
Incorporation of International Human Rights Briefing Series:

The UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

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BACKGROUND

In March 2021 the Scottish Government [announced its intention](#) to introduce a Human Rights Bill to the Scottish Parliament. This world-leading legislation will directly incorporate four key United Nations Human Rights treaties into Scots law, subject to devolved competence. This will provide a new human rights framework for Scotland and is the result of a process which started with the 2018 Report of the First Minister's Advisory Group on Human Rights and culminated with the [National Taskforce for Human Rights Leadership Report](#), (also available in [easy read format](#)). The process was informed by extensive engagement with a wide range of representatives from the public sector, civil

society and human rights experts. A public consultation process was conducted which resulted in the [All Our Rights in Law Report](#).

The relevant treaties are:

- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- The UN Convention on the Rights of Persons with Disabilities (UNCRPD).

The overriding aim of the new framework is to protect and advance the realisation of human rights for everyone in Scotland.

This Briefing series provides an overview of each of the treaties as well as some of the related rights and is intended to aid civil society's knowledge and understanding of the new framework and its potential future application.

OVERVIEW OF THE CONVENTION

The [International Convention on the Elimination of All Forms of Racial Discrimination](#) (ICERD) is a UN Convention which was adopted in 1965, and ratified by the UK in 1969. The treaty has been ratified by 189 of the 194 member nations of the United Nations. CERD aims to put into practice the fundamental aim of the United Nations to eliminate racial discrimination and government policies based on racial superiority or hatred and to instil co-operation among nations and international peace and security in order to achieve a world society free of racial segregation and discrimination.

The Convention remains the principal international human rights instrument defining and prohibiting racial discrimination in all sectors of private and public life. It is comprised of 25 articles which together form a common international legal framework which sets out the provisions relevant to the protection and enforcement of the right not to suffer racial discrimination as provided for under

international law. By becoming a party to the Convention, states have declared that racial discrimination should be outlawed and have pledged themselves to abide by the terms of the Convention.

The Convention defines 'racial discrimination' in Article 1 as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Efficacy and implementation of the Convention at domestic level is monitored by the UN's [Committee on the Elimination of Racial Discrimination](#) (CERD) a body of 18 independent experts who are responsible for holding states to account on their efforts towards eliminating racial discrimination.

KEY PROVISIONS

In defining racial discrimination, Article 1 provides that discrimination is prohibited on the grounds of 'race, colour, descent or national or ethnic origin,' often referred to as the 'protected groups' under the Convention. CERD has adopted General Recommendations to clarify that the scope of Article 1 also includes groups not explicitly

named but who fall within the Convention's broad criteria, such as women, indigenous persons, the Roma, Dalits, non-citizens including refugees, African descendants, particularly those in the diaspora, Muslims subjected to Islamophobia, and more generally persons whose religious identity has been 'racialized', that is used as a basis for discrimination.¹

In its reference to the 'purpose or effect' of the actions specified, Article 1 applies the provisions of ICERD to circumstances where discrimination is intended as well as to those where it is not. This broadens the prohibition of racial discrimination under the Convention so that it covers both direct and indirect discrimination. Direct discrimination refers to a situation where someone is treated unfairly because of their race, colour, descent or national or ethnic origin. Indirect discrimination refers to actions that are apparently neutral, but which have a disparate negative impact on the members of a protected group. CERD has determined that whether an action is discriminatory will depend on whether it can be objectively justified or not.²

Article 1 (4) allows special measures to be taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection. This exception to the general prohibition of discrimination is permitted as far as 'may be necessary in order to ensure

such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms' provided 'that such measures do not... lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'.

Taken together, the provisions of Article 1 confer the aim of substantive equality on the Convention. This means that the overall objective of ICERD is to ensure equality of outcomes rather than procedural equality of opportunity or formal equality.

Article 5 provides that the relevant civil and political rights referred to in Article 1 include the right to political participation, freedom of speech, freedom of movement, marriage and choice of spouse, to own property and to inherit, and that economic, social, and cultural rights include rights relating to work, housing, health care, and education. Under Article 5, states must guarantee 'equality before the law' in the enjoyment of the rights.

Article 6 provides for access to justice by guaranteeing effective protection from discrimination through access to tribunals and other relevant state institutions against any acts of racial discrimination which violate human rights and fundamental freedoms. The right to a remedy is also guaranteed.

1. Gary McDougall, The International Convention on the Elimination of all Forms of Racial Discrimination (UN 2021), https://legal.un.org/avl/pdf/ha/cerd/cerd_e.pdf

2. General Recommendation No. 14 (on Article 1, paragraph 1, of the Convention), paras. 1 and 2; in Report of the Committee on the Elimination of Racial Discrimination (A/48/18, 15 September 1993).

Article 3 places an obligation on states to eradicate all practices of segregation and apartheid and Article 4 calls on states to condemn propaganda based on theories of the superiority of one racial group over another in all forms. Organisations and all organised propaganda activities that promote racial hatred should be declared illegal.³

Article 7 places emphasis on the need for public education and awareness-raising as a means of combating prejudices which lead to racial discrimination and as a way of 'promoting understanding, tolerance and friendship among nations and racial or ethnical groups.' In order to accomplish these aims it calls on states to adopt 'immediate and effective measures, particularly in the fields of teaching, education, culture and information'. The role of misinformation and indoctrination has been acknowledged by CERD, which has condemned it as a root cause of hate speech.⁴

KEY POTENTIAL IMPACTS OF INCORPORATION

Following on from the [First Minister's Advisory Group on Human Rights Leadership's recommendation](#) to fully incorporate a range of international human

rights Conventions including ICERD, the National Taskforce for Human Rights Leadership has been examining how ICERD and its sister Conventions which deal with women's rights⁵ and disability,⁶ might be brought into Scots law through incorporation.⁷ **Direct incorporation** means that the provisions of an international agreement, such as ICERD, become part of the national law. It is the first legal step towards making human rights enforceable in the national legal system. Enforceability means that there are institutions and procedures available to provide a remedy when a human right is abused or violated. Incorporation will encourage stronger implementation, which includes all of the law, policy and other measures taken to ensure that human rights are respected, protected and fulfilled.

The obligation of non-discrimination under ICERD imposes both negative obligations not to discriminate on the grounds of race, which are generally in line with current UK provision, but it also imposes positive duties which are proactive, and which require states to take preventative action to counter prejudice and discrimination. Furthermore, although the scope and nature of ICERD's provisions overlap with the protections provided by domestic laws in some respects, the Convention is more comprehensive as it

3. See General Recommendation No. 35 (combatting racist hate speech), para. 21; in Report of the Committee on the Elimination of Racial Discrimination, 12-30 August 2013, Annex 8 (A/69/18) and (CERD/C/GC/35, 26 September 2013).

4. See General Recommendation No. 35 (combatting racist hate speech), para. 21; in Report of the Committee on the Elimination of Racial Discrimination, 12-30 August 2013, Annex 8 (A/69/18) and (CERD/C/GC/35, 26 September 2013).

5. UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

6. UN Convention on the Rights of Persons with Disabilities (UNCRPD)

7. National Taskforce for Human Rights Leadership, [Leadership Report](#), 12 March 2021.

imposes a set of principles and clear aims that cut across all areas of state policy. It differs in this respect from most anti-discrimination law at the domestic level which is narrowly focused on commercial activities or those which carry clear resource implications. Incorporation offers an opportunity to change this in areas where relevant [policy is devolved to the Scottish Parliament](#).

Under the current devolution arrangements, 'equal opportunities', and therefore equality law, is a reserved matter subject to certain limited exceptions.⁸ The right not to be discriminated against on the grounds of race is dealt with in the Equality Act 2010 which is an Act of the UK Parliament which applies to Great Britain, with Northern Ireland having its own equality law regime in place. The Equality Act's scope is broad: it provides protection on the grounds of a range of 'protected characteristics' (PCs)⁹ in relation to employment (also a reserved matter), the provision of goods and services, the exercise of public functions, housing and education.

The definition of race¹⁰ under the Equality Act includes colour, nationality, ethnic or national origin. Religion or belief forms a separate protected characteristic,¹¹ although those religions whose members enjoy a

long-shared history and cultural tradition, such as Judaism and Sikhism, are also protected by the race provisions.¹²

The Act prohibits discrimination by applying an equal treatment approach to ensure that a person with a specified PC and a person who does not have the PC are treated the same. There is limited scope for different or 'special' treatment between PC group members and their comparators, even where inequality derives from historical disadvantage including formerly legally sanctioned differentiated treatment, or where the wider context and/or circumstances relevant to the person with the PC and his or her comparator are not the same. This is referred to as the 'formal equality' approach. ICERD, in common with other international human rights Conventions, provides for an alternative or 'substantive equality' approach which, *requires states to take steps to eliminate discrimination in order to achieve substantive equality of outcome and address structural injustices. International law requires that access and delivery of human rights, including economic, social and cultural rights, should not exclude groups, particularly those who are marginalised and possibly 'hidden' from the system.*¹³

8. See the Scotland Act 1998, Schedule 5 L2, as amended by section 37 of the Scotland Act 2016

9. The protected characteristics are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex.

10. Section 9 Equality Act 2010.

11. Section 10 Equality Act 2010.

12. See *Mandla v Dowell Lee* [1983] 1 All ER 1062, HL.

13. Katie Boyle *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights*, (Scottish Human Rights Commission, 2018), p. 8.

Scotland has its own Race Equality Framework¹⁴ which is intended to advance equality, tackle racism and address the barriers that prevent people from minority ethnic communities from realising their potential. It does so by taking 'a long-term, partnership-based approach, working with all sections of society including the Scottish Parliament, public sector bodies and agencies, established networks and forums, voluntary sector equality bodies and communities' over a 15-year period (2016-2030). The Framework is accompanied by an Action Plan. Although the Framework and Action Plan set out a clear commitment for tackling the inequalities experienced by black and minority ethnic (BME) communities in Scotland across a range of policy areas,¹⁵ their lack of attachment to a comprehensive legislative framework results in a compliance gap which could be filled by the incorporation of ICERD.

ICERD's incorporation into Scots law would require the adoption of a substantive approach to tackling race inequalities and their causes based on the lived experiences of different racial and ethnic groups. This approach is capable of instilling change to

the systems, practices and processes which currently perpetuate injustice and disadvantage. Although the reservation of equality and employment law limits Scotland's power to act in certain respects, many policy areas relevant to the realisation of full and substantive equality are devolved to Scotland, including education, health, housing and criminal justice. In some other areas which are reserved, arrangements are in place to enable decisions about policy and service delivery to be taken at the Scottish rather than UK level, including some elements of social security. Furthermore, working within reserved equality and employment law offers some potential progress, for example through the use of the positive action measures provided by the Equality Act¹⁶ which have not been widely used to date so that their specific boundaries remain untested. More generally in the provision of services as well as in employment, further potential for progress in the Scottish context exists under the Public Sector Duty (PSED)¹⁷ and the Fairer Scotland Duty (FSD).¹⁸

ICERD's incorporation would provide a consolidated, comprehensive, and

14. Race Equality Framework for Scotland: <https://www.gov.scot/publications/race-equality-framework-scotland-2016-2030/>

15. For a detailed analysis of the potential interplay between incorporation of the CERD and the Scottish Government's race equality framework across the devolved policy areas, see Emma Sullivan (2020), *Incorporating ICERD Alongside Race and Equality Policy to Ensure Equal Rights Enjoyment in Scotland*, University of Edinburgh, available: https://hrcscotland.org/wp-content/uploads/2020/11/Sullivan_HRCS_Dissertation_HRCS-Copy.pdf

16. See Section 158, Equality Act 2010, which allows for 'any action' to be taken to support those with a protected characteristic as long as it is a 'proportionate means of achieving a legitimate aim', and section 159 which provides a specific exemption in relation to recruitment and promotion which permits an employer to take a protected characteristic, such as sex, into consideration when deciding whom to recruit or promote in circumstances where people having the protected characteristic are at a disadvantage or are under-represented.

17. Section 149, Equality Act 2010 which requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities. In Scotland a further set of additional Scottish specific duties are imposed on public bodies including the requirement to publish a set of equality outcomes and to report on progress every two years. In setting these outcomes, public authorities must consider relevant evidence and take steps to involve people with protected characteristics.

18. Section 1, Equality Act 2010 which places a legal duty on public authorities in Scotland to pay due regard to how they can reduce inequalities of outcome caused by socioeconomic disadvantage when making strategic decisions.

strengthened legal framework which could be used to improve the implementation of non-discrimination on the grounds of race, even in areas with existing provision.

The CERD Committee last examined the UK's implementation of ICERD in 2016.¹⁹ Its general recommendations (based on data drawn from across the UK) included actions across a number of policy areas devolved to Scotland including tackling racist hate crime, the disproportionate detention and restraint of BME populations, issues connected to access to justice for BME populations and problems of racial bias in the criminal justice system. The lack of racial and ethnic diversity in Scotland's police force was a subject of specific focus.²⁰ The Committee noted, 'the importance of collecting accurate and updated disaggregated data to develop effective policies to combat racial discrimination and to monitor the impact of measures taken' and recommended that the devolved nations 'systematically collect and publish disaggregated data on the enjoyment of rights by members of ethnic minorities in all fields of life, and...include such information in the next periodic report.'²¹

The strategic importance of such data in the formulation and prioritisation of all government policy and its use in ensuring the effective operation of the PSED and FSD

through Equality Impact Assessments is clear. Although Scotland's National Performance Framework²² has, as one of its aims, 'to reduce inequalities' and identifies Human Rights as one of the national outcomes, the data on which the analysis of race and ethnicity impacts is based is patchy and largely reliant on secondary sources.

To ensure that the promise of equality on the grounds of race is realised through better implementation of rights under existing frameworks as well as those flowing from ICERD's incorporation, it is important that Scottish civil society ensures that the voices of those it represents are heard, particularly in relation to different racial and ethnic populations. Appropriate action could include pressing for changes to the devolution framework so as to give the Scottish Parliament enhanced powers over equality law or holding the Scottish Government to account for the better realisation of race equality in devolved policy areas. ICERD provides an important tool which can be used to support such claims and it is important to remember that the UK is already bound by its provisions through the ratification process and that, despite the complexities of devolution, incorporation would place an obligation on the Scottish government to maximise the enjoyment of the rights provided by ICERD for everyone in Scotland.

19. 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, available: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD_C_GBR_CO_21-23_24985_E.pdf

20. Ibid, para 28.

21. Ibid, paras 13 and 14.

22. <https://nationalperformance.gov.scot/>

NEXT STEPS

In line with the Human Rights Taskforce recommendations, the establishment of a new statutory human rights framework will be a multistep process. The aim of the new framework is to incorporate a range of internationally recognised human rights, including those set out in ICERD, as well as civil and political rights and special attention to individuals or groups of individuals who have often been given the least attention by society. To accomplish this, further consultation on the approach to be taken is necessary. This includes pre-legislative consultation processes across all parts of society followed by public participation as part of the normal legislative process. Extensive law and policy guidance will be developed so that all people, public authorities and government understand what respecting, protecting and fulfilling human rights means in law, policy and practice. Together, everyone can play a part in making rights real in Scotland.

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USEFUL RESOURCES

Academic Advisory Panel to the National Taskforce on Human Rights Leadership,
<https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/>

Coalition for Racial Equality and Rights, 2016, Submission to the United Nations Committee on the Elimination of Racial Discrimination,
https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/INT_CERD_NGO_GB_R_24533_E.pdf

Committee on the Elimination of Racial Discrimination,
<https://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx>

EHRC, ICERD, 2021,
<https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/international-convention-elimination-all>

EHRC, 2017, Race rights in the UK: Submission to the UN Committee on the Elimination of Racial Discrimination,
<https://www.equalityhumanrights.com/en/publication-download/race-rights-uk-submission-un-committee-elimination-racial-discrimination>

First Minister's Advisory Group on Human Rights Leadership, Final Report, 10 December 2018,
<https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

Human Rights Consortium Scotland, resources for civil society around human rights incorporation, available at:
<https://hrcscotland.org/incorporating-human-rights/incorporation-general/>

Incorporating Human Rights in Scotland, project website, including infographics, easy-read, and other resources,
<https://www.law.ed.ac.uk/research/research-projects/incorporating-human-rights-in-scotland>

National Taskforce for Human Rights Leadership, Leadership Report, 12 March 2021,
<https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/>

Runnymede, 2021, Taking Stock: Race Equality in Scotland,
https://www.race.ed.ac.uk/wp-content/uploads/2020/07/Taking_Stock_Race_Equality_in_Scotland.pdf

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