

# Human Rights Consortium Scotland's Guide to responding to the Human Rights Bill for Scotland Consultation

August 2023

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## About the consultation process

The Scottish Government consultation on the Human Rights Bill for Scotland is available [here](#), including an accompanying [Easy Read version](#), [facilitator guide](#) (for if you wish to host a group discussion on the consultation) and a [summary guide](#).

The Government commissioned Together: Scottish Alliance for Children's Rights to produce child-friendly versions that are available [here](#).

**The consultation closes on 5th October 2023. Details of how to respond are available [here](#).**

The Scottish Government is running several events where people can respond verbally to the consultation – see details of dates and times under “engagement events” [here](#).

### About this Guide

The purpose of this Guide is to be a helpful resource for organisations (or individuals) planning their consultation response. We have set out 3 things:

1. **What the questions are all about:** We have attempted to pick out from the text the definite details of what the Scottish Government is proposing so that this can be clearer. However, it should all be seen in the light of the Scottish Government still being in fairly early stages of Bill development and wanting views on each part of it.
2. **Some things to think about:** Every organisation is different and works with and for different people, communities and on different issues. We have included some suggestions of experience or views that might be – or might not be! – relevant to your organisation's response.
3. **The Consortium response:** We have still to write our full response. We have included most of the key points in this Guide that we will be including in our final response.

**Joint response:** In September 2023, we will be emailing our network members with a draft joint response and to ask if organisations want to support this joint response. If your organisation is not yet a member of the Consortium network, you can find details on how to [join here](#).

**More information:** We are running an event series about the consultation throughout August-September 2023. Find out more details at [www.hrcscotland.org](http://www.hrcscotland.org)

This whole consultation is complex, and the Human Rights Bill itself is complex. If you want to chat through details with the Consortium, get in touch by emailing: [info@hrcscotland.org](mailto:info@hrcscotland.org)

## What is the Bill all about?

### Our international human rights

Human rights are all about people being treated with **dignity, respect, and fairness**. Human rights include **freedoms** and rights that the Government needs to respect and protect, and **basic essentials** that we all need to live a decent life. Our human rights were agreed at an international level in a number of treaties, and the UK signed up to them.

All of us have these human rights – no matter who we are, where we are from, what we have done, what we look like – all of us.

And all our human rights work together – it is when they are put together that they provide a foundation so that people can lead a decent life and be treated with dignity.

**We already have some of our international human rights in UK law:** Some of our human rights have been brought from that international level directly into UK law. These are in the European Convention on Human Rights, incorporated into our law through the Human Rights Act 1998 and the Scotland Act 1998. These are mainly what is called our civil and political rights – things like freedom of speech, freedom from torture, right to life.

- Find out more about the Human Rights Act 1998 [here](#).
- Find out more about the Scotland Act 1998 [here](#).

**The UNCRC will be part of Scots law soon:** There are a number of international treaties that recognise that some groups face particular barriers to their human rights. This includes the UNCRC – the children’s rights

convention. The Scottish Parliament passed a Bill in March 2021 to put the UNCRC directly into Scots law. The Supreme Court then ruled that this Bill needs amending to fit within devolution limits. The parliamentary process for reconsideration and amending the Bill is about to begin.

Find out more about what is happening with the UNCRC Incorporation (Scotland) Bill, including the latest work and upcoming work by both civil society and Scottish Government, please click [here](#).

**This Bill aims to bring more of our international human rights directly into our law:** Over many years, campaigners in Scotland have been calling for what are called our economic, social, and cultural rights to be incorporated into UK law too – these are things like the right to adequate housing, the right to food, and the right to health. These are the essentials rights that we all need to live. These rights sit in a treaty called the International Covenant on Economic, Social and Cultural Rights (ICESCR).

There are other treaties for particular groups that should also be part of UK law – these are:

- Convention on the Elimination of Discrimination Against Women (CEDAW) – **women’s human rights**
- UN Convention on the Rights of Persons with Disabilities (CRPD) – **disabled people’s human rights**
- International Convention on the Elimination of all forms of Racial Discrimination (CERD) – **rights related to race**

Underpinning all of these is a **healthy environment**, so the human right to a healthy environment needs to be part of our law too.

A National Taskforce for Human Rights Leadership (of which the Consortium was a member) recommended in March 2021<sup>1</sup> that these rights treaties should be incorporated into Scots law. They also made many other recommendations about what this law and its implementation should look like. The Scottish Government accepted all the Taskforce recommendations.

**Why do we need all our human rights in Scots law?** This is a fair question – this is not theoretical or just a nice sounding thing to do.

1. <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2021/03/national-taskforce-human-rights-leadership-report/documents/national-taskforce-human-rights-leadership-report/national-taskforce-human-rights-leadership-report/govscot%3Adocument/national-taskforce-human-rights-leadership-report.pdf>



Incorporation and implementation of all our human rights in Scots law will mean:

- All new law and policy will need to be assessed against human rights. Human rights will need to be considered and affect the big decisions of our law and policy makers.
- Public authorities like the NHS or councils will need to do more to build all our human rights into their decision-making. They will need to take steps to improve on human rights realisation and this will affect things like budgets and service priorities.
- People will be able to name and claim all their human rights. If these rights are not protected and realised, people will be able to get justice and hold the government to account, including in court.

**What impact will it have?** A lot depends on how the Bill is written, and how it is put into practice. Making all our human rights a core part of our law should:

- **Lead to better decision-making**, where a whole framework of rights can provide a way to decide priorities fairly and listen to people's experience to improve rights realisation.
- **Make sure that no one is left behind or ignored**. Human rights come into their own when used and applied to groups who most often miss out or their rights are trampled on.
- **People will be able to get remedy and justice** and hold the government to account when they experience rights infringements.
- Increasingly **build a human rights culture**, where we all know we have human rights, and we make Scotland a place where it is in no way acceptable for anyone to live with rights violations.

**The BIG purpose of this Scottish Human Rights Bill is for more people in Scotland to have all of their human rights respected, protected and made real.**

**It needs to bring change:** We all know that too many people in Scotland experience violations of their economic, social, cultural, and environmental human rights every day. This was highlighted and super-charged<sup>2</sup> during COVID, but many people have lived with rights infringements for years. Some of these infringements are very directly about how individuals have been

2. GDA Supercharged report

treated or ignored; many of these rights issues stem from underlying, systemic inequalities and unfairness that is baked into how we do things.

Bringing more of our international human rights directly into Scots law therefore must be more than a tick-box or empty-promises exercise – **it must bring change**. Getting our Human Rights Bill right means including all of the rights, duties and accountability levers to drive this change.

## Consortium response to Human Rights Bill for Scotland Consultation

We are pleased that the Scottish Government remain committed to passing this Bill within this parliamentary session (by May 2026) and that this consultation has been published. We recognise that due to constitutional issues, this Bill is being written in midst of a complex context.

We welcome that the consultation document is accompanied by different versions for accessibility, as well as government engagement events. We welcome the longer 4-month response period.

However, we are disappointed that the consultation document itself could have been more accessible by taking on board more of the advice from the Lived Experience Boards. In particular, the questions themselves could have been much better.

This guide includes some of the key points that the Consortium will be responding to each of the forty-four questions. However, we will also be raising 4 overarching key responses. These are:

- **“Could do better”**: The Scottish Government’s proposals for the model of incorporation must be significantly strengthened. In particular, the lack of ‘teeth’ proposed for the special protection treaties is regrettable. We ask the Government to ensure and demonstrate that its proposed approach goes as far as possible within devolution. Importantly, public bodies must have a duty to comply with the substantive rights in CRPD.
- **“More work required”**: There is a disappointing lack of development and analysis in several areas, particularly around access to justice and implementation. The Human Rights Bill Lived Experience Boards provided

significant advice around these areas but much of this is yet to be taken on board.

- **“Show your workings”**: There should be more open and transparent development of this Bill. This includes not leaving decisions about key elements of guidance or around the process of defining Minimum Core Obligations (MCOs) until after the Bill is passed. This should include concrete examples of what MCOs could be before the Bill reaches Parliament.
- **“Must arrive on time”**: We are concerned about too long a delay before full compliance duties are in place. This Bill must include timescales for full implementation.

## Consultation Part 4: Incorporating the Treaty Rights, pages 13-19

**Question 1, page 15: What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?**

**Question 2, page 15: What are your views on our proposal to allow for dignity to be a key threshold for defining content of MCOs?**

### What these questions are all about

Dignity is a core principle of human rights. Every person has inherent worth and value, and therefore government should not treat any person as having lesser value. And because every person deserves to be treated with dignity, the government cannot just trample on your rights nor fail to make sure you have the basic essentials that you need to live.

This part of the consultation is all about then, how should this human rights principle of dignity appear in our Scottish Bill and how can it best affect how Scotland applies human rights in law and practice.

The Scottish Government proposes that:

- Courts should be able to consider dignity when they are interpreting rights in the Bill.

- Dignity will be the key threshold for defining and delivering Minimum Core Obligations (MCOs, see more on these at Qs 21, 25, and 39). That is, if MCOs are in place for everyone, at all times, then no one's inherent dignity should be violated.

Though not included in the questions, the consultation also says that consideration is being given to how other key international human rights principles should be included in the Bill. These include universality, indivisibility, interdependence, and interrelatedness of rights.

### **You might want to think about**

Dignity is sometimes seen as the “litmus test” of human rights being protected and realised. Violation of a person's fundamental human rights is violation of respect for their inherent dignity. Your organisation might have experience around when the dignity of those that you work with or for, has been violated. You might have views around the importance of everyone being treated with dignity in the decisions taken by public bodies.

### **In short: What the Scottish Government is proposing**

- Courts should be able to consider dignity when interpreting the rights in the Bill.
- Dignity should be a key threshold for defining the content of Minimum Core Obligations.

### **In short: the Consortium response**

- We agree with the proposal for dignity to be a key threshold for defining Minimum Core Obligations.
- Courts should be required to consider dignity when interpreting the rights, not only allowed to.
- The Bill should include a purpose clause that includes dignity, universality, participation and other key human rights principles. This will ensure a shared and consistent understanding and interpretation of rights in the Bill. It will be helpful for public awareness and will help build a culture of human rights, guarding against narrow duty compliance.

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

### What this question is all about

This Bill is about incorporating international human rights – it is not about making up new Scottish rights. One of the benefits of incorporating international human rights, amongst many others, is that there is already a whole system of international consideration, development, and interpretation of rights. Scotland is not starting from scratch when we consider what these rights should look like in practice and how they should be understood. For example, UN Committees periodically produce ‘General Comments’, short papers that go into more detail on different rights. There are also recommendations from different UN Committees for UK implementation of rights, and other aspects of international and comparative law.

The UNCRC Incorporation Bill includes a part that allows courts and tribunals to consider these international human rights sources when interpreting UNCRC rights. This question is about whether this wider Human Rights Bill should include the same, as well as applying this interpretative option on duty-bearers generally (that is, public bodies and relevant private actors).

### What the Scottish Government is proposing

- Duty bearers, court and tribunals will be able to read, apply and interpret the rights in line with international human rights law, materials, and mechanisms.
- Different UN bodies can interpret issues slightly differently – the Government are considering how to deal with this in the Bill.

### In short: the Consortium response

- We agree with the Scottish Government proposed approach.

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

### What this question is all about

This question is BIG! The model of incorporation is all about what rights are in the Bill, the duties that go alongside them and the big levers included in the Bill to make sure that everyone can access these rights. Therefore, in many ways this is a catch-all question that is then spelled out further in many of the questions below.

### In short: What the Scottish Government is proposing

#### The rights and duties: ICESCR and Right to a healthy environment

- **Copy and paste the text of ICESCR** – that is, the covenant with economic, social, and cultural rights – directly into the Bill, except for any parts that are reserved to the UK Parliament.
- **Include the right to a healthy environment.**
- Begin with a **“procedural duty”** on these rights. The consultation does not say what this procedural duty is exactly, but it could be something like a duty to take into account, or a duty to have due regard. This duty will come in as soon as possible after the Bill is passed and will kick start public authorities building in human rights to their decision-making whilst giving them time to prepare for the stronger compliance duty that is coming.
- Then at some later point, this will change to the stronger **duty to comply with** the rights. The way we will know if they are complying is that:
  - o They will deliver all the Minimum Core Obligations – that is, the real baseline minimums of each right, (see more at Qs 21, 25 and 39)
  - o They will be progressively realising the rights. This means taking concrete steps to improve on rights for all.

### How these rights will be interpreted and delivered

- **Special protection treaties:** The way in which a public body interprets ICESCR rights and the right to a healthy environment (i.e., decides what exactly they mean in practice) for women, disabled people or race-related groups, must be informed by the 3 special protection treaties (CEDAW, CRPD and CERD). For example, when a local authority is planning how to progressively realise the right to housing for women, they will need to consider what CEDAW says about housing.

- **Equality:** There will be a **section about making sure there is equal access to the rights for everyone**. This might look like a requirement to secure the rights without discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, property, birth, or other status. LGBTI and older people could be protected through 'Other status' or by being specifically named in the Bill.
- **Dignity:** Courts and tribunals can all 'read, apply and interpret' the rights in light of the principle of dignity.
- **International:** Courts, tribunals and duty-bearers can all 'read, apply and interpret' the rights in light of **international human rights law**, materials and mechanisms.

### **Rights and duties: Special protection treaties – CEDAW, CERD and CRPD**

- **Copy and paste** the text of the three special protection rights treaties minus any reserved parts.
- There will be a procedural duty on these special protection treaties. Public bodies will then have to take into account these treaties both when delivering on ICESCR rights as outlined above, but also in all of their decision-making. (NB It is stated in the consultation that these treaties cannot have duty to comply because of devolution limits.)

### **You might want to think about**

Your organisation might have experience of where these rights are currently ignored, or human rights not taken seriously. You might have particular experience about barriers to rights for women, disabled people, and people who are Black, People of Colour (POC) or people from ethnic minorities.

### **In short: The Consortium response**

- We agree with some of the core elements of the Scottish Government's approach. However, the model of incorporation needs to be made much better and stronger if it is to realise the rights for more people in Scotland and to have the transformational change that we need.
- Public bodies should have duty to have due regard **plus** a duty to comply with rights in the Bill, with timescales specified in the Bill.
- Further consideration and transparency are needed around whether it is possible to put a duty to comply on all of the special protection treaties.



- We are very concerned that there needs to be a duty to comply with the substantive rights in the CRPD – to not do so is to not live up to the commitment to incorporate the CRPD as far as possible within devolved competence.

### **More on the Consortium response**

- We agree that all four treaties should be reproduced in the Bill removing any text that relates to areas that are reserved to the UK Parliament. Where there are rights that include both devolved and reserved elements, there should be careful consideration of how to adopt a maximalist approach to having as many rights as possible within this Bill derived from the treaties.
- We agree that the right to a healthy environment should be recognised and included in this Bill.
- We agree that there should first be a procedural duty on public bodies (and as far as possible private actors) to ICESCR and the right to a healthy environment. This procedural duty should be a duty to have due regard.
- We agree that there should be a period of time where only the duty to have due regard should apply. This period of time should not be more than two years and be specified in the Bill.
- After this date, we agree that a duty to comply should apply to ICESCR and the right to a healthy environment. We agree that the duty to comply should include a requirement to deliver MCOs as well as to demonstrate progressive realisation of the rights.
- This duty to comply should not replace a duty to have due regard but should be in addition to this.
- We agree that there should be an equality provision in the Bill which ensures equal access for everyone to the rights. Securing non-discrimination on certain grounds should include naming LGBTI people and older people on the face of the Bill. We agree that the special protection treaties should also be considered when interpreting and delivering ICESCR rights and the right to a healthy environment.
- We agree with placing a procedural duty on the special protection treaties, and as above, this procedural duty should be the duty to have due regard.
- As the consultation itself notes, a stronger duty of compliance is needed ‘for transformative impact’. The decision to not place a ‘duty to comply’ on the special protection treaties is a significant departure from full incorporation of these treaties. We accept that there are complex interactions with the



equal opportunities' reservation. We ask the Government to give further consideration as to whether their proposed model is maximalist, that is, the greatest extent possible within devolved constraints. We also ask for transparent engagement around the advice and rationale for these key decisions.

- A duty to comply, alongside a duty to have due regard, must be placed on substantive rights within the UNCRPD that are not in ICESCR -see more at Q5 below. We consider that without this enhancement of the Scottish Government's proposals, the Scottish Government will not be carrying out its commitment to implement the Taskforce's recommendations, nor will it deliver human rights for disabled people.
- We agree that there should be an interpretative provision that ensures that rights are interpreted in light of international standards. This should mirror those listed in the UNCRC Incorporation Bill such as General Comments, concluding observations, other international and comparative law. We agree that this interpretative provision should also include the principle of human dignity (as well as being included in a Purpose Clause, see Q1-2).

## **Question 5, page 19: Are there any rights in the equality treaties which you think should be treated differently? If so, please identify these, explain why and how this could be achieved.**

### **What this question is all about**

This question is all about whether there are particular rights within these three treaties that cannot 'just' have a procedural duty but should also have a duty to comply.

*NB. The Scottish Government call CEDAW, CRPD and CERD 'equality treaties'. We do not think this is a helpful title – we refer to them as special protection treaties.*

The three special protection treaties are not all the same. CEDAW (women's rights) and ICERD (race-related rights) mainly deal with making sure that these groups are treated equally to others. If you try to implement human rights in general without giving proper regard to the barriers faced by women

and by People of Colour or people from ethnic minorities, it will not work and their rights will not be fully realised.

This is also true of the need to give proper regard to disabled people's rights. However, the CRPD in particular also includes rights that are not part of ICESCR or include distinct features which do not feature in ICESCR. These include:

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

Under the Scottish Government's proposed approach, these missing CRPD rights will not have the 'teeth' of a duty to comply.

### **You might want to think about**

Your organisation might have experience of the impact on disabled people of these missing CRPD rights being violated. The interaction of these missing rights with some of the ICESCR rights or the right to a healthy environment is important, because this would highlight the importance of their full inclusion in the same framework. You might also have views on the importance of disabled people being able to 'name and claim' these rights in their interactions with public bodies, and ultimately in court if necessary.

## **In short: What the Scottish Government is proposing**

- Public bodies must take into account (a procedural type duty, such as duty to have due regard) the three special protection treaties (CEDAW, CERD and UNCRPD) in all of their decision-making. As noted above, they will also need to consider these treaties when implementing ICESCR or the right to a healthy environment for these groups.

## **In short: the Consortium response**

- We ask the Government to ensure, and demonstrate transparently, that its proposed approach – of only placing a procedural duty, and not duty to comply, on the special protection treaties – goes as far as possible within devolution limits.
- It is very important that the Bill should include a duty to comply on these missing CRPD rights.

## **Key points from Consortium response**

- It is crucial that this Bill incorporates all the rights in these treaties to the greatest extent possible within devolution, and as strongly as possible.
- The decision to not place a ‘duty to comply’ on the special protection treaties is a significant departure from full incorporation of these treaties. We accept that there are complex interactions with the equal opportunities reservation but consider that the consultation does not give sufficient assurance that the approach suggested is maximalist within devolution.
- At the very least, the substantive rights in UNCRPD must have both a duty to have due regard but also the duty to comply, in the same way as this applies to ICESCR and the right to a healthy environment. (Our response will spell out these rights, as listed above.)
- We consider that without this enhancement of the Scottish Government’s proposals, the Scottish Government will not be carrying out its commitment to implement the Taskforce’s recommendations, nor will it deliver human rights for disabled people.
- The Supreme Court ruling means that the UNCRC Incorporation Bill is likely to be limited to applying only to Acts passed by the Scottish Parliament. It is expected that it cannot apply to Acts passed at Westminster prior to devolution, even if these are in devolved areas. The Scottish Government is currently considering commissioning an audit of legislation to identify gaps and actions that can be taken to close these gaps. If this same devolution

limitation is to apply to this wider human rights bill, a mirroring audit of wider legislation that impacts rights in the Bill will be required, and should be planned for alongside wider Bill implementation. This audit needs to consider 1) where UK Acts – and amendments to UK Acts – that are within devolved competence impact on people's human rights, and 2) where Acts of the Scottish Parliament are not compatible with human rights obligations. The outcomes of this audit should then lead to new legislation to address any compliance gaps.

## Consultation Part 5: Recognising the Right to a Healthy Environment

**Many thanks to the Environmental Rights Centre for Scotland for writing this part of the Guide.**

### Introduction

On 15 June, the Scottish Government published their Report and Consultation on A Human Rights Bill for Scotland, which will incorporate the right to a healthy environment into Scots law for the first time. The Bill follows the passage of a landmark resolution by the UN General Assembly in July 2022, which declared access to a clean, healthy, and sustainable environment as a universal human right. The UN recognised that environmental damage has negative implications for the effective enjoyment of all human rights, for present and future generations, building on decades of interpretation by binding human rights tribunals and authoritative human rights bodies.

The Environmental Rights Centre for Scotland (ERCS) assist the public and civil society to understand and exercise their rights in environmental law and to protect the environment. We carry out advocacy in policy and law reform to improve environmental rights and compliance with the Aarhus Convention on access to information, public participation in decision-making, and access to justice on environmental matters.

ERCS is working collaboratively with Human Rights Consortium Scotland (HRCS) and the Civil Society Working Group (CSWG) to develop a response to the full consultation. This is ERCS's draft response to Part 5: Recognising the Right to a Healthy Environment, assembling key points to help inform

responses prepared by other individuals and organisations. Our approach draws on reports and guidance published by UN Special Rapporteurs on Human Rights and the Environment Prof. John Knox and Prof. David Boyd.

## **ERCS response to the consultation**

### **Part 5 – Recognising the Right to a Healthy Environment**

#### **Question 6, page 22: Do you agree or disagree with our proposed basis for defining the environment?**

##### **What this question is all about**

How the Scottish Government approaches defining the right will determine the scope and implementation of the right, as well as interpretations about how it can be exercised by people in Scotland. For the purposes of the Bill framework, The Scottish Government are considering their approach including whether to draw on the definition used within the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). The UK is a signatory to the Aarhus Convention, which enshrines the procedural element of our environmental rights.

##### **You might want to think about**

- How a definition influences interpretation of the right – broad scope vs. precision and clarity.
- How protection of the environment is fundamental to the right to life.
- The importance of referencing healthy ecosystems and the biosphere.

##### **In short: What the Scottish Government is proposing**

The Scottish Government proposes to use the Aarhus definition of the environment, with specific reference to ecosystems and the biosphere.

## In short: the ERCS response

- ERCS endorse using the Aarhus definition of the environment, highlighting the relevance of the Convention’s Preamble, Article 1, and Article 2.
- We provide further guidance on definitions for each feature of a healthy environment in the ERCS/LINK report “[The Substantive Right to a Healthy Environment](#)”

## More on the ERCS response

We endorse use of the Aarhus definition of the environment, which makes specific reference to ecosystems and the biosphere. We draw attention to the Aarhus Convention’s Preamble, and Article 1 and 2 and would want to see this reflected in the Bill.

Preamble:

*‘Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.’*

Article 1:

*‘In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.’*

Article 2:

*‘The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.’*

ERCS/LINK have proposed further definitions for each of the substantive features of a healthy environment, drawing on scientific bodies such as the World Health Organisation, Intergovernmental Panel on Climate Change, and Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. For more detail, please consult ERCS/LINK (2023) [‘The Substantive Right to a Healthy Environment’](#).

## Question 7, page 22: If you disagree please explain why.

Not applicable.

## Question 8, page 22: What are your views on the proposed formulation of the substantive and procedural aspects of the right to a healthy environment?

### What this question is all about

The right to a healthy environment includes substantive and procedural parts. The substantive part creates standalone rights. According to the UN Special Rapporteur on Human Rights and the Environment, these are: clean air; a safe climate; access to safe water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live, work, study, and play; and healthy biodiversity and ecosystems. The procedural part refers to how we can exercise our right and it has three features: access to information; participation in decision-making; and access to legal justice. This is already protected under the Aarhus Convention, but Scotland is not compliant and must improve access to justice to meet Article 9(4) of the Aarhus Convention (the right to remedies that are fair, equitable, timely and not prohibitively expensive).

### You might want to think about

- How the right can be exercised by rights holders and responded to by duty bearers.
- What is most appropriate to the Scottish context and how the right can be comprehensive.
- How the right to a healthy environment interacts with other rights and duties in the Bill.
- Whether the Scottish Government's formulation is consistent with guidance from UN Special Rapporteurs on Human Rights and the Environment.

### In short: what the Scottish Government is proposing

- The Scottish Government proposes to understand the right as having both



substantive aspects, and elements which set out a course of action (procedural aspects).

- Substantive aspects are understood to include clean air; safe and sufficient water; non-toxic environments (in which to live, work, study and play); healthy ecosystems and biodiversity; and safe climate.
- Procedural aspects are understood to include awareness-raising, promoting education and capacity building; access to information; public participation in decision-making; ensuring effective, affordable and timely remedies; and suitable policies, planning and action.
- The government identifies the inclusion of procedural elements in the framework of the Bill as supporting efforts to meet the recommendations of the Aarhus Convention Compliance Committee – in particular to establish a clear, transparent and consistent framework to implement Article 9(4) of the Aarhus Convention.

### **In short: the ERCS response**

- ERCS welcome the formulation of substantive aspects of the right to include clean air, safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems.
- It is important to identify and recognise the six substantive features as both interdependent, and in need of standalone protections.
- We question the exclusion of adequate sanitation under safe & sufficient water, given the systemic problems of sewage pollution and wastewater treatment in Scotland.
- We disagree with the exclusion of the right to healthy and sustainably produced food because we believe it is a core feature of the substantive right to a healthy environment.
- The procedural element of the right should meet Aarhus requirements, including access to environmental information, public participation in environmental decision-making, access to justice and effective remedies.
- We welcome the Scottish Government's acknowledgment that they are currently in breach of Article 9(4) of the Aarhus Convention. It must now set out a clear timetable for access to justice reforms as specified in ERCS's [Action Plan evaluation](#).

### **More on the ERCS response**

ERCS welcome the formulation of substantive aspects of the right to include



clean air, safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems, and applaud efforts to adopt standards such as the UN Framework Principles on Human Rights and the Environment and the Aarhus Convention, as guiding frameworks for the development of this right within the Bill.

We believe that is important to identify and recognise the six substantive features as both interdependent, and in need of standalone protections as recommended by the UN Special Rapporteur on Human Rights and the Environment.

We question the exclusion of adequate sanitation under safe & sufficient water, given the systemic problems of sewage pollution and wastewater treatment in Scotland. We also disagree with the exclusion of the right to healthy and sustainably produced food because we believe it is a core feature of the substantive right to a healthy environment – see our response to Questions 9 and 10 for further detail.

The procedural element of the right should meet Aarhus requirements, including access to environmental information, public participation in environmental decision-making, access to justice and effective remedies. We welcome the Scottish Government's acknowledgment that they are currently in breach of Article 9(4) of the Aarhus Convention, and that Scotland requires a 'clear, transparent and consistent framework' to meet recommendations of the Aarhus Convention Compliance Committee (ACCC) by the deadline of 1 October 2024.

In September 2021, the governing institutions of the Aarhus Convention made their tenth consecutive finding that the UK is in breach of Article 9(4) of the Convention, which states that access to justice should be 'fair, equitable, timely, and not prohibitively expensive.' In October 2021, the Convention's Meeting of the Parties (MoP) adopted Decision VII/8s6 – requiring the UK government to submit an action plan to the ACCC, detailing how it will, 'as a matter of urgency' address the findings and recommendations of the Decision.

The Scottish Government must now demonstrate how it will implement the MoP's recommendations to achieve compliance with Article 9(4) by the

deadline of 1 October 2024. Proposed reforms currently falls short on this ambition – see our [Evaluation of Scotland’s Action Plan](#) (July 2022). The Government must now present a clear timetable and route map to implement necessary reforms, including an overhaul of court costs regime (replacing Protective Expenses Orders with Qualified One-way Cost Shifting), the removal of court fees from Sherriff courts, amendments to Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, a review of retrospective planning permission, and the reform of procedures in Sherriff courts relating to litter.

**Question 9, page 22: Do you agree or disagree with our proposed approach to the protection of healthy and sustainable food as part of the incorporation of the right to adequate food in ICESCR, rather than inclusion as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.**

**What this question is all about**

The right to healthy and sustainably produced food has previously been identified as a core substantive feature of the right to a healthy environment by UN Special Rapporteurs. However, the Scottish Government proposes not to recognise it as part of this right on the basis that it will receive protection elsewhere in the Bill. The Government aims to protect healthy and sustainable food through incorporation of the International Convention on Economic, Social and Cultural Rights (ICESCR), which under Article 11 guarantees the right to adequate, culturally appropriate, accessible and available food.

**You might want to think about**

- Definitions of the right to food under ICESCR, and subsequent elaborations including General Comment 12.
- The implications of not formally recognising food as a constituent feature of the right to a healthy environment.
- How to best provide clarity to duty bearers, rights holders, and legal authorities in exercising the right.

## **In short: what the Scottish Government is proposing**

- Incorporating the right to food under Article 11 of ICESCR, which guarantees the right to adequate, culturally appropriate, accessible and available food.
- Excluding it as a substantive feature of the right to a healthy environment, on the basis that it can be better respected, protected and fulfilled through ICESCR and sustainability is a key element of the right to adequate food.

## **In short: the ERCS response**

While the ICESCR definition (and subsequent elaborations including through General Comment 12) includes consideration of both health and sustainability there has been a tendency – given the severe, persistent and widespread household food insecurity still affecting so many people across the world – to foreground the dimensions of availability and access.

Over the last five decades the damage caused by the global food system to nature, climate and health has become more acute, widespread and visible. Adverse environmental impacts across the food supply chain include biodiversity loss/land use change from intensive farming, impacts on water supplies, use of harmful pesticides and fertilisers, emissions from transportation, waste from packaging, and wasted food. There is therefore value in restating as part of the right to a healthy environment the right to healthy sustainable food.

The right to food must be recognised as a standalone feature, that underpins and interacts with other substantive features of the right.

It is important to distinguish between the economic/social right to food as it relates to nutrition, access/affordability, adequacy, and culture, and the right to healthy and sustainably produced food as a constituent part of broader environmental health.

Both interpretations are necessary but distinct elements of the right to food, and since the consultation report has recognised the merit in defining the right to water under both ICESCR and the right to a healthy environment, it is inconsistent to then exclude the right to food. Both are essential to a healthy environment.

## More on the ERCS response

We strongly disagree with the Scottish Government's proposed approach. While the ICESCR definition (and subsequent elaborations including through General Comment 12) includes consideration of both health and sustainability there has been a tendency – given the severe, persistent and widespread household food insecurity still affecting so many people across the world – to foreground the dimensions of availability and access.

Over the last five decades the damage caused by the global food system to nature, climate and health has become more acute, widespread and visible. Adverse environmental impacts across the food supply chain include biodiversity loss/land use change from intensive farming, impacts on water supplies, use of harmful pesticides and fertilisers, emissions from transportation, waste from packaging, and wasted food. There is therefore value in restating as part of the right to a healthy environment the right to healthy sustainable food. The right to food was previously excluded from the Good Food Nation Act, on the grounds that it would be incorporated in the Human Rights Bill. It now needs to be comprehensive.

The reason to incorporate the right to food as a standalone feature is similar to water – while it is recognised under ICESCR, it is also a substantive part of the right to a healthy environment, since sustainable food production is essential for the health of the wider environment. We believe it is important to provide a distinction between the economic/social right to food as it relates to nutrition, access/affordability, adequacy, and culture, and the right to healthy and sustainably produced food as a constituent part of broader environmental health.

Please consult ERCS's briefing [‘The relationship between a healthy environment and the right to food’](#), and section five of ERCS/Scottish Environment LINK's report [‘The substantive right to a healthy environment’](#) for further details.

## **Question 10, page 22: Do you agree or disagree with our proposed approach to including safe and sufficient water as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.**

### **What this question is all about**

The Scottish Government propose to distinguish between the right to water for human consumption under ICESCR, and the importance of safe and sufficient water as an essential part of the wider environment.

### **You might want to think about**

- Whether the proposed approach will strengthen, dilute, or have no impact on exercising the right.
- Whether this definition is comprehensive.
- The exclusion of 'adequate sanitation' from the proposed definition.

### **In short: what the Scottish Government is proposing**

- Recognising 'safe and sufficient water' as a substantive feature of the right to a healthy environment, in addition to incorporating the human right to water through ICESCR.
- Distinguishing between the right to water for human consumption, and safe and sufficient water as a component of environmental health.

### **In short: the ERCS response**

- ERCS agree with the proposed approach, and advocate extending the definition to recognise adequate sanitation.
- The logic applied here – that the inclusion of water as a social right under ICESCR does not preclude its inclusion as a distinct feature of a healthy environment – should also be applied to the right to food.

### **More on the ERCS response**

We agree with the need to include safe and sufficient water but believe this feature should also refer to the right to adequate sanitation given the widespread and persistent issues of sewage pollution in Scotland. 'Safe and sufficient' must be conceived of in broad terms, with the aim of restoring the

ecosystem health of Scotland's inland waterways, rivers, and lochs. It must address wastewater and pollution from sewage, agricultural discharge, and other sources, the impacts of climate change on water availability, and measures for enhanced water monitoring, testing, and enforcement against polluters.

We agree with the reasons provided for including the right to safe and sufficient water as distinct from its conception as a social right under ICESCR and believe there are similar reasons for including the right to healthy and sustainably produced food. Please consult sections four of ERCS/Scottish Environment LINK's report '[The substantive right to a healthy environment](#)' (July 2023) for further details.

## **Question 11, page 22: Are there any other substantive or procedural elements you think should be understood as aspects of the right?**

### **What this question is all about**

This is a space to add any other comments about substantive or procedural elements and how they could be achieved.

### **You might want to think about**

- The institutions necessary to deliver environmental justice.
- Environmental principles.
- Enforcement mechanisms and legal remedies.

### **In short: the ERCS response**

- We need to see dedicated reforms with clear timelines to make the Right to a Healthy Environment fully enforceable.
- The substantive features of the right are interdependent and require standalone protections.
- Each feature must be defined according to expert guidance and international best practice, and adhere to the highest standards, with appropriate enforcement mechanisms to ensure compliance.
- We advocate embedding the five environmental principles when establishing the definitions and highest standards of the substantive features, to ensure policy coherence and coordination across all sectors.

- Rights must be enforceable in a court of law, with appropriate mechanisms in place to effectively hold public bodies and polluters to account.
- The establishment of a dedicated environmental court with a comprehensive jurisdiction would increase access to justice, address the current fragmentation in routes to remedy, and develop judicial expertise to improve effectiveness and efficiency.

### **More on the ERCS response**

We need to see dedicated reforms with clear timelines to make the Right to a Healthy Environment fully enforceable.

ERCS believe that the substantive element includes six features outlined above, which are interdependent and require standalone protections. Each feature must be defined according to expert guidance and international best practice, and adhere to the highest standards, with appropriate enforcement mechanisms to ensure compliance – consult ERCS/Scottish Environment LINK’s report ‘The substantive right to a healthy environment’ (July 2023) for further details.

We advocate embedding the five environmental principles when establishing the definitions and highest standards of the substantive features, to ensure policy coherence and coordination across all sectors. The principles are provided for by the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 and recommend that protecting the environment should be integrated into the making of policies, precaution, prevention, rectification at source, and the polluter should pay.

For the procedural element to be fulfilled, rights must be enforceable in a court of law, with appropriate mechanisms in place to effectively hold public bodies and polluters to account. With regards to the procedural element, ERCS believe that this must ensure full compliance with Aarhus Conventions access to justice requirements, which include reform of legal aid (Regulation 15), reform of legal expenses and the court costs regime (replacement of Protective Expenses Orders with Qualified One-way Cost Shifting), and the establishment of a dedicated Scottish Environment Court with a comprehensive jurisdiction to increase access to justice, address the current fragmentation in routes to remedy, and develop judicial expertise to improve effectiveness and efficiency.



Please consult [‘Recommendations for a Plan of Action on Judicial Expenses’](#), [‘Evaluation of UK Action Plan’](#) and [‘Briefing on why Scotland needs a Scottish Environment Court’](#) for further details.

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## Consultation Part 6: Incorporating Further Rights and Embedding Equality

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

### What this question is all about

It is about whether to include two other aspects of our international human rights in this Bill:

1. **Human Rights Act 1998:** We already have some of our human rights in law through the Human Rights Act 1998, mostly what are called civil and political rights. Things like freedom of expression, the right to life, the right to private and family life. The Taskforce recommended that these rights should be restated in this new bill so that it includes all of our human rights in one place. There was also the sense that this might also help to stop any regression on these rights.

However, the Scottish Government has decided that it is not possible to restate the Human Rights Act 1998 because it is reserved to the UK Parliament. The Government states that if the Bill was to restate the Human Rights Act, this might risk the whole Bill being challenged in court.



2. **Convention Against Torture:** The UN Convention Against Torture (UNCAT) is another international human rights treaty that protects all of us. The Taskforce suggested that consideration should be given as to whether this should also be included in this Bill. The Scottish Government say that the rights within the UN Convention Against Torture are already well protected in law.

### **You might want to think about**

Public bodies (and some private actors) have a duty to comply with the Human Rights Act in all that they are doing. However, we know that very often public bodies do not give much consideration to this duty. There is very limited awareness of human rights in general across public bodies. Your organisation might have experience of the extent to which public bodies talk about or implement human rights.

The Convention Against Torture relates to protections for people who have experienced abuse or violence by any public authority. It includes for example, where people have experienced abuse in children's homes, in care homes, or in prisons. Your organisation might have experience or views around the extent to which people are protected in institutional settings. You might want to think about issues around adequate compensation for those who suffered from abuse in state care in Scotland.

Rehabilitation from torture includes things like medical care, psychological and emotional services, and legal services. Your organisation may have experience around the extent to which this is available for those that you work with or for.

### **In short: What the Scottish Government is proposing**

- Not to restate the rights from the Human Rights Act in this Bill
- Not to include the Convention Against Torture in this Bill

### **In short: the Consortium response**

- We accept the Scottish Government's conclusions.
- However, the Human Rights Act 1998 duties and rights should be fully included in implementation of this Bill, including being part of guidance, public body training and capacity building, and information and awareness raising.

- The Scottish Government should be required to deliver services aimed at rehabilitation from torture.
- Effective remedy under this Bill should include fair and appropriate levels of compensation.

## **Question 13, page 24: How can we best embed participation in the framework of the Bill?**

### **What this question is all about**

Having a say in decisions that affect you is a key principle of human rights. If this Bill incorporates ICESCR, as the Government is proposing, the right to participation is inherent in its implementation. It is also part of implementation of the special protection treaties.

But it is also important that our human rights framework in Scotland is based on the reality of human rights in people's lives. However, that cannot happen unless public bodies specifically listen to people whose rights are most at risk to inform what they do. This question is all about which parts of the Bill should specifically include a requirement on public bodies, including the Scottish Government, around participation.

### **You might want to think about**

We know that genuine participation - where public bodies engage accessibly with people whose rights are at risk, listen well and embed what they hear into the decisions they make – is crucial to human rights being made real. Your organisation might have experience around where participation has been welcomed or not by public bodies, and where it has worked or not worked well. Maybe you have publications or evidence around this that you could include.

### **In short: What the Scottish Government is proposing**

- The Scottish Government are asking quite an open question here on how participation should be part of this Bill. They say they need to make sure that whatever is included in this Bill works well with other duties on public bodies around participation, such as those from the Public Sector Equality Duty.

## **In short: the Consortium response**

- Participation should be embedded throughout the Bill, including in its purpose, in reporting on implementation of the Bill, and in monitoring and accountability.

## **More on key points from Consortium response**

- Participation of those whose rights are most at risk is crucial for driving an increasing culture of human rights, for better decision-making and for empowerment of marginalised individuals and groups. Therefore, participation should be embedded throughout the framework.
- Specifically:
  - o Participation should be a core principle within the purpose clause
  - o The Human Rights Scheme should include a requirement on Scottish Ministers to consult people whose rights are at risk.
  - o There should be a programme of participation of people whose rights are most at risk in determining Minimum Core Obligations.
  - o The SHRC should have a duty to embed the participation of people whose rights are most at risk in all that they do, and particularly with regard to their monitoring role, as outlined in response to Q31.
  - o Courts should be required to consider the complainants' views in determining remedy.

**Question 14, page 26: What are your views on the proposed approach to including an equality provision to ensure everyone is able to access rights, in the Bill?**

**Question 15, page 26: How do you think we should define the groups to be protected by the equality provision?**

**Question 16, page 26: Do you agree or disagree that the use of ‘other status’ in the equality provision would sufficiently protect the rights of LGBTI and older people?**

**Question 17, page 26: If you disagree, please provide comments to support your answer.**

**Question 18, page 27: Do you think the Bill framework needs to do anything additionally for LGBTI or older people?**

### **What these questions are all about**

We know that particular groups face discrimination and barriers to their rights that are not faced by other people. There is all too often a lack of considering the experiences and rights of these groups when deciding priorities, budgets or more. For example, a budget that is not gendered, taking fully into account the experiences and barriers faced by women, will not deliver for women.

Decisions that are not fully informed by people who face everyday racial discrimination will not deliver for People of Colour. Services that are designed without thinking about the particular access requirements of disabled people with different impairments will exclude them.

These questions are mainly about the way in which the Bill requires public bodies to think about non-discrimination of particular groups when accessing rights, and how they make sure there is equal access to these rights for everyone. It suggests a particular way of doing so: an equality section of the Bill that states that the rights should be secured without discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. This particular aspect of the Bill very much interacts with the reserved area of equal opportunities, so there are complex decisions about what this part of the Bill can look like to stay within devolution limits.

There is also consideration specifically about the rights of LGBTI and older people. These two groups were highlighted by the Taskforce as groups who

should be specifically included in the Bill. There is no international treaty for their rights and yet, they often face considerable barriers and discrimination. They could be protected under the catch-all 'other status' in an equality section of the Bill, or they could be specifically named.

### **You might want to think about**

Your organisation might have experience around where LGBTI or older people have experienced discrimination or particular barriers to their human rights. You might have experience about policy or law being developed with or without proper consideration of particular groups, and the consequences of this. You might have views on other particular groups who experience discrimination and barriers to rights.

### **In short: What the Scottish Government proposes**

- An equality provision as outlined above, with consideration being given as to whether to name LGBTI and older people specifically or as part of 'other status'.

### **In short: the Consortium response**

- We agree that there should be an equality provision, and that LGBTI and older people should be specifically named. This is because there is significant benefit in these groups being visible in the Bill given the particular consideration needed to address barriers to their rights.
- Consideration should be given to specifically attaching a requirement on Scottish Ministers to publish guidance around interpretation of 'other status'. This will allow them to specify evidence and criteria that public bodies should apply in considering other groups whose rights are at risk, for example Care Experienced people.

## **Part 7: The Duties**

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

#### **What this question is about**

This Bill will place very concrete new duties on public bodies. These duties are

what make the rights in the Bill actually enforceable. If public bodies do not carry out these duties, ultimately they will be able to be taken to court. Who these duties apply to is important then for determining who is held responsible for implementing human rights.

The consultation says that these duties should apply to all Scottish bodies delivering public services. It flags two particular issues that affect this:

- The duties cannot apply to UK public bodies: The Supreme Court ruled that the UNCRC Bill has to be amended to make sure that it does not appear to place duties on UK public authorities. This is because the Scottish Parliament cannot pass law that is outside their remit. The Scottish Parliament will be considering amendments to the UNCRC Bill in September 2023 onwards.
- What about private sector? Some private businesses and charities are contracted to provide some parts of public services. These privately-run services can have a significant impact on human rights, for example private care homes, taxi services that are contracted by the NHS to transport people to hospital. The UNCRC Bill says that duties should also apply to private actors delivering public functions, and the Government says that at least as a starting point, this Bill would mirror that approach.

### **You might want to think about**

Your organisation or those you work with/for might have experience of crucial public services being delivered by private business, and their impact on realisation of people's human rights.

### **In short: what the Scottish Government is proposing**

- The Government will take into account amendments to the UNCRC Bill around how to make sure this Bill keeps within devolution limits around which public bodies are given duties.
- The Government will start from position of including private bodies carrying out public functions, but are open to comment on this.

### **In short: the Consortium's response**

- The duties should apply to as many public bodies as possible within devolution.

- The Scottish Government should engage with the UK Government concerning UK public bodies.
- The duties should apply to all private bodies carrying out public functions.

### **More on the Consortium's response**

- People should be able to expect their human rights to be respected, protected and fulfilled by every public body, whether or not it is within devolved or reserved competence. This is particularly true because people do not always know whether the public body they are dealing with is Scotland-only or UK wide. We ask the Scottish Government to discuss this with the UK Government, as well as to urge them to incorporate all of our international human rights at a UK level.

## **Question 20, page 29: What is your view on the proposed initial procedural duty intended to embed rights in decision making?**

### **What this question is about**

This question somewhat repeats part of Question 4 on the model of incorporation. One part of this incorporation model is to put what is called a 'procedural duty' on public bodies. This will be the duty that will require them to think about human rights when they are making decisions, setting their priorities and delivering their services. This duty is particularly important around how public bodies consider barriers faced by particular groups in accessing their rights. For example, applying gender-based budgeting or making sure people whose first language is not English can access health services.

This question just generally asks for views on this duty. It does not spell out exactly what this right is, but only refers throughout to this duty as a 'procedural duty'.

### **You might want to think about**

Public bodies have some human rights duties now but this Bill will give them a new duty to embed economic, social, cultural and environmental rights, the special protection treaties, into what they do. This will include things like when they are deciding their budget, developing or tendering new services,



guidelines for frontline staff, or shaping new policies. You might have views on the extent to which a new duty to have due regard to human rights could immediately lead to improvement or impact. You might have experience of key barriers or enablers to public bodies taking human rights seriously.

### **In short: what the Scottish Government is proposing**

- As soon as the Bill is commenced, all Scottish public bodies (& some private actors) will have a procedural duty to ensure rights in the Bill are taken into account. This will give them time to prepare before the stronger duty to comply comes into force.

### **In short: the Consortium response**

- We agree that there should be a procedural duty placed on public bodies. This should be the duty to have due regard.
- The timescale for commencement should be no more than 6 months from Royal Assent. Applying the stronger duty to comply should be no more than two years later, and this date should be specified in the Bill.
- The duty to have due regard should continue to apply after this time, but should be then accompanied by the duty to comply.

### **More on the Consortium response**

- We agree that it is necessary for public bodies to have an initial period where a procedural duty applies in order to give them time to embed human rights into their decision-making. This is because we firmly believe that this Bill needs to help to drive change in realisation of human rights, and that will require change in how public bodies work. We agree that public bodies will need some time to increase their capacity around human rights and shift the way in which they make decisions.
- It is important that this initial period is not open-ended – a definite timescale for full duties is required both for rights-holders confidence, for integrity of the Bill itself, and for public authority planning. The Bill should include a date for the duty to comply coming into force of no more than two years after the Bill's commencement. This will also allow a reasonable period for development of minimum core obligations.
- The procedural duty should be the duty to have due regard. This duty is already well-understood. The duty to have due regard complements the duty to comply, by ensuring that human rights are embedded in a holistic way and built positively and proactively into decision-making.



## Question 21, page 29: What is your view on the proposed duty to comply?

### What this question is about

The proposal is that all public bodies will have a duty to comply with the rights in the Bill. They will have to demonstrate that they are complying in two ways:

- delivering Minimum Core Obligations of each right. These are baseline levels of rights that should be met immediately and for everyone, all of the time – see further discussion under Q39.
- progressively realising rights in the Bill – that is, taking targeted and deliberate steps to realise rights. Significantly this includes demonstrating they are using the maximum available resources, and to do so ensuring non-retrogression i.e. they do not go backwards on rights implementation without very good reason.

### You might want to think about

The duty to comply is really important because it is this duty that has ‘teeth’ to allow people to name and claim their rights. If applied fully, it will mean that the minimum core of each right becomes non-negotiable. Interactions between public bodies and individuals will have to be framed around how to deliver these minimum core obligations on rights, rather than whether to. It will also mean that, if someone experiences an infringement of these minimum levels, or a public body is failing to do anything to improve realisation of a right, this can be enforced.

All too often, human rights remain at the level of principle and rhetoric, rather than shaping public body decision-making or delivering for excluded individuals or groups. Your organisation might have experience around the importance of this ‘teeth’ duty for empowering people and making their rights a reality. Specifically, you might have experience of where even really baseline levels of rights protection related to different rights are breached, and how implementation of this duty could help give attention to this.

### In short: What the Scottish Government is proposing

- After an initial period where only the procedural duty will apply, all Scottish public bodies (& relevant private actors) will then have a duty to comply

with rights in the Bill. This will mean delivering on Minimum Core Obligations and taking deliberate steps to progressively realise rights.

### **In short: the Consortium response**

- We agree that all public bodies (& relevant private actors) should be given a duty to comply with rights in the Bill.
- We agree that this duty to comply should include delivering Minimum Core Obligations and demonstrating progressively realising rights. Guidance to public authorities should include detail on the definition of progressive realisation, including using maximum available resources.
- As above, we consider that this duty should apply after a specified time of no more than two years. This duty to comply should also accompany the duty to have due regard, rather than replace it.
- As referred to in Q4, the duty to comply should also apply to the substantive rights within CRPD.

### **Question 22, page 30: Do you think certain public authorities should be required to report on what actions they are planning to take, and what actions they have taken, to meet duties set out in the Bill?**

### **Question 23, page 30: How could the proposed duty to report best align with existing reporting obligations on public authorities?**

#### **What this question is about**

Question 22 is a very ‘yes’ or ‘no’ question about whether public bodies should have to report periodically on two things: what they have done to meet their duties under this Bill, and what they are planning to do.

The consultation briefly mentions different models available for this reporting. For example, it could follow the UNCRC Bill approach. Under the UNCRC Bill:

- Public bodies must publish a report every 3 years on what they have done and plan to do to implement children’s rights, and send this to Scottish Ministers

- Public bodies must publish a child-friendly version of the report
- Scottish Ministers must develop guidance for public bodies about this reporting duty, after consulting with children and young people, the Children and Young People’s Commissioner for Scotland (CYPCS), the Scottish Human Rights Commission (SHRC) and anyone else they think is appropriate. They need to then issue and publish this guidance, and review and revise this guidance from time to time.

There is also mention of other models such as for the Fairer Scotland Duty. It talks about the need for this Bill’s reporting duty to work well with other public body reporting duties, so that it complements existing duties.

### **You might want to think about**

The Human Rights Bill Lived Experience Boards have had a lot of discussion around embedding lived expertise and voices into public body reporting. Read some of the detail [here](#). They emphasised three things in particular:

- That public bodies should not just report on the activities they have done or will do, but about the lived experience of rights and where there are gaps. People whose rights are at risk should shape what is reported on and the content of each report.
- Reports should be written in a way that non-policy-maker people can understand them, and in such a way as to be valuable for rights-holders to use them to hold public bodies to account. They should also be published in a range of different formats and mediums, using an approach of inclusive communications.
- Public bodies, and the Scottish Government, should not be able to ‘mark their own homework’ when it comes to these rights implementation reports. (See further discussion under Q40).

Your organisation might have experience and views around where public body reporting has or has not been effective, participative or transparent. You might have ideas around how public body reporting can help to consistently and continually drive progress on rights over time, and ways in which your organisation would want to use these reports for information and accountability. You might have views on ways in which these reports should be published and disseminated.

## **In short: What the Scottish Government is proposing**

- Placing a requirement on public bodies to report on what actions they have taken, or are planning to take, to meet their duties in the Bill

## **In short: the Consortium response**

- We agree that there should be a public bodies' reporting requirement - this should largely mirror the UNCRC reporting requirements. Public bodies should have to consult with people whose rights are most at risk when developing these reports, including to ensure that the content is accessible.
- The Scottish Government should be required to consult with people whose rights are most at risk when developing guidance on reporting requirements.
- Public bodies should also be required to submit their reports to the Scottish Human Rights Commission for monitoring (see further discussion at Q31)
- We agree that it makes sense for these reporting requirements to complement and strengthen other public body reporting requirements.

## **Question 24, page 33: What are your views on the need to demonstrate compliance with economic, social and cultural rights, as well as the right to a healthy environment, via MCOs and progressive realisation?**

## **Question 25, page 33: What are your views on the right to a healthy environment falling under the same duties as economic, social and cultural rights?**

### **What these questions are all about**

Question 24 is very similar to Q21, around public bodies being given a duty to comply with rights in the Bill. Public bodies will have to demonstrate that they are complying by doing two things:

#### **1. Delivering Minimum Core Obligations (MCOs)**

MCOs are a set of the most basic floor of rights protections that should be met immediately for everyone, always. They are “a non-negotiable absolute

right to a basic level of subsistence below which no person should fall”. If a public body fails in its duty to comply with the rights by delivering these MCOs for an individual or a group, they can be held accountable, in court if necessary.

There are key aspects of MCOs that have been set out at an international level. However, detail of what they should be in Scotland is still to be decided. The Scottish Government (and the Taskforce recommendations) say that MCOs need to be defined through a participatory approach (see Q39 below).

## **2. Demonstrating progressive realisation of rights**

This basically means that public bodies should not only be delivering on the minimums. They also need to show that they are taking targeted, concrete steps to keep improving on how they realise people’s rights.

The consultation includes some of the key international principles that need to apply to progressive realisation of rights. These include that public bodies should gather and use their “maximum available resources” to do so. They must also take steps to ensure non-retrogression on rights, that is they should not go backwards on rights realisation.

### **You might want to think about**

We have set out under Q21 some aspects that you might want to think about around this duty to comply.

### **In short: What the Scottish Government is proposing**

- A duty to comply with rights in the Bill be placed on public bodies. This will include delivering Minimum Core Obligations and demonstrating progressive realisation of rights.

### **In short: the Consortium response**

- We will repeat our response to Q21.
- We agree that there should be the same duties for the right to a healthy environment as for ICESCR (and special protection treaties).

## Question 26, page 33: What is your view on the proposed duty to publish a Human Rights Scheme?

### What this question is all about

This question is about whether to give Scottish Ministers a duty to publish a Human Rights Scheme, and a related duty to report on actions taken on the requirements in the Scheme.

The Human Rights Scheme will be a list of key requirements to do with implementation of rights in the Bill that the Scottish Government will have to report against. This is very similar to the Children's Rights Scheme in the UNCRC Bill.

### In short: What the Scottish Government is proposing

- To give Scottish Ministers a duty to publish a Human Rights Scheme, and a related duty to report on actions taken on the requirements in the Scheme.

### In short: the Consortium response

- We agree with these proposed duties. More details on our response around the Human Rights Scheme is at Q26 of this Guide.

## Part 8: Ensuring Access to Justice for Rights-Holders

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

#### What this question is about

The consultation states clearly that 'When we talk about advocacy, we are referring to advocacy, information and advice provided to and for rights holders'. However, all of the consultation text in this part is about advocacy services.

Independent advocacy services can be crucial in helping people to navigate routes to justice with all of the support that they need. These services can also be essential to enable participation of people in decisions that affect their lives, particularly for people whose rights are more at risk. For example, people with learning disabilities, Care Experienced people, carers.

Independent advocacy appears in different pieces of law with slightly different duties, such as around mental health and social security. In the UNCRC Bill, there is one mention of advocacy on the face of the Bill. This is in the Children's Rights Scheme where Ministers have to report on arrangements to enable children to participate in decisions that affect them, and it states 'for example from children's advocacy services'.

### **You might want to think about**

By placing independent advocacy at the core of the new human rights legal framework, we can foster greater participation and improve access to justice for those who are most vulnerable and at risk of their rights not being fulfilled. Importantly, in

There are two main types of independent advocacy: individual and collective.

- 1. Individual or one-to-one independent advocacy:** Independent advocacy can take various forms: professional advocacy where an advocate helps an individual represent their interests or speaks on behalf of those unable to do so; citizen advocacy where volunteers assist community members in need, and peer advocacy where advocates draw from personal experiences to empower others to advocate for themselves.
- 2. Collective independent group advocacy:** Group advocacy creates inclusive spaces for individuals to connect, offer mutual support, and discuss common concerns. It empowers people to express their experiences and beliefs, giving them the ability to advocate for change and influence decisions affecting their lives. Additionally, group advocacy plays a crucial role in identifying successful practices and uncovering service gaps, which helps inform resource allocation and decision-making processes.

### **In short: What the Scottish Government is proposing**

- The Scottish Government is considering the way that advocacy appears in the UNCRC Bill and whether this can be mirrored or amended for this Bill.



- They also broadly state that they are ‘open to views on the most effective means of supporting people to access the rights in the Bill’.

### **In short: the Consortium response**

- This Bill should include access for all to independent advocacy, and access to these services should be included in the Human Rights Scheme.
- There should be a step-change in the provision of rights advice in Scotland, including co-production and resourcing of a National Hub for Human Rights Education, Information and Advice.

### **More on Consortium response**

Independent advocacy plays a crucial role in defending human rights in Scotland as advocates and advocacy groups are "human rights defenders."

They achieve this by:

1. **Enhancing understanding of rights:** Independent advocates educate and inform individuals about their rights, addressing the common issue of people being unaware of their rights.
2. **Enabling access to justice:** Advocates facilitate routes to remedy for rights violations, ensuring that effective remedies are accessible to all, as mandated by Article 8 of the Universal Declaration on Human Rights.
3. **Facilitating the right to participation:** Advocates support and empower rights-holders to actively participate in decision-making processes, enabling duty bearers to fulfill their obligations around participation and leading to better decision-making.
4. **Empowering rights-holders:** Advocates work alongside marginalized individuals and groups, empowering them to participate equally in decision-making about their lives and policy and law-making processes, thus promoting the sharing of power and rights realization.

### **Additional Consortium response under this question**

We are disappointed overall by the narrow set of questions in this Part 8 of the consultation. Access to justice is a fundamental part of human rights law protections. International human rights law states that when there is a human right violation, remedies must be accessible, affordable, timely and effective – it needs to work in practice for rights-holders. There is little analysis in the consultation of how the new framework will deliver this.

The Lived Experience Boards also provided significant advice around access to justice. For example, they said that Government needs to create a system that recognises the emotional toll on people of seeking justice, that using the courts and lawyers is seen as unaffordable and impossible to navigate, that community and accessible sources of advice are desperately needed, and much more. Much of what they said is yet to be given due consideration.

**Therefore, squeezed under this question, we are planning to include several big concerns around how the Bill will improve access to justice:**

- **Right to remedy**

The Bill should include the right to remedy that is effective, affordable, accessible, timely and person-centred. The Human Rights Scheme should include reporting on improvements to make justice accessible, affordable, timely, effective, and person-centred.

- **Justice on systemic issues**

The consultation gives scant consideration to the way in which the system will drive change on systemic issues. This includes considering the place of public interest litigation in the framework and addressing barriers to this. This is largely missing from the Table showing routes to justice on page 36. We further emphasise that an individual should not have to complain to SPSO before going to court.

- **Accessible justice**

As outlined above, a National @network of Human Rights Education, Advice and Information should be resourced and co-produced. This should provide information about rights where and when you need it, both national and community based. Inclusive communications should be built in across the justice system.

The Scottish Government need to examine and consider improvements to people's experience of going to court, both for individuals and groups, and both taking a case and intervening. Court rules should be revised to ensure that the system works clearly and effectively for rights-holders. This should include for example, consideration of independent advocates providing

support in court and clarity on courts accepting interventions.

- **Affordable justice**

Under international human rights law, remedy must be affordable, and under the Aarhus Convention, environmental justice must 'not be prohibitively expensive'. The consultation briefly mentions legal aid but does not include affordability in any of the questions.

This Bill must include measures to make justice affordable. This should include removing court fees for all equality and human rights cases. In addition, it should introduce Qualified One-Way Cost Shifting (QOCS). Under QOCS, if an individual or group lose a case, they are not required to pay the defendant's legal costs, except in specific circumstances (e.g. if the claim is found to be fraudulent).

The lack of legal aid reform is a significant barrier to justice: people simply cannot find a solicitor to take their case because there are far fewer solicitors willing to take legal aid cases. This is particularly true where someone's case is complex or relates to a specialist area of law, or they live outside the Central Belt. The consultation simply states that the Government 'remain committed to reforming the current system of legal aid' – that is not enough. There should be a commitment to consult on legislative change to radically reform legal aid by end of 2023.

- **Timely justice**

There is a 3 month time limit to take judicial review (unless exceptional circumstances). The statute of limitations of cases under the Human Rights Act 1998 is one year, but also allows for this time period to be extended if the court considers it to be 'equitable having regard to all the circumstances'. The UNCRC Bill allows cases to be taken up to one year after a child's 18th birthday, particularly out of recognition of the difficulty that children can face in accessing justice before then. This Bill should take a similar case of allowing cases to be taken up to one year (after a person's 18th birthday), but also allow the courts to extend this time period if they consider this to be equitable. We also have concerns that SPSO complaints can take a long time – see Q29 below.

## Question 28, page 41: What are your views on our proposals in relation to front-line complaints handling mechanisms of public bodies?

### What this question is about

Most often, the first formal stage of trying to get something done about a gap or unfairness in a public service, is to make a formal complaint. This question is about how to make sure that the way that complaints are handled recognises the rights and the duties in the Bill. For example, this will mean that when a public body considers a complaint, they do not only look at the process around a decision, but they need to ask questions such as whether ultimately someone's right was protected, and whether there was respect for their dignity, and more.

### You might want to think about

The people that you work with and for, may have experience of taking a complaint and what worked or did not work well with that process. You could think about the types of support that someone needs in the complaints process.

### In short: What the Scottish Government is proposing

- The SPSO update its model complaints handling procedures to reflect rights and duties in the Bill.

### In short: the Consortium response

- We agree that front-line complaints handling by public bodies needs to be changed to take into account rights and duties in this Bill. These changes, including any by SPSO or by bodies not covered by SPSO such as courts and the police, should be co-produced with people whose rights are most at risk.

## Question 29, page 41: What are your views in relation to our proposed changes to the Scottish Public Services Ombudsman's remit?

### What this question is about

When someone is not satisfied with the response from a public service to a complaint, they can then take their complaint to the Scottish Public Services Ombudsman (SPSO). The SPSO deals with complaints about most devolved public services, except for the courts and police.

The consultation suggests that the SPSO remit would change:

- to deal with complaints relating to rights under the Bill. SPSO could consider rights issues within any complaint raised with them, even if the complainer does not specify human rights as such.
- They'll be able to take oral complaints – right now, complaints have to be in writing unless there are special circumstances.
- They could carry out investigations into any areas of concern, even when no specific complaint has been made.

It also suggests ways in which the SPSO approach would stay the same:

- Recommendations that SPSO make can include things like an apology or asking the public body to review the decision or change a process.
- SPSO recommendations are currently non-binding on public bodies – that is, there is legal requirement for them to do anything in response. It is suggested that this would stay the same for human rights-related complaints.

### You might want to think about

People that you work with or for, might have experience of taking a complaint to SPSO, and how that worked or did not work well for them.

### In short: What the Scottish Government is proposing

- Expanding the remit of SPSO to specifically deal with rights under the Bill – SPSO would become the main non-court route to getting something done about a violation of rights in the Bill.
- SPS will accept oral complaints.
- Giving SPSO the ability to take investigations on areas of concern related to rights

## **In short: the Consortium response**

- We agree that SPSO should have an expanded remit to consider rights issues within complaints. However, more consideration is needed around remedy through SPSO being accessible, effective, affordable, timely and supportive.
- Specifically, more consideration should be given to the range of remedies that SPSO can make, to making sure that taking a complaint is timely, and to the SPSO role in raising systemic issues with the SHRC.
- We do not agree that SPSO recommendations should be non-binding.
- We do not agree that SPSO should be able to take investigations.
- People should not have to raise a complaint with SPSO before taking a human rights case to court.

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

### **What this question is about**

There are a whole range of scrutiny bodies in Scotland. These include things like the Care Inspectorate and the Scottish Housing Regulator. Most of these bodies are concerned with checking, maintaining, and improving public service standards.

This section is about adding human rights to their remits. This will mean that they will check public body services against whether they are carrying out their duties in this Bill. This will be an additional way that public bodies can be scrutinised, held to account, and be required to progress human rights in what they do.

The consultation also suggests improving on how these scrutiny bodies can work together. It also suggests requiring them to share information on systemic rights issues with the SHRC and with other bodies concerned with rights such as CYPSCS, Mental Welfare Commission and Environmental Standards Scotland.

### **You might want to think about**

Your organisation might have experience around the impact and working of scrutiny bodies in particular areas.

### **In short: What the Scottish Government is proposing**

- To add human rights to the remit of Scottish scrutiny bodies, so that they assess public bodies on how they are doing in meeting their human rights duties, and what they could do better
- Requiring scrutiny bodies to share information with each other, and with the SHRC, CYPCS and others on human rights issues

### **In short: the Consortium response**

- We agree with scrutiny bodies having human rights added to their remit
- Consideration is needed on ensuring capacity of these bodies around human rights.

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

## **Question 32, page 42: What are your views on potentially mirroring these powers for the Children and Young People's Commissioner for Scotland where needed?**

### **What these questions are all about**

The Scottish Human Rights Commission (SHRC) is the central authority on human rights in Scotland. It is our National Human Rights Institution – this is a formal term that shows that they are independent, and that they have met rigorous checks by the UN to keep their special A-status accreditation.

The first question is about whether the SHRC should be given new powers to strengthen its role.

Currently, the SHRC has fairly limited powers. It can:

- Intervene in court proceedings to bring additional evidence around human rights issues, but only if the court allows it to do so.
- Undertake inquiries into the policies or practice of Scottish public bodies, but this cannot be into only one public body. Any SHRC inquiry has to look at a particular rights issue in all relevant public bodies. So for example, it could



not hold an inquiry into one local authority, but would have to do the same for every local authority in Scotland. The SHRC has never used its inquiry power, at least partly because of the huge resource that this would require.

- When the UNCRC Act is commenced, the SHRC will also be able to take a children's rights court case or intervene in their own name. Courts will have to inform the SHRC about cases where the court might find legislation to be incompatible with the UNCRC.

There are many more powers that could be given to the SHRC. For example, they could have the power to:

- Give advice to individuals.
- Take an investigation into particular rights issues.
- Hold an inquiry into only one public body.
- Monitor and scrutinise public body reports on implementation of rights in the Bill (see Q23 for more on public body reporting).
- To compel information from public bodies.

Question 32 is about whether any new powers given to the SHRC in this Bill should also be given to CYPCS.

## **You might want to think about**

Your organisation might have experience of engaging with the SHRC and CYPCS. You might also have experience around trying to get advice on human rights issues or views on what more is needed to more effectively hold public bodies to account on addressing systemic human rights violations.

## **In short: What the Scottish Government is proposing**

- Giving new powers to the SHRC to bring or intervene in cases about rights in the Bill, and an investigatory power around systemic rights issues. They are open to views on other ways that the SHRC mandate or powers should be expanded.
- Enabling strong information sharing between the SHRC and SPSO
- Giving the same or similar powers to CYPCS

## **In short: the Consortium response**

- Our national human rights institutions currently do not have the powers or resources that are needed to hold public authorities to account on human rights.

- The SHRC general mandate should be expanded and should include participation of people whose rights are most at risk.
- The SHRC should be given a range of new powers.
- The SHRC's new powers must be matched by increased and sufficient resources to use these powers fully.
- We agree that CYPCS should be given the same or similar powers under this Bill as the SHRC.

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

### What this question is all about

'Standing' means who has the right to take a judicial review. Under the Human Rights Act 1998, this is very narrow – to bring a case, you have to either be a direct 'victim' of a rights violation or the Equality and Human Rights Commission (a UK body). This means that NGOs cannot take Human Rights Act cases in their own name. NGOs could take test cases on systemic issues on rights in this Bill – amongst other things, this would avoid lots of individuals from having to take multiple cases. It would also mean that there are more court rulings on important rights issues.

In most civil law cases in Scotland, 'standing' is much wider than under the Human Rights Act – you only have to demonstrate to the court that you have 'sufficient interest' in what the case is about. This question is about potentially deliberately not applying the narrow approach of the Human Rights Act but instead, allowing this much broader approach to 'standing' to apply to rights cases under this Bill.

### You might want to think about

If the rules of 'standing' were kept broad, more organisations could get involved in taking test cases as one way to help bring change on systemic issues. Your organisation might have experience of being involved in judicial review or the barriers to doing so. You might have comments on the importance of cases being taken to court to address systemic rights issues.

## **In short: What the Scottish Government is proposing**

- To keep to the normal rules on ‘standing’ so that anyone with ‘sufficient interest’ can raise a judicial review on rights in the Bill

## **In short: the Consortium response**

- We agree with the Scottish Government’s proposed approach.
- Further consideration is needed on court rules that clearly define ‘sufficient interest’ so that this is clear for courts and for NGOs who are considering taking a case.

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

### **What this question is all about**

When courts make a decision about whether a public body has acted unlawfully or not, they apply certain legal ‘tests’ to help them decide. The consultation discusses two main tests:

- the ‘Wednesbury test’ which is where a decision has to be ‘so unreasonable that no reasonable decision maker could have reached it’. This is a very high bar! If this test applied, then there may be very few situations where a court would find that a rights violation had occurred.
- the ‘proportionality test’ – this is the test applied in the Human Rights Act and suggests that restrictions of a right by a public body must be a ‘proportionate means of achieving a legitimate aim.’

The Government is considering whether there should be a lower threshold than for the Wednesbury test for duties under this Bill. They are also considering other aspects that a court might consider when making a decision. These could include whether a consultation has been carried out.

### **You might want to think about**

People that you work with or for might have experience of going to court to get remedy and whether this was successful.

### **In short: What the Scottish Government is proposing**

- Considering whether to adopt a ‘lower bar’ than the Wednesbury test and what the courts should consider in making decisions under this Bill

### **In short: the Consortium response**

- We will include a short answer to this question that simply states that the chief consideration is that people who experience violations of rights in the Bill must be able to access justice and accountability through the courts.

## **Question 35, page 46: Do you agree or disagree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders?**

## **Question 36, page 46: If you do not agree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders, what additional remedies would help to do this?**

### **What these questions are all about**

Judicial remedies are the decisions that the courts make that bring justice for people whose rights have been violated. It is important then that the types of remedies that courts can decide on are wide enough and strong enough to deliver justice in a really effective way for different people and different rights violations.

The UN has set out guidelines for remedies for human rights violations. The consultation summarises these as:

- Restitution
- Compensation
- Rehabilitation, where a violation of a right has caused medical or psychological harm. For example, this is an important remedy for some victims of torture, see Q12.
- Satisfaction including public apology, sanctions/amendment to educational materials
- Guarantees of non-repetition – can include reviewing and reforming laws.

The Taskforce recommended that consideration be given to a remedy of a structural interdict – this is a remedy which would be about structural or systemic problems. These interdicts might include, not just a one-off ruling from the court, but the courts asking public bodies to act and then report back, or similar remedies.

### **You might want to think about**

It is important to consider what people might view as ‘getting justice’ on human rights. What should justice through the courts look like in reality? You or those you work with or for, might have experience of seeking remedy of different kinds, such as an apology or compensation.

### **In short: What the Scottish Government is proposing**

- The Government is considering whether the remedies set out by the UN are available within Scotland now, or whether some addition is needed. This includes considering ‘structural interdicts’ – that is, a remedy that is aimed at justice for violations that are systemic and affect many people.

### **In short: the Consortium response**

- We welcome this consideration of extending the remedies available to bring justice for different people and on different rights, including structural interdicts.
- Mirroring the UNCRC Bill, courts should be required to give the person taking the rights case, an opportunity to have a say in what remedies are granted.
- Consideration should be given to the level of compensation that is available as a rights remedy, ensuring that this is commensurate with the seriousness of rights violations.

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

### **What this question is all about**

Human rights should be a non-negotiable foundation in law so that all legislation has to comply with them. There should never be legislation passed by the Scottish Parliament which ignores or tramples on human rights.

Right now, Scottish Parliament legislation must comply with the European Convention on Human Rights, and if it does not, courts can 'strike down' part or all of that law or require amendments.

The UNCRC Incorporation Bill includes that all new Scottish Parliament law must comply with the UNCRC. If it does not, courts can 'strike down' legislation passed prior to the Bill receiving Royal Assent and issue a 'declarator of incompatibility' on legislation after the Bill receives Royal Assent. These parts of the UNCRC Incorporation Bill will be part of the reconsideration process in Parliament due to the Supreme Court ruling.

### **You might want to think about**

Your organisation might have views on current Scots law that is incompatible with economic, social, cultural or environmental rights. You might have views on how the Scottish Parliament properly considers human rights during the passage of legislation.

### **In short: what the Scottish Government is proposing**

- There is no definite proposal in this section. They state that they will await outcomes of the UNCRC Bill reconsideration process to determine how this Bill deals with compatibility of new law with rights, and remedies in court for any incompatibilities.
- They are open to views about remedies to incompatibility of legislation which are appropriate for economic, social, cultural, and environmental rights.

## **In short: the Consortium response**

- Courts should be able to ‘strike down’ laws or issue declarators of incompatibility for any part of Scottish Parliament law that is not compatible with rights in the Bill.

## **Part 9: Implementing the New Scottish Human Rights Act**

### **Question 38, page 48: What are your views on our proposals for bringing the legislation into force?**

#### **What this question is all about**

This question is about the time that would be needed between Royal Assent and the Bill coming into force. As outlined under Q19 and Q20, it is proposed that public bodies will then first have a procedural type duty, and then the stronger duty to comply with the rights in the Bill.

The consultation talks about needing time before commencement of any duties, for:

- public bodies to put in place the infrastructure they need for compliance and implementation.
- for new court rules.
- for the Government to work closely with stakeholders on new guidance.

#### **You might want to think about**

This Bill – and the Scottish Government - are making bold and ambitious promises about the purpose of this Bill for driving a human rights culture and better realising rights for everybody. It is essential then that this Bill does not just ‘sit on the shelf’ or become about narrow tick-box compliance. Instead, we want this Bill to be a significant driver of change.

Your organisation will have experience and views about the extent of change needed for rights realisation for certain groups and people. You might have views about what the key changes are that public bodies need to make in order to better realise rights and how much time should be built in for this change prior to them having more rights duties. Will such big changes take



place without strong rights duties being in place or at least, imminent?

### **In short: What the Scottish Government is proposing**

- An ‘appropriate’ period of time between Royal Assent and commencement of duties to allow for guidance to be developed, public authorities to start to prepare and court rules to change.

### **In short: the Consortium response**

- Every day, people are living with serious violations of rights in this Bill. This should be the primary driver behind setting the timescales for full implementation of this Bill.
- All of these international human rights are in place now, so public body implementation of these rights can and should begin now.
- Timescales need to be specified in the Bill and given due priority. This should be commencement of no more than 6 months after Royal Assent; and the additional duty to comply no more than 2 years later. These are reasonable timescales that allow for development of guidance, public sector capacity, and Minimum Core Obligations.

## **Question 39, page 48: What are your views on our proposals to establish Minimum Core Obligations through a participatory process?**

### **What this question is all about**

Minimum Core Obligations are baseline levels of rights that must be in place immediately for everyone, all the time. These are not ambitious levels or about targets – indeed, for some MCOs it might be that what we expect public bodies to usually do and provide goes considerably further. However, MCOs also bring real potential to direct public bodies to delivering these basic essentials for people who are often ignored. For example, if MCOs are delivered, no one in Scotland should be destitute, no one in Scotland should be told there is no temporary accommodation available if they are made homeless, no one who uses a wheelchair should be left on a housing waiting list for years, no child should be left without schooling. You can read an example on page 32 in the consultation on MCOs on the right to health.

There is UN guidance around MCOs relating to different rights. However, this guidance is not full or specific enough on its own – MCOs need to be further and carefully defined for Scotland and put into regulations. As the consultation says, UN General Comments and other examples, ‘do not provide the full picture and should be viewed as foundations from which to build a minimum core that best reflects the evolving basic needs, diversity, culture, and overall resource capacity of Scotland’. Defining MCOs for Scotland will very much enable people to ‘name and claim’ these rights. That is, it will be very clear when they are met or not met. And if they are not, people can get justice and hold public bodies to account for meeting them, including through court. MCOs are therefore a key aspect of how this new human rights law framework will work, direct priorities and empower people and communities.

The Government already committed in March 2021 to MCOs being developed through a participatory process. The question simply asks for views on this core commitment and how it should be done.

### **You might want to think about**

You might have experience of where even really baseline levels of rights protection related to different rights are breached. You might have experience around human rights not being clear or needing to be more clearly defined and understood in Scotland. You might want to think about how people that you work with or for might use these MCOs in interactions with public bodies about decision-making, and for holding government to account.

### **In short: What the Scottish Government is proposing**

- The Bill will include a provision for a participatory process for the development of MCOs. This will be completed after the Bill is commenced but before the stronger duty to comply comes into force.

### **In short: the Consortium response**

- We agree that it is essential that MCOs are developed through a participatory process, and this should be particularly with groups whose rights are most at risk. Consideration should be given to whether this process is led by Scottish Government or by the Scottish Human Rights Commission.

- Many MCOs might reflect provision that is already in our law, but public bodies can be held accountable for delivering these through the human rights framework.
- Major decisions that relate to the impact and planning for this Bill should not be simply avoided and left to be resolved through this MCO development process after the Bill has passed. The Scottish Government should provide details of UN guidance on MCOs and examples of MCOs in Scotland, before this Bill is introduced to Parliament.
- MCOs should be subject to review through a participatory process every 10 years.

## Question 40, page 50: What are your views on our proposals for a Human Rights Scheme?

### What this question is about

The Human Rights Scheme will be a list of key requirements to do with the implementation of rights in the Bill that the Scottish Government will have to report against. The proposed approach set out in the consultation closely mirrors the Children’s Rights Scheme in the UNCRC Bill.

In drawing up the first Scheme or amending it, or reporting on what they have done to implement the Scheme’s requirements, Scottish Ministers would have to:

- Consider things like new General Comments or recommendations from UN Committees
- Consult with some named groups – the consultation says that this could include rights-holders. The Children’s Rights Scheme requires Ministers to consult children, CYPCS, the SHRC, and anyone else that they think is appropriate.

The first Human Rights Scheme would have to be laid before the Scottish Parliament so that MSPs would have a say in deciding what requirements it includes.

After that, Scottish Ministers would have to report against its requirements periodically. The Children’s Rights Scheme requires annual reporting by Ministers – this consultation does not specify a time period.

The consultation includes a big list of things that the Scheme could include:

- An update on Scotland's National Action Plan on Human Rights (SNAP2)
- Plans to introduce further legislation on human rights
- Plans or proposals around improving access to justice through complaints mechanisms, and access to information, advocacy and representation
- Activities to embed human rights in the budget process
- The extent to which public participation is informing implementation of the Bill
- Information and awareness raising around the Bill
- Guidance published and planned
- Reporting to the Scottish Parliament on compliance with human rights treaties
- Reporting to international bodies on compliance with human rights treaties
- Responses to recommendations from international rights bodies
- Implementation of judgments of the European Court of Human Rights
- Human rights monitoring and evaluation that has been carried out or planned
- Human rights impact assessments

### **You might want to think about**

The Human Rights Scheme will be the clearest way for individuals, organisations and MSPs to know what the Scottish Government is doing to keep on progressing the realisation of human rights. It will be a key tool for holding the Government to account on keeping to their duties and commitments on human rights. This means that it is important that it includes all the key areas requiring action if this Bill is to be implemented fully and make human rights real for more people.

You might have views on other requirements that this Scheme should include that are important for human rights realisation of those that you work with or for. You might want to consider how you would use reports by the Scottish Government on what they are doing on rights implementation.

### **In short: what the Scottish Government is proposing**

- A Human Rights Scheme will be published and approved by MSPs that will be a list of requirements on Scottish Ministers around implementing rights
- Scottish Ministers will have to report on what they have done and plan to

do, against this list. To do so, they will have to take into account things like UN recommendations, and they will have to consult with rights-holders and others.

### **In short: the Consortium response**

- We agree with the proposal to have a Human Rights Scheme. Scottish Ministers should have to consult with people whose rights are most at risk when developing the Scheme and reporting against it, and report against it annually.
- In addition to this list of proposed requirements above, the Scheme should also include: requirements around improvements to data collection and publication; access for all to appropriate individual and collective independent advocacy (not only with regards to access to justice); provision of rights advice; inclusive communications; Scottish Minister's engagement with UK Ministers around human rights; provision of services aimed at rehabilitation from torture; the extent to which participation of people whose rights are most at risk is informing implementation of the Bill; emerging case law and interpretation of rights; timescale and plans to develop/review MCOs; plans or proposals to ensure access to justice is accessible, effective, timely, affordable and supportive; Human Rights Impact Assessments.

## **Question 41, page 51: What are your views on enhancing the assessment and scrutiny of legislation introduced to the Scottish Parliament in relation to the rights in the Human Rights Bill?**

### **What this question is all about**

Every Bill that is introduced to the Scottish Parliament needs to have accompanying statements from the MSP or Minister who is introducing it, and from the Presiding Officer, to say that the Bill complies with the European Convention on Human Rights (ECHR). This same approach is included in the UNCRC Incorporation Bill -statements that any new Bill complies with the UNCRC.

This question is about whether this same approach should apply to this Bill. This would then mean that every Bill is assessed against 'a much fuller

spectrum of civil, political, economic, social, cultural, environmental, and children's rights.'

### **You might want to think about**

Your organisation may have experience of engaging directly with the Parliament or its Committees or members around human rights impacts of particular aspects of new legislation.

### **In short: What the Scottish Government is proposing**

- All Public Bills (Government, Member and Committee Bills) having to be accompanied by a statement of compatibility with rights in this Bill.
- They will engage with Scottish Parliament around other enhancements to legislative scrutiny related to human rights.

### **In short: the Consortium response**

- We broadly agree with the Scottish Government proposal.
- Statements of compatibility should include a requirement to demonstrate that consultation with people whose rights are at risk has been undertaken in order to assess a Bill's compatibility with human rights.
- Mirroring the UNCRC Bill, Ministers should be required to carry out Human Rights Impact Assessments for any Bill or SI introduced to the Scottish Parliament.
- We will also be asking the Scottish Parliament to engage with people whose rights are at risk in determining any enhancements to their legislative scrutiny around human rights compliance.

## **Question 42, page 53: How can the Scottish Government and partners effectively build capacity across the public sector to ensure the rights in the Bill are delivered?**

### **What this question is all about**

This question is about two things:

#### **1. Guidance**

Clear guidance is necessary for full implementation and for accountability.

Most new pieces of law have accompanying guidance to help public bodies to be clear about what they need to do to implement it. This guidance also helps individuals and communities be clear about what any public body is meant to be doing, and to hold them to account if they are not doing so.

The Government has already committed to the Taskforce recommendation on guidance – that is, there should be statutory and non-statutory guidance, and it should be developed through consultation. Importantly, this consultation should include with rights-holders. The consultation does not say anything beyond this already-standing commitment.

## **2. Government and public body capacity building on rights**

The Scottish Government recognises that there is going to have to be a significant increase in government and public body capacity around rights in this Bill if it is to be fully implemented.

Three related developments to note are:

- The Scottish Government has set up a Human Rights Bill Implementation Working Group (August 2023) – the Consortium is a member of this Group.
- A public consultation on a strategy to mainstream equality and human rights across government (and potentially beyond) is expected in coming months.
- The consultation says that Government will develop a plan to build government and public body capacity around the rights and duties in this Bill. This will tie in with similar developments around the UNCRC Bill implementation, reform of the Public Sector Equality Duty, and embedding equality and human rights more generally.

### **You might want to think about**

You might have experience of reading or using guidance on other pieces of legislation and to what extent it has been useful for clarity and accountability. Specifically, you might have experience around the Public Sector Equality Duty or the Fairer Scotland Duty – what is working well, or not working well, with implementation of these duties. You might have views about how guidance and capacity building plans should be developed, and the participation of people whose rights are most at risk in these developments.



## **In short: What the Scottish Government is proposing**

- Statutory and non-statutory guidance, developed in consultation with stakeholders including rights-holders.
- Development of a plan for capacity building of government and public bodies.

## **In short: the Consortium response**

- We agree that statutory and non-statutory guidance is essential. This should be developed with participation of people whose rights are most at risk and written and published in a way that it is accessible to rights-holders as well as duty-bearers.
- We welcome the development of a plan around human rights capacity building for government and public bodies. We already know what our international human rights are - building capacity should not, and does not need to, wait for the Bill to be passed.
- Scottish Government should demonstrate learning from what has worked or not worked in bringing change related to implementation of other rights-related duties and shape the guidance and capacity building efforts on this Bill accordingly.

## **Question 43, page 53: How can the Scottish Government and partners provide effective information and raise awareness of the rights for rights-holders?**

### **What this question is all about**

This section is very short! This question is asking how the Scottish Government and its partners can give people clear and helpful information about their rights and how they can make more people aware of these rights. If people are going to be able to name and claim their rights, and use them in interactions with public bodies, they need to know what their rights are and what to do if they are not realised.

### **You might want to think about**

Working with communities all over Scotland, and our member organisations, it comes up time and time again that information on what human rights we all

have is difficult to find, understand, and navigate. You might want to think about the best places and practices you and those you work with and for, have found when accessing information. This could be online or in-person. The Scottish Government has committed to a public awareness campaign on the Bill – you might have views on what this should look like and what it should include.

### **In short: what the Scottish Government is proposing**

- Develop effective ways to ensure people have access to information about their rights and easy access to rights-related advice.
- Implement a large-scale public awareness campaign to promote awareness of the new human rights framework.

### **In short: the Consortium's response**

- This is a key area for implementation of the Bill – the lack of development in this area is disappointing.
- Co-produce and fund a National Network for Human Rights Information, Education, Legal Services and Advice.

## **Question 44, page 53: What are your views on monitoring and reporting?**

### **What this question is all about**

It is important that this new human rights law has 'teeth'. This means that there must be a duty to comply on all rights as far as possible within devolution and credible routes to remedy and justice if these are infringed upon. Importantly, the way that public body implementation of rights is monitored, reported, and scrutinised must also have 'teeth', to drive improvement on rights realisation.

The Human Rights Bill Lived Experience Boards had significant discussions around monitoring and reporting – one aspect they emphasised was that government and public bodies should not be able to 'mark their own homework' when it comes to rights. They said there must be consequences for a failure to comply with rights.

This section of the consultation mainly refers to other sections on public body reporting requirements at Q23, and the Human Rights Scheme at Q40. We also recommend that the SHRC has a role in scrutinising rights reporting, see Q31.

In addition, the consultation notes that the Taskforce recommended consideration of the setting up of a National Mechanism for Monitoring, Reporting and Implementation. However, the Scottish Government states that this is not necessary as they are already carrying out all its potential functions.

### **In short: What the Scottish Government is proposing**

- The Scottish Government consider that the proposal for a National Mechanism for Monitoring, Reporting, and Implementation is not necessary. Alongside reporting requirements (p. 52) and the Human Rights Scheme (pp. 49 – 52) the Government state that consideration will be given to strengthening monitoring and reporting.

### **In short: the Consortium response**

- Referring to our response to Qs 22 and 40, the Human Rights Scheme and the reporting requirements on public bodies need to bring accountability on fulfilling rights in the Bill. The SHRC, as outlined in Q13, also have a role in monitoring and scrutinising government and public body rights reporting.
- Consideration should be given to a Scottish Parliament reporting duty, mirroring the approach taken in the UNCRC Bill.
- At every stage of monitoring and reporting, it should not be reporting on activity itself. Instead, it should be reporting on activity or decisions that have led to the realisation of rights, as determined, and evidenced through participation of people whose rights are most at risk.

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