



THE UNIVERSITY *of* EDINBURGH  
Edinburgh Law School

Human Rights & Racial Discrimination:

Incorporating ICERD Alongside Race and Equality Policy  
to Ensure Equal Rights Enjoyment in Scotland

**Dissertation in Law**

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**Author:** Emma Sullivan

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## **Executive Summary**

A comparison of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) with the Scottish Race Equality Framework and Action Plan (REFAP) demonstrates that the two can work together and complement each other by combining individual rights protections with broader policy changes. Analysing the standards of both ICERD and REFAP in (1) Education, (2) Employment, (3) Health, (4) Housing, and (5) Community Cohesion and Safety, demonstrates that while Scotland's efforts to address discrimination are substantial, there remains room for improvement. In each area there continue to be gaps between Scotland's current equality policy and legislation, and the standards required by ICERD. Although concepts such as intersectionality and participative decision making are present in policy, they have yet to be fully integrated into actions. Further any analysis of the success or failure of the policy continues to be hindered by a lack of up-to-date, accurate and disaggregated data.

Contemporary race and equality policies in Scotland thoroughly acknowledge many of the challenges and generate a number of positive steps to address them. But any sustainable solutions to this issue will require looking beyond the surface level symptoms of racial discrimination. Instead, there is a need to genuinely understand the deeply rooted structural inequalities present in Scotland, along with the discriminatory ideologies that have sustained these inequalities. In developing solutions, policy must work with law and practice to achieve substantive changes in outcomes for minority ethnic communities. Ultimately, an incorporation of the rights contained in ICERD will be essential to ensuring that Scotland's planned efforts at human rights development will benefit everyone equally.

## **Work-Based Placement Research Brief**

### **I. Introduction**

The global events occurring in the spring and summer of 2020 ushered issues of racial discrimination and inequity into the foreground of social discourse. The COVID-19 pandemic continues to disproportionately impact historically marginalised populations in Western countries. The virus highlights inequities that persist across healthcare, education, housing, and employment. The subsequent protests following the murder of George Floyd by police in the United States ignited a reckoning with the realities of racial discrimination and violence in these same Western societies. Together, these two events forced broader acknowledgement that racial discrimination is not a thing of the past. Instead, the historical roots of discrimination continue to generate tangible consequences in the present.

This research brief will examine the potential for incorporating the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>1</sup> along with the Race Equality Framework and Action Plan (REFAP)<sup>2</sup> to address issues of racial discrimination in Scotland. By comparing ICERD with REFAP, the brief will demonstrate that the two can complement each other by bringing individual rights protections and broader policy changes together. Rights incorporations bring in the accountability that is often lacking in policy development, and in turn, policies have the potential to engage society in ways the law cannot.

Issues arising from systemic racial discrimination are present in most, if not all societies, and Scotland is no exception.<sup>3</sup> Although this brief will analyse the consequences of racial discrimination in five areas of policy and legislation, attempts to address the issue will continue to suffer until the originating structural causes are identified and dismantled. Such reform will be crucial to ensuring

<sup>1</sup> UN General Assembly, (1965). International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.

<sup>2</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/03/race-equality-framework-scotland-2016-2030/documents/00497601-pdf/00497601-pdf/govscot%3Adocument/00497601.pdf>; Scottish Government, (2017) *A Fairer Scotland for All: Race Equality Action Plan 2017-2021* available at <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2017/12/fairer-scotland-race-equality-action-plan-2017-2021-highlight-report/documents/00528746-pdf/00528746-pdf/govscot%3Adocument/00528746.pdf>

<sup>3</sup> Davidson, N. et al., (2018). *No Problem Here: Understanding Racism in Scotland*, Edinburgh: Luath Press Limited.

that human rights incorporation in Scotland is conducted in a manner which benefits everyone equally.<sup>4</sup>

#### A. Methodology

This research engages in qualitative, and to a lesser extent, quantitative analysis through comparing and contrasting ICERD and the corresponding work of the Committee on the Elimination of Racial Discrimination (CERD) with Scotland's REFAP. The comparison qualitatively analyses discrepancies in the standards contained in both ICERD and REFAP, while quantitatively examining the concrete actions discussed by each. The analysis includes discussion of the relevant portions of the Equality Act (2010) and additional reports from the Scottish government and NGOs, along with secondary sources to enhance the discussion. Ultimately, this analysis will determine the added value of incorporating ICERD alongside continued policy and strategy development to counter racial discrimination in Scotland.

#### B. Structure

First, the brief will provide a short disclaimer on constitutional issues related to devolution in the United Kingdom. Next, there will be a discussion of useful metaphors to conceptualise systemic discrimination. After this, the brief will provide overviews of three key themes along with an introductory discussion of ICERD and REFAP. Together, these sections will contextualise the analyses of anti-racial discrimination policies in Scotland.

In the subsequent five sections, the brief will compare the approaches of REFAP and ICERD in a particular area of policy and legislation. These sections will include: (1) Education, (2) Employment, (3) Health, (4) Housing, and (5) Community Cohesion and Safety. Each section will begin by discussing the relevant rights and standards contained in ICERD. Next, the brief will note the approach taken in the Scottish Race and Equality Framework, followed by the relevant intended next steps contained in the Action Plan. The comparison will be followed by an assessment of the gap between the two approaches. This will include examples of the ways in which the current Scottish policy and practice differs from the standards contained in ICERD. Finally, each section will conclude with a discussion about the ways in which an incorporation of ICERD would benefit the particular area of policy.

## II. **Constitutional Issues**

<sup>4</sup> Walawalkar, Aaron (2019). *88% Of UK Public Thinks 'Effective' Human Rights Should Protect Everyone, Poll Finds*, EachOther, available at <https://eachother.org.uk/poll-effective-human-rights-should-protect-everyone/>.

An incorporation of ICERD will have to be done within the parameters of current devolution arrangements as articulated in the Scotland Act (1998). Although issues of international relations are largely reserved to Westminster, the competency to implement international obligations is devolved to the Scottish Parliament.<sup>5</sup> Thus, even though Scotland itself is not a Member State to the Convention, it still must implement the United Kingdom's obligations under the treaty. Equality law is, for the most part, also reserved to Westminster.<sup>6</sup> This means that an incorporation of the protections contained in ICERD will require careful consideration by constitutional experts to ensure compliance with the current constitutional arrangements. Constitutional issues with regard to devolution are outside the scope of this brief which focuses instead on the areas where current Scottish policies, practice, and legislation fall short of standards under ICERD. Nevertheless, attempts by the Scottish Parliament to rectify these discrepancies will need to be appropriately tailored.

### **III. Conceptualising Systemic Discrimination**

The groundwater approach<sup>7</sup> and upstream versus downstream analogies are both helpful concepts when discussing how ICERD and REFAP might work together to address racial discrimination. These analogies provide insight into the structural nature of racial discrimination and in doing so, help to better inform solutions.

#### **A. The Groundwater Approach**

The groundwater approach accounts for structural trends in a society which inevitably impact each area of policymaking. Racial discrimination and the inequities which it maintains, represent a metaphorical ground water capable of infecting various policy areas. In short, racial discrimination touches all areas of life. Thus, attempts to address discrimination in individual policy areas without addressing the underlying cause will not produce sustainable solutions. The structural nature of racial discrimination must be accounted for when considering how Scotland might use human rights incorporation to combat inequality.

<sup>5</sup> Scotland Act. (1998), Schedule 5, para.7(1)- (2)).

<sup>6</sup> *Id.*

<sup>7</sup> The groundwater approach encourages policymakers to consider, as a metaphor, the potential for infected groundwater to poison various lakes which on the surface seem separate and unconnected. Each of these lakes then metaphorically represent different policy areas such as housing and education. The groundwater represents structural trends in a society which inevitably impact each area of policymaking. This approach was developed by the Racial Equity Institute to make the complexities of structural racism in the United States "accessible and practical." See Hayes-Greene, Deena, and Bayard P. Love, (2018). *The Groundwater Approach: Building a Practical Understanding of Structural Racism*. The Racial Equity Institute. Available at:

<https://static1.squarespace.com/static/578fa7e3d482e9af82f8f507/t/5c1b08a50ebbe8ecc9f38d21/1545275564106/REI+Groundwater+Approach.pdf>

For an example, consider the Scottish government's attempts to improve outcomes for Gypsy/Travellers. Instead of only looking at the poor outcomes experienced by this population in health or education, the government might engage in a genuine re-examination of the history between government and Scotland's Gypsy/Travellers. Such an examination might then expose historically overt discriminatory ideas and policies which have morphed into more covert forms of discrimination today. In other words, how have discriminatory ideas against Gypsy/Travellers been maintained in the groundwater? Understanding and acknowledging the deep-rooted structural nature of discrimination against this population would also necessitate participatory engagement to understand Gypsy/Travellers' perspectives. In addition to providing insight into the past, these actions might also facilitate the development of sustainable solutions for the future.

#### B. Upstream v. Downstream Analogy

The upstream versus downstream analogy highlights the distinction between symptoms and causes of discrimination. In this way, the analogy encourages policymakers to consider whether they are dealing with the symptoms of racial discrimination or the discrimination itself.<sup>8</sup> In short, a consequence which arrives downstream was created by an issue upstream. For example, consider policymakers attempting to address minority ethnic groups in Scotland experiencing poorer health outcomes. As part of the solution, the healthcare system must continue treating negative health outcomes, or symptoms experienced by these groups. However, a sustainable solution will require looking upstream to identify and address the originating causes of the difference in health outcomes, such as social exclusion or distrust of the healthcare system due to discrimination.

### IV. **Key Ideas**

There are three key ideas woven throughout the brief. The *first* is intersectionality, which acknowledges the ways in which those with two or more marginalised identities experience double or multiple discrimination in Scotland. The *second* idea is that of gathering accurate, up-to-date, and disaggregated data to inform solutions on racial discrimination. Finally, the *third* key idea involves representation and participatory decision making. Those who belong to minority ethnic groups in Scotland are the experts in their own experiences and as such they possess crucial insight into problem solving that may not exist outside their group. They must be proactively included in decision-making processes which impact their lives.

#### A. Intersectionality and Multiple Discrimination

<sup>8</sup> For example, see this approach used in sexual violence prevention in Iverson, S.V. & Issadore, M.N., (2018). Going Upstream: Policy as Sexual Violence Prevention and Response. *New Directions for Student Services*, 2018(161), pp.59–69.

Intersectionality encompasses the understanding that “categories such as gender, race, and class are not stable and discrete, but rather, variable and changing constellations that are interrelated, co-constitutive, and simultaneous.”<sup>9</sup> In other words, we as human beings are not merely comprised of one identity, but of many, and these identities combine in various ways to produce unique experiences of discrimination and privilege within society. When discussing intersectionality in the context of discrimination, this brief will refer to marginalised or minority intersecting identities which “combine and intersect to generate distinct prejudices and discriminatory practices that violate individuals’ equal rights in society.”<sup>10</sup> Further, in line with the language used in ICERD, the brief will use the term *race* to encompass understood notions of both race and ethnicity. Finally, when referring to a non-white group within the Scottish population, the brief will use the term ‘minority ethnic.’<sup>11</sup>

Intersectionality ultimately calls for an understanding that the combination of two or more historically marginalised identities produces an entirely new form of discrimination which is itself distinct from the discrimination experienced by members with only one such identity.<sup>12</sup> For example, the most commonly discussed intersection is that of race and sex. Thus, women of colour living in Scotland possess, at minimum, a marginalised gender identity and a minority ethnic identity. An example of the intersectional discrimination these women experience manifests in the realities of the organisations that represent them. Such organisations advocating for the rights of women of colour in the UK are often “marginal to and under-resourced compared with the rest of the sector.”<sup>13</sup> These organisations experience barriers to their efforts which are distinct from barriers experienced by those advocating for women or for minority ethnic groups broadly. This is due to the representatives’ own intersectional identities and the related identities of those they represent.<sup>14</sup>

<sup>9</sup> Crenshaw, K., (2019). *Seeing Race Again: Countering Colorblindness Across the Disciplines*, Oakland, California: University of California Press, pg 202.

<sup>10</sup> United Nations Development Program (UNDP), (2020). *Tackling Social Norms: A Game Changer for Gender Inequalities*, pg 7, available at: [http://hdr.undp.org/sites/default/files/hd\\_perspectives\\_gsni.pdf](http://hdr.undp.org/sites/default/files/hd_perspectives_gsni.pdf).

<sup>11</sup> For insight into the use of this term as opposed to the term ‘ethnic minority’ see Marcus, G., (2019). *Gypsy and Traveller Girls Silence, Agency and Power* 1st ed. Cham: Springer International Publishing: Imprint: Palgrave Macmillan, pg 11.

<sup>12</sup> For an informative discussion of the ways in which anti-discrimination law fails to account for intersectional discrimination see Crenshaw, Kimberlé, (2016). *The Urgency of Intersectionality*, Video File, available at: [https://www.ted.com/talks/kimberle\\_crenshaw\\_the\\_urgency\\_of\\_intersectionality?utm\\_campaign=tedspread&utm\\_medium=referral&utm\\_source=tedcomshare](https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality?utm_campaign=tedspread&utm_medium=referral&utm_source=tedcomshare).

<sup>13</sup> Christoffersen A., (2019). “Are We All ‘Baskets of Characteristics?’ Intersectional Slippages and the Displacement of Race in English and Scottish Equality Policy.” In: Hankivsky O., Jordan-Zachery J. (eds) *The Palgrave Handbook of Intersectionality in Public Policy*. The Politics of Intersectionality. Palgrave Macmillan, Cham, pg 722.

<sup>14</sup> *Id.*

The intersection of race and gender is not the only intersection of relevance to racial discrimination. Those with minority ethnic identities may also identify as disabled, as children or as elderly, as members of a lower economic class, or as non-citizens. Each of these identities then intersects with an individual's race to produce unique experiences of discrimination. The value of intersectionality is acknowledged in the Race and Equality Action Plan, which includes it as an “overarching guiding principle.”<sup>15</sup> Yet, thoroughly engaging with the concept requires going beyond acknowledging its existence.

Intersectionality generates tangible consequences which must be understood in order to be meaningfully countered. It is for this reason that disaggregated data gathering is of particular importance to policies surrounding racial discrimination. By disaggregating data according to various identities or characteristics, the policymaker gains insight into the experiences of those with intersectional marginalised identities. By gaining a more holistic view of racial discrimination in Scotland, representatives might then generate appropriately tailored solutions.

#### B. Gathering Up-to-Date, Accurate and Disaggregated Data

The Committee on the Elimination of Racial Discrimination (CERD), has stated that Member States are “to endeavour to include in their reports under article 9 relevant information on the demographic composition of the population.”<sup>16</sup> The existence and availability of this data in Scotland was noted as an issue both in the UK's most recent report to CERD,<sup>17</sup> and also in the Committee's corresponding Concluding Observations.<sup>18</sup> At the most basic level, good data is essential to developing “effective policies to combat racial discrimination and to monitor the impact

<sup>15</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 10.

<sup>16</sup> Committee on the Elimination of All Forms of Racial Discrimination (CERD), (1973). General Recommendation IV Concerning Reporting by States Parties (art. 1 of the Convention), A/90/18; see also CERD, (2016). Concluding Observations on the Twenty-First to Twenty-Third Periodic Reports of United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/CO/21-23, paras 13-14, available at: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD\\_C\\_GBR\\_CO\\_21-23\\_24985\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD_C_GBR_CO_21-23_24985_E.pdf).

<sup>17</sup> “This absence of evidence from national sources, combined with poor monitoring of access to services by ethnicity, means that the NHS in Scotland does not have sufficient basic data on which to plan evidence-based interventions for ethnic minorities.” See Equality and Human Rights Commission, (2017). *Race Rights in the UK: Submission to the UN Committee on the Elimination of Racial Discrimination*, pg 26, available at: <https://www.equalityhumanrights.com/en/publication-download/race-rights-uk-submission-un-committee-elimination-racial-discrimination>.

<sup>18</sup> CERD, (2016). Concluding Observations on the Twenty-First to Twenty-Third Periodic Reports of United Kingdom of Great Britain and Northern Ireland, paras 13-14, available at: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD\\_C\\_GBR\\_CO\\_21-23\\_24985\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD_C_GBR_CO_21-23_24985_E.pdf)

of the measures taken.”<sup>19</sup> The necessity of disaggregated data gathering is also consistently reiterated throughout CERD’s General Recommendations.<sup>20</sup>

This data is of particular relevance to Scotland’s Public Sector Equality Duties (PSEDs).<sup>21</sup> Part of these duties requires the completion of Equality Impact Assessments<sup>22</sup> which would surely benefit from a more in-depth understanding of who might be impacted. The data should also be accessible to facilitate citizens’ and community organisations’ abilities to make their own determinations concerning the impact of various policy or legislative changes. The Race and Equality Framework recognises the limitations of the current approach to data through the Equality Evidence Finder,<sup>23</sup> and commits to improving the gathering and availability of disaggregated data.<sup>24</sup> While this acknowledgement is valuable, the follow-through on this aspect of the policy is crucial. The value is not just in being able to appropriately report to CERD, but also in ensuring that Scottish equality policy is better informed moving forward.

### C. Representation and Participatory Decision-Making

Better data improves not only governance, but also assists a population in effective engagement with government. The importance of representation and participatory decision-making will be discussed in a variety of ways throughout the brief. To begin, Scotland’s public services should reflect the communities they serve.<sup>25</sup> This means that NHS Scotland, the Scottish education system, and other public service sectors should be hiring members from minority ethnic groups. In civil and political terms, members of minority ethnic groups should be present on local governing bodies and in other relevant institutions. This fulfils a component of the right to participation<sup>26</sup> which when effective should enable the protection and promotion of the identities of these communities.<sup>27</sup>

<sup>19</sup> *Id.*

<sup>20</sup> CERD, (2000). General Recommendation XXVII on Discrimination against Roma, para 46; CERD, (2000). General Recommendation XXV on Gender-Related Dimensions of Racial Discrimination, para 6; CERD, (2002). General Recommendation XXIX on article 1, paragraph 1 of the Convention (Descent), para m; CERD, (1999) General Recommendation XXIV concerning article 1 of the Convention, para 3.

<sup>21</sup> The Equality Act 2010 (Specific Duties) (Scotland), Regulations 2012, No. 162.

<sup>22</sup> *Id.* at Reg 5.

<sup>23</sup> Scottish Government, Equality Evidence Finder, available at: <https://www2.gov.scot/Topics/People/Equality/Equalities>.

<sup>24</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 24.

<sup>25</sup> For a discussion of the Committee’s views on positive discrimination and other actions taken to advance equality, see CERD, (2009). General Recommendation XXXII on the meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination, CERD/C/GC/32, section III.

<sup>26</sup> United Nations General Assembly, (1992). Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Resolution 47/135, articles 2(2-3); 4(4); 4(5); 5(1-2), available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Minorities.aspx>.

<sup>27</sup> Barten, U., (2014). *Minorities, Minority Rights and Internal Self-Determination*, Cham: Springer, pg 246.

Satisfying the right to participation will require not just that these communities are empowered to attend meetings and apply for jobs through the provision of resources and knowledge. Rather, successful engagement will also demand appropriate discussions with these communities through participative decision-making processes.<sup>28</sup> One part of these processes will be consultation. The U.K.'s Consultation Institute defines this as, "the dynamic process of dialogue between individuals or groups, based upon a genuine exchange of views, with the objective of influencing decisions policies or programmes of action."<sup>29</sup> Thus, effective consultation with a minority ethnic community requires not only informing them of a change, but also facilitating opportunities for feedback on that change.<sup>30</sup>

Such participation facilitates both the understanding and acknowledgement of the causes behind a lack of engagement with public institutions thus far. Scotland is not operating from a blank slate on racial discrimination, and therefore must work to understand the historical and contemporary reasons for rifts between government and minority ethnic communities.<sup>31</sup> Rights incorporation will not benefit these communities unless they trust the institutions meant to uphold their rights. In short, representation requires engagement, which in turn requires the establishment and maintenance of trust between minority ethnic communities and the Scottish government.

## V. **ICERD and the Committee on the Elimination of Racial Discrimination**

ICERD was created as a global response to a series of anti-Semitic incidents between 1959 and 1960 known as the swastika epidemic.<sup>32</sup> Although it was the first international human rights treaty, it continues to be one of the most underutilised.<sup>33</sup> One reason for this infrequent use may be a perception that racial discrimination is covered by the Principle of Non-Discrimination.<sup>34</sup> However, the Principle's existence does not eliminate the need for explicit protections against various forms of

<sup>28</sup> The Lund Recommendations are a useful tool in designing initiatives working towards participative decision making, see OSCE, (1999). The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, available at: <https://www.osce.org/files/f/documents/3/7/30325.pdf>.

<sup>29</sup> The Consultation Institute, (2017). *Beware a Wholly Inadequate Definition of Consultation*, available at: <https://www.consultationinstitute.org/beware-wholly-inadequate-definition-consultation/>

<sup>30</sup> Norton, P., Johnstone, R.L. & Hansen, A.M., (2020). Achieving Excellence in Public Participation and Consultation. In *Regulation of Extractive Industries: Community Engagement in the Arctic*. Routledge.

<sup>31</sup> For example, social workers in certain Scottish Gypsy/Traveller communities are still referred to as 'the cruelty.' See Marcus, G., (2019). *Gypsy and Traveller Girls Silence, Agency and Power* 1st ed, pg 47.

<sup>32</sup> Keane, D. and Waughray, A. (2017). *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument*. Manchester: Manchester University Press, pg 3.

<sup>33</sup> Miller, J.T. & Alfredsson, G., (2009). *International Human Rights Monitoring Mechanisms Essays in Honour of Jakob Th. Moller*, 2nd rev., Leiden; Boston: Martinus Nijhoff Publishers, pgs 85-86.

<sup>34</sup> UN General Assembly, (2012). Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/RES/67/1, paras 2, 12-14, available at [https://www.un.org/ruleoflaw/files/37839\\_A-RES-67-1.pdf](https://www.un.org/ruleoflaw/files/37839_A-RES-67-1.pdf).

discrimination.<sup>35</sup> Together, ICERD and the work of CERD go beyond the Principle of Non-Discrimination, to provide explicit rights protections and State obligations which address the oft-overlooked racial dimensions of human rights violations.

#### A. Scotland's Current Obligations Under ICERD

Under the Scotland Act (1998), Scotland currently has a number of obligations to which it must adhere under the Convention. Member States of human rights treaties have the obligations to protect, respect and promote the rights contained within the treaty.<sup>36</sup> Under ICERD, Scotland has an obligation to *respect* the rights of individuals to enjoy the full spectrum of civil, political, economic, social, and cultural rights without distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin.<sup>37</sup>

By respecting these rights, the Scottish government ensures that the state itself is not in violation. Scotland also has an obligation to *protect* these rights by ensuring that third parties do not interfere with individuals' abilities to enjoy their rights on equal footing. Finally, Scotland is under an obligation to *fulfil* these rights either by facilitating access to them, or by providing these rights directly.<sup>38</sup> These obligations are in addition to those which are explicitly contained in the Convention itself. Under ICERD, Scotland has both broad and specific obligations regardless of whether the Convention is incorporated.<sup>39</sup> But by combining rights incorporation with policy, Scotland will be better positioned to protect and fulfil the rights of minority ethnic communities, rather than simply respecting them.

#### B. The Added Benefit of Incorporation

At its most basic, rights incorporation brings accountability, which the First Minister's Advisory Group on Human Rights Leadership notes "must be at the heart of any next steps on Scotland's

<sup>35</sup> Just as the International Convention on the Elimination of all forms of Discrimination Against Women (ICEDAW) is a vital tool in protecting the ability of individuals to equally enjoy their rights across the gender spectrum, ICERD contains the protections needed to ensure equal enjoyment of rights regardless of race, colour, descent or national or ethnic origin.

<sup>36</sup> McCrudden, Christopher, (2013). *Mainstreaming Human Rights*, in Nolan, A., O'Connell, R. & Harvey, C.J., 2013. *Human rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, Oxford; Portland, Or.: Hart Pub, pg 12. Note: McCrudden is referencing Henry Shue's typology as articulated in H Shue, (1996). *Basic Rights: Subsistence, Affluence, and US Foreign Policy* 2nd ed. Princeton University Press.

<sup>37</sup> UN General Assembly, (1965). International Convention on the Elimination of All Forms of Racial Discrimination, Article 1.

<sup>38</sup> McCrudden, Christopher, (2013). *Mainstreaming Human Rights*, pg 12.

<sup>39</sup> For a more in-depth discussion of State's obligations under human rights treaties see Jayawickrama, N. (2017). *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*. Cambridge: Cambridge University Press, pgs 74-84.

human rights journey.”<sup>40</sup> Such accountability is crucial in the area of racial discrimination as this discrimination has historically been used as a tool to deny the human rights of certain groups. Although legal recourse or access to remedy is not the only form of accountability, it is essential to the realisation of these rights within a society as it provides them with teeth and facilitates their enforcement.

Further, committing to the incorporation of a human rights treaty, particularly an incorporation which is both full and direct, demonstrates a firm commitment to the rights and obligations contained in that treaty. The Scottish government’s decision to incorporate the United Nations Convention on the Rights of the Child (UNCRC) has demonstrated the potential for such a commitment.<sup>41</sup> Thus, another benefit of incorporation is its use as an awareness-raising tool which might initiate the decisive societal shift that the Scottish government has acknowledged as necessary to achieve racial equality.<sup>42</sup>

The effectiveness of incorporation will also depend on the method of incorporation. For example, whether or not Courts will be required to consult the work of CERD in interpreting the rights contained in ICERD. Additionally, what provisions will be included to ensure the protections have teeth? As the Public Sector Equality Duties (PSEDs) have demonstrated, even legal requirements will prove ineffective if not adequately resourced and maintained.<sup>43</sup> Ultimately, ICERD incorporation will ensure Scotland’s planned efforts at human rights incorporation benefits all of Scotland’s population regardless of race, colour, descent or national or ethnic origin.

## **VI. Scotland’s Race and Equality Framework and Action Plan**

Scotland’s Race and Equality Policy is a combination of a Framework which lays out the main ideas, and an Action Plan which specifies future changes. The Framework contains the plans for improved racial equity in Scotland from 2016 through 2030. The Action Plan contains over 100 actions that the Scottish government planned to take from 2017 through the life of this Parliament in 2021.

<sup>40</sup> First Minister’s Advisory Group on Human Rights Leadership, (2018). *Recommendations for a New Human Rights Framework to Improve People’s Lives: Report to the First Minister*, Chair, Professor Alan Miller, pg 15, available at <https://humanrightsladership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>.

<sup>41</sup> See the Scottish government’s collection of 148 consultation responses at [https://consult.gov.scot/children-and-families/uncrc/consultation/published\\_select\\_respondent?\\_b\\_index=60](https://consult.gov.scot/children-and-families/uncrc/consultation/published_select_respondent?_b_index=60).

<sup>42</sup> Scottish Government, (2020). Race Equality Action Plan: Year Two Progress Update, pg 2, available at: <https://www.gov.scot/publications/race-equality-action-plan-year-two-progress-update/>,

<sup>43</sup> Equality and Human Rights Commission, (2018). *Effectiveness of the PSED Specific Duties in Scotland*, available at: [https://864a82af-f028-4baf-a094-46face9205ca.filesusr.com/ugd/7ec2e5\\_37ea60592ef145b8887a5b7ec473e130.pdf](https://864a82af-f028-4baf-a094-46face9205ca.filesusr.com/ugd/7ec2e5_37ea60592ef145b8887a5b7ec473e130.pdf);

## A. Framework

The Framework has the stated objectives of, “tackling racism and addressing the barriers that prevent people from minority ethnic communities from realising their potential.”<sup>44</sup> The policy is the product of discussions with the public, community leaders, academics, and relevant organisations. The text acknowledges the systemic nature of racial discrimination and sets out objectives to address this challenge. In this, and many other ways, the Framework does an admirable job of identifying and attempting to address racial discrimination in Scotland.

But the Framework is policy, and as such is heavily dependent upon politics which are subject to change. The objective of eliminating racism in Scotland must be more concrete. For example, although the Framework’s visions largely line up with the obligations and rights contained in ICERD,<sup>45</sup> there is no discussion of access to remedy or recourse in the event that these rights and obligations are violated. This reiterates the need for policy to work with law and practice to realise sustainable change for minority ethnic groups in Scotland.

## B. Action Plan

The actions within the plan are divided into three timeframes, 2017-2018, 2018-2019, and 2019-2020. Progress updates have been posted for the first two of these time frames which discuss the actions taken and planned next steps.<sup>46</sup> The first of these updates is substantially more thorough than the second, which makes it difficult to analyse follow-up on the latter. Nevertheless, the information contained in these reports demonstrates promising progress towards fulfilling the objectives contained in ICERD. Yet, if Scotland wishes “to show leadership in advancing race equality and tackling racism,” they must demonstrate progress in law and practice as well. Incorporating ICERD would be a firm step in that direction. The subsequent sections will demonstrate the gaps between REFAP, the law, and the lived experiences of minority ethnic groups in Scotland. The brief will then further suggest how these gaps might begin to be filled by an incorporation of ICERD.

## VII. Education

Education plays a central role in any effort to address racial discrimination as it is both a tool of empowerment and a social setting in which children learn about themselves and their peers. Both of

<sup>44</sup> Scottish Government, (2017) *A Fairer Scotland for All: Race Equality Action Plan 2017-2021*, pg 4.

<sup>45</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 15.

<sup>46</sup> Scottish Government, (2020). *Race Equality Action Plan: Year Two Progress Update*; Scottish Government, (2019). *Race Equality Action Plan: Year One Progress Update*, available at: <https://www.gov.scot/publications/race-equality-action-plan-year-1-progress-update/>

these functions are essential to combatting racial discrimination and its consequences within a society. Thus, when these functions are inhibited or otherwise impacted by racial discrimination this creates broader societal consequences.

#### A. Identified Challenges

The first important challenge with education is to ensure that children are enjoying their right to education equally regardless of their race, colour, descent or national or ethnic origin. This means ensuring that children have equal access to education, but also that they are receiving an adequate education. Ensuring quality requires navigating variations in language, literacy, and lifestyle to ensure that students are able to obtain education on equal footing with their peers. Navigating the diverse needs of students also requires adequate resourcing.<sup>47</sup> Finally, racially motivated bullying in any form cannot be tolerated. Schools must provide a safe and inclusive environment which facilitates quality learning for all students.

#### B. ICERD Standards

ICERD recognises the role education plays in combatting racial discrimination and requires Member States to take “immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combatting prejudices...to promoting understanding, tolerance and friendship...”<sup>48</sup> The right to education and training without discrimination is also protected by Article 5(e)(v) of the Convention.<sup>49</sup> The right to education is addressed in more detail within the work of the Committee on Economic Social and Cultural Rights (CESCR)<sup>50</sup> along with that of the Committee on the Rights of the Child (CRC).<sup>51</sup>

The Committee on the Elimination of Racial Discrimination (CERD) also addresses education throughout its General Recommendations (GRs). GR No. 30 calls for “resolute action” to avoid segregated schooling and eliminate stereotyping and stigmatising by staff.<sup>52</sup> In GR No. 27, the Committee discusses improving the inclusion of Roma and Travelling populations in education.<sup>53</sup> As

<sup>47</sup> Galindo F. (2017) Gypsies, the Administration of Justice, Automation and the Resolution of Problems. In: Elósegui M., Hermida C. (eds) *Racial Justice, Policies and Courts' Legal Reasoning in Europe*. Ius Gentium: Comparative Perspectives on Law and Justice, vol 60. Springer, Cham, pg 116.

<sup>48</sup> UN General Assembly, (1965). International Convention on the Elimination of All Forms of Racial Discrimination, Article 7.

<sup>49</sup> *Id.* at Article 5(e)(v).

<sup>50</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), (1999). General Comment No. 13: The Right to Education (Art. 13 of the Covenant), E/C.12/1999/10.

<sup>51</sup> UN Committee on the Rights of the Child (CRC), (2001). General Comment No. 1 (2001), Article 29 (1), The Aims of Education, CRC/GC/2001/1.

<sup>52</sup> CERD, (2005). General Recommendation XXX on Discrimination Against Non-Citizens, para 12.

<sup>53</sup> CERD, (2000). General Recommendation XXVII on Discrimination against Roma, paras 18-26.

a part of this inclusion, CERD suggests the incorporation of Roma history and culture into the curriculum.<sup>54</sup> GR No. 29 notes that both public and private educational institutions must be inclusive to effectively educate the population as a whole on non-discrimination.<sup>55</sup> Relatedly, the Committee recommends the review of language in all textbooks to ensure discriminatory material is not being used.<sup>56</sup>

### C. Race and Equality Framework and Action Plan

The Framework similarly recognises the need to address racism through curriculum and improved training of educators.<sup>57</sup> The Policy commits to addressing issues of bullying by supporting anti-bullying services and providing improved monitoring of racist incidents in schools.<sup>58</sup> It also addresses poor engagement with minority ethnic communities by committing to taking account of their views and experiences in the NPFS review.<sup>59</sup> More specifically, the Action Plan commits to publishing educational guidance to improve outcomes for Gypsy/Traveller children.<sup>60</sup>

The Action Plan also commits to providing an equality based and rights respecting education.<sup>61</sup> However, one of the actions taken was to conduct a survey to obtain views on the content developed thus far. Less than ten responses were received for the survey making it difficult to determine the quality of changes made.<sup>62</sup> REFAP and its follow up reports demonstrate thorough identification of issues and important next steps to address racial discrimination in and through education. Still, the “Expected Impact” of the follow up to the Action Plan often seems to contain more planned processes than measurable positive impacts for students and their families.

### D. Identified Gaps

<sup>54</sup> *Id.* at para 26; Note also “States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.” See United Nations General Assembly, (1992). Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, article 4(4).

<sup>55</sup> CERD, (2002). General Recommendation XXIX on article 1, paragraph 1, of the Convention (Descent), para rr.

<sup>56</sup> *Id.* at para vv.

<sup>57</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 54.

<sup>58</sup> *Id.* at pg 53; Scottish Government, (2019). *Race Equality Action Plan: Year One Progress Update*, pg 11.

<sup>59</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 50.

<sup>60</sup> Scottish Government, (2018). *Improving Educational Outcomes for Children and Young People from Travelling Cultures: Guidance*, available at <https://www.gov.scot/publications/improving-educational-outcomes-children-young-people-travelling-cultures/pages/1/> ; Scottish Government, (2017) *A Fairer Scotland for All: Race Equality Action Plan 2017-2021*, pg 39.

<sup>61</sup> *Id.* at, pg 14. The Year One Progress Report demonstrates follow up on this, see Scottish Government, (2019). *Race Equality Action Plan: Year One Progress Update*, pg 9.

<sup>62</sup> Scottish Government, (2019). *Race Equality Action Plan: Year One Progress Update*, pg 9.

While the policy acknowledges issues surrounding access to education, there is also a need to ensure equality in the acceptability and adequacy of education being received.<sup>63</sup> Further, with regard to students with varying language, literacy, and lifestyle needs, adaptations are important, but they cannot have the effect of producing segregation.<sup>64</sup> Although committing to a rights respecting education, REFAP fails to discuss specific changes to the curriculum which might include teaching the history of Scotland's Gypsy/Traveller population or otherwise 'decolonising the curriculum.'<sup>65</sup>

Teaching an inclusive history also facilitates children learning about their own rights to culture and to an identity.<sup>66</sup> There are no better experts on these subjects than members of minority ethnic communities themselves. Committing to improved engagement with minority ethnic communities is valuable. But improving this engagement will entail appropriate conversations with these community members about their negative experiences with educational institutions in Scotland thus far.<sup>67</sup> Finally, there is no discussion in the REFAP about how to best meet the needs of students with intersectional identities. For example, Gypsy/Traveller girls in Scotland have high drop-out rates.<sup>68</sup> Changing this outcome will require acknowledging their intersectional identities as children, as females, and as members of a Gypsy/Traveller group.

#### E. Benefit of Incorporation

Education serves as an excellent example of the fact that incorporation is not a universal solution to be applied in a vacuum. Instead, it may serve as a catalyst to initiate a thorough review of the ways in which Scotland's education system is directly or indirectly discriminating against children from minority ethnic communities. Further, the benefit of an ICERD incorporation in the area of education may not necessarily be additive. Rather, the benefit may come through streamlining policies and legislation which further the aim of equality in education. This would ensure children across Scotland are equally benefiting from such policies. For example, the resourcing needed to support students with diverse learning needs must be available throughout Scotland, and not only in larger cities such as Glasgow.

<sup>63</sup> CESCR, (1999). General Comment No. 13: The Right to Education, para 6; see also UNESCO, (2005) *Education for All: the Quality Imperative; EFA Global Monitoring Report*, (n77) 29, available at <https://unesdoc.unesco.org/ark:/48223/pf0000137333>.

<sup>64</sup> Marcus, G., (2019). *Gypsy and Traveller Girls Silence, Agency and Power* 1st ed., pgs 3-4.

<sup>65</sup> Tinker Sachs G. et al. (2017). "Decolonizing Pedagogies: Disrupting Perceptions of "The Other" in Teacher Education." In: Pirbhai-Illich F., Pete S., Martin F. (eds) *Culturally Responsive Pedagogy*. Palgrave Macmillan, Cham.

<sup>66</sup> UN General Assembly, (1989). Convention on the Rights of the Child, 1577 UNTS 3, Articles 3, 28 and 31.

<sup>67</sup> Although the Action Plan and its follow up reports reference engagement with these communities, there seems to be much planning about how to interact with these families, and less actual interaction. See Scottish Government, (2019). Race Equality Action Plan: Year One Progress Update, pg 16.

<sup>68</sup> Marcus, G., (2019). *Gypsy and Traveller Girls Silence, Agency and Power* 1st ed, pg 187.

Incorporation would encourage a view of children as human beings with unique overlapping identities and experiences. This understanding would not only benefit the educators who interact with students, but also the students themselves as they interact with each other. Positive interactions with educators and with each other will facilitate an environment in which students are encouraged to engage with their rights, including their rights to identity and language.<sup>69</sup> Such an environment is not possible when students are segregated. Incorporation would encourage the Scottish education system to critically examine situations in which students are put into a separated learning environment.

Scotland's policy work in this area is thorough with numerous plans and processes, but the actual outcome of much of this work seems intangible. Perhaps there is a point at which such planning and process development becomes more of a hinderance than a help to achieving equality for students. Incorporation might then serve as a method with which to reset the burgeoning planning by refocusing on the rights of minority ethnic students to equality in learning. Because ultimately, if Scotland wishes to be a global leader in human rights, there is no better place to begin than the classroom.

### **VIII. Employment**

Education is intimately connected to employment as the skills and opportunities obtained in education often translate into earning potential in employment. Employment, like education, demonstrates the interconnectedness and indivisibility of human rights through providing the resources essential to the realisation of other rights. Thus, when racial discrimination violates the right to employment, this violation creates a domino effect in other areas of life. Employment protections are particularly important in Scotland as the economy is dependent upon population growth, which is in turn dependent upon migration.<sup>70</sup> Migration and the employability of migrants are both threatened by the current Brexit arrangements.<sup>71</sup> Thus, there continues to be an economic

<sup>69</sup> For a positive example of a rights respecting education see: Center for Youth and Criminal Justice, (2019). *Learning from Wales: Children's Rights, Inclusion, Youth Justice*. Available at <https://www.cycj.org.uk/learning-from-wales-childrens-rights-inclusion-youth-justice/>; For provisions covering the right to identity see Organisation for Security and Co-operation in Europe (OSCE), (1990). Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, paras. 32.2, 32.5, 33 and 34, available at <https://www.osce.org/odihr/elections/14304>; The right to language is particularly important to minority communities as it comprises a large component of daily life, see Barten, U., (2014). *Minorities, Minority Rights and Internal Self-Determination*, Cham: Springer. pg 223.

<sup>70</sup> Scottish Government (2019). Scotland's Population Needs and Migration Policy, pg 1, available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2018/02/scotlands-population-needs-migration-policy/documents/00531087-pdf/00531087-pdf/govscot%3Adocument/00531087.pdf>.

<sup>71</sup> Id. at pg 16.

incentive for Scotland to ensure equality in all stages of employment regardless of one's racial identity.

#### A. Identified challenges

Discrimination in employment, as in other areas, may seem to be thoroughly covered by the Equality Act (2010).<sup>72</sup> But the availability of a remedy does not always signify an accessible or effective one. Thus, one challenge in the area of employment is to supplement or otherwise more effectively utilise the Equality Act and relevant Public Sector Equality Duties to counter racial discrimination.<sup>73</sup> This challenge is substantial as both employment and equality law are largely reserved.<sup>74</sup> In terms of equality in the employment process, one's race (or perceived race) decreases the likelihood of receiving an interview and being promoted within the workplace.<sup>75</sup>

Challenges to addressing racial discrimination in employment are compounded by issues of underreporting. Often discrimination experienced in employment goes unreported, making it difficult to understand and combat.<sup>76</sup> Currently, a large portion of those designated as key workers during the pandemic are from minority ethnic communities. Further, the structural inequalities with which they already live have made them uniquely vulnerable to the virus. Ultimately, there is a need to rectify the poor outcomes experienced in employment by those from minority ethnic groups, particularly as they translate into poverty and social exclusion.<sup>77</sup>

#### B. ICERD Standards

CERD also recognises that discrimination in employment produces unequal access to resources which then generates inequalities across nearly all sectors of life. Thus, Article 5(e)(i) of ICERD protects the rights “to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable

<sup>72</sup> Equality Act, (2010). Part 5: Work.

<sup>73</sup> Discrimination in employment is largely justiciable under the Equality Act, but the text of the Act itself focuses heavily on gender-based discrimination. See Christoffersen A., (2019). “Are We All ‘Baskets of Characteristics?’ Intersectional Slippages and the Displacement of Race in English and Scottish Equality Policy.” In: Hankivsky O., Jordan-Zachery J. (eds) *The Palgrave Handbook of Intersectionality in Public Policy*. The Politics of Intersectionality. Palgrave Macmillan, Cham, pgs 713-714. This focus is then reflected in the respective success rates for the various categories of claims. “For example, in 2010–11, only 16% of race discrimination claims and 18% of religious discrimination claims that received a full hearing before an employment tribunal were successful, as compared to 37% of sex discrimination claims.” See: Equality and Human Rights Commission, (2018). *Effectiveness of the PSED Specific Duties in Scotland*; Employment Tribunals and EAT Statistics, 2010-2011, London: HM Courts and Tribunals Service, pg. 8.

<sup>74</sup> For an introductory discussion of equality law under current devolution arrangements see Busby, Nicole (2020). *The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW*. Academic Advisory Panel to the National Taskforce for Human Rights Leadership.

<sup>75</sup> Davidson, N. et al., 2018. *No Problem Here: Understanding Racism in Scotland*, pg 84.

<sup>76</sup> *Id.* at pg 88

<sup>77</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 60.

remuneration.”<sup>78</sup> The Convention protects the right to work, and the ability to do so safely and with appropriate compensation. In line with non-discrimination, ICERD and CERD reiterate that these protections should not vary depending on one’s race.<sup>79</sup>

In GR No. 21 the Committee states that individuals must have the right to freely pursue their economic, social and cultural development.<sup>80</sup> The rights to economic, social and cultural development are forms of internal self-determination for minority ethnic communities.<sup>81</sup> To protect, respect and promote equal access to economic and social development, Member States must ensure that both public and private actors are not engaging in discrimination.<sup>82</sup> With regard to the self-determination of minority ethnic populations, the Committee points to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as a tool for guidance on facilitating internal self-determination.<sup>83</sup>

### C. Race and Equality Framework and Action Plan

To address discrimination committed by the government, REFAP commits to working across public agencies to remove barriers to employment for minority ethnic communities.<sup>84</sup> Relatedly, The Scottish government also commits to ensuring that its own public workforce is representative of the communities which it serves.<sup>85</sup> In line with CERD, the Framework also acknowledges the close relationship between education, employment and poverty, and commits to better resourcing in each of these three areas to improve outcomes for everyone.<sup>86</sup>

<sup>78</sup> UN General Assembly, (1965). International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(e)(i).

<sup>79</sup> CERD, (2002). General Recommendation XXIX on article 1, paragraph 1 of the Convention (Descent), para gg.

<sup>80</sup> CERD, (1996). General Recommendation XXI on the Right to Self-Determination, para 2.

<sup>81</sup> “Internal self-determination is the right of the people of a state to govern themselves without outside interference. External self-determination is the right of peoples to determine their own political status and to be free of alien domination, including formation of their own independent state.” See Hannum, Hurst. *Legal Aspects of Self-Determination*, Princeton University Encyclopedia available at:

<https://pesd.princeton.edu/node/511#:~:text=Internal%20self%20determination%20is%20the,of%20their%20own%20independent%20state.>; see also CERD, (1996). General Recommendation XXI on the Right to Self-Determination, para 4; See also United Nations General Assembly, (1992). Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Resolution 47/135. “The right to have an identity for members of minorities contributes to the definition of ‘self’ in self-determination.” See Barten, U., (2014). *Minorities, Minority Rights and Internal Self-Determination*, pg 231.

<sup>82</sup> CERD, (1996). General Recommendation XX on Article 5 of the Convention, paras 2, 5; CERD, (2000). General Recommendation XXVII on Discrimination against Roma, para 27.

<sup>83</sup> CERD, (1996). General Recommendation XXI on the Right to Self-Determination, para 3; See also United Nations General Assembly, (1992). Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Resolution 47/135.

<sup>84</sup> Scottish Government, (2017) *A Fairer Scotland for All: Race Equality Action Plan 2017-2021*, pg 60.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at pg 22.

To address discrimination committed by the private sector, the Policy commits to working with relevant partners and stakeholders to improve workplace equality practice.<sup>87</sup> To this end, resources were developed and published to promote inclusive recruitment practices.<sup>88</sup> More specifically, the Action Plan commits to providing funding to the Workplace Equality Fund with the aim of removing barriers to employment faced by minority communities. An important success in this arena occurred when the Social Enterprise Capacity Building Programme more than doubled its target engagement with minority ethnic groups.<sup>89</sup> Another positive outcome lies in the improved diversification of the Early Learning and Childcare workforce.<sup>90</sup>

#### D. Identified Gaps

Racial discrimination which occurs in employment is largely justiciable under the Equality Act (2010). The Act is minimally discussed in the Policy, presumably because the Scottish Parliament does not have the legislative competency to change it. Yet, the relative effectiveness, or ineffectiveness of the Act impacts Scotland's ability to implement its obligations under ICERD. The standard from ICERD is clear, Member States "shall assure to everyone within their jurisdiction effective protection and remedies...against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention."<sup>91</sup> Yet, there are currently a number of factors inhibiting the Act's effectiveness in providing a remedy for racial discrimination in employment.

To begin, the Act and its related Public Sector Equality Duties (PSEDs) in Scotland have a heavy bend towards gender-based discrimination.<sup>92</sup> This focus is then reflected in the respective success rates of gender-based discrimination claims in comparison to racial discrimination-based claims.<sup>93</sup> The lower success rate of racial discrimination-based claims is then compounded by the fact that discrimination is so rarely reported.<sup>94</sup> While REFAP acknowledges underreporting, it says

<sup>87</sup> *Id.* at pg 69.

<sup>88</sup> *Id.* at pg 6.

<sup>89</sup> Scottish Government, (2019). Race Equality Action Plan: Year One Progress Update, pg 7.

<sup>90</sup> More specifically, "engagement work with Al Meezan Islamic Centre saw 49 people apply and has resulted in 81% of those who applied being successful." See Scottish Government, (2020). Race Equality Action Plan: Year Two Progress Update, pg 8.

<sup>91</sup> UN General Assembly, (1965). International Convention on the Elimination of All Forms of Racial Discrimination, Article 6.

<sup>92</sup> See Christoffersen A., (2019). "Are We All 'Baskets of Characteristics?'" Intersectional Slippages and the Displacement of Race in English and Scottish Equality Policy." In: Hankivsky O., Jordan-Zachery J. (eds) *The Palgrave Handbook of Intersectionality in Public Policy*. The Politics of Intersectionality, pgs 713-714.

<sup>93</sup> Equality and Human Rights Commission, (2018). *Effectiveness of the PSED Specific Duties in Scotland*; Employment Tribunals and EAT Statistics, 2010-2011, London: HM Courts and Tribunals Service, pg. 8.

<sup>94</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 32.

little about plans to rectify this. Thus, if the few racial discrimination-based claims that *are* reported go on to be unsuccessful, this creates a cycle in which discrimination is not reported because victims do not trust the system meant to address it.

There are other barriers which might prevent historically marginalised demographics from pursuing a claim in the first place. Such barriers to justice might be economic, meaning not only that individuals cannot afford litigation, but also that they are unable to get the time off of work needed to attend hearings. Depending on the demographic, these barriers might include language and literacy. For those who have experienced an intersectional form of discrimination, filing a claim is further complicated by the decision of whether to file under one category or both. This is particularly problematic as intersectional discrimination is not merely additive. Instead, the forms of discrimination endured by those with multiple marginalised identities are distinct from those experienced by an individual who has only one such identity.<sup>95</sup>

For example, a woman of colour who experiences discrimination must choose to file under gender-based discrimination, race-based discrimination, or under both categories. Yet her chances of success could be inhibited if the discrimination she experienced does not present clearly as one or the other.<sup>96</sup> Instead, it is likely a unique combination of the two. Unfortunately, there is not an option to file under that unique combination. Finally, the policy thoroughly acknowledges inequalities in unemployment but focuses less on the discrimination behind that inequality.

#### E. Benefit of Incorporation

Taking account of the protections contained in ICERD necessitates a better understanding of the discriminatory ideas and practices which generate racial inequalities in employment. Incorporation would require not just that adequate remedies for racial discrimination are available, but also that they are accessible.<sup>97</sup> This will require working with civil society organisations to understand the barriers to litigation faced by minority ethnic groups. The knowledge gained must then be used to ensure adequate resourcing of these civil society organisations such that they are able to use strategic litigation to challenge the most common forms of racial discrimination they see in employment.

<sup>95</sup> Kimberlé, (2016). *The Urgency of Intersectionality*, Video File, available at: [https://www.ted.com/talks/kimberle\\_crenshaw\\_the\\_urgency\\_of\\_intersectionality?utm\\_campaign=tedsread&utm\\_medium=referral&utm\\_source=tedcomshare](https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality?utm_campaign=tedsread&utm_medium=referral&utm_source=tedcomshare).

<sup>96</sup> Crenshaw, Kimberle Williams, (1991). Mapping the Margins: Intersectionality, Identity politics, and Violence Against Women of Color. *Stanford Law Review*, 43(6), pg 1261.

<sup>97</sup> CERD, (2002). General recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), para u.

While access to remedy has a key role to play in effective human rights protection, in an ideal world litigation would not be necessary as actors would not be engaging in discriminatory behaviour to begin with. By committing to an incorporation of ICERD protections, the government would signal to public and private actors that Scotland is moving towards increased accountability for actions which directly, or indirectly amount to racial discrimination. This might then enable incorporation to serve as an awareness raising tool among both private and public actors to initiate discussions around issues of racial discrimination in all stages of employment. In particular, it might generate discussions and trainings on issues such as intersectional discrimination.<sup>98</sup> Such discussions might then encourage the private sector to review and appropriately adjust its own hiring and anti-discrimination practices. In this way, awareness raising may initiate sustainable change without the need for litigation.

## **IX. Housing**

Employment provides the resources needed to maintain an adequate standard of living (ASOL) which is an umbrella right protected by international human rights law. This encompasses the rights to housing, food, water and sanitation among other necessities. ASOL's main articulation lies in Article 11(1) of the International Convention on Economic, Social and Cultural Rights (ICESCR) and Article 25.1 of the Universal Declaration of Human Rights (UDHR).<sup>99</sup> Although the components of ASOL are each important to maintaining human dignity, this section will focus solely on housing.<sup>100</sup>

### **A. Identified Challenges**

The pandemic has highlighted the contemporary housing inequalities in Scotland.<sup>101</sup> Overcrowding and homelessness, which are both symptoms of housing that is unavailable, inaccessible and inadequate, inhibit Scotland's ability to effectively control and combat the spread of the virus. The economic downturn created by the virus further threatens the ability of many to pay rent and other housing costs. This exacerbates the inequalities that already exist in housing. For example, "poorer areas tend to be more densely populated and properties overcrowded, making

<sup>98</sup> For example, training could be conducted for tribunals on intersectional experiences of discrimination to facilitate improved success rates of these claims.

<sup>99</sup> UN General Assembly, (1966). *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, art. 11(1); UN General Assembly, (1948). *Universal Declaration of Human Rights*, 217 A (III), art. 25(1).

<sup>100</sup> For a comprehensive list of the human rights provisions relating to the right to adequate housing see UN Human Rights Office of the High Commissioner, *International Standards: Adequate Housing*, available at <https://www.ohchr.org/EN/Issues/Housing/Pages/InternationalStandards.aspx>.

<sup>101</sup> Scottish Government, (2020). *COVID-19 Allocations Advice and Information for the Housing Sector*, available at <https://www.gov.scot/publications/coronavirus-covid-19-allocations-advice-and-information-for-the-housing-sector/>.

social distancing nigh on impossible.”<sup>102</sup> Additionally, the percentage of minority ethnic populations who are in relative poverty after housing costs is double that of white British populations.<sup>103</sup> In short, adequate housing is less economically accessible for minority ethnic populations in Scotland than it is for white populations.<sup>104</sup>

There are also several housing related challenges that involve nomadic or semi-nomadic populations in Scotland including Scottish Gypsy/Travellers and Roma peoples. These populations must be able to enjoy and have equal access to housing that is culturally appropriate.<sup>105</sup> Cultural adequacy requires respecting and taking account of “the expression of cultural identity and ways of life.”<sup>106</sup> On a broader note, there is a need to ensure that social housing is allocated without discrimination.<sup>107</sup> Importantly, racial segregation must be acknowledged and addressed when and where it exists in housing.<sup>108</sup> As with education and employment, housing demonstrates the interdependent nature of human rights by highlighting inequalities that exist in other areas. For example, the ability of children to access their rights to family life and family unity are often heavily dependent on the access to and quality of their housing.<sup>109</sup>

#### B. ICERD Standards

To begin, the right to housing is interpreted by CESCR to encompass, “... the right to live somewhere in security, peace and dignity.”<sup>110</sup> Within ICERD, Article 3 mandates the prevention and

<sup>102</sup>University of Glasgow, (2020). *Structural Inequalities and Dying at Home During Covid-19*, available at: <https://policyscotland.gla.ac.uk/structural-inequalities-and-dying-at-home-during-covid-19/>

<sup>103</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 61.

<sup>104</sup> *Id.*

<sup>105</sup> Poole, L., & Adamson, K. (2008). *Report on the Situation of the Roma Community in Govanhill, Glasgow*. University of the West of Scotland, Pg 7, available at: <http://www.bemis.org.uk/resources/gt/scotland/report%20on%20the%20situation%20of%20the%20roma%20community%20in%20govanhill,%20Glasgow.pdf>; For an in-depth discussion of the right to adequate housing as it pertains to travelling populations see Council of Europe Commissioner for Human Rights, (2012). *Human Rights of Roma and Travellers in Europe*, Council of Europe Publishing, F-67075 Strasbourg Cedex, pg 137-157 available at <https://rm.coe.int/the-human-rights-of-roma-and-travellers-in-europe/168079b434>.

<sup>106</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), (1991). General comment No. 4: The right to Adequate Housing (art. 11 (1) of the Covenant); see also UN Office of the High Commissioner for Human Rights, *The Right to Adequate Housing Toolkit*, available at: <https://www.ohchr.org/en/issues/housing/toolkit/pages/righttoadequatehousingtoolkit.aspx>

<sup>107</sup> CESCR, General Comment No. 4, Right to Adequate Housing, Article 11 of the Covenant, para 17.

<sup>108</sup> UN General Assembly, (1965). *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 2(1)(c); <sup>108</sup> CERD, (2000). *General Recommendation XXVII on Discrimination against Roma*, para 30.

<sup>109</sup> Although this is not explicitly contained in ICERD, it is protected under Article 23 of the International Convention on Civil and Political Rights and under Articles 8 and 9 of the UNCRC, the racial/ethnic component of children being separated from family and identity makes it relevant to this discussion.

<sup>110</sup> As ICESCR contains a comprehensive protection of the right to housing, the work of CESCR is a useful tool in understanding this right and the right to ASOL more broadly. See CESCR, (1991). General Comment No. 4, Right to Adequate Housing, Article 11 of the Covenant, para 7.

elimination of racial segregation in housing, and Article 5(e)(iii) protects individuals' right to housing on a non-discriminatory basis.<sup>111</sup> With regard to travelling populations, the Committee discusses preventing segregation and ensuring the provision of appropriate stopping locations for caravans.<sup>112</sup> Similarly, GR No. 29 discusses monitoring and reporting on trends which contribute to the segregation of descent-based communities.<sup>113</sup> Finally, the Committee discusses the need to “act firmly” to counter discrimination against travelling populations by local communities.<sup>114</sup>

More broadly, housing “should not be interpreted in a narrow or restrictive sense.”<sup>115</sup> Housing is more than a structure or a commodity. Instead, the right to adequate housing encompasses legal security of tenure, availability of services material and infrastructure, affordability, habitability, accessibility, cultural adequacy, and more.<sup>116</sup> As with all human rights, housing is connected to the principle of human dignity. This principle indicates rights fulfilment and the treatment to which an individual is entitled based on their status as a human being.<sup>117</sup> Human dignity underscores the requirement of adequacy in housing. This is a requirement which applies to each component of the right. For example, housing should provide adequate security, adequate space, an adequate location, and more.<sup>118</sup>

### C. Race and Equality Framework and Action Plan

REFAP thoroughly acknowledges many of the inequalities that exist in Scottish housing. The Policy also commits to further tackling the ways in which minority ethnic communities are impacted by these inequalities.<sup>119</sup> To this end, the Framework commits to strengthening participation from minority ethnic tenants in the housing sector, and to making better use of housing data that currently exists.<sup>120</sup> The Framework also recognises the need ensure that minority ethnic communities are benefitting equally from social housing.<sup>121</sup>

<sup>111</sup> UN General Assembly, (1965). International Convention on the Elimination of All Forms of Racial Discrimination, Article 3, 5.

<sup>112</sup> Scottish Government, (2017) *A Fairer Scotland for All: Race Equality Action Plan 2017-2021*, pg 75.

<sup>113</sup> CERD, (2002). General recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), paras n-q.

<sup>114</sup> CERD, (2000). General Recommendation XXVII on Discrimination against Roma, paras 12-16.

<sup>115</sup> CESCR, (1991). *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, E/1992/23, para 7.

<sup>116</sup> United Nations, Fact Sheet No. 21, the Human Right to Adequate Housing, available at

<https://www.un.org/ruleoflaw/files/FactSheet21en.pdf>.

<sup>117</sup> Gilibert, P., (2018). *Human Dignity and Human Rights* First., Oxford: Oxford University Press, pg 8; see also General Assembly, (2012). Resolution 66/290. Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome, A/RES/66/290, para 3.

<sup>118</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), (1991). *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, para 7.

<sup>119</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 78.

<sup>120</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 79.

<sup>121</sup> *Id.*

A positive development was the publication of the New Housing Need and Demand Assessment in October of 2018.<sup>122</sup> This tool is meant to “produce long-run, broad estimates of additional future housing required across Scotland...”<sup>123</sup> Ideally, this information will be used to better meet housing needs for all of Scotland’s population. Relatedly, the Scottish Housing Regulator reviewed its own regulatory framework, and now requires data collection on each protected characteristic. This improved disaggregated data collection will hopefully provide more insight into the housing challenges faced by individuals with intersectional identities.

With regard to Gypsy/Traveller populations, the Policy commits to identifying and communicating with landlords who are not meeting the minimum site standards at travelling stops.<sup>124</sup> This work led to the discovery that over half of social landlords were not meeting the standards set for Traveller sites.<sup>125</sup> This discovery then generated new requirements being placed on landlords, including the maintenance of evidence that they are meeting standards such as the collection of data on protected characteristics.<sup>126</sup> Finally, the Glasgow City Council is also working with the larger Gypsy/Traveller population living in Govanhill to take targeted action against landlords in the area who are failing to uphold their obligations.<sup>127</sup>

#### D. Identified Gaps

Although it is positive that these populations are being supported in taking action against discriminatory or problematic landlords, the extent of the problem warrants a closer examination of why and how this discrimination exists so broadly. In other words, what underlying discriminatory ideology permitted over 50 percent of landlords to not uphold their obligations? This is an example of the unsustainability of resolving downstream issues without addressing the upstream causes. In this case, a failure to examine the discriminatory attitudes that permitted such widespread housing inequities facilitated violations of the right to housing. One of the other main gaps between the policy and ICERD is that segregation in housing is not overtly discussed once in the policy.<sup>128</sup> In

<sup>122</sup> Scottish Government, (2020). Housing Need and Demand Assessment Tool, available at <https://www.gov.scot/publications/hnda-tool/>.

<sup>123</sup> *Id.*

<sup>124</sup> Scottish Government, (2017) *A Fairer Scotland for All: Race Equality Action Plan 2017-2021*, pg 39.

<sup>125</sup> Scottish Government, (2019). Race Equality Action Plan: Year One Progress Update, pg 25.

<sup>126</sup> *Id.*

<sup>127</sup> Adams, Lucy, (2016). Rogue Landlords Exploit Vulnerable Families in Govanhill, BBC News, available at <https://www.bbc.com/news/uk-scotland-glasgow-west-37169170>.

<sup>128</sup> Shehab, N. & Salama, A., (2018). *The Spatiality of Segregation: Narratives from the Everyday Urban Environment of Gothenburg and Glasgow*, ArchNet-IJAR: International Journal of Architectural Research, 12(1), pgs 78-89.

contrast, racial segregation in housing is explicitly condemned by ICERD and repeatedly addressed by the Committee.<sup>129</sup>

REFAP also does not discuss housing as a component of the broader ASOL framework. Further, housing is more than just a structure or a ‘roof over one’s head.’<sup>130</sup> Yet, in the Policy it is discussed mainly as a structure, or as a site in the case of Gypsy/Travellers, and thus as a commodity. When housing is understood only as a commodity, these discussions miss housing’s fundamental role in facilitating other essentials such as clean water, sanitation, electricity and more. Ultimately, such a failure loses sight of housing’s role in ensuring the maintenance of human dignity.

#### E. Benefit of Incorporation

When economic, social and cultural rights are incorporated in a manner which acknowledges the right to ASOL, human dignity must also be a key underlying consideration. Using human dignity as a baseline for ASOL, and more specifically for housing, might then guide decisions meant to ensure that everyone is able to enjoy the right to housing regardless of their racial identity. Maintaining equality in access to, and adequacy of housing will also require upholding consistent housing standards across the board. This consistency should spread across public and private housing as well as stopping sites for travelling populations.<sup>131</sup> Examining housing holistically through considering the elements identified by CERD, CESCR and other human rights bodies would ensure that factors such as location for work and basic necessities are not ignored in housing policy.<sup>132</sup>

Racial segregation in housing cannot be addressed without first acknowledging that it exists. After acknowledging the issue, policy makers can begin to better understand the trends that create and maintain segregation. These are all actions that CERD encourages Member States to take.<sup>133</sup> CERD also recommends taking steps create dialogue around the causes of segregation, and to generate solutions on how communities might become better integrated.<sup>134</sup>

Finally, the manner in which the UK’s exit from the EU is ultimately conducted may impact the protections currently in place for travelling populations. An ICERD incorporation would help to ensure that Scotland is keeping pace with the human rights protections in place for Roma and other

<sup>129</sup> CERD, (2000). General Recommendation XXVII on Discrimination against Roma, para 30; see also CERD, (2002). General recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), para a, n-o.

<sup>130</sup> CESCR, (1991). *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, E/1992/23, para 7.

<sup>131</sup> The work being done by the Govanhill Housing Association demonstrates a positive step in this direction, see a discussion of their efforts at <http://www.govanhillha.org/about-us/south-west-govanhill/>.

<sup>132</sup> *Id.*

<sup>133</sup> CERD, (2000). General Recommendation XXVII on Discrimination against Roma, para 30; see also CERD, (2002). General recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), para a, n-o.

<sup>134</sup> CERD, (2002). General recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), para q.

travelling populations in Europe. More specifically, the work of CERD and the Council of Europe could be used to continue to work with these populations to ensure their access to culturally appropriate housing.<sup>135</sup>

## **X. Health and Healthcare**

The right to the highest attainable standard of mental and physical health is also closely related to ASOL. This is because the components which comprise ASOL also impact health and wellbeing. For example, the accessibility (both physical and economic) of adequate or nutritious food impacts underlying health conditions.<sup>136</sup> Alternatively, inadequate sanitation facilities can contribute to the spread of disease.<sup>137</sup> While basic access to medical facilities such as hospitals or clinics is essential, there are a number of other factors which contribute to a healthy life.

### **A. Identified Challenges**

Minority ethnic groups in Scotland continue to experience poor health outcomes and barriers to access surrounding healthcare resources. Health is one of, if not the main area in which Scotland is lacking adequate race and ethnicity data, particularly data which is disaggregated.<sup>138</sup> This lack of data makes it harder to understand the barriers minority ethnic communities face in this area. More data is needed to provide insight into whether different groups understand the healthcare resources available to them, and whether they have confidence in the healthcare system to begin with.

There are also structural inequalities that marginalise different minority ethnic groups contributing to poverty and social exclusion, and thus producing poor health outcomes.<sup>139</sup> Finally, in addition to highlighting pre-existing healthcare inequalities, the COVID-19 pandemic is disproportionately impacting those of minority ethnic backgrounds.<sup>140</sup> Discrimination is both a cause and a consequence of poor health. Discrimination can prevent those who might otherwise seek

<sup>135</sup> For an in-depth discussion of the right to adequate housing as it pertains to travelling populations see Council of Europe Commissioner for Human Rights, (2012). *Human Rights of Roma and Travellers in Europe*, Council of Europe Publishing, F-67075 Strasbourg Cedex, pg 137-157 available at <https://rm.coe.int/the-human-rights-of-roma-and-travellers-in-europe/168079b434>.

<sup>136</sup> UN Office of the High Commissioner for Human Rights, (2010). Fact Sheet No. 34: The Right to Adequate Food, pg 5, available at <https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>.

<sup>137</sup> UN General Assembly, (2010). Resolution 64/292: The Human Right to Water and Sanitation, A/RES/64/292, pg 2, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/479/35/PDF/N0947935.pdf?OpenElement>.

<sup>138</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 71; Equality and Human Rights Commission, (2017). *Race rights in the UK: Submission to the UN Committee on the Elimination of Racial Discrimination*, pgs 25-26.

<sup>139</sup> UN Office of the United Nations High Commissioner for Human Rights (2008). *Fact Sheet No. 31: The Right to Health*, pg 7, available at <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

<sup>140</sup> The IFS Deaton Review, (2020). *Covid-19 and Inequalities*, pg 8, available at <https://www.ifs.org.uk/inequality/Covid-19-and-inequalities/>.

treatment from doing so, while also maintaining structural inequalities that contribute to poor health outcomes.

### B. ICERD Standards

The right to the highest attainable standard of physical and mental health is articulated by CESCR in General Comment No. 14 on the right to health. The Committee explains that the right to health encompasses both freedoms and entitlements.<sup>141</sup> The main freedom is that from non-consensual treatment, and the entitlements include essential medicines and to access to basic health services.<sup>142</sup> These entitlements should be enjoyed equally by all groups regardless of race. However, differences are not to be ignored and non-discrimination in the health context also requires accounting for the varying needs of different groups.<sup>143</sup> For example, maternal health requires access to equitable and adequate healthcare facilities and services for family planning.<sup>144</sup>

Within ICERD, Article 5(e)(iv) protects the right to public health and medical care.<sup>145</sup> Additionally, the Committee reinforces the obligation to protect the right to an adequate standard of physical and mental health for specific groups including non-citizens, Roma populations, and those of African Descent.<sup>146</sup> Finally, the Committee discusses the need to ensure equal access to healthcare facilities and to programs and projects in the field of health.<sup>147</sup>

### C. Race and Equality Framework and Action Plan

With regard to poor health outcomes experienced by certain demographics, the Framework focuses on the promotion of preventative approaches through effective engagement with minority ethnic communities.<sup>148</sup> The Framework also acknowledges the issues surrounding data gathering and commits to developing “cohesive, effective practice on improving approaches to gathering, collating and publishing ethnicity data on health and social care at a national level.”<sup>149</sup> With regard to

<sup>141</sup> CERD, (1993). General Recommendation XIV on article 1, paragraph 1, of the Convention, para 2.

<sup>142</sup> Office of the United Nations High Commissioner for Human Rights (2008). *Fact Sheet No. 31 The Right to Health*, pg 3, available at <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

<sup>143</sup> *Id.*

<sup>144</sup> UN General Assembly, (1979). Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13, Art. 14.

<sup>145</sup> UN General Assembly, (1965). International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(e)(v).

<sup>146</sup> CERD, (2005). General Recommendation XXX on Discrimination Against Non-Citizens, para 36; CERD, (2000). General Recommendation XXVII on Discrimination against Roma, paras 31-34; CERD, General Recommendation XXIX on article 1, paragraph 1 of the Convention (Descent), paras nn-oo.

<sup>147</sup> CERD, (2000). General Recommendation XXVII on Discrimination against Roma, paras 33-34.

<sup>148</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 14.

<sup>149</sup> *Id.* at pg 75.

representation, the Framework recognises the need to ensure that NHS Scotland staff reflect the communities they serve and commits to increasing staff from minority ethnic populations.

The Action Plan similarly commits to continued stakeholder engagement and better data gathering through improved coding for ethnicity.<sup>150</sup> The Action Plan specifically commits to funding three projects targeted at reducing inequalities in access to cancer screenings.<sup>151</sup> There are a number of positive examples in the Follow Up Report, including the specification that the Screening Inequalities Fund has contributed to 34 projects targeted at increasing attendance in screening among minority ethnic groups.<sup>152</sup>

#### D. Identified Gaps

The policy focuses heavily on *access* to healthcare and less on *adequacy* or quality with regard to the healthcare received.<sup>153</sup> In human rights both are important, as is demonstrated by the freedoms and entitlements articulated by CDESCR. For an example in difference of quality, CERD noted concern regarding the overrepresentation of certain demographics in psychiatric institutions in the U.K. and the “disproportionate use of restraint, seclusion and medication.”<sup>154</sup> As has been repeatedly stressed, the gathering of disaggregated data is crucial. Without understanding the varied experiences with healthcare in Scotland, it is hard to determine where the gaps are, and thus even harder to correct them. Finally, another common gap between the policy and ICERD lies in the policy’s limited discussion of the upstream discrimination that produces the downstream negative health outcomes. For example, differences in health outcomes may be tied to discrimination which violates the right to employment. This violation then inhibits access to resources which are necessary to an adequate standard of living.

#### E. Benefit of Incorporation

An incorporation of ICERD would encourage Scotland to view health and healthcare issues among minority ethnic populations holistically rather than as a process issue. By understanding the lived experiences of individuals with various healthcare issues, Scotland would be better positioned to address structural healthcare inequalities.<sup>155</sup> Further, Scotland would be able to use disaggregated

<sup>150</sup> Scottish Government, (2017) *A Fairer Scotland for All: Race Equality Action Plan 2017-2021*, pg 22.

<sup>151</sup> *Id.*

<sup>152</sup> Scottish Government, (2020). *Race Equality Action Plan: Year Two Progress Update*, pgs 12-13.

<sup>153</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pgs 74, 84.

<sup>154</sup> CERD, (2016). *Concluding Observations on the Twenty-First to Twenty-Third Periodic Reports of United Kingdom of Great Britain and Northern Ireland*, CERD/C/GBR/CO/21-23, pg 7.

<sup>155</sup> For example, see the recent tension in Govanhill involving perceived cultural differences of the Roma community impacting the spread of the virus. This was not an issue of lack of access to healthcare, but instead demonstrated the

data to dig into the root causes of poor health outcomes among minority ethnic communities. The causes of such poor outcomes might be a lack of information, barriers to access, or discrimination occurring within the healthcare system. By understanding healthcare as a component of interconnected human rights, Scotland will be able to address multiple issues simultaneously. As the COVID-19 pandemic has highlighted, unequal health outcomes are related to inequalities across all areas of life. Thus, the solution must holistically address the discriminatory causes and not only the symptoms that manifest in poor health outcomes.<sup>156</sup>

## **XI. Community Cohesion and Safety**

Racial discrimination occurs at a variety of levels, none of which are acceptable but some of which are more harmful than others. Discrimination which calls for or results in violence must be criminally penalised.<sup>157</sup> The use of violence in alignment with ideas of racial superiority and discrimination is the very reason that ICERD was created in the first place. The horrors of the Holocaust demonstrated the potential for ideas of racial discrimination that go unchecked. Further, the worst of international crimes, genocide, is broadly an attempt to eliminate a group based on their identity.<sup>158</sup> Although genocide is an extreme example, it demonstrates the importance of building and maintaining equitable societies that are inclusive of all their citizens.

### **A. Identified Challenges**

If communities are inclusive, individuals' notions of safety should not be dependent upon their racial identity. An individual should not feel that their racial identity opens them up to potential violence. Yet, the Framework acknowledges the "evidence that not everyone accepts minority ethnic people as an equal part of Scotland's society."<sup>159</sup> When ideas of racial superiority or stereotyping are pervasive within a community, it is beneficial to engage with a variety of members from that community in order to understand the roots of those ideas. This may seem obvious, but to do so requires engagement with the discriminators and not just those who experience discrimination.

crosscutting nature of structural inequality. Overcrowding in housing created a perceived concern about appropriate social distancing and led to racialised tension. See Stewart, Catriona, (2020). *Claims 50% of Roma Group have Fled Govanhill after false Covid-19 Rumours*, The Glasgow Times, available at <https://www.glasgowtimes.co.uk/news/18373662.claims-50-roma-group-fled-govanhill-false-covid-19-rumours/>.

<sup>156</sup> Scottish Government Advisory Group on Economic Recovery, (2020). *Towards a Robust, Resilient Wellbeing Economy for Scotland*, pg 30, available at <https://www.gov.scot/publications/towards-a-robust-resilient-wellbeing-economy-for-scotland-report-on-submissions-to-the-advisory-group-on-economic-recovery/>.

<sup>157</sup> UN General Assembly, (1965). International Convention on the Elimination of All Forms of Racial Discrimination, Article 4(a).

<sup>158</sup> UN General Assembly, (1951). Convention on the Prevention and Punishment of the Crime of Genocide, Res 260 A(III).

<sup>159</sup> Scottish Social Attitudes Survey 2010; SCSR (2010) Scottish Social Attitudes Survey 2010: Attitudes to discrimination and positive action. Available from: <http://www.gov.scot/Resource/Doc/355763/0120175.pdf>

At a larger level, eliminating these discriminatory ideas requires ensuring that those with public voices, such as representatives and journalists are not advocating for them. This presents a unique challenge as it comes into the territory of freedom of speech and expression. However, this does not relieve Scotland of the duty to address inflammatory or racist reporting.<sup>160</sup>

Journalists are not the only ones with public voices. There are also times when public representatives are part of the problem. This presents the challenge of determining the best way to handle representatives who voice discriminatory ideas. Finally, when racialised violence or incidents occur, the victim should feel safe and supported in reporting the incident. In Scotland, under reporting continues to be a challenge which contributes to a subsequent lack of enforcement against hate crimes.<sup>161</sup>

### B. ICERD Standards

When acts of racial discrimination are reported, Article 6 of ICERD demands effective protection and remedies for the victims of such acts.<sup>162</sup> As a part of these remedies, the Committee includes access to reparations for the victims.<sup>163</sup> More specifically, the Durban Declaration discusses the importance of carrying out “comprehensive, exhausting, timely and impartial investigations” into acts of racism and racial discrimination.<sup>164</sup> In sum, the justice system must be equally accessible and beneficial to everyone, especially regarding race-based violence. When the justice system is not equally benefitting everyone, Member States should work to identify the stages of the process at which discrimination is occurring. For example, determining whether there are xenophobic attitudes present in the administrative process or during civil or criminal proceedings.

In terms of creating inclusive communities, the Declaration discusses the need for Member States to create conditions which are conducive to “greater harmony, tolerance and respect” among community members.<sup>165</sup> To achieve this harmony, the Committee points out the need to challenge and eradicate ideas of racial or ethnic superiority, including in the media.<sup>166</sup> More broadly, Scotland

<sup>160</sup> Inflammatory reporting from local newspapers regarding Gypsy/Travellers continues to occur in Scotland, see Davidson, N. et al., 2018. *No Problem Here: Understanding Racism in Scotland*, pg 113.

<sup>161</sup> Coalition for Racial Equality and Rights, (2016). *Submission to the United Nations Committee on the Elimination of Racial Discrimination*, [https://864a82af-f028-4baf-a094-46face9205ca.filesusr.com/ugd/7ec2e5\\_d91fb45cc2394e738d1ae177676e2251.pdf](https://864a82af-f028-4baf-a094-46face9205ca.filesusr.com/ugd/7ec2e5_d91fb45cc2394e738d1ae177676e2251.pdf).

<sup>162</sup> UN General Assembly, (1965). International Convention on the Elimination of All Forms of Racial Discrimination, Article 6.

<sup>163</sup> CERD, (2000). General Recommendation XXVI on Article 6 of the Convention, para 2.

<sup>164</sup> 2001 World Conference Against Racism (WCAR). *The Durban Declaration and Programme of Action*, para 89, available at <https://www.un.org/WCAR/durban.pdf>.

<sup>165</sup> *Id.* at para 49.

<sup>166</sup> CERD, (2000). General Recommendation XXVII on Discrimination against Roma, paras 36-40.

must identify areas which are prone to racialised violence and discrimination to effectively target solutions.<sup>167</sup>

### C. Race and Equality Framework and Action Plan

The Framework recognises many of the aforementioned identified challenges. The Policy seeks to address racial discrimination and hate crimes through engagement with youth from minority ethnic communities.<sup>168</sup> Additionally, the Action Plan discusses the implementation of a more targeted ‘Tackling Prejudice and Building Connected Communities Action Plan’ along with the establishment of an Advisory Panel on Community Cohesion.<sup>169</sup> Similarly, the Plan notes continued efforts with the ‘Hate has no Home in Scotland’ campaign. As a step to improving the justice system, the Framework commits working with the Scottish police to prevent discrimination and tackle racial biases.<sup>170</sup>

Importantly, the Scottish Parliament is currently in the first stage of developing a new Hate Crime Bill to create effective remedies for crimes motivated by a protected characteristic.<sup>171</sup> This process included a 14-week public consultation on the content of the new bill.<sup>172</sup>

### D. Identified Gaps

For the justice system to be effective, individuals must first report the hate crime, and underreporting continues to be an issue in Scotland. Although the policy commits to taking steps to better understand racism and racially motivated violence within communities, these are areas in which ICERD calls for concrete actions to achieve substantive changes in outcomes. REFAP focuses heavily on police training and equality but police are only one part of the justice system. The Committee recommends that states re-examine the entirety of the justice system and not just the entry point. Relatedly, although the Framework acknowledges that hate crimes motivated by race are by far the most common, the main commitments are only focused around engagement with minority ethnic communities. Although engagement with these populations is an important part of understanding the issue, it cannot be fully understood without engagement of the perpetrators of hate-based violence.

### E. Added Benefit

<sup>167</sup> CERD, (2002). General recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), para ee.

<sup>168</sup> Scottish Government, (2017) *A Fairer Scotland for All: Race Equality Action Plan 2017-2021*, pg 64.

<sup>169</sup> Scottish Government, (2019). Race Equality Action Plan: Year One Progress Update, pg 33.

<sup>170</sup> Scottish Government, (2016). *Race and Equality Framework for Scotland*, pg 33.

<sup>171</sup> Scottish Government, (2020). Hate Crime and Public Order (Scotland) Bill. The Bill is currently in the first stage, see the overview at <https://beta.parliament.scot/bills/hate-crime-and-public-order-scotland-bill>.

<sup>172</sup> Scottish Government, (2019). Race Equality Action Plan: Year One Progress Update, pg 34.

While Scotland has taken the step of developing a new Hate Crime Bill, it is still unclear what the protections will look like. ICERD and the work of the Committee would provide useful guidance on how to structure this law and ensure it provides the appropriate protections and remedies in alignment with the Convention. Additionally, the consultation should be a participative process which adequately accounts for the experiences of those who will be impacted by its contents. Further, by examining the entirety of the justice system, Scotland would improve and maintain the system's integrity. A part of this entails determining how and when the system functions in a discriminatory way, and also what barriers exist that prevent the system from being equally accessible for everyone.

By reaffirming that the justice system is meant to protect and serve everyone, Scotland would signal both that racial discrimination will not be tolerated, and that it will be handled appropriately when it occurs. Finally, there is a common theme throughout the policy of committing to better engagement with minority ethnic communities to address issues of racial discrimination. While their voices are essential to solving the problem, they themselves are not usually the problem. Similarly, processes alone are not the problem. Rather, it is the discriminatory attitudes and stereotyping that persist throughout processes which produce inequalities. Changing processes alone will not change attitudes. Discriminatory ideology that persists in society must be identified and eradicated.

## **XII. Conclusion**

Scotland's progress towards human rights incorporation demonstrates a genuine commitment to better protection of these rights for the population. However, these efforts will come up short if they fail to benefit everyone equally. ICERD and the corresponding work of CERD together address many of the challenges to equal rights enjoyment in Scotland. ICERD goes beyond the Principle of Non-Discrimination to ensure access to, and quality of rights protections remain equal for everyone regardless of race, colour, descent, or national or ethnic origin.

The Scottish REFAP policy also thoroughly addresses many of these challenges, but as a policy the Framework is subject to changes in politics. Alternatively, incorporation would be a step towards cementing these rights and obligations into law and practice, this then contributes to sustainable change by mandating adherence. Although an incorporation of ICERD would focus on the legal aspect, it also has the potential to serve as a catalyst which ignites the needed corresponding changes to both policy and practice.

For example, understanding racial discrimination requires gathering accurate, up-to-date and disaggregated data to inform solutions. Ensuring the sustainability of rights protections requires training public officials and law enforcement agencies on concepts such as intersectionality. Engaging in participatory decision making with minority ethnic communities requires establishing and maintaining relationships of trust.

Incorporating ICERD would require an examination of racial discrimination and inequality beyond REFAP. It would necessitate an understanding of the root causes of racial discrimination in Scotland, and not only its symptoms. Through a societal review with such depth and breadth as would be required by a genuine incorporation of ICERD, Scotland might begin to identify and eradicate an issue as deeply entrenched and systemic as racial discrimination.

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