

**Human Rights Consortium Scotland**  
**Response to the Scottish Government’s “A Human Rights Bill for Scotland:  
[consultation](#)”**  
**October 2023**

**With Support from:**

1. Action for ME
2. AdvoCard
3. Age Scotland
4. C-Change Scotland
5. CEMVO Scotland
6. Clan Childlaw
7. Community Transport Association
8. Corra Foundation
9. Dumfries and Galloway Advocacy Service
10. Empower Women for Change
11. Environmental Rights Centre Scotland (ERCS)
12. Feniks
13. Glasgow Disability Alliance (GDA)
14. Grampian Regional Equality Council (GREC)
15. Hospice UK
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17. Include Me
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21. LGBT Youth Scotland
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## **About us**

Human Rights Consortium Scotland is the Scottish civil society network to defend and promote human rights. Our mission is to create a society where human rights are respected, upheld, and realised for all in Scotland. We work to enable a strong collective civil society voice on human rights and to facilitate civil society to have the understanding and resources that it needs to embed human rights in all its work.

## **General Comments**

We strongly support the incorporation of all of our international human rights treaties and the right to a healthy environment into Scots law. We recognise that this builds on the UNCRC Incorporation Bill, to bring all of our rights – economic, social, cultural, environmental and group rights - into law alongside the rights that are already in law through the Human Rights Act 1998 and Scotland Act 1998. This Scottish Human Rights Bill has the potential to be transformative through making all of our rights binding, not guiding. Building a framework of strong rights and duties, with access to justice and accountability, will lead to better rights-based decision-making and people being able to ‘name and claim’ their human rights.

We emphasise that better rights protection and realisation is sorely needed. Too many people across Scotland live everyday with violations of their fundamental human rights, and they are all too often powerless to do anything about it. People’s human rights are not taken seriously, and their voices are not heard.

Therefore, we strongly welcome the long-awaited consultation on this Bill as a significant step towards introduction and implementation of enhanced human rights law in Scotland.

## **Must do better**

As outlined below, we welcome many of the Bill proposals. However, we are concerned that the proposals also need to be significantly improved. In particular, we highlight:

- The model of incorporation needs to place the stronger duty to comply on as many rights as possible. Where this is restricted by devolution limits, the Scottish Government needs to be open and transparent to assure all that the Bill goes as far as it can within these constraints. We emphasise that the duty to comply must apply to standalone rights within CRPD.
- The section and questions in the consultation on access to justice and implementation are disappointing. The status quo on access to justice is not sufficient – this Bill must include measures to make justice more accessible, affordable, effective, timely and supportive. This includes giving the right to effective remedy in the Bill.
- Implementation is not something to be left until after the Bill is passed. Proper planning, resourcing and attention needs to be given to implementation planning now, so that this Bill does not just “sit on the shelf”. Planning and clarity around resourcing, both to enable the change that this Bill requires, but

also through human rights budgeting in its implementation, needs to be a major part of the Bill's development.

- Timescales need to be stated in the Bill. People are living with serious infringements of their human rights now, and it would not be acceptable for full implementation to be at an undefined future point.

### **The consultation process**

The Lived Experience Board provided in-depth advice on how best to carry out a human rights-based consultation, only some of which was implemented such as availability of different formats and a child-friendly version. However, we flag that it was still necessary to “translate” much of the consultation and more formats were required. We flag in particular, that publishing the consultation just before the summer holidays meant that the four-month timescale for the consultation was, in effect, reduced to two months. We welcome assurance from the Scottish Government that future consultations will not include holiday periods within their total consultation period, particularly where it is imperative that the Government hears from people and communities whose rights are most at risk.

### **Questions**

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

The proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill is essential. Dignity stands as a fundamental and universal principle of human rights. It asserts that every individual possesses inherent worth and value, and as such, government actions and policies must uphold this principle by not treating any person as having lesser value.

However, courts should not just be allowed but should be required to consider dignity when interpreting these rights. This mandatory consideration will provide a consistent safeguard for individuals' dignity and reinforce the principle in legal practice.

Moreover, to promote a shared and consistent understanding of human rights principles within the Bill, we recommend the inclusion of a purpose clause that explicitly mentions dignity along with other key human rights principles such as universality, participation, and other relevant principles. Such a clause would enhance public awareness and contribute to building a culture of human rights, thereby guarding against narrow duty compliance, and ensuring a comprehensive approach to protecting human dignity.

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

We agree with the proposal to make dignity a key threshold for defining and delivering Minimum Core Obligations (MCOs) within the Bill. Dignity, as a core

principle of human rights, plays a pivotal role in ensuring that every person's inherent worth and value is respected and protected.

The concept of dignity as the key threshold for MCOs implies that, if these obligations are in place for everyone, at all times, then no one's inherent dignity should be violated. This approach aligns closely with the principles of human rights and reinforces the commitment to upholding the dignity of all individuals, irrespective of their circumstances.

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

We fully support the Scottish Government's approach to include international law, materials, and mechanisms within the proposed interpretative provision of the Human Rights Bill. This aligns with the bill's aim of incorporating established international human rights standards rather than creating new Scottish rights. The existing international framework, including UN General Comments and recommendations, provides a strong foundation for interpreting and applying human rights in practice. We further note that including this provision will help to enable clarity of the law, and for the Bill to align well with the UNCRC Incorporation Bill.

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

We support the incorporation of ICESCR, CEDAW, CRPD, CERD and the right to a healthy environment into Scots law. This is a significant step forwards in the advancement of human rights in Scotland and will provide a robust framework that will enable people to name and claim their rights, will embed rights into decision-making by public bodies, and will lead to the progressive realisation of all of our rights for everyone.

We support the proposal that all four treaties should be reproduced in the Bill while eliminating any text related to areas reserved for the UK Parliament.

It is essential that the Bill takes a maximalist approach to include as many rights as possible within the Bill. This includes incorporating aspects of any right that fall within devolution, even if the whole right does not. The Scottish Government should, in advance of the Bill being introduced to Parliament, engage transparently around decisions related to going as far as possible within devolved limits in incorporation of ESCR. The Scottish Government should publish a paper outlining which rights fall within devolved or reserved competence and the rationale for their approach. Openness about this complex but necessary decision-making will help to provide confidence and assurance that the Bill is going as far as possible within devolved limits.

Furthermore, we urge the Scottish Government to engage at an early stage with the UK Government around the Bill to minimise any risk of it being challenged in court.

We strongly support the recognition and inclusion of the right to a healthy environment in the Bill.

We support the establishment of a procedural duty, on all four treaties and the right to a healthy environment. This procedural duty should be the duty to have due regard – the reasons for this are discussed further under Q20.

We agree with the proposal to place a duty to comply on public bodies and relevant private actors, and that this duty should include the delivery of Minimum Core Obligations (MCOs) and demonstration of progressive realisation of the rights. Progressive realisation should include the use of maximum available resources and non-retrogression.

Importantly, we consider that the framework should include both the duty to have due regard and a duty to comply - the duty to comply should not replace the duty to have due regard but should complement it.

Incorporating all the rights within the four treaties to the greatest extent possible within devolution is crucial. We are very concerned about the proposal to not place the stronger duty to comply on the special protection treaties. As the consultation itself acknowledges, the duty to comply has the potential to be “transformative”, and it is this duty that can enable people to name and claim these rights. Any decision to limit incorporation of the special protection treaties to only a procedural duty is a significant departure from the detail and intent of the National Taskforce recommendations, and from full incorporation. We fully acknowledge the complexity of decision-making around the limits of devolution and that this Bill must be careful to stay within those devolved limits. Therefore, it is essential that the Scottish Government is open and transparent in their decision-making around constitutional limits to assure all that the Bill goes as far as possible in placing a stronger compliance duty on the group treaties.

The Scottish Human Rights Bill needs to bring significant improvements to the protection and realisation of disabled people’s rights. All too often, disabled people live with daily, serious infringements of their human rights. For example, many disabled people are stuck in bed or in the house, with inadequate care, and unable to participate in cultural, social and employment opportunities; many disabled people are treated with a lack of dignity and respect by public bodies, and their views are not listened to; many disabled people are stuck in hospital and institutions far longer than need be because of a lack of care, support and housing; disabled people often wait for weeks, if not months or years, for suitable housing; disabled people are too often excluded from education and have very limited access to choice of healthy food.

This Bill establishes an overarching legal framework for human rights that will underpin the advancement of human rights for at least a generation - it is vital that this framework fully includes rights for disabled people. The proposed model of incorporation, by limiting CRPD rights to only a procedural duty, falls short of doing so.

The proposed model of incorporation treats all three special protection treaties as the same, but we emphasise that CRPD contains significant, substantive rights for disabled people that are not found with ICESCR. These rights are of crucial importance to respect for the dignity of disabled people. If these standalone rights are to be fully realised for disabled people, public bodies must have the stronger duty to comply. We suggest that consideration needs to be given to the following CRPD rights, amongst others:

- Article 5 Equality and non-discrimination including the requirement to make “reasonable accommodation”.
- Article 9 The right to accessibility of the physical environment, transportation, information and communication, and services open to the public.
- Article 19 The right to live independently and be included in the community.
- Article 17 The right to respect for physical and mental integrity.
- Article 11 Situations of risk.
- Article 12 Equal recognition before the law.
- Article 26 Habilitation and Rehabilitation.
- Article 20 Personal mobility.
- Article 13 Access to justice.
- Article 14 Liberty and security of the person.
- Article 16 Freedom from exploitation.
- Article 7(3) Participation of disabled children.
- Article 24 Inclusive education.

We urge the Scottish Government to put in place a duty to comply with all CRPD substantive rights within devolved competence.

We support the inclusion of an equality provision in the Bill to ensure equal access to rights for everyone and a non-discrimination clause. As outlined further in Q18, LGBTI, older, and Care Experienced people should be named, and further consideration given to naming other groups such as people affected by addiction.

We agree that special protection treaties should also be considered when interpreting and delivering ICESCR rights and the right to a healthy environment to ensure a coherent and effective framework.

We support the inclusion of an interpretative provision that aligns rights with international standards, mirroring those listed in the UNCRC Incorporation Bill, such as General Comments, concluding observations, and other international and comparative law.

We note that the Scottish Parliament reconsideration of the UNCRC Incorporation Bill has begun, and amendments are required to ensure that this Bill is within devolved competence. The Cabinet Secretary for Social Justice has confirmed consideration of an audit of legislation to identify any that is outside the scope of the UNCRC Bill or is not compliant. Given similar devolution limitations will apply to this wider human rights bill, a mirroring audit of wider legislation that impacts rights in the Bill will be required and should be planned for alongside wider Bill implementation.



**Question 5: Are there any rights in the equality treaties which you think should be treated differently? If so, please identify these, explain why and how this could be achieved.**

The Scottish Government's classification of CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women), CRPD (Convention on the Rights of Persons with Disabilities), and ICERD (International Convention on the Elimination of All Forms of Racial Discrimination) as “equality treaties” is somewhat limiting. We prefer to refer to them as “special protection treaties” due to their unique focus and significance.

Incorporating all the rights within these treaties to the greatest extent possible within devolution is crucial. We are very concerned about the proposal to not place the stronger duty to comply on the special protection treaties. As the consultation itself acknowledges, the duty to comply has the potential to be “transformative”, and it is this duty that can enable people to name and claim these rights. Any decision to limit incorporation of the special protection treaties to only a procedural duty is a significant departure from the detail and intent of the National Taskforce recommendations, and from full incorporation.

We fully acknowledge the complexity of decision-making around devolved competence and that this Bill must be careful to stay within those devolved limits. Therefore, it is essential that the Scottish Government is open and transparent in their decision-making around constitutional limits to assure all that the Bill goes as far as possible in placing a stronger compliance duty on the special protection treaties.

The Scottish Human Rights Bill needs to bring significant improvements to the protection and realisation of disabled people’s rights. All too often, disabled people live with daily, serious infringements of their human rights. For example, amongst other rights violations, many disabled people are stuck in bed or in the house, with inadequate care, and unable to participate in cultural, social and employment opportunities; many disabled people are treated with a lack of dignity and respect by public bodies, and their views are not listened to; many disabled people are stuck in hospital and institutions far longer than need be because of a lack of care, support and housing; disabled people often wait for weeks, if not months or years, for suitable housing; disabled people are too often excluded from education, and have very limited access to choice of healthy food.

This Bill establishes an overarching legal framework for human rights that will underpin the advancement of human rights for at least a generation - it is vital then that this framework fully includes and protects the rights of disabled people. The proposed model of incorporation, by limiting CRPD rights to only a procedural duty, falls short of doing so.

The proposed model of incorporation treats all three special protection treaties as the same, but they are not. We emphasise that CRPD contains significant, substantive rights for disabled people that are not found with ICESCR. These rights are of

crucial importance to respect for the dignity of disabled people. If these standalone rights are to be fully realised for disabled people, public bodies must have the stronger duty to comply. We suggest that consideration needs to be given to the following CRPD rights, amongst others:

- Article 5 Equality and non-discrimination including the requirement to make “reasonable accommodation”.
- Article 9 The right to accessibility of the physical environment, transportation, information and communication, and services open to the public.
- Article 19 The right to live independently and be included in the community.
- Article 17 The right to respect for physical and mental integrity.
- Article 11 Situations of risk.
- Article 12 Equal recognition before the law.
- Article 26 Habilitation and Rehabilitation.
- Article 20 Personal mobility.
- Article 13 Access to justice.
- Article 14 Liberty and security of the person.
- Article 16 Freedom from exploitation.
- Article 7(3) Participation of disabled children.
- Article 24 Inclusive education.

We urge the Scottish Government to put in place both a procedural duty and a duty to comply on all CRPD substantive rights within devolved competence. Without this enhancement, the Scottish Government will not fully realise its commitment to implement Taskforce recommendations and deliver human rights for disabled people.

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

How the Scottish Government chooses to define the right to the environment is of paramount importance, as it will shape the scope, implementation, and interpretation of this right for people in Scotland. The Aarhus Convention, to which the UK is a signatory, provides a robust and comprehensive framework for environmental rights. We strongly endorse the use of the Aarhus definition of the environment. We particularly emphasise the relevance of the Convention's Preamble, Article 1, and Article 2 in defining the environment. This definition, which encompasses ecosystems and the biosphere, aligns with the holistic nature of environmental protection and preservation.

Moreover, the Aarhus Convention's definition is well-established and widely recognised internationally. By adopting it within the Bill, Scotland can benefit from the clarity and precision it offers, ensuring that the right to a healthy environment is effectively upheld and exercised by its citizens. This approach will provide a solid foundation for the protection and enjoyment of environmental rights in Scotland.



**Question 7: If you disagree, please explain why.**

Not applicable.

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

We agree with the proposed formulation of the substantive aspects of the right. These aspects, including clean air, a safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems, are essential components of a comprehensive right to a healthy environment.

It is crucial to recognise these six substantive features as both interdependent and in need of standalone protections, as recommended by the UN Special Rapporteur on Human Rights and the Environment. However, we question the exclusion of adequate sanitation under the category of safe and sufficient water, considering the systemic issues of sewage pollution and wastewater treatment in Scotland.

Regarding the procedural element of the right, we fully support the alignment with Aarhus requirements, encompassing access to environmental information, public participation in environmental decision-making, access to justice, and effective remedies. We commend the Scottish Government's acknowledgment of its current breach of Article 9(4) of the Aarhus Convention and its commitment to establishing a clear, transparent, and consistent framework to meet the Convention's recommendations by the deadline of 1 October 2024.

We highlight that the Aarhus Convention Compliance Committee has repeatedly found the UK in breach of Article 9(4) of the Convention, emphasising the need for access to justice that is "fair, equitable, timely, and not prohibitively expensive". The Scottish Government must now demonstrate how it will implement the Convention's recommendations to achieve compliance by the given deadline. Proposed reforms should include a clear timetable and route map for necessary changes, such as an overhaul of the court costs regime, removal of court fees from Sherriff courts, amendments to regulations, a review of planning permission processes, and procedural reforms in Sherriff courts related to litter cases.

**Question 9: Do you agree or disagree with our proposed approach to the protection of healthy and sustainable food as part of the incorporation of the right to adequate food in ICESCR, rather than inclusion as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.**

We strongly disagree with the Scottish Government's proposed approach to exclude the right to food as an aspect of the right to a healthy environment.

Over the past five decades, the harm inflicted by the global food system on nature, climate, and public health has become increasingly severe, widespread, and evident. Environmental damage stemming from the food supply chain includes biodiversity

loss and land use changes due to intensive farming, impacts on water supplies, the use of harmful pesticides and fertilisers, emissions from transportation, waste generated from packaging, and food wastage.

It is essential to incorporate both the economic and social right to food concerning aspects such as nutrition, access, affordability, adequacy, and culture, and the right to healthy and sustainably produced food as a constituent part of broader environmental health. Both interpretations are necessary and distinct elements of the right to food, and, since the consultation acknowledges the merit of defining the right to water under both ICESCR and the right to a healthy environment, it would be inconsistent to exclude the right to food. Both are crucial components for a healthy environment.

In summary, we firmly believe that the right to healthy and sustainably produced food should be incorporated as part of a right to a healthy environment.

**Question 10: Do you agree or disagree with our proposed approach to including safe and sufficient water as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.**

We agree that in addition to incorporating the human right to water through ICESCR, including “safe and sufficient water” as an integral component of the right to a healthy environment is essential.

This approach rightly recognises both the right to water for human consumption and the broader concept of safe and sufficient water as a critical element of environmental health. It aligns with the need to address both the human right to water and the environmental imperative for clean and adequate water sources.

Furthermore, the definition should encompass adequate sanitation. This is particularly important given the persistent issues of sewage pollution in Scotland. The concept of “safe and sufficient” water should be broadly conceived to encompass the restoration of the ecosystem health of Scotland's inland waterways, rivers, and lochs. This approach should encompass tackling issues such as wastewater and pollution stemming from sewage, agricultural discharge, and other pollution sources, as well as addressing the impacts of climate change on water availability. Measures for enhanced water monitoring, testing, and robust enforcement against polluters should also be integral to this approach.

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

In considering additional elements to be understood as aspects of the right to a healthy environment, it is imperative to implement dedicated reforms with clearly defined timelines to ensure the full enforceability of the right to a healthy environment.

Recognising the interdependence of the substantive features of the right, each of these features should be granted standalone protections. Expert guidance and international best practices should inform their definition, adhering to the highest standards. Adequate enforcement mechanisms should be in place to guarantee compliance.

Advocacy for the inclusion of the five environmental principles when establishing definitions and standards for the substantive features is put forth. This approach fosters policy coherence and coordination across all sectors. The environmental principles encompass integrating environmental protection into policymaking, applying precautionary measures, taking preventive actions, rectifying issues at their source, and ensuring that those responsible for pollution bear the associated costs.

There should be emphasis placed on the importance of rights being enforceable within a legal framework, with appropriate mechanisms in place to hold public bodies and polluters accountable. A dedicated environmental court with comprehensive jurisdiction should be established to enhance access to justice, address existing fragmentation in routes to remedy, and cultivate judicial expertise to improve effectiveness and efficiency.

**Question 12: Given that the Human Rights Act 1998 is protected from modification under the Scotland Act 1998, how do you think we can best signal that the Human Rights Act (and civil and political rights) form a core pillar of human rights law in Scotland?**

For clear understanding and full implementation, and to ensure that the whole of Scotland's human rights framework works well together, we recommend that the Human Rights Act 1998 (HRA), civil and political rights, and the UNCRC be fully embedded into capacity building and awareness-raising plans related to this Bill. This would be effective in providing clarity for duty bearers, as well as for rights-holders in understanding and using all of their human rights. We note that, whilst there has been some improvement in public bodies considering their duty not to act incompatibly under the Human Rights Act 1998 in recent years<sup>1</sup>, much more could be done to improve this. Building understanding and a culture of human rights should be about all of our rights in law – those already incorporated through the Human Rights Act, those in the UNCRC Incorporation Bill, and those included in this Bill.

We note the Scottish Government's proposal not to include the Convention Against Torture in this Bill. The UN Convention Against Torture (CAT), Article 14 sets out that: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible".

The UN Committee Against Torture General Comment No. 3 (2012) states that: "Rehabilitation should aim to restore, as far as possible, torture victims'

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<sup>1</sup> HRCS FOI report

independence, physical, mental, social and vocational ability, as well as their full inclusion and participation in society”.

Implementation of CAT requires rehabilitation services to be available as a court remedy, but consideration also needs to be given to adequate provision of rehabilitation services in Scotland. Currently, demand for support services for survivors of torture in Scotland far outweighs available provision. For example, Freedom from Torture services in Glasgow which provides psychological support to torture survivors were only able to provide support to 59% of referrals in 2019 and 54% of referrals in 2020.

We urge the Scottish Government to consider how best to ensure that rehabilitation services are available as a remedy under this Bill.

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

Incorporating participation into the framework of the proposed Human Rights Bill for Scotland is a crucial aspect of ensuring that the bill aligns with the principles of human rights and effectively safeguards the rights of individuals and groups.

The bill, as proposed by the Scottish Government, will incorporate ICESCR which inherently includes the right to participation as an integral element of its implementation. Moreover, participation is a key component of the implementation of special protection treaties.

Participation should be a core requirement at every part of a Scottish human rights framework. This includes:

- Participation should be explicitly designated as a core principle within the purpose clause of the bill. This underscores the fundamental importance of participation in achieving the bill's objectives.
- The Human Rights Scheme should include a requirement for Scottish Ministers to consult with individuals and groups whose rights are most at risk. This consultation process should be robust and comprehensive, ensuring that their voices are heard and considered in decision-making.
- Individuals and groups whose rights are most at risk should be engaged in defining Minimum Core Obligations.
- The SHRC should have a clear duty to embed the participation of people whose rights are most at risk in all aspects of its work, especially concerning its monitoring role. This will strengthen the SHRC's effectiveness in promoting and protecting human rights.
- Mirroring the UNCRC Bill, courts should be mandated to consider the views and perspectives of complainants when determining remedies.
- Capacity building for public bodies should include effective approaches to participation of people whose rights are most at risk.

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

We agree with the proposed approach of including an equality provision in the Bill.

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

LGBTI people and older people should be specifically named within the non-discrimination aspect of the equality provision. This explicit recognition in the Bill is crucial because it highlights the unique considerations required to address barriers to their rights effectively and ensures that these groups have visibility within the human rights framework.

Care Experienced people experience lifelong discrimination related to rights in the Bill. This was recognised in The Promise that stated that: “older care experienced people must have a right to access supportive, caring services for as long as they require them”. Dr David Scott writes:

*“Inequalities for Care Experienced people stem not only from pre-existing disadvantages which may bring them into contact with the care system, but also as a result of direct and indirect discrimination in the practices of public authorities. Their specific disadvantage needs specific recognition (...) Inclusion in the text of the non-discrimination provision of the Bill would offer the strongest protection”<sup>2</sup>.*

It is important to embed particular consideration of Care Experienced people rights throughout the Scottish human rights framework, recognising that they are a group whose rights are most at risk and in need of specific protection. Therefore, the equality clause should include naming Care Experienced people.

Additionally, there should be careful consideration, in discussions with people with lived experience, about naming other groups in the equality provision such as people affected by addiction to alcohol and drugs.

**Question 16: Do you agree or disagree that the use of ‘other status’ in the equality provision would sufficiently protect the rights of LGBTI and older people?**

As above, we believe that the use of “other status” in the equality provision would not sufficiently protect the rights of LGBTI, older and Care Experienced people.

It is essential to ensure that any “other status” provision is complemented by clear guidance to public bodies for its effective implementation. The Scottish Government should consider attaching a requirement for Scottish Ministers to publish guidance regarding the interpretation of “other status”. This guidance should specify the

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<sup>2</sup> Scott, D Incorporating International Human Rights: The protection of Care Experienced People’s Rights in the Scottish Human Rights Bill, 2023 – link to be added after publication

evidence and criteria that public bodies should apply when considering other groups whose rights may be at risk.

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

Not applicable.

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

Yes, as outlined above, the bill's framework should do something additional for LGBTI and older people by specifically naming them within the equality provision.

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

We agree that the duties outlined in the Bill should apply to as many public bodies as possible within devolved competence.

We highlight that it is often challenging for individuals to discern whether the public body they are interacting with is a Scottish or UK public authority. Therefore, consideration should be given to ensuring clarity for rights-holders around duty-bearers under this Bill.

Furthermore, we emphasise that the most effective and comprehensive way for all of our international human rights to be incorporated is for this to happen at a UK level, and thus would fully include all areas of law and policy affecting people's lives. We urge the Scottish Government to engage with the UK Government around this, and specifically to engage around the implementation of international human rights across rights-holder interactions with UK public bodies and resolve any potential inconsistencies.

We agree that the duties should apply to all private bodies when carrying out public functions, as they too play a significant role in upholding human rights. We agree that this should mirror the approach taken by the UNCRC Incorporation Bill.

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

We strongly support the inclusion of an initial procedural duty in the Bill, which is intended to embed human rights considerations into decision-making processes. This procedural duty is a crucial step in ensuring that public bodies take human rights into account when making decisions, setting priorities, and delivering services. It is particularly essential in addressing the barriers faced by specific groups in accessing their rights, such as applying gender-based budgeting or enhancing



access to services for individuals whose first language is not English. Public bodies require time to adapt and enhance their capacity on human rights, and this duty will facilitate this transition effectively.

This procedural duty should be the duty to have due regard. We note that this reflects the findings of the First Minister's Advisory Group on Human Rights, and the report of the National Taskforce on Human Rights Leadership. The duty to have due regard is already an established principle in the Public Sector Equality Duty and the Fairer Scotland Duty. We note from guidance on the latter that this means there must be active consideration:

*“To 'have due regard' means that, in making any strategic decision, a public authority subject to the Duty must actively consider, with an open mind, whether there are opportunities to reduce inequalities of outcome caused by socio-economic disadvantage. This is not a tick box exercise. Serious consideration must be given – and as early in the decision-making process as possible”<sup>3</sup>.*

Due regard is well understood and has been clearly interpreted by courts regarding the Public Sector Equality Duty. For example:

*“[T]he duty [to have due regard] must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of 'ticking boxes’”<sup>4</sup>.*

We consider that the duty to have due regard is the strongest, clearest, and well-understood procedural duty. Given the importance of legal certainty and clarity for all stakeholders, including rights-holders, we recommend that the Bill place a duty to have due regard on relevant public bodies and private actors.

The duty to have due regard (the procedural duty) should continue to apply after the full duty to comply is in effect. This ensures that human rights considerations remain an integral part of decision-making, and public bodies continue to proactively embed human rights in their processes. The procedural duty to have due regard complements the duty to comply, ensuring that human rights are incorporated holistically and proactively into decision-making processes.

Timescales for implementation should be stated in the Bill. The timescale for the commencement of this procedural duty should not exceed six months from the date of Royal Assent. This gives sufficient time for the preparation of guidance but also does not mean any unnecessary delay in starting to embed these rights across duty-bearers' work. Any longer period denies the serious rights infringements that people are living with every day. Bringing in this procedural duty will also help to focus public body attention and resources on the change needed to comply with the rights.

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

<sup>3</sup> Fairer Scotland Duty: Interim guidance for public bodies: <https://www.gov.scot/publications/fairer-scotland-duty-interim-guidance-public-bodies/pages/2/>

<sup>4</sup> R (Brown) v Secretary of State for Work and Pensions [2008] EWCA 3158 (Admin), para 92. As quoted in [DueRegardJune2015.pdf \(equallyours.org.uk\)](http://www.equallyours.org.uk/Files/2015/06/06/DueRegardJune2015.pdf)

We agree with applying the proposed duty to comply with the rights on all public bodies, and relevant private entities. This duty is essential as it provides a robust enforcement mechanism that enables individuals to assert their rights effectively. All too often human rights are treated as only nice principles or rhetoric, and do not have any meaningful impact on government and public body decision-making. Including this “teeth” duty will mean that everyone’s human rights are taken seriously, and public bodies will be directed to ensure that they deliver human rights outcomes for all. By ensuring that these rights are enforceable in court, individuals and communities who have no other way to be heard can raise their voice through the judicial process. This duty to comply will ensure that government and government bodies can be held to account on meeting their human rights obligations.

We agree that the duty to comply should comprise two critical components: the delivery of Minimum Core Obligations, which necessitates the immediate and consistent fulfilment of baseline rights for all individuals, all the time; secondly, the progressive realisation of rights, which compels public bodies to take deliberate steps towards realising these rights by utilising maximum available resources, while ensuring non-retrogression.

To ensure clarity and effectiveness, guidance provided to public authorities should include guidance around demonstration of progressive realisation, use of maximum available resources and non-retrogression.

We also recommend that the duty to comply be implemented within a specified period of no more than two years from the Bill's commencement, and this should be stated in the Bill. This is more than enough time for public bodies to adapt their practices, build capacity around human rights, identify concrete steps for progressive realisation of rights, and deliver on MCOs – any longer would be unnecessary delay in the Bill’s full implementation, whilst individuals and communities live with serious rights infringements every day.

As outlined in Q4 and Q8, we are very concerned about the proposal to not put a duty to comply with standalone, substantive rights within CRPD. We urge the Scottish Government to do so to properly recognise and protect the full range of disabled people’s human rights.

**Question 22: Do you think certain public authorities should be required to report on what actions they are planning to take, and what actions they have taken, to meet duties set out in the Bill?**

Yes, we agree that public authorities should be obligated to periodically report on what actions they are planning to take, and what actions they have taken, to meet duties set out in the Bill. This reporting requirement is crucial for ensuring transparency and accountability in the implementation of human rights.

Furthermore, it should be a requirement that public bodies consult with people whose rights are most at risk when developing these reports. These reports should not simply be a list of all activity but be about identifying gaps in rights realisation and

setting out the action they are taking to address these gaps. Public bodies should be required to publish these reports, with a specific focus on ensuring that the content of these reports is accessible and meaningful.

As discussed further in our answer to Q31, the Scottish Human Rights Commission should have the power to monitor and scrutinise these public authority reports, and give recommendations that must be complied with.

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

The proposed duty to report should be aligned with existing reporting obligations on public authorities to ensure consistency and efficiency. It is crucial that this reporting requirement complements and strengthens other public body reporting duties to avoid duplication, streamline the reporting process and strengthen accountability.

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

**Question 24: What are your views on the need to demonstrate compliance with economic, social and cultural rights, as well as the right to a healthy environment, via MCOs and progressive realisation?**

Our response aligns with our previous comments in Question 21. We strongly support the need to show compliance with economic, social, and cultural rights, the right to a healthy environment, and as many rights within the special protection treaties as possible within devolved competence, through the delivery of Minimum Core Obligations (MCOs) and the demonstration of progressive realisation.

MCOs are the basic level of rights protection that should be immediately guaranteed for everyone, without exception, all of the time. These obligations create an absolute baseline for providing essential subsistence rights, below which no individual should fall. Public bodies must be held accountable if they fail to deliver these MCOs for any individual or group, through legal means if necessary.

Furthermore, the principle of progressive realisation requires that public bodies not only meet the minimum requirements but also actively take targeted and concrete steps to continually enhance the realisation of people's rights. This includes using their maximum available resources to ensure that rights are progressively achieved and preventing any backward steps in rights implementation.

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

We agree with the proposal that the right to a healthy environment should fall under the same duties as economic, social, and cultural rights. This alignment ensures that

the duty to comply, which includes delivering Minimum Core Obligations (MCOs) and progressively realising rights, applies consistently to all these rights.

Economic, social, and cultural rights are closely linked with the right to a healthy environment because a clean and sustainable environment is essential for the enjoyment of these rights. Bringing together these rights under the same duties simplifies the implementation process, promotes comprehensive rights protection, and underscores the importance of safeguarding environmental rights alongside other fundamental human rights. It also simplifies the monitoring and enforcement mechanisms, facilitating a more effective and cohesive approach to upholding these critical rights.

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

We agree with the proposed duty to require Scottish Ministers to publish a Human Rights Scheme. This scheme will serve as a vital framework, listing key requirements related to the implementation of rights outlined in the Bill. Scottish Ministers will be obligated to report on their actions and progress concerning these requirements.

The concept of a Human Rights Scheme is similar to the Children's Rights Scheme outlined in the United Nations Convention on the Rights of the Child (UNCRC) Bill. Such a scheme plays a pivotal role in ensuring accountability and transparency in the implementation of human rights. It provides a structured framework for tracking and reporting on the government's efforts to fulfil its obligations under the Bill.

### **Question 27: What are your views on the most effective ways of supporting advocacy and/or advice services to help rights-holders realise their rights under the Bill?**

#### **Advocacy services**

Independent advocacy is framed as part of Scots law and policy in a number of different ways, such as:

- A right to (independent) advocacy for particular groups, e.g., for a disabled person accessing social security entitlements as set out in section 10 of the Social Security (Scotland) Act 2018.
- A duty to provide advocacy services e.g., duty on health boards and local authorities to secure the availability of advocacy services for those with a mental disorder as set out in Mental Health (Care & Treatment) (Scotland) Act 2003.
- A duty to provide information about available advocacy services e.g., to children referred to a Children's Hearings as set out in the Children's Hearings (Scotland) Act 2011.

- The right for views expressed by advocates to be taken account of in decision-making e.g., Adults with Incapacity Act 2000.
- A duty to allow advocates to take part in discussions or make representations on an individual's request e.g., Education (Additional Support for Learning) (Scotland) Act 2004.
- A duty to ensure that advocacy support is available and free of charge when someone is going to a Tribunal or Hearing e.g. in the Education (Additional Support for Learning) (Scotland) Act 2009 or Children's Hearings (Scotland) Act 2011.

Advocacy services can enable people to navigate the system, understand their rights, and feel supported as they seek remedy. Many people with lived experience of rights infringements have advised the Scottish Government about the importance of independent advocacy services for being able to participate in decision-making and being able to access justice. We highlight the advice of the Lived Experience Board around the emotional toll and exhaustion of fighting for your rights, especially when these infringements are daily and ongoing over long periods of time. The Board emphasised the importance of advocacy services being available to access human rights.

Anyone could experience an infringement of their civil, political, economic, social, cultural, and environmental rights, and anyone could need independent advocacy services in order to participate in decision-making around these rights and to access justice. In Scotland's enhanced human rights framework, independent advocacy should not only be available to those in specific circumstances or with particular characteristics. Instead, this Bill should include a right to independent advocacy for all, and this should be accompanied by a duty on relevant duty-bearers to provide the service and to provide information about the service to rights-holders. Independent advocacy must be a core part of any non-court and court routes to remedy – this should mean that the views of advocates should be taken into account by the SPSO and courts, and individuals should be given information about available independent advocacy services at every stage of routes to justice.

Independent advocacy services must be resourced in such a way as to be available to all those who need it for as long as they need it. The Human Rights Scheme should include reporting on the availability of independent advocacy for all who need it.

### **Advice services**

Scotland has a dearth of human rights advice. Very often, when people are unsure as to what to do to challenge a violation of their human rights, there is simply no one for them to ask. The SHRC is not able to give individual advice. The EHRC has a helpline, but this is national and not in-depth, and nor does the EHRC have responsibility for human rights in devolved areas. Many voluntary sector advice services can give ad-hoc advice generally related to human rights but not in detail as to how to access justice. People speak about being given confusing or inaccurate advice or being given partial advice which is unhelpful. They can be sent from pillar to post as different agencies try to identify others who can provide the level of detail

that the individual needs. This is especially true when people do not experience one single one-off infringement of their human rights but instead face myriad, often times complex, picture of human rights issues in their lives, and those of their family.

Scotland needs a step-change in the readily available and accessible advice on human rights – anything less will leave human rights justice out of reach to many if not most, people.

There should be a substantial enhancement in the provision of rights advice in Scotland. A National Network for Human Rights Education, Information, and Advice should be co-produced and resourced. This Network should serve as a comprehensive resource for individuals seeking information and advice about their rights – see further discussion at Q43.

### **More on access to justice**

The Lived Experience Board advised the Scottish Government that “it is incredibly difficult” to access justice. Our current system simply does not work for many, if not most, people, and therefore this Bill needs to bring significant improvement to our human rights justice system. The consultation regrettably does not include questions about several key aspects of improvements needed to ensure that people can access justice and remedy on rights infringements.

Reflecting international human rights principles, the Bill should establish a right to remedy that is effective, affordable, accessible, timely, and person-centred. This will ensure that being able to access remedy is a foundational pillar of our human rights framework.

The Bill should include measures to make justice affordable. Specifically, the Bill should:

- Remove court fees for all equality and human rights cases. A core principle of the international human rights framework is that access to justice and accountability on rights should not be affected by your ability to pay. There should be no possibility of human rights legal protections being more accessible for those who are wealthy, than those who are not. We note that court fees are one aspect of a whole system of costs and help with costs that can hinder or enable access to justice. We note too that charging court fees sits in stark contrast to the approach taken by Scottish tribunals such as Additional Support Needs Tribunals and Mental Health Tribunals that do not charge fees. We question the rationale that recognises some routes to justice as supported by the public purse, whilst others are not.

Equality and human rights cases are self-evidently in the public interest. It is therefore not appropriate for Full Cost Recovery to apply to human rights cases, particularly given the importance of courts playing their full role in enforcing and interpreting rights under this Bill. Court fees should also be removed for all cases brought by the SHRC or CYPSCS.

- The Bill should introduce Qualified One-Way Cost Shifting (QOCS). QOCS would address the financial disparities often present in legal disputes



involving human rights violations, leveling the playing field by protecting unsuccessful claimants from shouldering the defendant's legal costs. This provision alleviates the unpredictability of litigation expenses, ensuring individuals and groups are not deterred from seeking justice. QOCS also safeguards awarded compensation for successful claimants, rebalances power dynamics between parties, and empowers those with limited financial resources to pursue redress, ultimately enhancing access to justice for human rights cases in Scotland.

- The lack of any significant focus on legal aid reform in the consultation, and in the recent Programme for Government, is deeply regrettable. Legal aid is fundamental to guaranteeing equal access to justice for marginalised people and those who live in poverty, the very people for whom the rights in this Bill are particularly at risk. However, it is becoming increasingly difficult for people to find a lawyer who will take legal aid cases. We note Law Society research found there were 3,896 civil legal aid providers started legal aid work across all areas of law in 2011, and this had dropped to 2,101 by 2022<sup>5</sup>. Moreover, the complexity of human rights cases and the need for legal expertise make legal aid crucial in navigating routes to human rights justice, and the neglect of this reform could deter potential litigants from pursuing human rights cases. An effective legal aid system that works for people is crucial for the effectiveness of this Bill - failing to address this issue will ultimately jeopardise the bill's objectives.

This Bill should include measures to make justice timely. The time limit for judicial review is currently only 3 months. This is barely enough time to allow someone to find a lawyer who will take their case, get legal advice, and prepare their case. This is particularly the case because rights cases can often be complex or require specialist advice, and people are living with the consequences of often very serious, ongoing impacts of rights infringements. The Bill should mirror the UNCRC Bill in allowing for a one-year timeframe for taking cases (after a person's 18th birthday) with the possibility of courts extending this period based on equitable considerations.

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

We agree that complaint handling by public bodies needs to be significantly enhanced if they are to be effective in enabling individuals and groups to get remedy. It is crucial to ensure that the process of handling complaints aligns with the rights and duties outlined in the Bill.

Complaints handling should not be limited to merely reviewing the procedural aspects of a decision but should also consider whether the fundamental rights of individuals were protected and whether there was due respect for their dignity throughout the process. This approach is in line with the principles of the Bill, and it

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<sup>5</sup> Law Society of Scotland, [Civil legal aid increasingly out of reach for those in need](#), 2023

reinforces the importance of upholding human rights at every stage of public service delivery.

Furthermore, improvements to complaints handling should be co-produced in collaboration with individuals and groups whose rights are most at risk. Involving these stakeholders in the development of complaints-handling mechanisms will help ensure that the process is genuinely responsive to the diverse needs and experiences of rights-holders, thereby enhancing the effectiveness and fairness of the system.

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

We, in general, support the proposed expansion of the Scottish Public Services Ombudsman's (SPSO) remit to consider rights issues within complaints. However, we are concerned at the lack of analysis in the consultation around this fundamental change and around the SPSO’s role as a crucial non-court route to rights remedy.

We are particularly concerned at the lack of inclusion in the consultation about people’s experience of taking a complaint to the SPSO, and what change would be required to ensure that this is an affordable, accessible, timely, effective, and supportive route to human rights remedy and justice. Simply adding human rights to the SPSO remit is not sufficient – instead, much more consideration is needed around making sure that this is an effective route to human rights remedy, including building their capacity and ensuring strong decision-making. We emphasise that people whose rights are most at risk need to be involved and central to the decision-making around how SPSO will engage with rights issues.

We are also concerned about the lack of detail in the consultation around how SPSO will embed dignity in their decision-making and how they will engage with public body duties under the Bill, including delivering on Minimum Core Obligations and demonstrating progressive realisation. Insufficient and inconsistent SPSO decision-making around human rights would have very negative impacts on the effectiveness of Scotland’s human rights framework.

Routes to remedy need to be flexible to work for people - they should be able to choose whether to pursue remedy through SPSO, the courts, or both, without any disadvantage. This means for example that the “clock should stop” on their case if they are taking a complaint to SPSO, and they should not be required to exhaust the SPSO complaints process before taking a case to court.

Taking a non-court route to remedy should not be a weaker or less effective option. Instead, there should be parity of remedies available including sufficient compensation. Recommendations made by the SPSO must be binding to hold public bodies accountable for their actions and protect the rights of complainants.

Much more consideration is needed around how the SPSO and SHRC will work together to ensure that action, including cases to court, are taken on systemic issues. We do not agree that SPSO should be able to initiate its own investigations

and consider that this would bring confusion and a lack of clarity. Action on systemic issues should be the remit and responsibility of the SHRC, and it is vital that SPSO share information with the SHRC and work closely with them to ensure that this is effective.

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

We support the proposal to extend the responsibilities of Scotland's scrutiny bodies to include human rights considerations. This expansion will provide an additional layer of accountability by assessing public bodies' compliance with the provisions of the Bill. It is a positive step towards ensuring that human rights principles are actively integrated into the delivery of public services.

To ensure the effectiveness of these scrutiny bodies in their new role, it is essential to allocate adequate resources to build their capacity to address human rights issues effectively. This support will enable them to fulfil their expanded responsibilities thoroughly.

Additionally, we agree that encouraging collaboration across scrutiny bodies is crucial. This collaboration will enable a comprehensive evaluation of public services from a human rights perspective, facilitating a more holistic approach to oversight.

We agree that establishing mechanisms for sharing information on systemic human rights issues with relevant bodies, including the Scottish Human Rights Commission (SHRC), the Children and Young People's Commissioner for Scotland (CYPCS), the Mental Welfare Commission, and Environmental Standards Scotland, is vital. This collaborative approach will facilitate more efficient responses to overarching human rights challenges, contributing to the overall success of these scrutiny bodies in promoting and safeguarding human rights in Scotland.

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

Scotland needs its National Human Rights Institution to be authoritative and fit for purpose. The Scottish Human Rights Commission's (SHRC) current powers and resources are not sufficient for it to play its full role in advancing human rights in Scotland. We note the SHRC's own discussion paper that states that the SHRC's inability to raise proceedings in its own name means that it has more limited powers than the EHRC in England and Wales, and the NIHRC in Northern Ireland. "In effect, this means that people in other parts of the UK have greater access to justice routes than people in Scotland through their NHRI"<sup>6</sup>.

The SHRC also cannot provide any advice or services to individuals, but NHRIs elsewhere in the UK can do so. Given the dearth of human rights advice in Scotland, this restriction is regrettable.

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<sup>6</sup> SHRC, Exploring the experience of human rights protection for people in Scotland – a discussion paper, 2023

We consider that additional SHRC powers should include:

1. Providing advice to individuals
2. Conducting investigations into specific human rights issues.
3. Holding inquiries into the practices of individual public bodies.
4. Monitoring and scrutinising public body reports on the implementation of rights outlined in the Bill and requiring public bodies to implement its recommendations.
5. Compelling public bodies to provide necessary information for inquiries or investigations.
6. Issuing binding guidance

However, it is crucial that any new powers granted to the SHRC are accompanied by sufficient resources to enable the Commission to utilise these powers effectively. We note that “the SHRC is among the smallest public bodies in Scotland tasked with promoting and protecting people’s rights”<sup>7</sup>. Given the very important role that the SHRC should rightly have in holding Government and public authorities to account on delivering and progressing rights under this Bill, their resource needs to be significantly increased.

Furthermore, we note that CYPSCS must encourage the involvement of children and young people in their work, including communicating and consulting with children and young people, and with organisations who work with them. There is no corresponding requirement on the SHRC to engage with or consult with people whose rights are most at risk in their work. We therefore recommend that the Bill places such as requirement on the SHRC to ensure that people’s voices and experiences being heard and taken into account, and rights in reality, are a cornerstone of the Scottish human rights framework.

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

We agree with the idea of extending similar powers to the Children and Young People’s Commissioner for Scotland (CYPSCS) where they are needed. Just as the SHRC plays a crucial role in protecting and promoting human rights for the broader population, the CYPSCS similarly advocates for the rights of children and young people. Ensuring that both institutions have comparable powers will help maintain a cohesive and comprehensive approach to human rights protection across all age groups in Scotland.

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

We support the proposed approach to “standing” under the Human Rights Bill as outlined in the consultation.

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<sup>7</sup> SHRC, Exploring the experience of human rights protection for people in Scotland – a discussion paper, 2023

The broader approach to “standing” that the Scottish Government suggests, allowing individuals and organisations to demonstrate “sufficient interest” in cases related to human rights, is a more inclusive and effective way to protect and promote human rights in Scotland. The burden of clarifying the law, particularly around systemic rights infringements should not be placed on individuals. Instead, by enabling a broader approach to “standing” than is the case under the Human Rights Act 1998, NGOs and civil society organisations will be able to take strategic litigation.

The Scottish Government and other stakeholders should consider amendments to court rules to clearly define the criteria for “sufficient interest” so that there is clarity for both the courts and NGOs considering taking human rights cases.

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

The primary consideration when assessing “reasonableness” under the Human Rights Bill should be to ensure that individuals who experience violations of rights protected by the Bill have the ability to access justice and accountability through the courts. The assessment of reasonableness should prioritise the protection and enforcement of human rights, ensuring that individuals can seek redress when their rights are infringed upon.

The choice between the “Wednesbury test” and the “proportionality test” should favour the test that provides a more effective means of safeguarding human rights. While the Wednesbury test sets a very high bar for unreasonableness, the proportionality test, as applied in the Human Rights Act, allows for a more balanced consideration of whether restrictions on rights are justifiable and necessary.

In addition to the choice of the test, other relevant factors should be considered when assessing reasonableness, such as whether a meaningful consultation has been carried out. Ultimately, the approach to assessing reasonableness should prioritise the protection and promotion of human rights, ensuring that individuals have an accessible and effective route to challenge rights violations in Scotland.

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

We agree that existing judicial remedies are generally insufficient in delivering effective remedies for rights-holders. While the current remedies may address some rights violations, they do not cover the full range of human rights abuses, especially systemic or structural issues. There is a need for more comprehensive and flexible remedies to ensure justice for all rights-holders.

**Question 36: If you do not agree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders, what additional remedies would help to do this?**

We welcome consideration of extending the remedies available to bring justice for different people and on different rights. We welcome consideration of structural interdicts that could require public bodies to take specific actions, implement reforms, or report back to the courts on progress, ensuring that long-term changes are made to prevent future rights violations.

As discussed at Q12, we recommend that access to rehabilitation services should be available as a remedy.

Consideration should be given to increasing the compensation available in human rights cases so that it is sufficient to recognise the impact of rights infringements on individuals, and to ensure that human rights are taken seriously by public bodies. Sufficient compensation not only serves as a form of redress but also incentivises public bodies to respect and protect those rights in the first place. Without fair compensation, rights holders may be discouraged from pursuing legal action, leading to a weakening of the overall protection of rights. Furthermore, it ensures that rights holders are not unduly burdened by the financial losses incurred due to the rights infringement.

In addition to expanding the range of remedies, it is important to consider the views of individuals taking the rights cases in the decision-making process regarding which remedies are granted. This should mirror the UNCRC Incorporation Bill Section 8A requirement to have regard to a child's views when a court or tribunal is considering what relief or remedy to grant or what order to make.

**Question 37: What are your views on the most appropriate remedy in the event a court finds legislation is incompatible with the rights in the Bill?**

We believe that in the event a court finds the legislation incompatible with the rights in the Bill, the most appropriate remedy should be that the court has the authority to “strike down” the offending legislation or issue a declarator of incompatibility.

This remedy ensures that all legislation passed by the Scottish Parliament must comply with human rights, and any provision found to be incompatible can be nullified or amended to align with the rights in the Bill. This approach upholds the non-negotiable foundation of human rights in law and reinforces the principle that no legislation should ignore or violate these fundamental rights.

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

The primary driver for bringing the legislation into force should be addressing the serious violations of rights that people are experiencing of the rights in this Bill. Given that these international human rights are already established, the implementation by public bodies should commence immediately.

To ensure effective implementation, the timescales for bringing the legislation into force should be specified within the Bill itself. A reasonable timeline would involve



commencement within six months after receiving Royal Assent and the additional duty to comply no more than two years later. These time frames allow for the development of guidance, the building of public sector capacity, and the establishment of Minimum Core Obligations, ensuring a smooth and effective transition to full implementation of the Bill.

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

We note that this question simply repeats a commitment already made by the Scottish Government when they agreed to all of the National Taskforce recommendations.

Minimum Core Obligations are a very important aspect of the upcoming enhanced human rights framework. When these are delivered by public authorities as part of the “duty to comply”, there is significant potential to ensure that individuals and minority groups who currently live with ongoing violations of their economic, social, cultural and environmental rights are heard, and action and resources prioritised to ensure they can live a life of dignity. Delivering MCOs are a crucial part of people being able to “name and claim” their rights, and a crucial part of a country with human rights at its heart.

We strongly agree that Minimum Core Obligations (MCOs) should be established through a participatory process, with groups whose rights are most at risk. We note that such participation will not be focused on aspirations or targets, but about focusing on what is feasible, what must be delivered for all, and what is essential for respect for dignity.

We suggest that careful consideration should be given to whether this participatory process is led by the Scottish Government or the Scottish Human Rights Commission.

We are concerned that MCOs form such an important part of the human rights framework that all decisions about their content cannot, and should not, be simply left until the Bill is passed. We note that the UN has produced significant guidelines around the content of MCOs. The Scottish Government should provide details of UN guidance on MCOs and analysis of potential content of MCOs in Scotland before the Bill is introduced to Parliament.

We are also concerned that there must be a timescale placed in the Bill for defining MCOs and passing the related regulations, so that the full duty to comply can be introduced. This timescale should no more than two years after the Bill has passed.

MCOs are the floor of rights protection – if this Bill is successful in achieving its objectives and leading to greater rights realisation for all in Scotland, then that MCO floor should be raised in coming years. Therefore, the Bill should include a requirement to review MCOs through a participatory process to ensure their continued relevance and effectiveness.

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

We support the proposal to establish a Human Rights Scheme, as it serves as a crucial tool for accountability on the Scottish Government's commitment to advancing human rights. We emphasise that accountability is not served if reports are lacking clarity, try to include a description of simply everything that Government is doing, are inaccessible, or become a paperwork exercise. Instead, reports must show clearly what the Scottish Government is doing and plans to do to enable a strong and effective human rights framework, and to address systemic human rights issues. Reports should be written and published in a way that is accessible to all, enabling rights-holders to use them to hold Government to account. We highlight the advice of the Lived Experience Board on what these reports should look like. We recommend that consideration is given to including a clause in the Bill that requires reports under the Human Rights Scheme to be published in a range of accessible formats.

To ensure the effectiveness of the Human Rights Scheme, it is imperative that the Scottish Government consults with people whose rights are most at risk when developing the Scheme, reporting against it, and in seeking feedback on the reports and reporting process. This will require the Government to develop rights-based innovative approaches to participation.

Reporting should not be only on activity and policy, but crucially, should be on the outcomes of rights made real in people's lives. We note that in order for this to be effective, the Scottish Government will need to review what data and evidence it collects and collates, including disaggregated data to show the experience of rights for different groups. In particular, much better disaggregated data will be required to show gaps in the realisation of rights for people from different ethnic minorities, people with learning disabilities and people with different impairments.

We agree that Scottish Ministers should also consider international developments, such as new General Comments or recommendations from UN Committees, when drawing up or amending the Scheme. We agree that the first Human Rights Scheme should be subject to approval by the Scottish Parliament, giving MSPs an opportunity to determine its requirements.

We note that this Human Rights Scheme should complement and work well with the Children's Rights Scheme, and other reporting requirements. Annual reporting is required on the Children's Rights Scheme, and therefore consideration should be given to annual reporting being required on the wider Human Rights Scheme. We emphasise however, that most important to decisions about reporting timescales is that these reports must demonstrate and help drive improvement on rights realisation.

We recommend that, in addition to the proposed requirements set out in the consultation, the Scheme should encompass several crucial elements related to effective operation of our human rights framework, including:

- Improvements in data collection and publication.
- Access for all to appropriate individual and collective independent advocacy,
- Provision of rights advice.
- How inclusive communications is embedded across the system.
- Engagement of Scottish Ministers with UK Ministers regarding human rights.
- Provision of services aimed at rehabilitation from torture.
- Participation of individuals and groups whose rights are most at risk in informing the Bill's implementation.
- Monitoring emerging case law and interpretation of rights.
- Plans for the development and review of Minimum Core Obligations (MCOs),
- Plans or proposals to ensure access to justice is accessible, effective, timely, affordable, and supportive.
- Human rights budgeting (not only embedding human rights into budgeting processes as proposed in the consultation)

Progressive realisation of rights in Scotland requires the Scottish Government to play its full role in addressing underlying systemic issues that require national prioritisation and resourcing. Reporting on past actions and future plans related to these priorities should be a key part of the Human Rights Scheme.

**Question 41: What are your views on enhancing the assessment and scrutiny of legislation introduced to the Scottish Parliament in relation to the rights in the Human Rights Bill?**

We are in agreement with the Scottish Government's proposal to enhance the assessment and scrutiny of legislation introduced to the Scottish Parliament concerning the rights established in the Human Rights Bill through a required statement of compatibility. We note that this closely reflects this duty in Section 19 of the HRA which, although limited in of itself, has nonetheless been useful. For example, research has found that:

*“Section 19 has resulted in the development of many positive practices relating to the preparation of legislation by central government and the scrutiny of legislation by Parliament, notably the production of detailed guidance for the Executive and the work of the Joint Committee on Human Rights<sup>8</sup>”.*

These statements of compatibility should be accompanied by a requirement for evidence demonstrating that thorough consultations have been conducted with people whose rights are most at risk. This is vital to ensure that proposed Bills are rigorously evaluated for their compatibility with human rights, especially regarding their impact on vulnerable or marginalised groups within society.

Akin to the UNCRC Bill, Ministers should be obligated to conduct Human Rights Impact Assessments for any Bill or Statutory Instrument (SI) presented to the Scottish Parliament. These assessments serve as a crucial tool for conducting comprehensive evaluations of how proposed legislation may influence human rights

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<sup>8</sup> Weston, E. Section 19 of the Human Rights Act 1998: importance, impact and reform, 2013

across a wide array of dimensions. By integrating these assessments into the legislative process, we can better ensure that the potential human rights implications of proposed laws are carefully considered.

By implementing these measures, legislation introduced to the Scottish Parliament can be more rigorously assessed against a broad spectrum of human rights, including civil, political, economic, social, cultural, and environmental rights. This comprehensive approach contributes to the creation of a more effective and robust framework for safeguarding and advancing human rights in Scotland.

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

Given quite how crucial capacity building and guidance are to the Bill's effectiveness in realising rights, this section of the consultation is regrettably short of any detail or analysis.

One of the key messages to the Scottish Government from the Lived Experience Board, and from All Our Rights In Law project as part of the National Taskforce, is that this "law must not sit on a shelf". There must be as much attention given, if not more, to plans and actions around the Bill's full implementation as to getting the Bill passed. Implementation planning need not, and cannot, wait until the Bill is passed but must start now.

We note the Scottish Government's intention to create a plan around public sector capacity building, in coordination with the Implementation Working Group. Early capacity building ensures that government and public bodies are prepared to implement the Bill effectively from the outset.

Capacity building for the public sector requires sufficient resource – without this, there will not be the culture change and shift in decision-making and participation that full implementation of the Bill requires. We flag up too, that implementation of this Bill will also require resource for capacity building for civil society and community organisations, so that they are able to support individuals and groups to understand and access their human rights.

The Scottish Government should draw upon lessons learned from previous implementation of rights-related duties and obligations, including the Public Sector Equality Duty, Fairer Scotland Duty and the Human Rights Act 1998. Identifying successful strategies and avoiding pitfalls from past experiences can inform the development of guidance and capacity-building efforts under the Human Rights Bill.

We note the plan to develop statutory and non-statutory guidance, in consultation with a broad range of stakeholders. This guidance should be co-produced with people whose rights are most at risk. Echoing the advice of the Lived Experience Board, this guidance should be written and published in a way that is easily accessible to both duty-bearers and rights-holders. It should be presented in plain language and accessible formats to ensure that it is understandable and usable by all stakeholders.

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

One of the key barriers that is consistently raised in almost every discussion with rights holders and community groups around human rights is that people simply do not know that they have human rights at all. Even where they are aware that they have human rights in general, they very often do not know how these apply to everyday life and to the issues affecting them and their families. People rarely get information about their human rights when, where, or with the detail, that they need to apply to the situations of human rights violations that they face. Whilst there are some general sources of information on human rights, it is often too high-level and vague. Often, this information is tailored at a national level, rather than being local and specific. The information available lacks real everyday examples of what human rights mean to people in different situations and how they should be fulfilled.

There is a lack of information available about how to use your human rights for justice and hold any level of government to account. People speak about not being sure what they could do if they thought that there had been a significant violation of their human rights. Very often, people do not know where to begin to raise a human rights issue, let alone seek justice. A considerable hurdle to people's access to justice is simply knowing how to go about that.

There is a lack of inclusive communications around human rights and our justice system<sup>9</sup>. The information that is available is full of legal jargon, acronyms, and language that is excluding and inaccessible, particularly to people with learning disabilities or those whose first language is not English.

This section of the consultation is very disappointing in its lack of detail and analysis.

We call on the Scottish Government to work with groups of people whose rights are most at risk to co-produce the development of a National Network for Human Rights Information, Education, Legal Services and Advice. This Network should provide information that is accessible, in a wide range of different mediums and formats, with an inclusive communications approach. It should be available nationally but importantly should also operate at a community level. Not limited to this, it should include digital information and aim to ensure that information, education, and advice are available when and where people need it, including the point at which migrants first arrive in Scotland.

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

Monitoring and reporting are crucial aspects of transparency and accountability on rights in this Bill. We refer to our responses on the Human Rights Scheme and public body reporting requirements.

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<sup>9</sup> See more on this in our third call.

We further refer to our response related to increased powers and resourcing of the SHRC. The SHRC should have a crucial role in monitoring and scrutinising reports on public authorities fulfilling their duties under this Bill. They should be able to issue binding guidance, and make binding recommendations to public authorities.

It is important that monitoring reports are accessible to all, report on priorities identified and related actions to address rights violations and are written with the participation of people whose rights are most at risk. Consideration is required around ensuring that the Scottish Government and other public authority reports are not written in isolation but reflect the content of each, with the Scottish Government responding to systemic issues that require national attention.

Particularly, we highlight that monitoring and reporting of the progressive realisation of rights under this Bill is very much related to monitoring and scrutiny of budgets. Human Rights budgeting must be a core part of the implementation of this Bill if it is to lead to better realisation of rights.

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