that proceed to trial in the high court.²⁰³ Delays are having a significant impact on the mental health of victims and witnesses,²⁰⁴ with the Scottish Government acknowledged the risk that victims and witnesses may withdraw from cases.²⁰⁵
126. Issues with the Scottish Court Custody and Prisoner Escort Service (SCCPES) which is operated by a private company GEOAmeY are also contributing to court backlogs. Between July and Sep 2023, only 62% of prisoners were delivered to court on time. In evidence given to the Criminal Justice Committee during pre-budget scrutiny, it was found that failures by GEOAmeY had resulted in 48 trial days being lost during a six-week period because people in custody or prison could not be brought into court.²⁰⁶

The Commission recommends that the Scottish Government continue its efforts to reduce the court backlogs to ensure timely adjudication. Practical arrangements for attendance at court should be improved.

Criminal Justice Reform

127. Scotland has a broadly adversarial justice system with unique elements that reflect its history as a mixed legal system, including

the use of three verdicts (guilty, not guilty, and not proven) and a 15-member simple majority jury in solemn¹⁶ criminal procedure.

128. In 2022, the Scottish Government published a vision for Justice in Scotland which acknowledges that the nature of the criminal justice system has at times not served women and children.²⁰⁷ A range of research with women and child victims of gender-based violence have shown that they find engaging with the justice system “extremely distressing and retraumatising”.²⁰⁸¹⁷
129. An independent review of the management of sexual offences cases made a number of recommendations to improve the process of conducting sexual offences cases in Scottish courts for the victim, including improving the trauma-awareness throughout the system.²⁰⁹ This also included a new special offences court, presumed use of pre-recorded evidence; measures to improve the current experience of complainers with a particular focus on improved communication; steps to enhance jury involvement; and improvements to aspects of the Children’s Hearings System.
130. Reflecting the findings from the review, a Victims, Witnesses and Justice Reform (Scotland) Bill is currently being considered by the Scottish Parliament. The Bill’s stated intention is to improve justice responses, particularly in sexual offence cases. The reforms would abolish the not proven verdict in all criminal trials in Scotland, reduce juror numbers to twelve and require a two-thirds majority for conviction.
131. Ministers would also be subject to an obligation to establish a pilot specialist Sexual Offences Court. The Court would hear all solemn level sexual offence cases. Cases in the sexual offences

¹⁶ ‘Solemn’ is the term for the procedure applied to serious criminal cases in Scotland.

¹⁷ Examples of poor practice shared with the Scottish Parliament’s Criminal Justice Committee include statements being taken by sole male officers, lack of protection for victims and witnesses attending court, no challenge to unacceptable behaviour and language by legal representatives within courts and a lack of follow up and aftercare.

court may be heard by a single judge sitting without a jury. The Bill also proposes to introduce a statutory automatic right to anonymity in sexual offence cases, which is not currently in place in Scotland but is in the rest of the UK.

132. Some members of the legal profession – including the Law Society and the Scottish Bar Association - have argued that some of the proposals for reform - or their cumulative effect - affect the balancing of rights between too far in favour of the complainer¹⁸ and put at risk the fair trial rights of the accused.²¹⁰ Criminal defence lawyers have warned that they will boycott the pilot if proceeded with.²¹¹ Although there is no individual right to trial by jury in Scots law or international law - in particular Article 6 ECHR - the use of juries in solemn cases is an important component of Scotland's criminal justice system.

The Commission recommends the Scottish Government continue to seek opportunities to ensure that the justice system is more responsive to the needs of victims, especially women and children, while ensuring an accused's right to a fair trial in accordance with Article 6(1) ECHR and Article 14(1) ICCPR.

Legal Aid

133. The legal aid budget for 2023-24 is £156.1 million plus £3 million to strengthen access to justice for deprived communities and vulnerable groups.²¹² Scottish Legal Aid Board (SLAB)'s annual report showed that costs rose to £135 million in 2022/23, in part fee rate increase.²¹³ In January 2023, the Scottish Government announced £11 million package to increase fees for legal aid lawyers.²¹⁴ The Law Society and Scottish Solicitors Bar Association welcomed the agreement as a "step forward" but called for a long-term solution to underfunding and establishment

¹⁸ 'Complainer' is the legal term for victim in Scots criminal law.

of a sustainable fee review mechanism.²¹⁵ No proposals have yet been brought forward.

134. The Legal Aid (Scotland) Act 1986 is widely considered to be outdated and an independent review commissioned by the Scottish Government found wide-ranging issues with the current system.²¹⁶
135. Legal aid is available for people who are charged with criminal offences to cover the cost of representation at court by solicitors or advocates, and for bail applications. However, the number of solicitors providing criminal legal aid services has fallen dramatically, with 100 leaving the sector in the last two years.²¹⁷ In 2022, defence lawyers undertook a boycott of cases under the Domestic Abuse Act 2018, arguing that fees were insufficient to cover the complexity of cases.²¹⁸
136. Civil legal aid is means-tested and recipients with disposable income of over £293 per month are required to contribute to costs. The SLAB must agree that it is reasonable to go to court to pursue or to defend the case. Individual solicitors have the right to choose which cases they wish to represent. Identifying solicitors who will accept legal aid cases has become increasingly difficult. The 139 most deprived communities in Scotland, equivalent to around 100,000 people, share just 29 civil legal aid firms between them. There are no civil legal aid firms at all in 122 of the 139 areas.²¹⁹

The Commission recommends that the Scottish Government set out how it intends to reform the legal aid system in Scotland to ensure access to justice for all, in both the short and long term.

Policing

137. The outgoing Chief Inspector of Police Scotland publicly acknowledged that institutional racism, sexism, misogyny, and discrimination exist within Police Scotland.²²⁰ Without a plan to address systemic bias, the comments could further undermine confidence amongst the public in reporting hate crimes. A public

inquiry into the death of Sheku Bayoh, who died after being restrained in police custody will examine whether race was a factor in his death.²²¹

138. UK data confirms that women's trust in the police has fallen dramatically following the high-profile incidents of serious violence and misogyny perpetrated by serving officers.²²² While not be limited to Police Scotland, senior officers on the force have consistently acknowledged the challenges in building public trust.²²³ Police Scotland's engagement on a Violence Against Women strategy suggests that 57% of respondents chose not to report violence to the police for reasons including a lack of trust.²²⁴ His Majesty's Inspectorate of Constabulary in Scotland has also warned that not all officers have up-to-date vetting records.²²⁵
139. The Scottish Parliament is currently considering proposals for a Police (Ethics, Conduct and Scrutiny) (Scotland) Bill which would if passed increase the functions of the Police Investigations and Review Commissioner (the PIRC) and introduce an advisory board for the Commissioner. Police Scotland would also be required to have a statutory code of ethics, including a duty of candour. The reforms have been proposed following an independent review of police complaints handling, investigations, and misconduct, led by former Lord Advocate, Lady Elish Angiolini. The review²²⁶ refers to jurisprudence of the European Court of Human Rights on the importance of the victim involvement principle in dealing with complaints. Rights under Article 2, 3, 5 and 6 are also highlighted throughout in terms of obligations and rights of the organisation and individual officers.

The Commission recommends that the Scottish Government and Police Scotland take urgent and targeted steps to improve public confidence and trust and to eradicate acknowledged system biases.

Rights to privacy (art. 17) and recognition (art. 16)

New technologies- biometrics, facial recognition, cyber kiosks, and digital forensics

140. The Scottish Parliament established a Biometrics Commissioner for Scotland to oversee the acquisition, retention, use and destruction of biometric data by police in Scotland. The Commissioner's has developed a Code of Practice to guide the use of biometric data such as fingerprints, DNA, and facial and voice recognition.²²⁷ Section 15 of the Scottish Biometrics Commissioner Act 2020 allows the Commissioner to handle complaints regarding non-compliance with the Code.
141. The definition of biometric data adopted in Scotland is broader than elsewhere in the UK.¹⁹ However the Act included no legislative retention periods for records subject to the Biometrics Commissioner's mandate. The Code of Practice notes that there is a need to update relevant legislation to reflect the decision in *Gaughran-v-United Kingdom*,²²⁸ which found that: "the indiscriminate nature of the powers of retention... failed to strike a fair balance between the competing public and private interests."
142. The Scottish Biometrics Commissioner has warned that the direction of travel for privacy rights in the UK is extremely concerning.²²⁹ The UK Parliament is currently considering legislation²³⁰ which will abolish the Biometrics Commissioner for England and Wales and the Surveillance Camera Commissioner for England and Wales. In addition, suggestions²³¹ to integrate the semi-automated facial search capability within the UK Police National Database (PND) with the UK Passport Office database highlight conflicts between policing in devolved context and UK policy. The remit of the Scottish Commission and the Code does not apply to UK-Wide policing bodies operating in Scotland, or to

¹⁹ Section 34 of the Scottish Biometrics Commissioner Act 2020

the biometric data they collect when arresting or investigating citizens in Scotland.

The Commission recommends that the Scottish Government consider introduction of fixed periods for the retention of biometric data with a clear legislative basis.

LGBTI+ Human Rights

143. For the last five years there has been ongoing debate about reforms proposed by the Scottish Government to the statutory Gender Recognition process. The proposals primarily centred on ending the use of a medical panel in determining whether to grant a gender recognition certificate, which has the effect of changing a person's sex recorded on their birth certificate. Instead, certificates would be issued on the basis of statutory declaration on the basis of self-identification of identity.²³²
144. Since the proposals were first articulated in 2016, the political and social environment surrounding the identity of transgender people – in particular, transgender women – and their access to single-sex services has become increasingly fraught, highly politicised, and polarised. The Scottish Government introduced a Bill to reform the law in 2022, following two public consultations.
145. International Human Rights bodies and experts considered the proposals and the debate, including the UN Special Rapporteur on Violence Against Women,²³³ The UN Independent Expert of Sexual Orientation and Gender Identity²³⁴ and the Council of Europe's Human Rights Commissioner.²³⁵ In addition, a number of states made recommendations relating to gender identity as part of the UK's 4th Cycle of Universal Periodic Review.²³⁶ Domestic women's organisations, LGBTI+ organisations and campaign groups expressed a range of views on the merits and possible consequences of reforms.²³⁷
146. The reforms were passed by the Scottish Parliament in December 2022, however successfully challenged by the UK on constitutional grounds.²³⁸ The Court judged that the UK

Government did not act irrationally in coming to the conclusion that reforms could modify the Equality Act 2010, which is prevented by the devolution settlement, even if another conclusion could also have been reasonably reached.²³⁹ The Scottish Government has confirmed that it will not appeal the judgment, and the process for obtaining a Gender Recognition Certificate remains unchanged.

147. Both the UK²⁴⁰ and Scottish Government are considering legislation that would criminalise so-called ‘conversion practices’ which seek to change or suppress a person’s sexual orientation or gender identity. The Scottish Government committed to bring forward a gender identity inclusive proposal for a Bill following a public petition²⁴¹ and scrutiny by the Scottish Parliament.²⁴² The Commission provided an analysis of the relevant human rights framework to the inquiry²⁴³ and participated in an expert advisory group which made recommendations for legislation and policy to prevent conversion practices.²⁴⁴ A consultation on the scope of the legislation is currently underway.²⁴⁵
148. The Commission is concerned that proper attention to the merits and practical impacts of individual reforms are being subsumed in a broader, increasingly toxic debate. This atmosphere increases the risk of retrogression of human rights protections, as well as having deeply harmful personal impacts on individual women and LGBTI+ people in particular.

The Commission recommends that the Scottish Government develop an action plan to improve the gender recognition process to address concerns of trans people as far as possible under the devolution settlement. This should include engaging with opponents to reform with a view to address the polarisation of debate, which is causing harm to transgender people, the wider LGBT+ community and for women and girls, regardless of their individual policy views.

The Commission recommends that the provision and the promotion of all forms of “conversion therapy” in Scotland is prohibited through legislation. Legislation must have appropriate safeguards that enable LGBT+ persons to access non-judgmental physiological or spiritual

support and ensure that there is no disproportionate interference with the rights to freedom of thought, conscience and religion or freedom of expression.

Rights of the child (arts. 7, 24 and 26)

Legislative Framework

149. In January 2024, the United Nations Convention on the Rights of the Child (Scotland) Act was granted Royal Assent and became law. The Act means that Scotland is the only part of the UK to incorporate provisions on the UNCRC into domestic law.
150. Parliament initially passed the legislation in 2021, however the Bill was delayed following a successful legal challenge by the UK Government in respect of the Bill's competence on reserved areas of legislation. In October 2021, the Supreme Court judged that certain provisions in the Bill were outwith the legislative competence of the Scottish Parliament.
151. The Act requires public authorities, including Scottish Ministers, to act compatibly with UNCRC requirements in all devolved areas and functions. While the scope of the legislation has been reduced following the Supreme Court decision²⁴⁶ courts must read and give effect to Scottish Parliament legislation in a way that is compatible with the UNCRC and may 'strike down' or declare legislation incompatible. Children and representatives may challenge acts of public bodies that are incompatible with the convention and Children and Young People's Commissioner and Scottish Human Rights Commission have new powers to take legal action in relation to children's rights.

Other

152. The Children (Equal Protection) (Scotland) Act 2019 abolished the common law defence of "reasonable chastisement" of a child. Coming into force in November 2020, a person charged with assault of a child may no longer claim that a use of physical force was justifiable on the basis that it was physical punishment

administered in exercise of a parental right (or a right derived from having care or charge of a child).

Participation in public affairs (arts. 25 and 26)

Public participation in decision making

153. There is growing recognition in Scotland that participation is key to the realisation of people's human rights. Being afforded the opportunity to participate in decisions around delivery of local services, national policy (including the budget) and legislative priorities complement rights to vote, standing for and holding elected office. It also creates opportunities to develop policies which are more innovative, appropriate, and tailored to people's needs, provided participation is representative and well-supported.

Prisoners right to vote

154. The Commission's report to the List of Issues noted the Scottish Elections (Franchise and Representation) Bill was under consideration. This legislation was passed in 2020,²⁴⁷ and provides everyone who has a legal right to live in Scotland, including foreign nationals, with the right to vote in Scottish Parliament and local government elections. Prisoners serving sentences of twelve months or less may also register and vote in Scottish Parliament and local government elections.

155. Following the first elections carried out under the Act, Scottish Ministers²⁰ published a report with a view to considering whether the length of sentence cap was appropriate. As the elections were carried out during COVID-19 related restrictions, the report found that promotion activity in relation to prisoner voting was negatively

²⁰ In consultation the Scottish Prison Service (SPS), the Electoral Commission, Scotland, the Scottish Assessors Association and the Electoral Management Board for Scotland (EMB)

impacted. As a result, just 38 prisoners exercised their right to register to vote under the Act.²⁴⁸ Evidence from surveys carried out with prisoners suggests that there is a need for improved information on candidates and their policies during an election campaign, especially as access to internet is limited.²⁴⁹

Under-representation of minoritized groups and individuals

156. Although representation in the Scottish Parliament has increased to 46% - the highest percentage of women since the parliament was established – women account for only 35% of local representatives. Women continue to be under-represented in other public positions across a range of sectors, including the justice system. For example, 25% of judges in the supreme courts are women; 21.8% of sheriffs²¹ and 22.2% of senior police officers.²⁵⁰ The gender pay gap for women in Scotland is 10.9%, rising to 26.3% for part time workers, both increasing slightly from 2021 to 2022 after sustained falls.²⁵¹
157. Comparable data for race and ethnicity and for disability is not so readily available. Public authorities in Scotland are required by the Specific Duties of the Public Sector Equality Duty to publish employee information reports however there are significant inconsistencies in recorded and published data and high rates of non-disclosure.²⁵² Scottish Government has published an analysis of workforce data for seven criminal justice agencies in Scotland²⁵³ and solicitors regulated by the Law Society of Scotland. This found that the proportion of minority ethnic (excluding white minority) staff in justice organisations varies from less than 0.5% up to 3.4%.²⁵⁴
158. Official diversity data for MSPs is not published, however in 2021, more MSPs with visible impairments and more representatives

²¹ Sheriffs are lower court judges in Scotland.

from ethnic minority backgrounds were elected. A campaign for equal representation in Scottish Politics receives funding to develop toolkits to support political parties to collect candidate diversity data and to take action to support under-represented groups.²⁵⁵ The Scottish Government has also piloted improved diversity data recording for elections,²⁵⁶ although the candidate survey collected at the Local Government Elections in 2022 was voluntary.

159. The Scottish Government has introduced Scottish Elections (Representation and Reform) Bill which would extend candidacy rights for Scottish Parliament and local government elections to foreign nationals with limited leave to remain and extends the disqualification criteria for MSPs and councillors where a person has committed an offence aggravated by hostility toward certain persons including, for example, politicians or election staff.²⁵⁷ Proposals to extend candidacy rights to 16 and 17 year olds in line with the age of majority for voting have not been included in the Bill due to the potential exposure of young people to intimidation and practical issues such as travel and working hours.²⁵⁸

The Commission recommends that the Scottish Government pursue measures to improve public participation in public affairs at all levels, including the exercise of voting rights and the diversity of representatives.

C. Issues not raised by the List of Issues Pending Review

Violence Against Women and Girls (arts. 2, 3, 7 and 26)

160. Official statistics from the Scottish Crime and Justice Survey (SCJS) indicate that in 2019/20 3.7% of women and 2.6% of men survey reported experiences of partner abuse in the preceding 12 months.²⁵⁹ In addition 3.6% of respondents had experienced at least one type of serious sexual assault since the age of 16. Police recorded 64,807 incidents of domestic abuse in 2021-22 and in the same year there were 2,298 rape and attempted rapes reported to the police, but only 152 prosecutions and 78 convictions in a population of 5.45 million.
161. The Commission's recent response to the Baseline Assessment of the Istanbul Convention found that despite human rights and gender-perspectives being integrated in the national strategy to eradicate violence against women, implementation and practice does not always accord with the Scottish Government's aims.²⁶⁰
162. In 2021 the Scottish Government convened an independent Working Group on Criminal Justice and Misogyny to establish whether there were gaps in the law as it applies to hate crime and violence against women."²⁶¹ The Scottish Government consulted on draft legislation in 2023 and the current legislative programme includes commitment to introduce a Bill. The Commission submitted views to the consultation, advising that in our assessment, the proposed Bill is in general consistent with human rights standards and may advance respect for women's rights in the Scottish justice system; however, clarification and further development is required in some areas to ensure freedom of expression rights.

The Commission recommends that the Scottish Government address the gap between policy and practice in the sphere of violence against women and girls, including through improvements to progress

measurements, evidence, and gender-sensitivity across the justice system.

Freedom of Expression and Assembly (arts. 17, 18, 19, 20, 21 and 22)

Protest

163. The UK's Public Order Act 2023 does not apply to protest that happens in Scotland. Protests in Scotland are governed by developed legislation with the Public Order Act (1986) s.16 defining public assemblies. The Civic Government (Scotland) Act (1982) requires organisers of a public procession to provide written notification to the relevant local authority and Police Scotland and provide certain details on planned protests. Restrictions on assembly or expression in public fora may be imposed by a public authority in accordance with legal approved reasons, and there is a right of appeal to the sheriff court. Criminal laws or trespass laws may be engaged by certain protest activity in individual circumstances.
164. The Commission has continually sought to remind Police Scotland other agencies about the importance of the right to protest, for example ongoing protests concerning the conflict in Israel and Gaza.²⁶² The Commission wrote to Police Scotland in 2022 to raise concerns about the policing of protest during the state mourning period following the death of Queen Elizabeth II. The Commission has also highlighted restrictions on assembly activities on the Scottish Parliamentary Estate.
165. We also proactively engaged with the Scottish Government and Police Scotland in advance of the COP 26 meeting in November 2021. The Commission and the Equality and Human Rights Commission made a joint statement to the Forty-eighth session of the Human Rights Council in which we emphasised the importance of the right to protest in the context of COP 26, welcomed Police Scotland's recognition of its responsibilities to human rights and called for "meaningful and proactive

discussions with those seeking to protest, ensuring the right to freedom of assembly is supported, and by striking a proportionate balance between competing interests in facilitating the right to protest.”²⁶³

166. While the Public Order Act 2023 does not apply to protest activity that occurs in Scotland, it is possible that Scottish residents could face charges under the Act for engaging in protest activity south of the border. The Public Order Act further grants the police in England and Wales additional powers to restrict protest activities.
167. While the Act falls beyond our mandate, the Commission is concerned about the potential exercise of these powers as they relate to individuals who travel from Scotland to England and Wales for peaceful protest.
168. Similarly, the Strikes (Minimum Service Levels) Act 2023 is UK legislation that applies to Scotland. The legislation permits the introduction of minimum service levels in six “relevant” service areas, namely health services; fire and rescue services; education services; transport services; decommissioning of nuclear installations and management of radioactive waste and spent fuel; and border security.
169. The Scottish Government has the right to introduce the minimum service levels for devolved service areas – health, fire and rescue, education, and transport. However, it has set out its opposition to the legislation and stated that it will not exercise the right to introduce the minimum service levels and will not enforce any minimum service obligations upon employers.
170. The Public and Commercial Services union (PCS) has indicated that it may challenge Border Security Minimum Service Regulations introduced under the Strikes Act on Article 11 ECHR grounds.²⁶⁴

Defamation and Strategic Lawsuits Against Public Participation (SLAPPS)

171. Scotland currently has no specific measures to address the use of SLAPPs, and there is no data to assess how frequently legal processes are used to prevent exercise of freedom of expression, media reporting and public participation rights.²² The Scottish Government is not currently planning any legal reform, most notably of the Defamation and Malicious Publication (Scotland) Act 2021, to deal with SLAPPs.²⁶⁵
172. However, in the context of the development of anti-SLAPP legislation in England and Wales²⁶⁶, the absence of legislative reform in Scotland risks negatively impacting the effective functioning of the domestic judicial system by overburdening the court system with strategic civil litigation aimed at suppressing information on matters of public interest.

The Commission recommends that the Scottish Government review the need for specific legislation to ensure the protection of freedom of expression and compliance with international standards in preventing SLAPPs.

²² In 2022, the Human Rights Council noted that the rise of strategic lawsuits against public participation (SLAPPs) presented a growing threat to media freedom. The Council called on States, where necessary, to revise and repeal defamation and libel laws to ensure compliance with States' obligations under international human rights law. On a European level, the Council of Europe is in the process of developing a draft Recommendation on strategic lawsuits against public participation for Member States

Annex A: Recommendations

Considering the information submitted in this parallel report and our previous submission to the List of Issues, the Human Rights Committee may wish to raise the following recommendations as part of its examination of the UK at the 140th Session:

Part A. General information on the national human rights situation, including new measures and developments relating to the implementation of the Covenant.

Significant developments

The Commission recommends that the Scottish Government ensure that lessons are learned from the pandemic and independent COVID-19 Inquiry in Scotland and that steps are taken to integrate human rights protections into pandemic and emergency preparedness.

The Commission recommends that the Scottish Government enhance public awareness of, and the capacity of state agents towards, rights protected under the Covenant.

The Commission recommends that the Scottish Government and the Scottish Parliament consider whether the mandate, powers, and resourcing of the NHRI are sufficient to protect the human rights of all in Scotland.

Part B. Specific information on the implementation of articles 1–27 of the Covenant, including with regard to the previous recommendations of the Committee.

Constitutional and legal framework within which the Covenant is implemented (art 2)

The Commission recommends that the UK, at every level of government, desists with all policy activities which restrict or undermine the level of protection for civil and political rights as set out in the present Covenant and the ECHR.

The Commission recommends that the Scottish Government improve the accountability for human rights compliance through the most maximalist incorporation of human rights possible, especially given proposed new duties for public bodies.

Non-discrimination (arts. 2, 3 and 26)

The Commission recommends the Scottish Government use devolved flexibilities to enhance equality and non-discrimination across all rights in the Covenant and the forthcoming Scottish Human Rights Bill.

The Commission recommends the Scottish Government ensure that ongoing processes consider the specific participation of disabled people and their rights, including the COVID-19 Public Inquiry and Human Rights Bill process.

The Commission recommends that the Scottish Government take steps to support the Gypsy/Traveller communities in Scotland to realise their rights and to build trust with communities, including working with them to consider a reconciliation process for past harms.

The Commission recommends that the Scottish Government work with communities to improve confidence in the reporting of hate offences.

Sexual and reproductive rights and voluntary termination of pregnancy (arts. 2, 3, 6, 7 and 26)

The Commission recommends the Scottish Government ensures equal access to abortion care for women in all parts of Scotland.

Prohibition of torture and cruel, inhuman, or degrading treatment or punishment, right to liberty and security of person, and counter-terrorism measures (arts. 2, 4, 7, 9, 10, 14 and 19)

The Commission recommends that the Scottish Government bring forward a statutory framework to ensure a consistent approach to the use, monitoring and recording of restraint and seclusion in all settings.

The Commission recommends the Scottish Government act to fill gaps in service provision and suitable accommodation as well as concerns about legislative frameworks which can be used to deprive liberty.

The Commission recommends that the Scottish Government urgently address the commitments of the Coming Home implementation plan.

Right to life and conditions of detention (arts. 6, 9, 10 and 14)

The Commission recommends the Scottish Government and other agencies involved in prison management take all measures necessary to ensure that the prison estate and its management conform to international standards, including investment in alternatives to detention, address court backlogs and expediate prison redevelopment to ensure that all prisons in Scotland are fit for purpose.

The Commission recommends that all allegations of violence in Scottish detention settings are promptly and systematically investigated and that any instance of violence is examined by an appropriate healthcare professional in line with the Istanbul Protocol.

The Commission recommends that the Scottish Government should commit to exploring reform of the FAI system in relation to deaths in custody, ensuring the experiences of families whose relatives have died inform any change recommended and that any reform is informed by and grounded in human rights law and best practice.

The Commission recommends that the Scottish Government act urgently to ensure that all prisoners in Scotland have access to appropriate physical and mental healthcare in line with the right to health and other international standards.

The Commission recommends that the Scottish Government fully implement long called-for improvements to the women's pathways across in medium secure, low secure and community forensic settings. This should include a high secure service.

The Commission recommends that a statutory time limit for immigration detention is introduced, with access to judicial oversight, and that access to healthcare and other forms of support for people detained in removal centres is ensured for the full duration of their detention. In addition, the state should take urgent steps to ensure no vulnerable adult is put at further risk by the nature of their detention.

Elimination of slavery, servitude, and trafficking in persons (arts. 2, 7, 8, 24 and 26)

The Commission recommends that the Scottish Government and Crown Office and Procurator Fiscal Service take all steps necessary to end the prosecution of adults and children who have experienced human trafficking.

Treatment of aliens, including migrants, refugees, and asylum seekers (arts. 2, 9, 10, 13, 14 and 26)

The Commission recommends that all Scottish Public Bodies work together to ensure that the maximum support possible is available to individuals subject to NRPF, who are in acute situations of vulnerability, while working with the UK Government end the use of the condition.

Access to justice, independence of the judiciary, and fair trials (arts. 2 and 14)

The Commission recommends Scottish Government ensure that access to effective and appropriate remedies for human rights violations can be improved in Scotland, including the introduction of remedies which result in systemic change.

SHRC recommends that the Scottish Government take steps to ensure the eligibility criteria for the financial redress scheme are monitored, taking into account the views of survivors, and are not overly restrictive. The Scottish Government should also set out what steps it will take to ensure the range of commitments in the Historic Abuse Action Plan are delivered, and in what timeframe it expects to do so.

The Commission recommends that the sentencing of children and young people in conflict with the law reflects human rights standards articulated by the UN CRC.

The Commission recommends that the Scottish Government continue its efforts to reduce the court backlogs to ensure timely adjudication. Practical arrangements for attendance at court should be improved.

The Commission recommends the Scottish Government continue to seek opportunities to ensure that the justice system is more responsive to the needs of victims, especially women and children, while ensuring an accused's right to a fair trial in accordance with Article 6(1) ECHR and Article 14(1) ICCPR.

The Commission recommends that the Scottish Government set out how it intends to reform the legal aid system in Scotland to ensure access to justice for all, in both the short and long term.

The Commission recommends that the Scottish Government and Police Scotland take urgent and targeted steps to improve public confidence and trust and to eradicate acknowledged system biases.

Rights to privacy (art. 17) and recognition (art. 16)

The Commission recommends that the Scottish Government consider introduction of fixed periods for the retention of biometric data with a clear legislative basis.

The Commission recommends that the Scottish Government develop an action plan to improve the gender recognition process to address concerns of trans people as far as possible under the devolution settlement. This should include engaging with opponents to reform with a view to address the polarisation of debate, which is causing harm to transgender people, the wider LGBT+ community and for women and girls, regardless of their individual policy views.

The Commission recommends that the provision and the promotion of all forms of "conversion therapy" in Scotland is prohibited through legislation. Legislation must have appropriate safeguards that enable

LGBT+ persons to access non-judgmental physiological or spiritual support and ensure that there is no disproportionate interference with the rights to freedom of thought, conscience and religion or freedom of expression.

Participation in public affairs (arts. 25 and 26)

The Commission recommends that the Scottish Government pursue measures to improve public participation in public affairs at all levels, including the exercise of voting rights and the diversity of representatives.

Part C. Issues not raised by the List of Issues Pending Review

Violence Against Women and Girls (arts. 2, 3, 7 and 26)

The Commission recommends that the Scottish Government address the gap between policy and practice in the sphere of violence against women and girls, including through improvements to progress measurements, evidence, and gender-sensitivity across the justice system.

Freedom of Expression and Assembly (arts. 17, 18, 19, 20, 21 and 22)

The Commission recommends that the Scottish Government review the need for specific legislation to ensure the protection of freedom of expression and compliance with international standards in preventing SLAPPs.

Annex B: Overview of the Devolution Settlement

The UK's unwritten constitution leaves some matters open to political, legal, and academic debate. In simple terms, The UK Parliament maintains legislative sovereignty, and in principle retains the power to legislate on any matter of its choosing. However, the status of the Scottish Parliament is recognised as constitutionally significant. The Parliament was created by the Scotland Act 1998, which was amended in 2016 to provide a clause recognising the permanence of the institution.²⁶⁷

The Scottish Parliament has power to create primary legislation in the form of Acts of the Scottish Parliament. The scope of the Scottish Parliament's legal powers – known as devolved powers or competence – is provided on a general basis²⁶⁸ subject to three main limits:²⁶⁹

- Legislation must not be incompatible with the European Convention on Human Rights;
- The Scottish Parliament cannot modify “protected statutes;” and
- Legislation that “relates to” matters reserved to the UK Parliament is incompetent, and therefore “not law.”

Reserved matters are listed in schedule 5 of the Scotland Act 1998.

Identifying the limits of devolved competence is not always simple.²⁷⁰ While the whole policy area is reserved, many areas are subject to exceptions and sometimes the phrasing of such exceptions is subject to interpretation. Schedule 4 lists “protected statutes” that cannot be modified by Scottish law – whether expressly or in substance – even if the Scottish Parliament has power to legislate in that area. The Human Rights Act 1998 is a protected statute.

“Observing and implementing international obligations,” is an exception to the general reservation of international relations.²⁷¹ Scotland may choose how to implement and protect international human rights obligations to which the UK is a party, but cannot accept formal legal

obligations as a separate party (The Scottish Government has made several voluntary commitments with international and regional bodies).

The Scottish Parliament has elected to legislate for domestic incorporation of the UN Convention on the Rights of the Child, and while the legislation was successfully challenged for relating to reserved matters, the majority of the provisions of the Bill were found to be in the scope of devolved competence.²⁷²

The Scottish Parliament has established the Scottish Human Rights Commission as a National Human Rights Institution with power to promote and protect human rights in devolved areas of law and policy. The Equality and Human Rights Commission is established by the UK Parliament and has a mandate to regulate equality law in England, Wales and Scotland and operate as NHRI in respect of reserved areas in Scotland.

Scotland has a number of standalone state institutions, many of which pre-date the establishment of the Parliament in 1998. These include a separate legal system and judiciary, education system, health service and property and land registration system.

Summary of reserved and devolved areas

Devolved areas:

- agriculture, forestry, and fisheries
- benefits (some aspects)
- consumer advocacy and advice
- economic development
- education and training
- agriculture, forestry, and fisheries
- benefits (some aspects)
- consumer advocacy and advice

- economic development
- education and training
- elections to the Scottish Parliament and local government
- energy (some aspects)
- environment
- equality legislation (some aspects)
- fire services
- freedom of information
- health and social services
- housing
- justice and policing
- local government
- planning
- sport and the arts
- taxation (some aspects)
- tourism
- transport (some aspects)

Reserved areas:

- benefits (some aspects)
- betting and gambling
- broadcasting
- constitution (some aspects)

- consumer protection policy
- currency
- data protection
- defence and national security
- equality legislation (most aspects)
- energy (most aspects)
- elections to the UK Parliament
- employment law and industrial relations
- financial services
- foreign affairs
- immigration, asylum, and visas
- nationality and citizenship
- postal services
- taxation (some aspects)
- telecommunications
- trade and industry
- transport (some aspects)

Endnotes

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- ¹⁶¹ See: [Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary 2022 - GOV.UK \(www.gov.uk\)](#) see Table 4: NRM referrals by country of police force responsible for investigation, age at exploitation, exploitation type and gender [Note 1] [Note 2] [Note 5] [Note 6] [Note 7].
- ¹⁶² These figures include 16 girls aged 17 or under, 54 women over the age of 18 and 8 where the age was not known, reported in Scotland and where the reason for exploitation included sexual purposes.

¹⁶³ These figures include 13 boys aged 17 or under and 16 males over the age of 18, and 1 referral where age was not known, reported in Scotland and where the reason for exploitation included sexual purposes.

¹⁶⁴ See: [Lord Advocate's instructions: Non-prosecution of victims of human trafficking | COPFS](#)

¹⁶⁵ See: [Human Trafficking and Exploitation \(Scotland\) Act 2015 \(legislation.gov.uk\)](#)

¹⁶⁶ See: [Trafficked children locked in Scots jails in breach of rights law, activists say | The National](#)

¹⁶⁷ See: [Statement: Trafficked children detained in Young Offenders Institutions - The Children and Young People's Commissioner Scotland \(cypcs.org.uk\)](#)

¹⁶⁸ See: [Slavery and human trafficking: guidance for businesses - gov.scot \(www.gov.scot\)](#)

¹⁶⁹ See: [Transparency in supply chains - extension: inclusion of Scottish public bodies - consultation - gov.scot \(www.gov.scot\)](#)

¹⁷⁰ See: [New Scots Refugee Integration Strategy 2018 - 2022 \(www.gov.scot\)](#)

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¹⁷³ See: <https://www.gov.scot/publications/ending-destitution-together/pages/9/>

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¹⁷⁶ See: [Commission opposes UK government's Illegal Migration Bill \(scottishhumanrights.com\)](#)

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¹⁷⁹ For example, see: [Legal limbo: unaccompanied children in hotels denied care and protection | Helen Bamber ; Letter to Prime Minister - Children in Hotels .docx \(justrightscotland.org.uk\)](#)

¹⁸⁰ [Commission focus on Access to Justice \(scottishhumanrights.com\)](#)

¹⁸¹ [Copy of FINAL Access to Justice ElizD MS Sep 1 \(scottishhumanrights.com\)](#)

¹⁸² Article 2(1)(c) and Schedule 3, The High Court of Judiciary Fees Order 2022 (SI No.182 2022); Article 3(2)(c) and Schedule 3, The Court of Session etc. Fees Order 2022 (SI No.183 2022); Article 3(1)(c) and Schedule 3, The Sheriff Court Fees Order 2022 as amended by the Sheriff Court Fees Amendment Order 2022 (SI No.181 2022); Article 2(1)(c) and Schedule 3, The Justice of the Peace Court Fees (Scotland) Order 2022 (SI No.179 2022); Article 2(1)(c) and Schedule 3, The Sheriff Appeal Court Fees Order 2022 (SI No.183 2022).

¹⁸³ See: <https://hrcscotland.org/wp-content/uploads/2018/11/final-overcoming-barriers-to-pil-in-scotland-web-version.pdf>

¹⁸⁴ UN Human Rights Committee, 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (17 August 2015) CCPR/C/GBR/7, para 11.

¹⁸⁵ Police Scotland, 'Management Information National Stop and Search Database: Quarterly Report' (May 2022) 16 <[stopsearch-external-mi-report-apr-mar-2021_22-data.pdf \(scotland.police.uk\)](#)> last accessed 23 January 2024.

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²⁷⁰ “Relates to” requires more than a merely loose, incidental or consequential connection with a reserved matter (*Martin v Most* [2010] UKSC 10; *Imperial Tobacco v Lord Advocate* [2012] UKSC 61)

²⁷¹ Sch.5, Pt1, para 7(2)(a)

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