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# Incorporating International Human Rights: The protection of Care Experienced People's Rights in the Scottish Human Rights Bill

A briefing paper by Dr David Scott

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## EXECUTIVE SUMMARY

On 15 June 2023, the Scottish Government published 'A Human Rights Bill for Scotland', the long-awaited consultation on its plans to incorporate various UN human rights treaties into Scots law, subject to the limits of the devolved competence of the Scottish Parliament. By introducing international human rights into Scots law, the Scottish Government hopes 'to tackle poverty and inequality, aid the delivery of a better environment for our future generations to enjoy, deliver stronger public services and improve the lives of those who are most marginalised and disadvantaged in our society'.<sup>1</sup>

The Human Rights Consortium Scotland commissioned this report in partnership with Who Cares? Scotland to explore the potential impact of the proposed Scottish Human Rights Bill for protecting the rights of Care Experienced people.<sup>2</sup> The report focuses on the domestic and international law dimensions of this question, in order to understand how best to integrate Care Experienced people into the Bill as proposed.

The report has three sections:

- First, the report begins with an outline of the SHRB as it appears in the Consultation, identifying how it will change the actions of public authorities in Scotland and place human rights at the centre of decision-making and government.

- Second, it considers evidence of the specific needs of Care Experienced people and the potential for the SHRB to better support the realisation of their human rights.
- Finally, the report offers an analysis of four ways in which Care Experienced people could be offered specific protection under the SHRB.

Care Experienced people, like many people who face disadvantage in Scotland, stand to benefit from the introduction of economic, social, and cultural rights into Scots law. Yet Care Experienced people also face specific forms of discrimination and embedded inequality which require particular consideration and targeted intervention. While recognition in guidance, international law, and outcome monitoring would go some way towards this goal, this report shows that the most secure way to ensure Care Experienced people's rights are protected is to recognise them in the text of the Bill. To do so would be consistent with the Scottish Government's wider efforts to keep its promise to Care Experienced people and make a real difference to the effective protection of their rights.

## INTRODUCTION – THE PLAN FOR A SCOTTISH HUMAN RIGHTS BILL

On 15 June 2023, the Scottish Government published ‘A Human Rights Bill for Scotland’ (hereafter ‘the Consultation’), the long-awaited consultation on its plans to incorporate various UN human rights treaties into Scots law, subject to the limits of the devolved competence of the Scottish Parliament.<sup>3</sup> The Consultation follows two prior reports on plans to create a Framework for better realising people’s rights across Scotland: the report of the First Minister’s Advisory Group on Human Rights Leadership, which convened in November 2017 and published its final report on 10 December 2018,<sup>4</sup> and the National Taskforce for Human Rights Leadership, which convened in 2019 and published its final report on 12 March 2021.<sup>5</sup>

The Scottish Government wants to consolidate and build on Scotland’s existing human rights culture, in order ‘to tackle poverty and inequality, aid the delivery of a better environment for our future generations to enjoy, deliver stronger public services and improve the lives of those who are most marginalised and disadvantaged in our society’.<sup>6</sup> With this in mind, the proposed Scottish Human Rights Bill (hereafter ‘the Bill’ or ‘the SHRB’) will include:

- Incorporation of certain<sup>7</sup> rights contained within the International Covenant on Economic, Social and Cultural Rights

(ICESCR), including the right to an adequate standard of living (which covers food, clothing, and housing, and the continuous improvement of living conditions), the right to health, the right to education, and the right to social security, subject to the limits of devolved competence

- Incorporation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention on the Rights of Persons with Disabilities (CRPD), again subject to the limits of devolved competence<sup>8</sup>
- The creation of a right to a healthy environment, currently not protected by a specific human rights treaty
- An equality clause, aligned with the Equality Act 2010, that will include a non-discrimination provision modelled on Article 2 of ICESCR<sup>9</sup> or Article 14 of the European Convention on Human Rights (hereafter ‘ECHR’).<sup>10</sup> This provision will cover grounds of discrimination already prohibited by the Equality Act (the ‘protected characteristics’) and ICESCR and the ECHR, such as race, sex, religion, and belief, but may also include LGBTI and older people as additional protected groups as their rights are not protected by a specific UN treaty at present.<sup>11</sup>
- An interpretative clause to allow courts to consider the concept of human dignity, as it is understood in international law, when interpreting the SHRB.<sup>12</sup>

Parallel to the SHRB, the Scottish Government has been working to incorporate the UN Convention on the Rights of the Child into Scots law through the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (hereafter the 'UNCRC Bill'). While the UNCRC Bill was unanimously passed by the Scottish Parliament on 16 March 2021, some of its provisions were struck down by the UK Supreme Court in October 2021 for being outside the legislative competence of the Scottish Parliament, prompting a revision of its terms to bring it in line with the Supreme Court's judgment.<sup>13</sup> The Cabinet Secretary for Social Justice introduced the UNCRC Bill for reconsideration on 14 September 2023, meaning it should pass into law in advance of the SHRB.<sup>14</sup>

## WHAT WILL THE SHRB DO?

The SHRB is intended to transform the practice of government in Scotland, embedding human rights at the heart of parliamentary and public authority practices. The Scottish Government proposes that this will be achieved through a series of interlocking legal duties and monitoring mechanisms:

- **A duty on public bodies** (and, so far as possible, private actors) delivering devolved public functions **to realise human rights across Scotland**. For the economic, social, and cultural rights incorporated from ICESCR and the right to a healthy environment, this duty will

first be a **procedural duty**, where rights considerations should be built into decision-making processes. After a period of time to be decided in the Bill, this will move to a **hard legal 'duty to comply'**. This compliance duty will require public authorities to meet all minimum core obligations under the human rights treaties<sup>15</sup> and to progressively realise these rights—that is, take concrete targeted steps to improve their realisation using maximum available resources and demonstrating non-retrogression.<sup>16</sup>

- **For rights incorporated from the 'equality treaties'**<sup>17</sup> – CEDAW, CERD, and CPRD—it is proposed that **only a procedural duty** will attach, requiring public authorities to merely consider rather than comply with these rights in their decision-making.<sup>18</sup>
- **A reporting duty on public bodies**, accounting not only for their previous actions but also their future plans for improving the implementation of the rights and duties contained in the SHRB.<sup>19</sup>
- **A duty on Scottish Ministers to publish a Human Rights Scheme**, which will set out the actions to be taken by the Scottish Government to realise the rights contained in the SHRB.<sup>20</sup>
- **Increased scrutiny by the Scottish Parliament** of the human rights implications of new pieces of legislation, evidenced by, for example, statements of compatibility from Scottish Ministers.<sup>21</sup>

The Consultation also sets out a number of policies to ensure access to justice for rights-

holders, including improved complaints handling,<sup>22</sup> support for advocacy and advice services,<sup>23</sup> the availability of legal aid for challenging human rights violations in the courts,<sup>24</sup> and enhanced powers for the Scottish Human Rights Commission to intervene in legal proceedings and launch their own investigations into systemic violations of rights protected in the Bill.<sup>25</sup> Rules around standing (the rules which govern who can bring a claim before courts), the standard of review, and the remedies available for human rights cases are also under consultation, in order to ensure any violations of human rights are investigated and rectified as comprehensively as possible.<sup>26</sup>

One notable change from the recommendations of the First Minister's Advisory Group on Human Rights Leadership and the National Taskforce for Human Rights Leadership is the Consultation's proposal not to restate the civil and political rights<sup>27</sup> protected at the UK level by the Human Rights Act 1998.<sup>28</sup> This is due to a concern that restatement may lead to differences in the application of these rights between Scotland and the rest of the UK, placing the SHRB outside of the devolved competence of the Scottish Parliament<sup>29</sup> – although this is open to feedback from stakeholders through the Consultation.<sup>30</sup> Accordingly, this report will focus only on the implementation of ICESCR and the three 'equality treaties' for Care Experienced people, in line with the proposed focus of the SHRB as set out in the Consultation.

Similarly, because the right to a healthy environment lacks the same kind of treaty definition and international practice as the ICESCR, the report focuses on the ICESCR and the equality treaties in order to focus on the most established international practices which could change Scots law through the SHRB.<sup>31</sup>

## THE IMPLEMENTATION GAP FOR CARE EXPERIENCED PEOPLE'S HUMAN RIGHTS

With the outline of the SHRB set out, the report now turns to consider the position of Care Experienced people within the SHRB. The report first reviews evidence of the implementation gap for Care Experienced people's rights, before turning to consider how the rights incorporated in the SHRB could help close the inequality gap for Care Experienced people across Scotland.

### The needs of Care Experienced people

Around 1% of the UK's population are Care Experienced,<sup>32</sup> with nearly 15,000 children in care across Scotland today.<sup>33</sup> However, evidence shows that Care Experienced people have vastly different life outcomes compared to non-Care Experienced people. According to national data collected by the Independent Root and Branch Review of Care, Care Experienced people in Scotland are:

- Almost twice as likely to have poor health
- More than twice as likely to have experienced homelessness

- Over twice as likely to have no educational qualifications and less than half the chance of having a degree
- Over one and a half times more likely to have financial difficulties
- Over one and a half times more likely to experience severe multiple disadvantage (homelessness, substance use, mental health, offending)<sup>34</sup>

Evidence from Who Cares? Scotland backs up these national statistics. Seven out of ten respondents to Who Cares? Scotland's Annual Participation Programme 2020-22 on mental health reported that they were unable to access mental health support, while all participants felt their care experience had impacted upon their mental health, finding that trauma can affect Care Experienced people throughout their lifetime.<sup>35</sup> Evidence on food insecurity also demonstrates the poorer life outcomes of Care Experienced people, with recent figures from Ipsos and the Trussell Trust network showing that Care Experienced people make up 20% of all people referred to food banks in Scotland—a figure twenty times higher than their representation in Scotland's general population.<sup>36</sup>

The relationship between disadvantage and the care system is not linear. In some cases, existing poverty can increase the likelihood of children being removed from their families. As the Independent Root and Branch Review of Care sets out in 'The Promise', the final outcome report of its review of the Scottish care system:

*When a family lacks financial resources, when they face sub-standard service provision, when the streets they walk are less safe than in other parts of town, when homes are cramped and when keeping food on the table is a struggle, meeting all the needs of a child can be challenging. It is thus hardly surprising that some families, without supportive resources to turn to, are simply unable to be the parents they want to be and that their children deserve.*

– Independent Root and Branch Review of Care, 'The Promise'<sup>37</sup>

But the actions of public authorities can reinforce these inequalities. Many Care Experienced people encounter direct discrimination and stigma when seeking support, such as when Care Experienced parents are automatically referred to or assumed to already be in contact with social work services as a result of their care experience.<sup>38</sup> The failure to consider the needs of Care Experienced people can also lead to indirect discrimination, such as in the failure to consider the complex family dynamics of Care Experienced people within Covid-19 guidance, which led to difficulties maintaining family connections and group living under restrictions on household numbers.<sup>39</sup>

The human cost of the failures of the care system is significant. Children and adults who have lived in the care system have

reduced opportunities which follow them right through their lives. Health, education, and employment outcomes are all poorer for Care Experienced people, leading to reduced incomes and poorer life outcomes. Moreover, disadvantage in respect of one set of rights can lead to detrimental effects for other rights. Lower incomes or employment opportunities, for example, can cause knock-on effects in terms of homelessness, food insecurity, and poor health overall, leading to an increased use of support services.<sup>40</sup> The additional cost of services required by Care Experienced people as a result of current care system failures is estimated to be £875 million per year, with a further £732 million lost each year as a result of the lower incomes Care Experienced people have on average.<sup>41</sup>

Because of the lifelong impact of care experience and its impact on people's earnings, opportunities, and reliance on public services across their lives, protection of Care Experienced people's rights is needed beyond childhood. Who Cares? Scotland's advocacy service, however, has reported real gaps in the support available to Care Experienced adults, such as the end of financial support for Care Experienced people not on a Compulsory Supervision Order on or after their 16th birthday.<sup>42</sup> Issues with homelessness, mental health difficulties, and unemployment also continue into adulthood, necessitating holistic support across a Care Experienced person's life. In the words of one Care Experienced person:

*I'm old now in terms of care experience, I think yeah, I want to still be included. Your parents don't just say you're too old, goodbye, it doesn't happen to other people why should it happen to me? You don't stop experiencing care, trauma, financial support, parenting in general. It would be nice to know if I fall on hard times, or I feel lonely, then that door is open.*  
– Care Experienced person supported by Who Cares? Scotland<sup>43</sup>

For that reason, Who Cares? Scotland have campaigned for lifelong rights beyond childhood for Care Experienced people – a position supported by 100% of participants involved in their 2020-22 Annual Participation Programme.<sup>44</sup> The Independent Root and Branch Review of Care has echoed these calls in its final report, 'The Promise', by stating that '[o]lder care experienced people must have a right to access...supportive, caring services for as long as they require them'.<sup>45</sup> Following the publication of 'The Promise', the Scottish Government committed to introducing a Promise Bill by the end of this parliamentary session, which would include any further legislative changes required to Keep the Promise, including support for a national lifelong advocacy service for care experienced people and their families.<sup>46</sup>



## The human rights protections offered by the SHRB

The SHRB offers a range of rights which would target the disadvantages faced by Care Experienced people. Below the report covers six core socio-economic rights which target the disadvantages faced by Care Experienced people across Scotland:

- The right to social security
- The rights of families, mothers, and children
- The right to food
- The right to health
- The right to housing
- The right to education

The section then closes with a consideration of the indivisibility and interdependence of these rights, demonstrating how the ICESCR remains sensitive to the interconnectedness of different rights and the risk of multiple disadvantage stemming from the failure to fulfil each right.

Many of the rights in the ICESCR are detailed, setting out lists of obligations that the state party must meet under the treaty. Beyond the text of the rights themselves, the UN Committee on Economic, Social, and Cultural Rights, the UN body in charge of monitoring compliance with ICESCR, provides further guidance on the meaning of rights. It does so through its periodic reports on the rights compliance of countries signed up to ICESCR and the publication of 'General Comments' which offer non-state-specific interpretations of

the rights and obligations contained in the ICESCR.<sup>47</sup> While not legally binding, General Comments are often seen as a persuasive interpretation of these rights for the purposes of international law.<sup>48</sup> The Consultation proposes that these and other international materials will be able to be taken into account by domestic courts when interpreting the rights contained within the Bill.<sup>49</sup>

The Scottish Government has also proposed a participatory process to define the Minimum Core Obligations of these rights, situating their meaning and level of protection in a Scottish context.<sup>50</sup> This participatory process will hopefully offer the opportunity for Care Experienced people to put forward their specific needs, in order that they can be integrated into the content of each right in Scots law.

It should be noted that the application of the rights contained in the SHRB has limits, binding only bodies carrying out devolved public functions.<sup>51</sup> This means that the right to housing, for example, will create obligations on public actors such as local authorities to prevent an individual falling into homelessness, but not on private actors such as landlords – although a local authority may be under a duty to investigate a systematic denial of housing to a certain group, or to pursue private actors committing illegal evictions.

In addition, the devolved limits of these rights mean not all public authorities will

need to abide by these rights, as the duties will apply only to Scottish public authorities and not UK public authorities. The right to social security, for example, will apply to welfare payments made by the Scottish Government, but reserved, UK-wide benefits like Universal Credit will be outwith the scope of the SHRB. These limitations should be born in mind when considering the SHRB's overall impact on the needs of Care

Experienced people. While the Bill has the potential to transform the practices of public authorities in Scotland, gaps will still remain in the protection offered to Care Experienced people when dealing with actors outside the Bill's scope.

## RIGHTS

**The right to social security  
(Article 9 ICESCR)**

## APPLICATION

The right to social security is protected by Article 9 of ICESCR. In its General Comment No. 19, the UN Committee on Economic, Social, and Cultural Rights explained that the right encompasses both a prohibition on 'arbitrary and unreasonable restrictions of existing social security coverage' as well as a positive right 'to equal enjoyment of adequate protection from social risks and contingencies'.<sup>52</sup> The right encompasses nine branches of social security provision: health care, benefits in case of sickness, old-age, unemployment, employment injury, maternity, disability, family and child support, and benefits for survivors and 'orphans. Social security must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the Covenant'.<sup>53</sup> The adequacy of social security payments should be monitored regularly 'to ensure that beneficiaries are able to afford the goods and services they require to realize their Covenant rights', and the Committee has underlined that 'social security should be treated as a social good, and not primarily as a mere instrument of economic or financial policy'.<sup>54</sup>

## The right to social security continued

In its 2016 periodic report on the UK's compliance with the ICESCR, the Committee reported it was 'deeply concerned about the various changes in the entitlements to, and cuts in, social benefits introduced by the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016, such as the reduction of the household benefit cap, the removal of the spare-room subsidy (bedroom tax), the four-year freeze on certain benefits and the reduction in child tax credits. The Committee noted 'the adverse impact of these changes and cuts on the enjoyment of the rights to social security and to an adequate standard of living by disadvantaged and marginalized individuals and groups'.<sup>55</sup> It also noted 'with concern the adverse impact that reforms of social security and reductions in financial support to local authorities have had on the right to adequate housing'.<sup>56</sup>

## The rights of families, mothers, and children (Article 10 ICESCR)

The right to family life is already protected in Scots law by Article 8 of the ECHR, incorporated into Scots law by the Human Rights Act 1998.<sup>57</sup> While the text of Article 10 of ICESCR offers a more detailed definition of this right, including '[t]he widest possible protection and assistance' to be accorded to the family, special protection for mothers during the period before and after childbirth, and special measures of protection and assistance for all children and young persons, the right has not been subject to a General Comment by the UN Committee on Economic, Social, and Cultural Rights, nor has it been subject to significant practice at the UN level.<sup>58</sup>

Nevertheless, in its list of issues for the next (seventh) periodic report of United Kingdom of Great Britain and Northern Ireland, the UN Committee on Economic, Social, and Cultural Rights requested further information on 'the measures taken to regulate and monitor private and for-profit providers of child protection services in the State party, such as children's homes', including information on 'the steps

### The right to food (Article 11 ICESCR)

taken or envisaged by' the UK 'to ensure adequate accommodation and protection measures for children under the age of 18 who have been deprived of a family environment and placed in unregulated alternative care or residential care homes'.<sup>59</sup> This suggests that incorporation of ICESCR through the Bill could lead to changes in the regulation of children's care homes.

The right to food is protected by Article 11(1) of ICESCR. In its General Comment No. 12, the UN Committee on Economic, Social, and Cultural Rights explained that this right covers not only the physical availability of food but also economic access to food.<sup>60</sup> It places on the state an obligation to ensure other actors such as the private business sector do not act in ways which prevent realisation of the right.<sup>61</sup> The importance of this right is further stressed in Article 11(2), which recognises 'the fundamental right of everyone to be free from hunger' – although its 'fundamental' status should only be understood as stressing the importance of realizing this core right, rather than granting it a different or higher status to other rights contained in the ICESCR.<sup>62</sup>

In its 2016 periodic report on the UK's compliance with the ICESCR, the Committee identified a 'lack of adequate measures adopted by [the UK] to address the increasing levels of food insecurity, malnutrition, including obesity, and the lack of adequate measures to reduce the reliance on food banks', and called on the UK to 'develop a comprehensive national strategy for the protection and promotion of the right to adequate food in order to address food insecurity in all jurisdictions of [the UK]'.<sup>63</sup>

### The right to housing (Article 11 ICESCR)

The right to housing is also protected by Article 11(1) of ICESCR. In its General Comment No. 4, the UN Committee on Economic, Social, and Cultural Rights explained that the right does not only protect immediate shelter but rather 'the right

## The right to housing continued

to live somewhere in security, peace and dignity'.<sup>64</sup> This means that a home is not merely 'having a roof over one's head' but also encompasses 'adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities all at a reasonable cost'.<sup>65</sup> For that reason, the UN Committee on Economic, Social, and Cultural Rights has understood the right to housing to encompass a number of discrete obligations concerning, among other aspects, the legal security of tenure; the availability of facilities and infrastructure to provide for safe drinking water, heating, and lighting; affordability; accessibility; and cultural adequacy.<sup>66</sup> Forced evictions are also prohibited under the right to housing, including an obligation on states to 'ensure that the law [against forced evictions] is enforced against its agents or third parties who carry out forced evictions'. Moreover, in the case of legal and illegal evictions the state has an obligation to prevent homelessness and ensure the provision of adequate alternative housing if necessary following the eviction.<sup>67</sup>

In its 2016 periodic report on the UK's compliance with the ICESCR, the Committee stated its concerns about 'the persistent critical situation in terms of the availability, affordability and accessibility of adequate housing' in the UK, noting further that 'the lack of social housing has forced households to move into the private rental sector, which is not adequate in terms of affordability, habitability, accessibility and security of tenure'.<sup>68</sup> It accordingly called on the UK to take 'measures to address the housing deficit by ensuring a sufficient supply of housing, in particular social housing units, especially for the most disadvantaged and marginalized individuals and groups', more effective regulation of the private rental sector, and 'corrective measures to address bad housing, including substandard housing conditions and uninhabitable housing'.<sup>69</sup>

## The right to health (Article 12 ICESCR)

The right to health is protected by Article 12 of ICESCR. In its General Comment No. 14, the UN Committee on Economic, Social, and Cultural Rights explained that the right to health is not a right to be healthy but a right to have access to facilities, goods, services, and conditions that are conducive to the realization of the highest standard of physical and mental health.<sup>70</sup> Moreover, the right also encompasses provision of 'the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health'.<sup>71</sup>

In its 2016 periodic report on the UK's compliance with the ICESCR, the Committee noted continued discrimination against 'refugees, asylum seekers and refused asylum seekers, as well as Roma, Gypsies and Travellers' in the accessibility of the right to health, as well as a lack of adequate resources for mental health services.<sup>72</sup>

## The right to education (Article 13 ICESCR)

The right to education is already protected in Scots law by Article 2 of Protocol No 1 of the ECHR, incorporated into Scots law by the Human Rights Act 1998.<sup>73</sup> However, while the ECHR prohibits discrimination in the provision of education, the parallel provision in Article 13 of ICESCR sets out proactive steps the state has to take to fulfil this right in practice.

In its General Comment No. 13, the UN Committee on Economic, Social, and Cultural Rights explained that Article 13 of ICESCR requires that education is not only physically available but also requires a functioning educational system, including 'trained teachers receiving domestically competitive salaries, teaching materials, and so on'. Education must be physically and economically accessible to all, 'especially the most vulnerable groups, in law and fact, without

## The right to education continued

discrimination', and must be sufficiently adaptable to 'respond to the needs of students within their diverse social and cultural settings'.<sup>74</sup> Moreover, the Committee emphasised the need to 'closely monitor education—including all relevant policies, institutions, programmes, spending patterns and other practices—so as to identify and take measures to redress any de facto discrimination'.<sup>75</sup>

In its 2016 periodic report on the UK's compliance with the ICESCR, the Committee expressed concern 'about the persistence of significant inequalities in educational attainment, especially for children belonging to ethnic, religious or other minorities and children from low-income families, which has the effect of limiting social mobility'.<sup>76</sup> It also called on the UK to 'take all necessary steps to reduce higher education fees, with a view to making higher education equally accessible to all, in accordance with capacity, and by progressively introducing free higher education'.<sup>77</sup>

## The indivisibility and interdependence of human rights

The need to tackle multiple disadvantage is also reflected in the concept of the indivisibility and interdependence of human rights, where the enjoyment and protection of one right will necessarily require the protection and fulfilment of others. While the Consultation is as yet undecided as to how this principle can be reflected in the text of the SHRB,<sup>78</sup> the principle is well-established in international law, with the UN Committee on Economic, Social, and Cultural Rights repeatedly emphasising the interconnectedness of individual rights and stressing that the failure to protect one right may negatively impact on the enjoyment of others.<sup>79</sup>

This interconnectedness is reflected in the Committee's 2016 periodic report on the UK's compliance with the ICESCR, where it noted not only the 'disproportionate, adverse impact that austerity measures introduced in 2010 are having on the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups' but

The indivisibility and interdependence of human rights continued

further identified in the fiscal and tax policy of the UK an adverse impact ‘on the ability of the State party to address persistent social inequality and to collect sufficient resources to achieve the full realization of economic, social and cultural rights for the benefit of disadvantaged and marginalized individuals and groups’.<sup>80</sup>

## THE ROUTES FOR INCLUSION OF CARE EXPERIENCED PEOPLE IN THE SHRB

The SHRB will offer people across Scotland the power to demand consideration and implementation of their rights across decision-making, policy development, and before the courts. In order to acknowledge the specific disadvantages faced by Care Experienced people, however, the Scottish Government has the opportunity to offer additional protection to Care Experienced people in the design and implementation of the Bill.

In this third section, the report will consider four routes for recognising the specific needs of Care Experienced people:

- Recognition of Care Experienced people in the text of the SHRB’s non-discrimination clause
- Recognition of Care Experienced people in public authority guidance for their duties under the SHRB
- Recognition of Care Experienced people

through international law and the SHRB’s human dignity clause

- Recognition of Care Experienced people in the Human Rights Scheme, the Scottish Government’s National Performance Framework, and other targets

### Recognition in the SHRB’s non-discrimination clause

The most direct route for recognising the rights of Care Experienced people would be through **explicit inclusion of Care Experienced people in the non-discrimination clause of the SHRB**. While the incorporation of CEDAW, CPRD, and CERD offers only a procedural duty for the rights contained within those treaties, so far as these rights are within devolved competence,<sup>81</sup> the Consultation also states that the Scottish Government intends to include a non-discrimination clause into the SHRB, similar to Article 2 of ICESCR or Article 14 of the ECHR, in order to ‘ensure everyone can access the rights under the Bill without discrimination’.<sup>82</sup>



In their respective treaties, these non-discrimination clauses have been powerful tools for challenging gaps in rights protection. Even where a practice would not breach the individual rights given within a treaty, non-discrimination articles allow for an individual to allege a separate violation of their rights on the grounds that the treatment of their rights directly or indirectly offers them less protection compared to other groups. Article 14 of the ECHR has been used to challenge discriminatory practices such as the unequal granting of rights to children born out of marriage,<sup>83</sup> educational tests which were biased against Roma children's right to education,<sup>84</sup> and the systematic denial of permits for gay pride parades in Russia,<sup>85</sup> and in its General Comment No. 20, the UN Committee on Economic, Social, and Cultural Rights also reiterated reiterated the 'immediate and cross-cutting' nature of the obligation to prevent direct and indirect discrimination in the enjoyment of any rights contained in ICESCR.<sup>86</sup>

The Consultation acknowledges that, if modelled word-for-word on the ICESCR or ECHR models, the rights of LGBTI and older age people would not be explicitly protected. Instead, they would need to fall within the 'other status' section of the non-discrimination clause.<sup>87</sup> Because the impetus behind the Bill is in part to offer protection for precisely these groups, however, the Scottish Government are considering naming these groups in the text of the non-discrimination clause to 'help to ensure clarity of exactly who the provision is

intended to protect'.<sup>88</sup> This would guarantee that members of these groups can challenge discriminatory treatment of their rights under the Bill, including before courts.<sup>89</sup>

While 'other status' is a broad category which has been given expansive interpretation by international bodies, coming to include fatherhood,<sup>90</sup> marital status,<sup>91</sup> sexual orientation,<sup>92</sup> health status such as HIV status,<sup>93</sup> military rank,<sup>94</sup> and the parenthood of a child born out of wedlock,<sup>95</sup> care experience has not yet been recognised in this way in international law. Explicit inclusion of care experience in the text of the non-discrimination clause, then, would ensure that Care Experienced people's rights are considered and protected by public authorities across Scotland, grounding their rights in the text of domestic law and helping challenge the disadvantage and discrimination Care Experienced people face every day compared to the rest of the population.<sup>96</sup>

While the Scottish Government is rightly careful to ensure the SHRB's non-discrimination clause does not infringe on or alter the terms of the Equality Act 2010, a power reserved to the UK Parliament,<sup>97</sup> inclusion of Care Experienced people would fall within the exceptions granted to the Scottish Parliament under the Scotland Act 2016. These exceptions are to legislate to prevent, eliminate, or regulate discrimination by certain public authorities in Scotland when exercising their Scottish

functions, or, alternatively, to legislate to encourage equal opportunities as long as it is not prohibiting or regulating discrimination.<sup>98</sup> This would cohere with the Scottish Government's commitment to 'Keep the Promise' to Care Experienced people across Scotland<sup>99</sup> and the existing recognition of the specific human rights needs of Care Experienced people,<sup>100</sup> as well as aligning the SHRB with the recent practice of public authorities such as the Scottish Qualifications Authority,<sup>101</sup> the Scottish Funding Council,<sup>102</sup> and North Ayrshire, Falkirk, and Edinburgh City Councils,<sup>103</sup> which have all chosen to recognise care experience as a protected characteristic.

### **Recognition in public authority guidance for their duties under the SHRB**

A second method of inclusion would be to recognise the needs of Care Experienced people in the **public authority guidance for the implementation of the SHRB**. In its Consultation, the Scottish Government has promised to develop guidance for public authorities to help guide the implementation of their duties under the SHRB.<sup>104</sup> This guidance could instruct public authorities to consider Care Experienced people as falling within the 'other status' of the non-discrimination clause, or generally to monitor the human rights outcomes for Care Experienced people as a group, helping maintain a focus on Care Experienced people's needs within their decision-making processes.

Such guidance would be weaker in protection than if care experience were named in the text of the Bill, with guidance unlikely to attract the type of strong judicial enforcement envisaged by the non-discrimination clause. Moreover, if this guidance was non-statutory, it would remain subject to revision by future governments, denying Care Experienced people the public recognition of their rights by the entire Scottish Parliament. Nevertheless, even in the absence of legislative inclusion, public authority guidance could still help focus attention on the human rights outcomes of Care Experienced people in the short term, as well as providing the foundation for future developments under the Scottish Government's Promise Bill, which will place on a statutory footing the actions necessary to 'Keep the Promise' to Care Experienced people across Scotland.<sup>105</sup>

### **Recognition through international law and the SHRB's human dignity clause**

The third method for recognizing the rights of Care Experienced people would be through the **use of international materials**, most prominently through the proposed **interpretative clause to allow the Bill to be read in accordance with the international law concept of 'human dignity'**. The Consultation explains that this human dignity clause would allow 'duty-bearers, courts and tribunals to be able to read, apply and interpret the rights in line with international human rights law,

materials and mechanisms' including 'the General Comments and recommendations of UN Committees, concluding observations of UN treaty monitoring bodies and other mechanisms at the international or regional level'.<sup>106</sup>

The rights of Care Experienced people have some existing recognition at the international level, meaning that the statements of international bodies such as the UN Committee on the Rights of the Child can help guide the interpretation and implementation of the rights contained within the SHRB.<sup>107</sup> However, this recognition has focused largely on the rights of children and young people in care, meaning that the lifelong needs of Care Experienced people would be unprotected by international law.

<sup>108</sup>

Moreover, the status and interpretation of these international materials is complex. The UK Supreme Court has previously questioned the authoritativeness of statements by the UN Committees entrusted with enforcing the various part of the UN human rights system<sup>109</sup> – a position supported by international courts<sup>110</sup> and domestic courts in other countries.<sup>111</sup>

While dialogue with international bodies on the correct use of international materials could help mitigate any questions around the proper interpretation of 'human dignity', as well as potentially developing the global conversation around the lifelong rights of Care Experienced people, there is still the risk of an enforcement gap between what is expected at the international level and

what will actually be protected under the domestic law of the SHRB if Care Experienced people's rights are only given emphasis through the use of international materials. Explicit recognition in the SHRB's text or guidance, then, would more securely and directly protect their rights, grounding their recognition and development in domestic as opposed to international law.

### **Recognition in the Human Rights Scheme, the Scottish Government's National Performance Framework, and other targets**

The final method for recognising Care Experienced people's rights would be in **the monitoring of their human rights outcomes under the Bill**. Care Experienced people could be considered in the 'Human Rights' outcome of the National Performance Framework,<sup>112</sup> the Scottish National Action Plan for Human Rights,<sup>113</sup> or the Human Rights Scheme, for example, and other monitoring mechanisms proposed in the Consultation.<sup>114</sup> The Human Rights Scheme for example, could include Care Experienced people as a group of people whose rights are most at risk.

The Scottish Government already collects data on the educational outcomes of Care Experienced people, meaning that the development of human rights targets around this data would not be impossible.<sup>115</sup> This would also help fix the gaps in the available data on Care Experienced people identified by the Independent Root and

Branch Review of Care in ‘The Promise’.<sup>116</sup> Who Cares? Scotland have previously called for the integration of Care Experienced people into the National Performance Framework, in particular through improved data collection to ensure the inequalities faced by Care Experienced people are captured, monitored, and effectively tackled by the Scottish Government and local authorities.<sup>117</sup>

However, entrusting the protection of Care Experienced people’s rights to monitoring schemes alone would leave Care Experienced people with no specific ability to take a case before the courts where their rights have been violated. This would leave their rights with a lower status of protection and enforceability than other marginalised groups. Moreover, review of some of these monitoring schemes – such as the Scottish National Action Plan for Human Rights, which has already been established for 2023-2030 – may not occur before the Bill enters into force, meaning Care Experienced people’s rights will be left unmonitored in the early years of its implementation. Full and specific protection of Care Experienced people’s rights would therefore require their integration into the legislative system of the SHRB, in order to ensure that violations of their rights could be properly enforced and rectified through the court system.

## CONCLUSION

The SHRB has huge potential to change lives across Scotland. The introduction of enforceable rights to social security, food, health, housing, and education, among many others, will transform the way that public authorities make decisions, while also providing access to judicial remedies when things go wrong. As a group who face far higher rates of poverty, homelessness, hunger, and ill-health than the rest of the population, Care Experienced people have much to gain from the SHRB’s provisions.

Nevertheless, evidence shows that the disadvantages Care Experienced people face are specific in nature. Inequalities for Care Experienced people stem not only from the 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.

As this report has shown, recognition of the needs of Care Experienced people could come in a variety of forms. Inclusion in the text of the non-discrimination provision of the Bill would offer the strongest protection, granting Care Experienced people the power to challenge any direct and indirect discrimination they face in the realisation of their rights. But other methods of recognition can support this goal. Public authority guidance can place Care Experienced people’s rights at the forefront

of decision-making processes, just as international materials can place the needs of Care Experienced people within the wider context of international human rights law. Effective monitoring of human rights outcomes will also be vital to ensure the Bill is working for everyone.

Whichever route is taken, Care Experienced people must be made a focus of the SHRB, in order for the Bill to live up to the Scottish Government's primary goal of improving the lives 'of those who are most marginalised and disadvantaged in our society'.<sup>118</sup>

## Footnotes

1. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 2.
2. The term 'Care Experienced' refers to anyone who has been or is currently in care. This care may have been provided in many different settings, including living with a relative who is not the person's parent (known as kinship care), being looked after at home with the help of social work, living in a residential home or school, living with foster carers, living in secure accommodation, and experience of adoption. This term is distinct from 'Care Leaver', which is an age-restricted eligibility criteria rather than a lifelong identity.
3. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023.
4. First Minister's Advisory Group on Human Rights Leadership, 'Recommendations for a new human rights framework to improve people's lives: Report to the First Minister', 10 December 2018
5. National Taskforce for Human Rights Leadership, 'National Taskforce for Human Rights Leadership Report', 12 March 2021.
6. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 2.
7. Other rights contained in the ICESCR, such as the right to work, fall outside the devolved competence of the Scottish Parliament.
8. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 17–8 notes that the incorporation of CEDAW, CERD, and the CPRD will need to remain within the terms of the Equality Act 2010, and as such their incorporation into the Bill will remove any text relating to matters reserved to the UK Parliament.
9. International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, page 3, Article 2(2): 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
10. European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Article 14(1): 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'
11. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 9.
12. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 13–4. For further discussion of the concept of human dignity in international law, see Elaine Webster, 'The Underpinning Concept of "Human Dignity"', Academic Advisory Panel to the National Taskforce for Human Rights Leadership, June 2020; and see also page 18 of this report.
13. Reference by the Attorney General and the Advocate General for Scotland—European Charter of Local Self-Government (Incorporation) (Scotland) Bill [2021] UKSC 42. This is the first Bill to be sent back for reconsideration at the Scottish Parliament.
14. Scottish Parliament, 'United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (Reconsideration)', motion submitted by Cabinet Secretary for Social Justice Shirley-Anne Somerville, S6M-10429, 14 September 2023; and Cabinet Secretary for Social Justice, 'Equality, Human Rights, and Civil Justice Committee: Draft amendments for Reconsideration of the UNCRC (Incorporation) (Scotland) Bill', 13 September 2023.

15. Minimum core obligations are the obligations on the State to ensure the satisfaction of minimum essential levels of a right. The content of the minimum core obligations in the SHRB will be subject to public participation: see Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 33; and discussion at page 8 of this report.
16. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, pages 29–30. For further discussion of these duties, see Katie Boyle, 'The Meaning and Content of Duties to be Considered for Inclusion in the Bill', Academic Advisory Panel to the National Taskforce for Human Rights Leadership, 1 June 2020.
17. This is shorthand proposed by Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 12. Other organisations have used the phrase 'special protection treaties', in order to denote the wider rights and duties beyond equality status contained within these treaties. See Human Rights Consortium, 'Guide to responding to the Human Rights Bill for Scotland Consultation', August 2023, pages 17–8.
18. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 18.
19. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 30.
20. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 49–50.
21. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 50–51.
22. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, pages 39–40.
23. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 38.
24. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 39.
25. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, pages 40–1.
26. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, pages 41–6.
27. 'Civil and political' denotes rights such as the right to life, equality before the law, freedom of speech, freedom of religion, and the right to a fair trial. These are contrasted with 'economic, social, and cultural rights', which cover rights such as the right to work, the right to housing, the right to health, and the right to social security. This distinction is reflected in the existence of two separate UN treaties: the International Covenant on Civil and Political Rights and ICESCR, each protecting a different set of human rights.
28. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 23.
29. s29(2)(d) of the Scotland Act 1998 prevents the Scottish Parliament from passing legislation incompatible with the European Convention of Human Rights.
30. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 23.
31. Note, however, the Scottish Government's suggestion that the right to a healthy environment could interact with ICESCR rights such as the right to food and the right to water: Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 22.
32. Ipsos and the Trussell Trust, Hunger in Scotland, 28 June 2023, page 27.
33. Independent Root and Branch Review of Care, The Promise, 5 February 2020, page 7.
34. Independent Root and Branch Review of Care, The Money report, 5 February 2020, page 10.
35. Who Cares? Scotland, 'Tend Our Light', 17 February 2022, page 3.
36. Ipsos and the Trussell Trust, 'Hunger in Scotland', 28 June 2023, page 31.
37. Independent Root and Branch Review of Care, 'The Promise', 5 February 2020, page 17.
38. Who Cares? Scotland, "'Believe in Us": Care Experienced Parents—Findings from our Annual Participation Programme', 17 June 2022, pages 20–1.
39. Who Cares? Scotland, 'The Impact of Covid-19 Guidance on Scotland's Care Experienced Community', 9 April 2020, pages 15–8.
40. Lankelly Chase, 'Hard Edges Scotland', 24 June 2019.
41. Independent Root and Branch Review of Care, 'Follow the Money report', 5 February 2020, page 3. The additional costs as a result of care system failures are almost equal to the entire cost of delivering the care system in Scotland (£942 million per year).
42. Jasmin-Kasaya Pilling (on behalf of Who Cares? Scotland), 'Petitioner submission: Extend aftercare for previously looked after young people, and remove the continuing care age gap', PE1958/B, 24 October 2022.
43. Who Cares? Scotland, 'Our Voice, Our Community, Our Future: Who Cares? Scotland Strategic Plan 2023–2027' 3 November 2022, page 11.
44. Who Cares? Scotland, 'Navigating the World of Rights: Views from our Care Experienced membership', 1 December 2020, page 7. See also Who Cares? Scotland and the Equality and Human Rights Commission, 'Care Experience and Protected Characteristics', 1

March 2018, page 4, which calls for different bands of support for Care Experienced people under 18, 18–20, 21–25, and 25 and over.

45. Independent Root and Branch Review of Care, 'The Promise', 5 February 2020, page 92.

46. Scottish Government, 'Keeping the Promise to our Children, Young People, and Families', 20 December 2022, page 7. While the 2023–24 Programme for Government did not announce any further progress on the 'Promise Bill' which is set to implement the recommendations of the Independent Root and Branch Review of Care, the First Minister did announce that he will chair a Cabinet sub-committee on The Promise to enable cross-portfolio change: Scottish Government, 'Equality, Opportunity, Community: Our Programme for Government', 5 September 2023, page 36.

47. The UN Committee on Economic, Social, and Cultural Rights also serves an additional function for certain states as an adjudicatory body for individual cases. However, this power is extended only if a state has ratified the Optional Protocol to ICESCR. As the UK has not ratified this Optional Protocol, the individual complaint mechanism of the UN Committee on Economic, Social, and Cultural Rights would not apply in Scotland.

48. The International Court of Justice, the principal judicial organ of the UN, has previously 'ascribe[d] great weight' to General Comments of the Human Rights Committee on the grounds that they reflect 'the interpretation adopted by [an] independent body that was established specifically to supervise the application of that treaty': International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 30 November 2010, para. 66. See similarly International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 136, where the Court made reference to the Human Rights Committee's General Comment No. 27 when interpreting Article 12(3) of the International Covenant on Civil and Political Rights. Cf., however, the discussion of the limited bindingness of General Comments on page 18 of this report.

49. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 14–5.

50. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 14.

51. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 29.

52. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No 19: The right to social security', E/C.12/GC/19, 4 February 2008, para. 9.

53. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No 19: The right to social security', E/C.12/GC/19, 4 February 2008, paras 12–22.

54. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No 19: The right to social security', E/C.12/GC/19, 4 February 2008, paras 22 and 10.

55. UN Committee on Economic, Social, and Cultural Rights, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/CO/6, 14 July 2016, para. 40.

56. UN Committee on Economic, Social, and Cultural Rights, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/CO/6, 14 July 2016, para. 51.

57. European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Article 8(1): 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

58. Lyle Barker and Koldo Casla, 'Children's best interests and the right to family life under Article 10 ICESCR', *ATD Fourth World*, 19 June 2022.

59. UN Committee on Economic, Social, and Cultural Rights, 'List of issues in relation to the seventh periodic report of United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/Q/7, 23 March 2023, para. 27.

60. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 12: The Right to Adequate Food', E/C.12/1999/5, 12 May 1999, paras 6 and 13.

61. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 12: The Right to Adequate Food', E/C.12/1999/5, 12 May 1999, paras 19 and 20.

62. Kerstin Mechlem, 'Food, Right to, International Protection' (Max Planck Encyclopedia of Public International Law, June 2008) para. 9.

63. UN Committee on Economic, Social, and Cultural Rights, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/CO/6, 14 July 2016, paras 53 and 54.

64. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 4: The right to adequate housing', E/1992/23, 13 December 1991, para. 7.

65. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 4: The right to adequate housing', E/1992/23, 13 December 1991, para. 7.

66. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 4: The right to adequate housing', E/1992/23, 13 December 1991, para. 8.
67. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No 7: The Right to Adequate Housing: Forced Evictions', E/1998/22, 20 May 1997, paras 8 and 16.
68. UN Committee on Economic, Social, and Cultural Rights, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/CO/6, 14 July 2016, para. 49.
69. UN Committee on Economic, Social, and Cultural Rights, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/CO/6, 14 July 2016, para. 50.
70. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health', E/C.12/2000/4, 11 August 2000, para. 12.
71. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health', E/C.12/2000/4, 11 August 2000, para. 11, and see similarly *ibid* para. 43.
72. UN Committee on Economic, Social, and Cultural Rights, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/CO/6, 14 July 2016, paras 55, 57, and 58.
73. European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Article 2 of Protocol No 1: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'
74. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No 13: The Right to Education', E/C.12/1999/10, 8 December 1999, para. 6. The continuous improvement of the material conditions of teaching staff is discussed further in *ibid*, para. 27, calling on state parties 'to report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role'.
75. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No 13: The Right to Education', E/C.12/1999/10, 8 December 1999, para 37.
76. UN Committee on Economic, Social, and Cultural Rights, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/CO/6, 14 July 2016, para. 63.
77. UN Committee on Economic, Social, and Cultural Rights, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/CO/6, 14 July 2016, para. 66.
78. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 15.
79. See, for example, UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 4: The right to adequate housing', E/1992/23, 13 December 1991, para. 7 ('the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised'); UN Committee on Economic, Social, and Cultural Rights, 'General Comment No 7: The Right to Adequate Housing: Forced Evictions', E/1998/22, 20 May 1997, para. 4 ('[o]wing to the interrelationship and interdependency which exist among all human rights, forced evictions frequently violate other human rights'); UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 12: The Right to Adequate Food', E/C.12/1999/5, 12 May 1999, para. 1 ('The human right to adequate food is of crucial importance for the enjoyment of all rights') and para. 4 ('The Committee affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all'); UN Committee on Economic, Social, and Cultural Rights, 'General Comment No 13: The Right to Education', E/C.12/1999/10, 8 December 1999, para. 3 ('the right to health is closely related to and dependent upon the realization of other human rights,...including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement'); UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health', E/C.12/2000/4, 11 August 2000, para. 1 ('Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.') and para. 3 ('The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health'); and UN Committee on Economic, Social, and Cultural Rights, 'General Comment No 19: The right to social security', E/C.12/GC/19, 4 February 2008, para. 1 ('The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights').



80. UN Committee on Economic, Social, and Cultural Rights, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/CO/6, 14 July 2016, paras 18 and 16.
81. See discussion on page 4 of this report.
82. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 25.
83. *Marckx v Belgium*, no. 6833/74, 13 June 1979.
84. *DH and others v the Czech Republic* [GC], no. 57325/00, 13 November 2007.
85. *Alekseyev v Russia*, app nos 4916/07, 25924/08, and 14599/09, 21 October 2010. For a more detailed overview of the European Court of Human Rights' caselaw, see European Union Agency for Fundamental Rights, 'Handbook on European non-discrimination law' (2018), and the Court's own factsheets on different aspects of the prohibition of discrimination.
86. UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights', E/C.12/GC/20, 2 July 2009, para. 7.
87. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 26. Note that the rights of LGBTI+ people and older age people are already well-established as falling under the 'other status' clause of non-discrimination clauses in international law. See European Union Agency for Fundamental Rights, 'Handbook on European non-discrimination law' (2018), pages 224–6.
88. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 26.
89. Note that the Equality Act 2010 already offers legal protection against discrimination for older people and LGBT (but not intersex) people under the protected characteristics of 'age', 'sexual orientation', and 'gender reassignment'.
90. European Court of Human Rights, *Weller v. Hungary*, no. 44399/05, 31 March 2009.
91. European Court of Human Rights, *Petrov v. Bulgaria*, no. 15197/02, 22 May 2008.
92. European Commission of Human Rights, *Sutherland v. the United Kingdom*, no. 25186/94, 1 July 1997.
93. European Court of Human Rights, *Kiyutin v. Russia*, no. 2700/10, 10 March 2011; UN Committee on Economic, Social, and Cultural Rights, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights', E/C.12/GC/20, 2 July 2009, para. 33.
94. European Court of Human Rights, *Engel and Others v. the Netherlands*, nos. 5100/71 and others, 8 June 1976.
95. European Court of Human Rights, *Sommerfeld v. Germany* [GC], no. 31871/96, 8 July 2003; European Court of Human Rights, *Sahin v. Germany* [GC] No. 30943/96, 8 July 2003.
96. See discussion at pages 5–7 of this report.
97. sL2 of the Scotland Act 1998, Schedule 5.
98. These exemptions are acknowledged in the Consultation: see Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 17. For a similar argument, in respect of corporate parents, see the comments of the Equality and Human Rights Commission in *Who Cares? Scotland and the Equality and Human Rights Commission, 'Care Experience and Protected Characteristics'*, 1 March 2018, page 6: 'The Equality Act 2010 does not prevent corporate parents from taking action to address the needs of, or disadvantages faced, by people with care experience, unless this causes unlawful indirect discrimination against people sharing one of the protected characteristics. Corporate parents can therefore treat people with care experience more favourably than people who do not have care experience. This would only be unlawful if doing so puts (or would put) people who share a protected characteristic at a particular disadvantage and that can't be justified, i.e. it is not a proportionate way of achieving a legitimate aim.'
99. See discussion on page 7 of this report.
100. The SHRB is described as a 'key measure' for introducing a human-rights based approach to 'Keeping the Promise': see Scottish Government, 'Keeping the promise to our children, young people, and families', 30 March 2022, page 57. See also the recognition of the need for particular attention to the realisation of the rights of Care Experienced people in National Taskforce for Human Rights Leadership, 'National Taskforce for Human Rights Leadership Report', 12 March 2021, page 41.
101. Scottish Qualifications Authority, 'SQA is a proud corporate parent', March 2018.
102. The Scottish Funding Council, 'Care Experience as a Protected Characteristic: A Best Practice Guide prepared by Who Cares? Scotland', 1 May 2017.
103. See North Ayrshire Council, 'Minutes of 29 March 2023 meeting', page 20; Edinburgh City Council, 'Protected Characteristics—Care Experienced', 27 April 2023; and Falkirk Council, 'Falkirk Council votes to recognise care experience as protected characteristic', 6 July 2023. For a UK-wide perspective, demonstrating similar practices across English local authorities, see Terry Galloway, 'Care Experience as a Protected Characteristic Briefing Report', 8 July 2023.

104. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 51.
105. Scottish Government, 'Keeping the promise to our children, young people, and families', 30 March 2022 page 7.
106. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, pages 14–5.
107. See, for example, Council of Europe, Committee of Ministers Recommendation Rec(2005)5 on the rights of children living in residential institutions, 16 March 2005; Council of Europe, Recommendation CM/Rec(2010)2 of the Committee of Ministers to member states on deinstitutionalisation and community living of children with disabilities, 3 February 2010; UN General Assembly, 'Guidelines for the Alternative Care of Children', A/Res/64/142, 24 February 2010; Council of Europe, 'Recommendation CM/Rec(2011)12 on children's rights and social services friendly to children and families', 16 November 2011; UN Committee on the Rights of the Child, '2018 Day of General Discussion: Protecting and Empowering Children as Human Rights Defenders', 28 September 2018; UN Committee on the Rights of the Child, '2021 Day of General Discussion: Children's Rights and Alternative Care Outcome Report', 13 June 2022.
108. For one exception, see UN Committee on the Rights of the Child, '2021 Day of General Discussion: Children's Rights and Alternative Care Outcome Report', 13 June 2022, Recommendation D4, which calls for comprehensive support for care leavers as well as children currently under alternative care.
109. See, for example, Lord Reed's comments in *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28, para. 64 ('it is unfortunate that the General Comments of the [UN Committee on the Rights of the Child] have been described in some dicta in this court as "authoritative". In context, all that appears to have been meant was that the comments were issued by a body possessing relevant experience and expertise'); and Lord Wilson's comments in *R (on the application of A and B) v Secretary of State for Health* [2017] UKSC 41, para. 35 (stating that, 'as a matter of international law, the authority of [the UN Committee on the Elimination of Discrimination Against Women and the UN Committee on Economic, Social and Cultural Rights] recommendations is slight').
110. International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 30 November 2010, para. 66, where the Court notes it 'is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee'; and International Court of Justice, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination, Qatar v United Arab Emirates*, Preliminary objections, Judgment, 4 February 2021, paras 100–101, where the Court explicitly refused to endorse the UN Committee on the Elimination of Racial Discrimination's interpretations of Article 1(1) of CERD set out in its UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 30 on discrimination against non-citizens', 5 August 2004. For further discussion, including the practice of regional human rights systems, see Hinako Takata and Shotaro Hamamoto, 'Human Rights, Treaty Bodies, General Comments/Recommendations' (Max Planck Encyclopedia of Public International Law, January 2023) paras. 49–54.
111. See discussion of the caselaw of courts in Japan, Australia, and Canada in Hinako Takata and Shotaro Hamamoto, 'Human Rights, Treaty Bodies, General Comments/Recommendations' (Max Planck Encyclopedia of Public International Law, January 2023) para. 62.
112. Scottish Government, 'National Performance Framework: Human Rights'.
113. Scottish National Action Plan for Human Rights, 'SNAP 2: Scotland's second National Human Rights Action Plan (2023–2030)', 2 March 2023.
114. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, pages 33 and 52.
115. Scottish Government, 'Education Outcomes for Looked After Children 2021/22', 15 August 2023.
116. Independent Root and Branch Review of Care, *The Money report*, 5 February 2020, page 4.
117. Who Cares? Scotland, 'National Outcomes review: Response to the Scottish Government's public consultation', 5 June 2023, page 5.
118. Scottish Government, 'A Human Rights Bill of Scotland: consultation', 15 June 2023, page 2.

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