

# A Human Rights Bill for Scotland: **Consultation**



June 2023

# Ministerial Foreword



“

Having your rights realised makes you feel valued as a person. ”

**Member of Lived Experience Board**

“

If we get human rights implemented correctly, then there are big benefits for communities of people who have been historically denied their rights and discriminated against. ”

**Member of Lived Experience Board**

Scotland is a modern, inclusive nation which respects, protects, and fulfils all internationally recognised human rights. We have made great strides in our collective human rights journey and have committed to go further through a new Human Rights Bill that will incorporate international human rights standards already signed and ratified by the UK into domestic law in Scotland.

Embedding international human rights in Scotland will further emphasise the importance of all people being treated with dignity, and ensure that human rights play an even more central role in our strategies, policies and decision-making

processes across all areas of government and the wider public sector. This consultation on the proposals for a Human Rights Bill to be introduced within this session of the Scottish Parliament seeks the views of everyone on that vision.

We have benefited from expert advice in this area. The National Taskforce on Human Rights Leadership I previously co-chaired with Professor Alan Miller set out an ambitious roadmap for incorporating international human rights standards, making sure that public bodies take a rights-based approach and improving access to justice. Our Lived Experience Board have provided deeply moving testimony of their experiences, which is shared in part throughout this consultation as a reminder of what it is we are seeking to achieve – a Bill that improves the lives of the people of Scotland.

Scotland has a strong human rights culture, and a constitutional settlement which already embeds key civil and political rights at the heart of Scotland’s democratic institutions. However, we are also constrained by the devolution settlement in how far we can go to protect rights – including fundamental economic, social, cultural and environmental rights which are not already protected in domestic law. The judgment of the UK Supreme Court on the United Nations Convention on the Rights of

# Ministerial Foreword

the Child (Incorporation) (Scotland) Bill has brought those limitations into sharp focus.

Our existing human rights have also been threatened. Last year, the UK Government brought forward proposals to repeal the Human Rights Act 1998 and to replace it with a “Bill of Rights”. Whilst those proposals have not made progress at Westminster, they further emphasise the uncertain backdrop against which we are operating.

Whilst only independence can allow us to fully incorporate all rights into domestic law, we want to use the powers we do have to enhance Scotland’s human rights culture. Incorporating these internationally recognised treaties and recognising and including the right to a healthy environment within the limits of devolved competence is a necessary and important step for Scotland now to take.

By giving domestic legal effect to these standards, Scotland can ensure that focused attention on fundamental rights like health, housing and an adequate standard of living is not a political choice. This Bill will therefore help to tackle poverty and inequality, aid the delivery of a better environment for our future generations to enjoy, deliver stronger public services and improve the lives of those who are most marginalised and disadvantaged in our society.

This Bill will not deliver this step change overnight. What it will do is create a legal framework for us to embed international human rights within domestic law and drive transformative, positive change for people – empowering them to claim their rights. For human rights to truly be transformative in this way, accountability must lie at the heart of the framework. Government, public bodies, the courts and independent scrutiny bodies all

have a role in ensuring human rights are respected, protected and fulfilled – so we want to build a multi-institutional approach that embeds a culture of human rights-based thinking across the public sector and puts human rights at the heart of decision-making. This will ensure better compliance with those standards from the outset and, where things have gone wrong, make it easier for people to hold duty-bearers to account.

“

[What would a fairer Scotland look and feel like?]

Lots of things would be different because you would be included and people would be happy. ”

**Member of Lived Experience Board**

Incorporating these international entitlements and recognising the right to a healthy environment sends an important signal of solidarity to the global community in support of the international rule of law and the protection of rights. At a time when rights are threatened and violated around the world, divisive forces are at play and international institutions are under strain, incorporating these rights provides a beacon of hope for the future. It demonstrates Scotland’s ongoing commitment to abide by the international legal standards signed and ratified by the UK.

Building a human rights culture is the responsibility of everyone. Your views are crucial to this process, and we look forward to hearing them.

**Shirley-Anne Somerville**

Cabinet Secretary for Social Justice

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# Part 1: Scotland's Human Rights Journey



This part of the consultation sets out Scotland's human rights journey, as context for the proposals for the Bill.

## International Human Rights

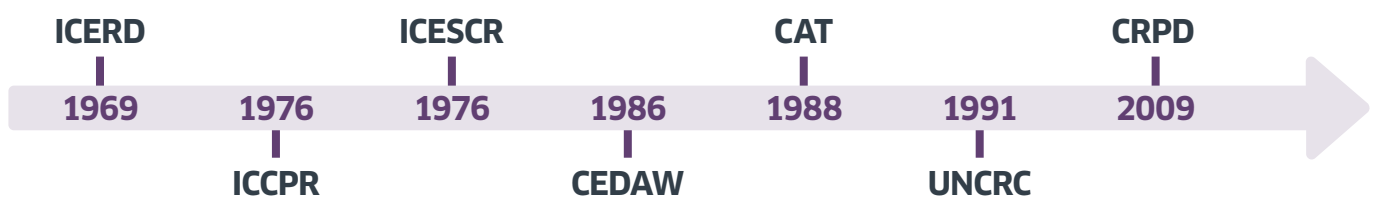
The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations (UN) in 1948, when the world was recovering from the atrocities of the Second World War. It set out for the first time the human rights – civil, political, economic, social and cultural – everyone everywhere in the world is entitled to. It acted as a catalyst for human rights treaties to be developed and adopted by countries around the world, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

**Together, these three core international human rights instruments are called the International Bill of Rights and provide much of the basis for international human rights entitlements.**

Treaties for women and specific groups have also been agreed since the adoption of the UDHR, including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the UN Convention on the Rights of the Child (UNCRC) and the Convention on the Rights of Persons with Disabilities (CRPD). The UN Convention Against Torture (UNCAT) also sets out clear expectations around the prevention of inhumane and degrading treatment.

## Human Rights in the UK

The UK Government has, since the adoption of the UDHR in 1948, signed and ratified these treaties, which means they have agreed to abide by and implement the rights and obligations in them.



Timeline of UK UN Human Rights Treaty Ratifications

# Part 1: Scotland's Human Rights Journey

The UK was instrumental in developing the European Convention of Human Rights (ECHR) and the first to ratify it in 1951. In 1998, the Human Rights Act incorporated rights in the ECHR into domestic law, which meant that UK courts could now hear cases relating to human rights set out in the Convention. The UK has over time developed and passed other pieces of legislation that have protected human rights and equality. For example, the Equality Act 2010 has consolidated a number of different pieces of anti-discrimination legislation and now forms the basis of equalities law in the UK.

## Human Rights and Devolution

The Scotland Act 1998, which established the Scottish Parliament, builds human rights protections into the bricks of the devolution settlement. It allows for Scottish laws which are incompatible with ECHR rights to be overturned, and means that Scottish Ministers have to act in accordance with those rights. Equal opportunities is mostly reserved to the UK Parliament, but the Scottish Parliament has powers to encourage equal opportunities and to regulate equal opportunities in relation to the Scottish functions of certain public authorities. The Scottish Human Rights Commission was established in 2008, as Scotland's National Human Rights Institution, to promote and protect human rights. Recently, the Scottish Parliament passed

the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (UNCRC Bill), which seeks to incorporate that treaty directly into Scots law, although there has been a delay in taking this forward due to provisions in it being struck down by the UK Supreme Court following a referral by the UK Government. Scotland's National Performance Framework (NPF) – which sets out the Scottish Government's vision of the kind of country we wish to create – has a National Outcome that '*We respect, protect and fulfil human rights and live free from discrimination*'.<sup>1</sup> We have also developed a collaborative National Action Plan (SNAP)<sup>2</sup> to advance implementation of rights and build a culture of rights across Scotland.

## Building Human Rights Leadership in Scotland

In 2018, the then First Minister Nicola Sturgeon MSP established an independent Advisory Group on Human Rights leadership (FMAG) with human rights experts who were asked to examine the human rights impacts of UK withdrawal from the EU and how best to protect and promote all human rights across all potential scenarios.<sup>3</sup> Specifically, they were asked to make recommendations "*on how Scotland can continue to lead by example in human rights, including economic, social, cultural and environmental rights*".<sup>4</sup> The FMAG reported in December 2018, recommending an Act

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1 [National Performance Framework –Home –\(www.nationalperformance.gov.scot\)](https://www.nationalperformance.gov.scot)

2 [Scotland's second National Human Rights Action Plan – \(www.snaprights.info\)](https://www.snaprights.info)

3 [First Minister's Advisory Group on Human Rights Leadership | Home –\(www.humanrightsleadership.scot\)](https://www.humanrightsleadership.scot)

4 Terms of Reference of FMAG: [First Minister's Advisory Group on Human Rights Leadership | Home –\(www.humanrightsleadership.scot\)](https://www.humanrightsleadership.scot)

# Part 1: Scotland's Human Rights Journey

of the Scottish Parliament which provides human rights leadership developed through a public participatory process and driven by the establishment of a new National Taskforce.

The then First Minister welcomed the findings of FMAG, and a Taskforce was set up to progress their recommendations, and to ensure this work was informed by engagement from the public with input from across the public sector and civil society. The Taskforce reported in March 2021, making 30 recommendations for establishing a statutory framework for human rights to bring internationally recognised human rights into domestic law. Specifically, that report recommended that the new framework should incorporate four international human rights treaties into Scots law:<sup>5</sup>

- the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>6</sup>
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>7</sup>
- the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>8</sup>

- the Convention on the Rights of Persons with Disabilities (CRPD)<sup>9</sup>

The Taskforce also recommended that the framework should include the right to a healthy environment; include an equality clause which aligns with the Equality Act 2010 and provide equal access to the rights contained within the Bill for everyone, including LGBTI people<sup>10</sup>; and include a right for older people. They also considered issues around access to justice, capacity building, participation and implementation.

Since the publication of the Taskforce report, we have established different groups of people to help us develop proposals for implementing their recommendations. This includes:

- A **Lived Experience Board**, which has been set up in recognition of the importance of involving the public in developing this framework. Membership includes more seldom heard individuals and groups with lived experience of trying to access their human rights. There are 3 different groups on the Board, facilitated by the Human Rights Consortium Scotland,

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5 Incorporation of the [Convention on the Rights of the Child \(pdf\) - \(www.ohchr.org\)](https://www.ohchr.org) (UNCRC) is already underway via the UNCRC (Incorporation) (Scotland) Bill

6 [International Covenant on Economic, Social and Cultural Rights \(pdf\) - \(www.ohchr.org\)](https://www.ohchr.org)

7 The Scottish Government had previously accepted a recommendation from the National Council of Women and Girls to incorporate CEDAW ([Convention on the Elimination of All Forms of Discrimination against Women \(pdf\) \(www.ohchr.org\)](https://www.ohchr.org)) into domestic law. [First Minister's National Advisory Council on Women and Girls - 2018 First Report and Recommendations \(pdf\) - \(www.onescotland.org\)](https://www.onescotland.org) at page 19

8 [Convention on the Elimination of All Forms of Racial Discrimination \(pdf\) - \(www.ohchr.org\)](https://www.ohchr.org)

9 [Convention on the Rights of Person with Disabilities \(pdf\) - \(www.ohchr.org\)](https://www.ohchr.org)

10 This consultation uses the term "LGBTI", with the "I" standing for "intersex". The Scottish Government appreciates that some organisations and people prefer to use terms such as "differences of sex development" or "variations of sex characteristics" rather than "intersex".



# Part 1: Scotland's Human Rights Journey

the Scottish Commission for Learning Disabilities and Together: Alliance for Children's Rights. The Board has produced a number of reports to inform the consultation proposals.<sup>11</sup>

- An **Advisory Board**, chaired by the Minister for Equalities, Migration and Refugees comprising a range of human rights and equality advocacy and third sector organisations. This builds on previous work carried out by the Taskforce, whose report was informed and co-produced by a significant level of stakeholder engagement with a wide variety of groups, and we are committed to a similar inclusive process as part of our Bill development.<sup>12</sup>

- An **Executive Board**, chaired by the Scottish Government's Director General for Communities and comprised of senior decision-makers from public authorities, tasked with ensuring there is capacity across the public sector to implement the Bill and providing strategic support and advice on specific Bill provisions affecting public authorities.<sup>13</sup>

This engagement work reflects the Taskforce's recommendation that the Scottish Government should adopt an innovative and human rights-based approach towards engaging the public in developing the framework.

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11 [Human Rights Bill Lived Experience Board -gov.scot \(www.gov.scot\)](http://www.gov.scot)

12 [Human Rights Bill Governance and Engagement Advisory Board -gov.scot \(www.gov.scot\)](http://www.gov.scot)

13 [Human Rights Bill Governance and Engagement Executive Board - gov.scot \(www.gov.scot\)](http://www.gov.scot)

# Part 2: What We Want To Achieve



This part of the consultation sets out our high level objectives for the Bill.

We want to:

- Build on **existing human rights and equality protections**, enshrined in the Scotland Act 1998, Human Rights Act 1998 and Equality Act 2010, within the limits of devolved competence.
- Provide a **clear, robust and accessible legal framework** that ensures:
  - All rights-holders in Scotland can understand and claim international human rights domestically; and that
  - All duty-bearers will better implement rights in practice, respond appropriately to rights issues as they arise, and be held to account when things go wrong.
- **Incorporate into Scots law**, within the limits of devolved competence:
  - the International Covenant on Economic, Social and Cultural Rights (ICESCR);
  - the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
  - the Convention on the Rights of Persons with Disabilities (CRPD); and
  - the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).
- Recognise and include the **right to a healthy environment**.
- Ensure the rights are incorporated in a way which ensures they can be enjoyed and accessed by everyone without discrimination via an **equality provision**, within the limits of devolved competence.
- Provide a clear set of **duties for public bodies** (including, so far as possible, private actors) carrying out devolved public functions in Scotland in relation to the rights of the Bill. This is with the aim of ensuring so far as possible that all law, policy and decision-making by Scotland's public authorities and services contributes to the advancement of the full range of international human rights standards contained in the Bill.
- Create and promote a **multi-institutional approach** so that institutions in Scotland – Government, Parliament, public bodies, courts and independent scrutiny bodies – can work together to ensure rights are upheld and create a human rights culture.

## Part 2: What We Want To Achieve

- Ensure there are **routes to remedy** available for when there has been an individual or systemic infringement of people’s human rights and that the remedies are accessible, affordable, timely and effective.
- Through the Bill and wider work, **continue to build a human rights culture** where duty-bearers place rights at the heart of their decision making, people understand what their rights are and how to access them, and together we build a society where everyone is able to live with fundamental human dignity.

# Part 3: The Rights



This part of the consultation sets out the rights considered by the Taskforce – what they are and where they have come from. This section is for illustrative purposes, to show the broad content of the treaties. Incorporation of the treaties in the Bill will be within the limits of devolved competence and that means not all of the text in the four treaties discussed below will be able to be included in the Bill, where it relates to reserved matters.

## **The International Covenant on Economic, Social and Cultural Rights (ICESCR)**

Ratified by the UK in 1976, the ICESCR sets out the obligations on states (those countries who have signed and ratified the treaty) to guarantee the economic, social and cultural rights contained in the treaty, which should be exercised without discrimination as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Economic, social and cultural rights are expected to be progressively realised over time in line with a country's resource capabilities. Amongst others, the ICESCR contains the following rights:

- The right to work and to favourable conditions of work (Art 6 & 7)
- The right to form trade unions and to join trade unions (Art 8)
- The right to social security (Art 9)
- The right to an adequate standard of living (Art 11) including:
  - The right to adequate food
  - The right to clothing
  - The right to adequate housing
- The right to the highest attainable standard of physical and mental health (Art 12)
- The right to education and free primary school education (Art 13 & 14)
- The right to take part in cultural life and enjoy the benefits of scientific progress (Art 15)

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

Ratified by the UK in 1969, the ICERD requires states to pursue by all appropriate means a policy of eliminating racial discrimination in all its forms and to promote understanding among all races.

# Part 3: The Rights

## **The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**

Ratified by the UK in 1986, the CEDAW places obligations on states aimed at eliminating discrimination against women. This includes taking all appropriate measures to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

## **The Convention on the Rights of Persons with Disabilities (CRPD)**

Ratified by the UK in 2009, the CRPD sets out the human rights of disabled people and the obligations on states to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.

## **Further Rights**

The Taskforce report considers a right to a healthy environment, a right for older people, a right to participation, restating civil and political rights in the Bill, and the potential incorporation of the UN Convention against Torture (UNCAT) through the Bill. Further detail on these issues and our approach to them is set out in subsequent parts of this consultation.

### **NOTE:**

Throughout the consultation, we sometimes use “equality treaties” as shorthand for when we are discussing ICERD, CEDAW and CRPD together. Economic, social and cultural rights mean the core rights within ICESCR.

# Part 4: Incorporating the Treaty Rights



This part of the consultation sets out our proposed approach and developing thinking on incorporating the treaties – that is:

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

Incorporating these four treaties together, while also addressing the wider Taskforce recommendations, including recognising and including the right to a healthy environment, is a complex task. The treaties were drafted at different points in time and contain different levels of specificity. A large number of the rights in them interact with the equal opportunities reservation in the Scotland Act 1998, as well as other reserved areas. We need to ensure that the Bill operates clearly within devolved competence whilst still meeting our overall objectives.

## Putting human dignity at the heart of the Bill

“

When you mention human rights, it's like, why has she mentioned that? What's that got to do with this? And I'm like, because you're not displaying any dignity, any respect for this person. ”

**Member of Lived Experience Board**

### Human Rights Taskforce Recommendation 9

The framework states the intent of the legislation is to give maximum possible effect to human rights and recognise that human dignity is the value which underpins all human rights. It is suggested this could be done via a purpose clause.

The principle of human dignity (as in the inherent worth of the human person) is a key feature of human rights treaties both internationally and regionally. Our engagement during the development of

# Part 4: Incorporating The Treaty Rights

the Bill has also shown human dignity to be a helpful tool in understanding and interpreting key human and comparative constitutional rights. Our intention is therefore for human dignity to be integrated into the framework as a fundamental value which can be used in reading and interpreting the framework as a whole. This closely reflects the formulation of international human rights treaties, and is intended to ensure we all have the opportunity to live a life with dignity.

Our proposal is to achieve this by ensuring the interpretative clause of the Bill allows courts to consider dignity when adjudicating on the rights in the Bill, with reference to the text of international treaties and materials. This would allow courts to consider the treaties, including their preambles, as well as accompanying guidance, concluding observations, and international jurisprudence which would include references to dignity within these sources. This will allow the principle of human dignity, as understood in international law, to be read across all of the rights within the Bill.

We also want to ensure that the process for defining minimum core obligations (MCOs)<sup>14</sup> as part of the framework recognises human dignity as a key threshold for defining this content and delivering them in practice. We believe that this will ensure that the MCOs

protected by the Bill capture the value of dignity, that doing so will help duty-bearers and rights-holders to have a clear understanding of the purpose of MCOs within the framework, and will help to ensure that no one in Scotland falls below such a level that their inherent dignity is violated. It will also enable those adjudicating on the rights to consider human dignity when assessing whether MCOs have been met.

## **Interpretative provision – maintaining a strong link to the international human rights system**

### **Human Rights Taskforce Recommendation 10**

Provide that courts and tribunals are clear on the intent of the legislation including the underpinning value of human dignity, in relation to international law and to comparative law. It is suggested this could be done through an interpretative clause.

We want to include provision in the Bill that allows for duty-bearers, courts and tribunals to be able to read, apply and interpret the rights in line with international human rights law, materials and mechanisms. This includes the General Comments<sup>15</sup> and recommendations of UN Committees, concluding observations of UN

14 Minimum core obligations are the obligations on the State to ensure the satisfaction of minimum essential levels of a right.

15 [General Comments | OHCHR](#): General Comments are a treaty body’s interpretation of human rights treaty provisions, thematic issues or its methods of work. Also called “general recommendations” (Committee on the Elimination of Racial Discrimination and Committee on the Elimination of Discrimination against Women).

# Part 4: Incorporating The Treaty Rights

treaty monitoring bodies<sup>16</sup> and other mechanisms at the international or regional level.

UN General Comments are published by treaty bodies, setting out their interpretation of the provisions in their respective human rights treaties. These comments are not legally binding but could be considered to carry weight and can serve as a useful tool to inform interpretation of rights domestically. However, it is also important to note that different treaty bodies can interpret issues engaging the same rights in different ways. This means that any provision in the Bill needs to allow for flexibility of interpretation depending on the rights being interpreted. We are open to views on the most appropriate ways to ensure they, and other materials, are considered under the Bill.

As explained above, we also want to ensure that human dignity can be taken into account in the interpretation of the rights in the Bill. International treaties, guidance and jurisprudence all include references to dignity within them and our intention is that courts can consider these in interpreting and applying the rights in the Bill.

We are also considering the most appropriate mechanism by which to recognise other key international human rights principles – such as the universality, indivisibility, interdependence and interrelatedness of all rights – within the framework. We need to consider carefully how we do this whilst meeting our objective of providing a clear and accessible framework.

## Questions

1. What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?
2. What are your views on our proposal to allow for dignity to be a key threshold for defining the content of MCOs?
3. What are your views on the types of international law, materials and mechanisms to be included within the proposed interpretative provision?

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<sup>16</sup> [UN Treaty Body database search for concluding observations](#)



# Part 4: Incorporating The Treaty Rights

## Model of Incorporation

**Human Rights Taskforce Recommendation 1(b):** Incorporation of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>17</sup>

For information purposes, this Covenant includes for everyone economic, social and cultural rights, including the following:

- right to an adequate standard of living, including the rights to adequate food, clothing and housing and the continuous improvement of living conditions
- right to the enjoyment of the highest attainable standard of physical and mental health
- right to education
- right to social security
- right to take part in cultural life and enjoy the benefits of scientific progress.

**Human Rights Taskforce Recommendation 2:** Include the right to a healthy environment with substantive and procedural elements in the statutory framework.

**Human Rights Taskforce Recommendation 3:** Incorporation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

**Human Rights Taskforce Recommendation 4:** Incorporation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

**Human Rights Taskforce Recommendation 5:** Incorporation of the Convention on the Rights of Persons with Disabilities (CRPD).

We are seeking to incorporate the four international treaties into Scots law, and recognise and include the right to a healthy environment, within the limits of devolved competence, making them binding and justiciable to the extent we are able. Our overarching aim in considering how we structure the Bill and the way we give effect to the rights in the treaties – the model of incorporation – is that we provide a clear and accessible human rights framework which makes a real difference to the people of Scotland.

### Using the Treaty text

The UNCRC Bill took the approach of directly incorporating text from the United Nations Convention on the Rights of the Child into Scots law. For the Human Rights Bill, we would propose taking a broadly similar approach – putting the rights from the four treaties into the Bill using the same wording as in the treaties themselves, removing anything that is reserved to the UK Parliament. An alternative approach could be to “transpose” the rights – by drawing together text from across the four treaties relevant to particular rights

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<sup>17</sup> See Part 3 for further detail about this treaty

# Part 4: Incorporating The Treaty Rights

and amalgamating it into one expression of the right. Again, we would remove text which related to reserved matters, resulting in a single set of rights within devolved competence.

On balance, we consider the direct treaty text approach is preferable. Transposing the rights in an amalgamated way creates significant risk that we could lose the meaning behind the treaties and that the Bill could move away from the standards, principles and practices of international law. This would create challenges for the future interpretation of the rights as they could lose their context as rights taken directly from international standards.

A direct treaty text approach to incorporation also allows us to more easily navigate the limits of devolved competence than if we transposed the treaties. There is a need to ensure rights relating to discrimination and equal opportunities work effectively within devolved competence, which is easier to achieve using the direct treaty text approach. The majority of these rights are found in the equality treaties.

A fundamental consideration for the Bill is how the protections across all the treaties – which are often overlapping in nature – should be read, interpreted and applied consistently and coherently with one another. The model we propose here is designed to help with this. We recognise that the direct text of the treaties involves detailed language which might make it difficult for duty-bearers and rights-holders to understand what the rights mean in practice. We are committed to providing a clear explanation of what the rights are and what they mean. We are open to views on the best mechanisms to achieve this.

## **Navigating the equal opportunities reservation**

A significant number of the rights, mainly within the equality treaties, interact directly with the “equal opportunities” reservation contained within the Scotland Act 1998. How we navigate this reservation is critical to how we effectively deliver the aims of the Bill within devolved competence.

The “equal opportunities” reservation means the Scottish Parliament cannot generally make law which is aimed at preventing, eliminating or regulating discrimination between persons on the grounds of certain protected characteristics (including sex, race and disability), unless an exception applies. One of those exceptions allows the Scottish Parliament to legislate to prevent, eliminate or regulate discrimination by certain public authorities in Scotland when exercising their Scottish functions (within certain parameters). Another exception allows the Scottish Parliament to legislate to encourage equal opportunities as long as it is not prohibiting or regulating discrimination. This means we are limited in what we can do in relation to rights in the treaties relating to equal opportunities.

## **Our proposed model**

Our aim is to deliver clear and accessible law that maintains that strong link to the international human rights system and works within the limits of devolution. To do this, as already stated we are proposing to adopt a direct treaty text approach, which takes a tailored approach in relation to the equality treaties. This approach seeks to ensure

# Part 4: Incorporating The Treaty Rights

the rights across the treaties can be read and applied consistently and coherently with one another, whilst effectively navigating the equal opportunities reservation. This has been initially explored with stakeholders and rights-holders.

We are considering:

- **reproducing all four treaties in the Bill**, removing any text that relates to areas reserved to the UK Parliament;
- recognising and including the **right to a healthy environment** in the Bill;
- for core ICESCR rights and the right to a healthy environment:
  - putting an **initial procedural duty** on public bodies (and, so far as possible, private actors) delivering devolved public functions to build the rights into the fabric of their decision-making. This would apply for a period of time following the Bill passing to give duty-bearers time to prepare for a subsequent compliance duty (see below);
  - moving to a **duty to comply** with the rights, for public bodies (and, so far as possible, private actors) delivering devolved public functions. The duty to comply will be demonstrated by progressively realising the rights and ensuring the delivery of minimum core obligations – for more detail on duties see Part 7;
  - including an **equality provision** (within the limits of the equal opportunities reservation) to ensure:
    - equal access for everyone to the rights; and

- that the provisions of the equality treaties inform the interpretation of the core ICESCR rights and the right to a healthy environment for those protected groups. For more detail on the equality provision see Part 6.
- putting a **procedural duty on duty-bearers, in relation to the equality treaties** (within the limits of the equal opportunities reservation). This is intended to ensure duty-bearers are considering all rights in the equality treaties in a holistic way both when delivering ICESCR rights and in their overall decision-making.
- including an **interpretative provision** in the Bill that ensures all the rights can be **interpreted in light of international human rights standards** and the concept of **human dignity**.

Our rationale for this approach is that we want to give the strongest possible protections whilst producing clear, accessible and workable law which functions effectively within devolved competence. Our proposed model attempts to strike a balance between the level of protection we provide and the coherence and workability of the law.

A critical point in the development of this model has been consideration of how the rights within the equality treaties intersect with the equal opportunities reservation and how best to give those rights legal effect in a coherent framework. The model seeks to address this by taking a different approach to protection for rights in the equality treaties compared with the core ICESCR rights and the right to a healthy environment.

# Part 4: Incorporating The Treaty Rights

In taking this approach, we are mindful of the need to ensure the integrity and coherency of the Bill as a whole and to provide clarity for rights-holders and duty-bearers. We are confident that our currently proposed approach delivers a significant step-change in ensuring that the rights of women, disabled people and people discriminated against on the basis of race, colour, descent, or national or ethnic origin, are given the targeted protection required by duty-bearers. For the first time in our domestic legal framework, duty-bearers will have to actively consider the rights in the ICERD, CEDAW and CRPD when delivering services – such as housing, social care or social security – and can be held accountable if they do not. When applied in practice this will be a significant and ground-breaking step on our human rights journey.

However, we fully recognise that there are some specific rights in the equality treaties which may be considered to be of standalone significance and where some stakeholders will understandably want to see us go further if possible. For example, we have heard from disabled people’s organisations about the importance of the right to independent living. We are carefully considering further if there are some rights in the equality treaties which we could treat differently, whilst still delivering a coherent and workable overall framework of human rights protection. We will particularly consider this where specific rights may have standalone significance and where there may be benefits to stronger protections under the framework. During the consultation period, we will take forward targeted engagement with relevant stakeholders

on this, alongside continued analysis of the carefully balanced competence and coherency considerations in relation to the treatment of these rights.

## Questions

4. What are your views on the proposed model of incorporation?
5. Are there any rights in the equality treaties which you think should be treated differently? If so, please identify these, explain why and how this could be achieved.

# Part 5: Recognising the Right to a Healthy Environment

This part of the consultation sets out our proposed approach to including the right to a healthy environment in the Bill.

“

Everyone has a right to an environment that is not harmful to their health and wellbeing. And in today's world, looking at air pollution and lots of different issues around environment, it's a very challenging situation and it's not really surprising that that there is a connection with human rights. Maybe it's actually a good direction to handle the problem...if we actually sit down and look around, it's actually more connected than we think. ”

**Member of Lived Experience Board**

“

[What difference would it make for children and young people if Scotland put extra rights into Scottish law, so everyone has the right to a healthy environment?]

It would make a huge difference to people's mental health, especially children and young people, creating happier and more comfortable children in Scotland. ”

**Member of Lived Experience Board**

## **Human Rights Taskforce Recommendation 2**

Include the right to a healthy environment with substantive and procedural elements in the statutory framework.

# Part 5: Recognising the Right to a Healthy Environment

We want to recognise and include the right to a healthy environment in the Bill. This will help to ensure a healthy and sustainable environment in Scotland and provide a platform to tackle issues related to the environment and human rights so that they are realised together. How we approach defining the right will be a key part of ensuring it is an effective and transformative human right for the people of Scotland. For the purposes of the Bill framework, we are considering our approach including whether to draw on the definition used within the Aarhus Convention,<sup>18</sup> which includes specific reference to ecosystems and the biosphere.

The right to a healthy environment is yet to be enshrined within an international treaty. Despite this, more than 100 countries have enacted legislation which includes the right to a healthy environment in some form and it was formally recognised by the UN General Assembly as a human right in July 2022.<sup>19</sup> While Scotland currently has strong legal protections and policy initiatives for environmental protection, recognising the right to a healthy environment as a human right of everyone in Scotland will deliver a stronger framework from which to take further action and strengthen accountability. The Taskforce recognised that the right to a healthy environment is linked to the realisation of other rights to be incorporated in the Bill, and they looked at standards such as the UN

Framework Principles on Human Rights and the Environment,<sup>20</sup> and the Aarhus Convention, as guiding frameworks for the development of this right within the Bill.

Based on those international standards and following engagement with stakeholders, we think the right should be understood as having both substantive aspects and elements which set out a course of action (procedural aspects). Substantive aspects should be understood as including 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 should be understood as including 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. Including these procedural aspects in the framework of the Bill would support our 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 (the right to remedies that are fair, equitable, timely and not prohibitively expensive).

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18 [The United Nations Economic Commission for Europe \(UNECE\) Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters](#)

19 [The human right to a clean, healthy and sustainable environment: \(un.org\)](#)

20 Published in 2018 by the UN the Framework Principles on Human Rights and the Environment set out the basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment.

# Part 5: Recognising the Right to a Healthy Environment

After engaging with stakeholders, we are also reflecting on whether healthy and sustainable food should be understood as a substantive aspect of the right to a healthy environment as protected by the Bill. Internationally, healthy and sustainable food is recognised as a substantive aspect of the right. However, the right to adequate food is also captured as a social right under the right to an adequate standard of living in ICESCR<sup>21</sup> – which the Bill will incorporate. Our current view is that the aspect of healthy and sustainable food can be better respected, protected and fulfilled via incorporation of the right to adequate food as provided for by ICESCR and that sustainability makes up a key element of the right to adequate food. Given that human rights are indivisible, interrelated, and interdependent, and should not be viewed in isolation of one another, incorporation of the right to adequate food should provide adequate protection for the environmental aspects of food production.

In relation to safe and sufficient water, while this is also understood as a social right under the ICESCR right to an adequate standard of living, our current view is that this should also be understood as a substantive aspect of the right to a healthy environment. This is because it enables us to draw out a key distinction between ensuring there is safe and sufficient drinking water

for human consumption and safe and sufficient water essential for the health of the wider environment. While overlaps exist, our approach aims to provide an adequate distinction between protection for water in both contexts.

## Questions

6. Do you agree or disagree with our proposed basis for defining the environment?
7. If you disagree please explain why.
8. What are your views on the proposed formulation of the substantive and procedural aspects of the right to a healthy environment?
9. Do you agree or disagree with our proposed approach to the protection of healthy and sustainable food as part of the incorporation of the right to adequate food in ICESCR, rather than inclusion as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.
10. Do you agree or disagree with our proposed approach to including safe and sufficient water as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.
11. Are there any other substantive or procedural elements you think should be understood as aspects of the right?

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21 For the full list of substantive elements of the right to a healthy environment and further details of their content, the reports of the UN Special Rapporteur provide extensive guidance as to what is included within the human right. [Special Rapporteur on human rights and the environment | OHCHR](#)

# Part 6: Incorporating Further Rights and Embedding Equality

This part of the consultation sets out our views on incorporating further rights into the Bill, and our approach to ensuring that the rights are delivered without discrimination.

## Civil and Political Rights

### Human Rights Taskforce Recommendation 1(a)

Re-state the rights protected by the Human Rights Act which gives domestic effect to the European Convention on Human Rights.

We have considered whether the Bill could restate the rights in the Human Rights Act 1998, so that all rights are in one place. We understand that the recommendation for a restatement of the Human Rights Act 1998 rights was driven by the desire to have all rights set out together in one place in an accessible way. As stakeholders have acknowledged, given the status of the Human Rights Act 1998 as an enactment which is protected from modification under the Scotland Act 1998, the Bill cannot have any substantive effect on these rights. We are concerned that attempting to restate the rights protected

by the Human Rights Act 1998 could be seen to have an effect on those rights and could place the Bill at risk of challenge on legislative competence grounds, with limited benefits in relation to clarity, accessibility and the enjoyment of the rights. We do not want to risk this Bill not coming into force, thus preventing change to improve people's lives; however, we recognise the importance of recognising rights as indivisible, interrelated and interdependent, and we will consider further with stakeholders how we can best do so within current constraints.

We have been considering our position on the potential for incorporation of the UN Convention against Torture (UNCAT) alongside the four treaties, given the Taskforce's suggestion we explore this further. We noted that Article 3 of the ECHR ("*No one shall be subjected to torture, inhuman or degrading treatment or punishment*") is already given domestic legal effect in the Human Rights Act 1998 and is embedded in the devolution settlement via the Scotland Act 1998. In addition, the principles that underpin specific articles of UNCAT are also given domestic effect in Scotland through a range of legal provision including in relation to extradition and the common law. Given it is already strongly



# Part 6: Incorporating Further Rights and Embedding Equality

accounted for within the constitutional settlement and other legislative provision, we are not therefore minded to pursue incorporation of UNCAT within this framework legislation.

We have also noted recent suggestions that we could consider incorporation of the International Covenant on Civil and Political Rights. We consider that the above rationale applies to this too given the Human Rights Act 1998 incorporates civil and political rights in the ECHR into domestic law and is itself protected from modification.

## 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?

## Participation

### Human Rights Taskforce Recommendation 29

Further consideration be given to including an explicit right to participation, drawn from the principles of international human rights law, within the legislation.

Participation is a crucial aspect of taking a human rights approach, and we are committed to ensuring effective participation in policy development for the Bill prior to introduction and beyond.

Participation was a central theme of the discussions of the Lived Experience Board, both in terms of the ongoing development of the Bill and for rights-holders generally in policy and decision making. The Board felt that people should be more involved in meaningful decisions about services that affect them, and that public services need to do more to involve people who are often seldom heard, or even invisible, in existing participatory processes.

In order to help achieve that, we want to ensure that participation is embedded within the relevant parts of the Bill, including the proposed Human Rights Scheme (see Part 9), in order to support both implementation and accountability for progress. It is important that this aligns with the broader Scottish Government approach to participation; for example, the review of the operation of the Public Sector Equality Duty (PSED) in Scotland is considering stronger duties in this area. We are mindful of the need for any duties related to participation to be deliverable in practice by public bodies and so will look carefully at the views expressed through the consultation on the PSED to further inform and align our thinking in this area going forward. A number of other pieces of legislation also have participation requirements, so there is precedent for this. We remain open to engagement and views on this.

## Question

13. How can we best embed participation in the framework of the Bill?

# Part 6: Incorporating Further Rights and Embedding Equality

## Equality provision within the Bill

“

[What difference would it make for children and young people if Scotland puts extra rights into Scottish law, especially rights for women and girls, disabled people, and children and families who experience racism?]

It would impact the young people of Scotland in the long term as we would grow to unlearn the prejudice taught to us by the older generations who did not have these rights in place when they were young and likely did not have the opportunity to mix with people from different backgrounds. ”

**Member of Lived Experience Board**

“

People’s lives are very significantly impacted by discrimination against women and discrimination against disabled people, but you need to have equal access to information and ways to address that, not only for people who can shout louder or are in the public eye. ”

**Member of Lived Experience Board**

### Human Rights Taskforce Recommendation 8

Include an equality clause which aligns with the Equality Act 2010 and provides equal access to everyone to the rights contained within the Bill.

The success of the Bill depends on the rights being incorporated in a way which means their protection can be enjoyed and accessed by everyone equally, regardless of status. To ensure everyone can access the rights under the Bill without discrimination, we want to include an equality provision.

Whilst the equality treaties are aimed at eliminating discrimination against women, disabled people and people and groups who experience racism, the purpose of an overarching equality provision would be to ensure equal access to the rights in the Bill for everyone. This would require duty-bearers to deliver ICESCR rights and the right to a healthy environment in a way that ensures equal access to all. One approach we are considering is whether to model the equality provision

# Part 6: Incorporating Further Rights and Embedding Equality

on Article 2 of ICESCR or Article 14 of the European Convention on Human Rights. These provisions require the rights in the respective treaties to 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.<sup>22</sup>

The above approach would rely on LGBTI and older age being protected through the use of 'other status'. However, we are also considering whether we should specifically list LGBTI and older age as grounds for protection, given the Taskforce noted that these groups lacked the protection of an international treaty and recommended explicit protection of them in the Bill. Putting these groups specifically on the face of the Bill could help to ensure clarity of exactly who the provision is intended to protect.

Further, as we discussed in Part 4, the proposed model of incorporation would direct duty-bearers to the equality treaties in order to interpret ICESCR rights and the right to a healthy environment for those protected groups.

The intention is that this will help duty-bearers to effectively navigate the framework, embed the content of the equality treaties in delivery of ICESCR rights and the right to a healthy environment and deliver the best possible protection for rights-holders in those groups, as part of a coherent overall framework.

The equality provision will of course have to operate within the limits of the equal opportunities reservation in the Scotland Act 1998. We are also mindful of the need to consider how this will operate within the wider Equality Act framework. As a result, we will continue to consider carefully how we define the grounds of discrimination which duty-bearers must consider and are open to views on the best approach to take to this definition, within the limits of devolved competence.

## Questions

14. What are your views on the proposed approach to including an equality provision to ensure everyone is able to access rights, in the Bill?
15. How do you think we should define the groups to be protected by the equality provision?
16. Do you agree or disagree that the use of 'other status' in the equality provision would sufficiently protect the rights of LGBTI and older people?
17. If you disagree, please provide comments to support your answer.

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<sup>22</sup> Article 14 of the ECHR also includes the ground of association with a national minority which is not explicitly referenced in Article 2 of ICESCR.

# Part 6: Incorporating Further Rights and Embedding Equality

## Rights for older people

### Human Rights Taskforce Recommendation 6

A right for older people to be included in the statutory framework.

We are committed to building a fairer Scotland for older people.<sup>23</sup> The Lived Experience Board provided evidence of older people being excluded from services and decisions affecting their lives, particularly in settings such as social care.

While there is not a specific international treaty for older people, it is clear that they should have equal access to the rights within the Bill.<sup>24</sup> As set out earlier in this part, we think that the inclusion of an equality provision could help ensure they can access the rights equally, taking into account the rights in the equality treaties focusing on areas like independent living, mobility and accessibility. The proposal to ensure that human dignity can be taken into account when interpreting the rights could also assist in placing this concept at the heart of the interpretation of rights for older people. We also want to give further consideration with stakeholders as to whether the Bill framework may need to do anything more specific in relation to older people, in keeping with the intention of the Bill to protect, respect and fulfil international human rights standards and would welcome views on this.

23 [Scottish Government \(2019\), A Fairer Scotland for Older People: framework for action](#)

24 [United Nations Principles for Older Persons | OHCHR](#)

25 The Scottish Government recognises that some organisations and people prefer to use terms such as “Variations of Sex Characteristics” and “Differences in Sex Development”, rather than “intersex”.

## LGBTI people

### Human Rights Taskforce Recommendation 7

An equality clause that protects and promotes the full and equal enjoyment of rights of LGBTI people.

We are committed to tackling inequality for lesbian, gay, bisexual, transgender and intersex<sup>25</sup> (LGBTI) people. While there is not a specific international human rights treaty for LGBTI people, we are clear that they should have equal access to the rights within the Bill. As set out earlier in this part, the inclusion of an equality provision could help ensure LGBTI people can access rights equally, and the proposal to ensure that human dignity can be taken into account when interpreting the rights could assist in placing this concept at the heart of the interpretation of rights for LGBTI people.

We want to give further consideration with stakeholders as to whether the Bill framework could do anything more specific in this area.

### Question

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

# Part 7: The Duties



This part of the consultation sets out our approach to designing the duties on those delivering devolved public functions, in relation to the rights in the Bill.

## **Human Rights Taskforce Recommendation 12**

Provide for a sunrise clause approach leading to a duty to comply which secures protection for rights-holders whilst also allowing duty-bearers time to prepare for full commencement of the legislative framework.

## **Human Rights Taskforce Recommendation 13**

That there be a participatory process to define the core minimum obligations of incorporated economic, social and cultural rights, and an explicit duty of progressive realisation to support the effective implementation of the framework, which takes into account the content of each right.

## **Human Rights Taskforce Recommendation 16**

Further consider the best approach to ensure there is clarity and certainty that relevant private actors carrying out public functions, and functions connected to the delivery of rights within the framework, are within the scope of the obligations in the framework.

Fundamentally, our aim is to deliver a framework under which duty-bearers are better prepared and able to respect, protect and fulfil the rights of the people of Scotland. The duties will be critical to realising our ambitions for the Bill, as they will determine the actions required by duty-bearers across Scotland. We want the Bill to provide a set of duties that reflects the breadth of international human rights obligations. This requires providing duties that lead to improvements to people's outcome in practice (substantive) as well as duties that set out a course of action (procedural). As far as possible, we want to ensure the duties in the Bill strike the right balance between providing protection for rights-holders whilst also delivering a Bill that provides clarity for duty-bearers and allows adequate time for implementation and meaningful change in practice.

# Part 7: The Duties

## Who the duties will apply to

Our view is that the duties should apply, so far as possible, to bodies carrying out devolved public functions. We will carefully consider the outcome of the UNCRC Bill reconsideration in developing our thinking in this area and will carry out further engagement. In relation to private actors, as a starting point we would wish to mirror the UNCRC Bill's proposed approach. This applies the duties of the Bill to bodies carrying out functions of a public nature, including private bodies acting under a contract or other arrangements with a public body.

### Question

19. What is your view on who the duties in the Bill should apply to?

## Initial Procedural Duty

We want to place an initial procedural duty on duty-bearers as soon as practicable after the Bill becomes an Act. This duty would focus on ensuring that the rights in the Bill are taken into account by duty-bearers, built into the fabric of their decision-making processes and adequately taken into account in the delivery of services. This could apply to policy or programme development, new legislation, as well as budgetary processes and decision-making. This approach aims to strike a balance between delivering increased protection to rights-holders and giving duty-bearers the necessary time to prepare for the stronger duties outlined below.

### Question

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

## Duty to Comply

While the initial procedural duty will help to integrate the rights into decision-making processes, for the Bill to help achieve a transformative impact, it will ultimately require a stronger duty of compliance. This duty would aim to ensure the need for specific rights-respecting outcomes to be fulfilled by duty-bearers, going beyond a duty focused on the process of decision-making to a duty focused on compliance with the right. We therefore want to place a duty to comply on duty-bearers in respect of the core ICESCR rights and the right to a healthy environment, as described above (see section on the Model of Incorporation in Part 4). Having this duty in the Bill would help deliver better human rights outcomes for rights-holders, help to drive improvements in the delivery of public services, strengthen accountability, and encourage public authorities to embed human rights approaches in their operations.

There are different component parts to demonstrating compliance, drawn from international law, which are further explained below.

### Question

21. What is your view on the proposed duty to comply?

# Part 7: The Duties

## Reporting

The above duties would require a reporting duty for duty-bearers to be able to demonstrate the actions they are taking and intend to take to ensure the rights in the Bill are being advanced and built into decision-making. We are considering, in relation to that duty, whether to follow the approach taken in section 15 of the UNCRC Bill. Other reporting models exist in other public sector duties, for example the Scottish Specific Duties that underpin the PSED and requirements under the Fairer Scotland Duty. Crucially, we are aiming to achieve a framework under which public authorities report both on previous actions but also future plans for implementing the rights and duties in the Bill. We are continuing to explore how this would interact with overall implementation of the Bill for public authorities in Scotland (as is further discussed in Part 9 of this consultation). We also recognise the need to align with existing reporting duties to enable public bodies to take a proportionate and meaningful approach to reporting, and we would aim to ensure any duties proposed in the Bill regarding reporting complement, and do not duplicate, existing duties. We welcome views on how best this might operate in practice.

### Questions

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

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

## Progressive Realisation of Economic, Social, and Cultural Rights and the Right to a Healthy Environment

In international law, economic, social, and cultural rights are broadly understood as requiring both that **a basic minimum threshold is met** (see the section on minimum core obligations below), and that the rights are to be **progressively realised over time using maximum available resources**. This is based on the understanding that rights such as the right to health and the right to an adequate standard of living can be continuously improved over time and in line with a country's resources. This does not mean progressive realisation allows states to avoid their duties – rather, it is an expectation upon states to move as quickly and effectively as possible to ensure the full realisation of these rights. The concept of progressive realisation is drawn from Article 2(1) of the ICESCR, which states:

# Part 7: The Duties

*“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”*

State action is understood as including requirements to take targeted, concrete and deliberate steps; gather and deploy maximum available resources; and ensure non-retrogression of the rights.

Our intention is that the duty to comply with the economic, social, and cultural rights and the right to a healthy environment set out in the Bill should require duty-bearers to progressively realise those rights, in line with the understanding of progressive realisation and State action in international law.

## **Minimum Core Obligations for Economic, Social, and Cultural Rights and the Right to a Healthy Environment (MCOs)**

As referenced above, in international law, economic, social, and cultural rights are broadly understood as requiring MCOs to be met. These are understood to be the basic minimum standard of delivering economic, social and cultural rights, and they set a minimum threshold which must be always upheld by a country irrespective of resources. In international law, the minimum core of a right must be complied with immediately unless it is demonstrably impossible for the state to do so. It is therefore a minimum floor from which the progressive realisation of the right builds on.

Our intention is that the duty to comply with the economic, social, and cultural rights and the right to a healthy environment set out in the Bill should require duty-bearers in Scotland to deliver a minimum core of the right. This requirement would operate in tandem with the requirement for duty-bearers to progressively realise the right, beyond the minimum core. This, we hope, will ensure MCOs remain a minimum ‘floor’ of realisation and do not become a ‘ceiling’.

In international law, MCOs have been developed through guidance materials written by the UN Committee on Economic, Social and Cultural Rights. The example below demonstrates the approach of the Committee to defining the core content of the ICESCR right to health.



# Part 7: The Duties

## Minimum Core Obligations – Case Study: The Right to the Highest Attainable Standard of Physical and Mental Health

General Comment 14<sup>26</sup> of the Committee sets out guidance as to what should be considered within the MCOs of this right. Broadly speaking this includes at the very least:

- access to and equitable distribution of health facilities, goods and services without discrimination, especially for those vulnerable and marginalised
- minimum essential and nutritionally adequate food to ensure freedom from hunger for all
- basic shelter, housing and sanitation, and adequate water
- essential drugs
- a national public health strategy and action plan, based on evidence.

In addition, the guidance says States should also prioritise:

- providing reproductive, maternal (prenatal as well as post-natal) and child health care
- immunisation against major infectious diseases
- prevention and control of epidemic and endemic diseases
- education and access to information on health issues, including on prevention and control
- training for health personnel, including education on health and human rights.

It is important to note that the example above represents the Committee's interpretation and can be used as a foundation from which to build, via a participatory process, a clearer understanding of the core content of rights for Scotland's particular context. Guidance can also be taken from the practice of other countries and their approaches to protecting MCOs or minimum standards set out by their constitutional frameworks. Examples we have focused on include the approach taken in Germany to '*existenzminimum*', the '*minimum vital*' entitlement in

Colombia, and the '*reasonableness standard*' adopted by the South African Constitutional Court. While General Comments and examples of practice in other countries can provide useful guidance in relation to MCOs for the Bill, they 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. It is up to the country or jurisdiction to determine what the full content of its MCOs should be.

<sup>26</sup> [General comment No. 14: The right to the highest attainable \(refworld.org\)](https://refworld.org/docid/3a684292.html)

# Part 7: The Duties

In order to deliver a minimum core for the people of Scotland, which is in line with best practice, built on strong foundations and has democratic legitimacy, we propose a participatory approach for defining what falls within the minimum core of each right. We are developing our thinking on what this process looks like, based on international guidance and good practice and with the fundamental value of human dignity acting as a guide to what MCOs should look like. This will help us deliver upon the intention for the Bill to protect those who need it most in society. We are considering how the outcome of this participatory process could be embedded into the framework and how MCOs could underpin the compliance duty in the Bill. To ensure MCOs remain relevant and continue to provide protection for those whose rights are least likely to be met, we are considering how to best provide for a process which can be repeated at appropriate intervals to ensure necessary changes can be made to the initial content of MCOs. We will engage further as our thinking develops in relation to the participatory process and how it can be effectively run.

Setting a minimum core for Scotland has the potential to be significantly impactful in determining the most basic needs of people in Scotland that must be prioritised and realised immediately. Our approach matches the ambition of the Bill and of the people of Scotland. However, it is important to recognise and emphasise the nature of MCOs as being a very basic floor of rights protection that can be met immediately and all times by duty-bearers. With this in mind, our approach will aim to ensure that the process for defining the MCOs for Scotland strikes the right balance between delivering rights

protection for those most marginalised and disadvantaged in society and setting a deliverable standard for duty-bearers in Scotland.

## Questions

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

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

## Duty to Publish a Human Rights Scheme

We want to place a duty on Scottish Ministers to publish a Human Rights Scheme (see Part 9 for further details). This would allow for general measures of implementation to be captured clearly within the Bill's overall framework. The duty to publish a Human Rights Scheme will include a reporting duty on Scottish Ministers to report on actions taken in relation to the Scheme's requirements. This aims to ensure accountability for consistent action to be taken to further implement and realise human rights for the people of Scotland. The Human Rights Scheme could serve as a way for Scottish Ministers to publish their plans for implementation and report on progress.

## Question

26. What is your view on the proposed duty to publish a Human Rights Scheme?

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



This part of the consultation sets out our proposals for improving access to justice (both non-court and court) for rights-holders who are seeking a remedy for when things go wrong in relation to the rights and duties contained in the Bill. It also covers the powers of the Scottish Human Rights Commission (SHRC). This part contains a significant amount of legal terminology and therefore has a greater amount of material explaining what we mean than other parts.

“

I think you're disadvantaged before you've even started because... the fact that you are this little minnow, you know, and there's this sense of just being totally overwhelmed. And I can understand that if some people want to access justice in law and we're talking about the Human Rights Act, I can see a lot of people going, you know what, I really don't want to get involved with all of that, because why would I put myself through all that grief, and upset? And so I'm just going to avoid it, and then therefore, they don't get the justice that maybe they should get? ”

**Member of Lived Experience Board**

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

## Human Rights Taskforce Recommendation 21

Through engagement with key stakeholders, including those who face additional access to justice barriers, further consider accessible, affordable, timely, and effective remedies and routes to remedy that will be provided for under the framework.

## Human Rights Taskforce Recommendation 26

As part of the development of the framework, to further explore access to justice, taking into account the views of right-holders, in order to consider how the framework could help provide a more accessible, affordable, timely, and effective judicial route to remedy.

Ensuring effective access to justice where a rights-holder has had their rights potentially infringed by a public authority is vital. It is an unavoidable fact that things can and do go wrong, and where this happens that needs to be resolved quickly and early. So we want to build on and strengthen the existing infrastructure of devolved public services, scrutiny bodies, independent complaints mechanisms, human rights bodies, and the courts, to strengthen access to justice.

Whilst sometimes the court may ultimately be the best place to consider a particular issue (for example, where an argument is being made that a piece of domestic legislation is incompatible with incorporated treaty rights, or there is a

systemic problem with multiple causes spread across multiple systems), and access to courts remains a key feature of these proposals, for most individuals and for many issues, going to court may not be the best solution. We know that for rights-holders, seeking a remedy can feel very challenging and have a big impact on them personally, and so it is important to support duty-bearers to get human rights based decisions right first time.

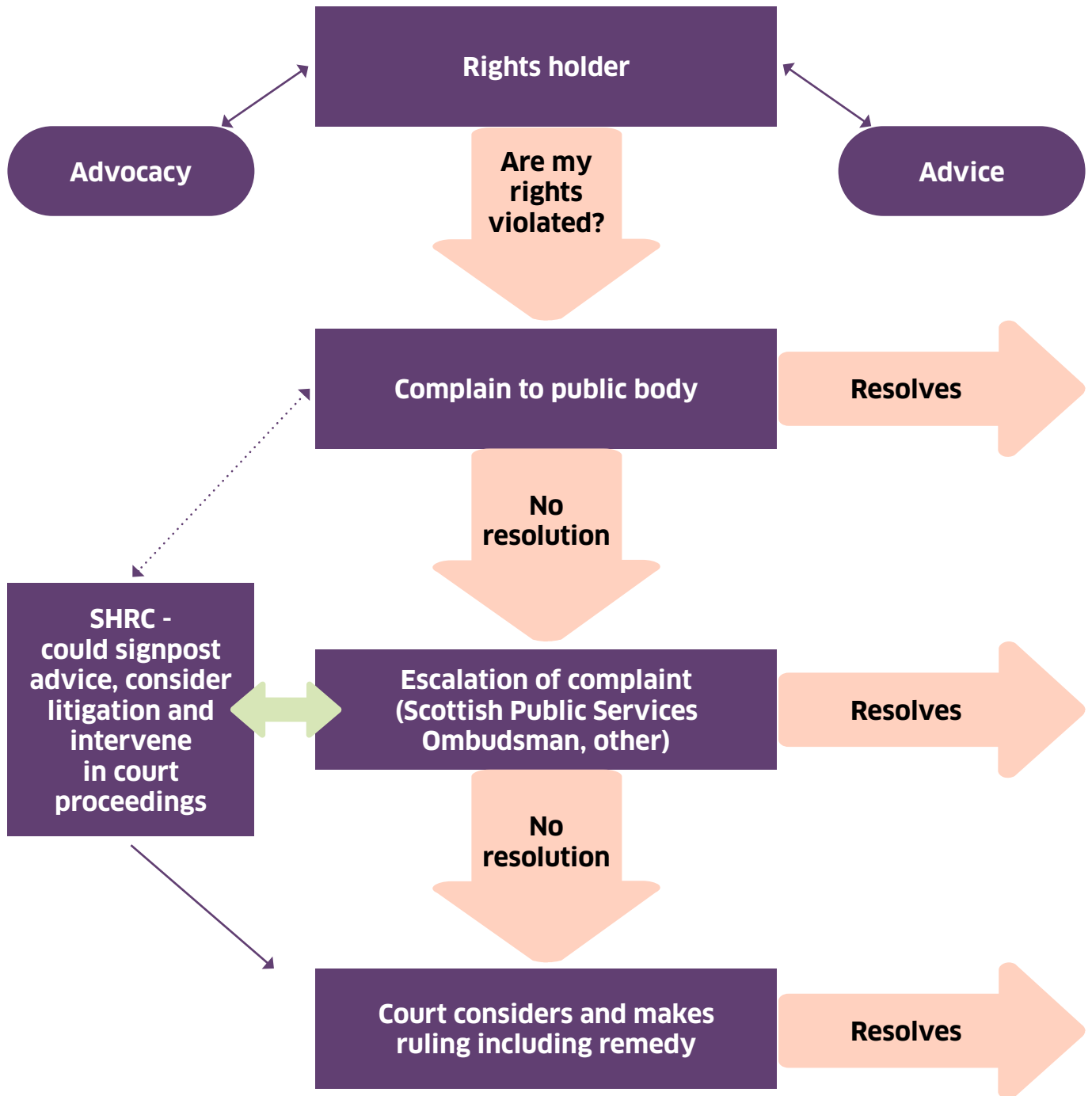
We think that strengthening the approach to accountability, advice and advocacy are key components to help resolve issues as quickly as possible and avoid, as far as possible, people having to go to court. Ensuring those components work well will help to make rights real for people and to embed a rights-based approach in public authorities and those who hold them to account. We want a move to a genuinely multi-institutional model of rights protection and stronger collaboration between duty-bearers who will be tasked with upholding the rights in the Bill.

When the rights and duties in the Bill are engaged, remedies need to be:

- **Accessible** – the individual understands clearly how they can resolve their issue through the system.
- **Affordable** – the financial cost to the individual needs to be limited as far as possible.
- **Timely** – the issue needs to be dealt with at the earliest opportunity.
- **Effective** – the remedy needs to deliver a better outcome for the individual.

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

Table showing routes to resolve violations of rights



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

## Getting things right first time



People lack the energy to [pursue a complaint]. And so they don't, because they're already consumed with the problems that are going on in their day to day life. And actually having that energy, not to mention, money and time to pursue a formal complaint that is going to take up all of your emotional energy, it will be really stressful, and you've already got enough problems. So they let it slide and I see time and again, really bad infringements are let slide. Or very often actually, it can just be lots of small infringements from a whole myriad of different organisations and different individuals. And it's really difficult to articulate that because there's lots of little small things. And then you finally might get to the straw that broke the camel's back. 🐪

**Member of Lived Experience Board**

### Human Rights Taskforce Recommendation 19

The Scottish Government should consider how scrutiny bodies can be supported through provision of adequate resources and clear guidance on their duties within the framework to effectively oversee the framework implementation plans of duty-bearers.

### Human Rights Taskforce Recommendation 22

Further consider specific duties being placed upon front-line complaint handling mechanisms and scrutiny bodies in order to enhance access to justice and ensure human rights obligations are given effect by all public authorities.

The Lived Experience Board emphasised the importance of initial complaints being addressed effectively, and a need to support front-line workers to respond effectively. They also highlighted the importance of a clear process that is easy to follow for rights-holders. So we want to ensure that public authorities have robust and effective front-line handling mechanisms in place to deal with complaints in relation to the rights in the Bill. We want to build on existing structures and put human rights at the heart of the system, rather than create separate, additional processes for human rights complaints. After all, a different system could cause confusion for rights-holders in what can often seem a complex and overwhelming system to navigate. We have engaged with a range of stakeholders, including the Scottish Public Services Ombudsman (SPSO), SHRC and scrutiny bodies, to help shape these proposals.

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

## Advocacy

“

I think advocacy is a big thing. I'm thinking about one time that I went to a review without an advocate and that was a big mistake that I've never made twice. Because there's also an issue of when the authorities are acting in concert, there's a lot of them and just one of you. So there's a lot of voices against one voice and you can't win against that." Another member stated "Advocacy needs to be available for parents, for whole family, for carers, and recognising that sometimes carers can speak up for people who are non-verbal. ”

**Member of Lived Experience Board**

When we talk about advocacy, we are referring to advocacy, information and advice provided to and for rights holders in relation to the rights in the Bill. Advocacy services are there to provide support and representation to empower individuals to claim their rights. They are an important resource in helping to ensure individuals can realise their rights and access justice where things go wrong. Given routes to remedy can be complex, advocacy services can play a crucial role in helping rights-holders navigate the system.

The importance of advocacy has been a common theme in the discussions of the Lived Experience Board. The Taskforce did not make a specific recommendation in relation to advocacy but did note the

importance of making improvements to access to justice through advocacy and representation and recognised the potential for advocacy services being available to more people when they need them. They noted that remedies become difficult to navigate without information and advice on rights and independent advocacy.

There are a number of existing advocacy services which already provide support to help people realise their rights. There are also duties to provide independent advocacy in a number of areas, including mental health services, social security and in children's hearings. The UNCRC Bill requires Scottish Ministers to set out arrangements to ensure children are able to participate in decisions that affect them with access to support and representation, like advocacy services, as part of the Children's Rights Scheme. That Bill also places a duty on public authorities listed in section 16 of the Bill to prepare and publish reports on what they have done to comply with the UNCRC requirements (as set out in the schedule of that Bill) and to secure better or further effect of children's rights. Such reports may include details on the provision of advocacy support but this is not set out on the face of the Bill. The reports will be required on a three yearly basis (as they were under the Children and Young People (Scotland) Act 2014).

We are carefully considering the approach taken in the UNCRC Bill, and its applicability given the specific rights we are incorporating and the wide variety of rights-holders. We are open to views on the most effective means of supporting people to access the rights in the Bill. Our key aim is to improve access to justice

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

in the context of the Bill and ensure that services are equipped to provide the support rights-holders need.

## 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?

## Legal Aid

Access to legal aid is an important aspect in supporting rights-holders to claim their rights through the courts, where they choose to. We remain committed to reforming the current system of legal aid to place the user at its centre.

## Improving complaints handling

The SPSO has an important role in publishing complaints handling procedures, alongside monitoring and supporting best practice in complaints handling in relation to many devolved areas. To help public authorities develop their front-line complaints processes in relation to the rights in the Bill, we are exploring with the SPSO scope for them to update their model complaints handling procedures so that they reflect the obligations in the Bill. Under this proposal, the SPSO would be able to issue declarations of non-compliance when a specified public authority is found to have acted incompatibly with these updated procedures.

## Escalating a complaint

When complaints cannot be resolved at this first stage by the public authority involved, they can be escalated to the SPSO for bodies under its remit. The

SPSO are the final stage for complaints about many devolved public services in Scotland including councils, the health service, prisons, water and sewerage providers, the Scottish Government, universities, and colleges. Human rights are often a core part of the issues that individuals are experiencing so we think it makes sense to further integrate this into SPSO's remit. To do this, we are proposing to:

- Develop a more specific human rights remit for when the SPSO is dealing with an escalated complaint. This would not require the applicant to make a specific reference to the rights in the Bill and would allow the SPSO to consider the duties in the Bill as part of any complaint.
- Remove the restriction on the SPSO whereby they are not able to receive oral complaints unless there are special circumstances. This will help improve accessibility of the system.
- Further consider own initiative investigation powers for the SPSO. This could allow them to look into areas of concern where no complaint was made or consider beyond an individual complaint where other individuals may be affected. We will also further consider developing a mechanism for people, including advocacy organisations, to make suggestions to the SPSO for areas of own-initiative focus.
- Maintain the non-binding nature of any SPSO recommendations to give the SPSO maximum flexibility in issuing recommendations. Experience shows that recommendations from the SPSO are usually complied with, and the SPSO have the ability to lay a special



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

report before the Scottish Parliament if they are not. Furthermore, non-binding recommendations may be helpful to allow the SPSO to work with public bodies constructively in order to secure better compliance. Recommendations for redress are flexible and can include an apology and practical action to mitigate any detriment.

We will further consider how pursuing a complaint through the SPSO could interact with court routes to remedy, such as judicial review.<sup>27</sup> We know that police complaints are one area where complaints are dealt with outside the jurisdiction of the SPSO, and that there are some areas where there is overlapping jurisdiction between the Care Inspectorate and the SPSO in relation to investigating complaints. We will consider these issues further.

## Scrutiny bodies

Scrutiny bodies can play an important role in holding devolved public services to account in relation to human rights and helping to drive culture change in service delivery.<sup>28</sup> Examples of scrutiny bodies include the Care Inspectorate, HM Inspectorate of Prisons for Scotland and the Scottish Housing Regulator. We want to create a more specific human rights remit for relevant scrutiny bodies, to strengthen their ability to ensure

human rights are embedded in public services, within the limits of devolved competence.<sup>29</sup> To do this, we are proposing to:

- Require scrutiny bodies, when undertaking their functions, to assess the bodies they oversee in light of the human rights obligations in the Bill, and to consider how these bodies can further mainstream human rights in the Bill.
- Enable scrutiny bodies to work more closely with each other – for example, making it easier to share information relating to human rights matters, being able to work together when looking at human rights issues and letting other scrutiny bodies know if there may be overlap in the issues they are looking at.
- Require scrutiny bodies (including the SPSO) to inform the SHRC of any systemic human rights issues they come across, as well as informing other relevant organisations (such as the SPSO, the Children and Young People’s Commissioner Scotland, the Mental Welfare Commission and Environmental Standards Scotland) of any systemic human rights issues that may be relevant to their organisations.

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27 We also note the role of Scottish Parliamentary Corporate Body with regard to SPSO.

28 “Scrutiny bodies” is a broad and overlapping term, and can cover complaints-handling bodies (such as the SPSO), inspectorates and regulatory bodies (such as the Care Inspectorate, HM Inspectorate of Prisons for Scotland and the Scottish Housing Regulator), but also other bodies which have an oversight role, such as the SHRC.

29 The requirements, and how they are articulated, may differ between different scrutiny bodies, partly depending on their existing requirements, and partly depending on any potential separate changes, such as in relation to the SPSO and SHRC. We will further consider exactly which scrutiny bodies any additional requirements could apply to.

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

## Questions

28. What are your views on our proposals in relation to front-line complaints handling mechanisms of public bodies?
29. What are your views in relation to our proposed changes to the Scottish Public Services Ombudsman's remit?
30. What are your views on our proposals in relation to scrutiny bodies?

## Powers of the Scottish Human Rights Commission (SHRC)

### Human Rights Taskforce Recommendation 11

The Scottish Human Rights Commission (SHRC) should be given additional powers including taking test cases and conducting investigations, and any further extended powers should be considered.

The SHRC was established in 2008, and functions as Scotland's National Human Rights Institution. It is an independent parliamentary commission, and currently holds A-status accreditation within the United Nations (UN) system. It has a general duty to promote human rights and, in particular, to encourage best practice in relation to human rights. It has the power to intervene in civil proceedings (with the exception of children's hearings), subject to the civil courts giving it leave to do so. In these instances, it may act as an authoritative third party, rather than representing one side or another. It also has the power to undertake inquiries in relation

to the policies or practices of Scottish public authorities (with restrictions on the ability to do so in relation to courts and tribunals) with the ability to compel evidence and to enter places of detention. It does not have the power to assist in claims or in legal proceedings, or to provide advice, guidance or grants linked to proceedings. The UNCRC Bill will provide the SHRC with additional powers, including the power to bring proceedings in the public interest and to intervene in proceedings in which a person claims that a public authority has acted (or proposes to act) in a way which is incompatible with the UNCRC requirements. To do so, the Bill will modify the Scottish Commission for Human Rights Act 2006 to disapply the existing prohibition on assisting in claims or legal proceedings but only in relation to proceedings under the UNCRC Bill. The UNCRC Bill will further require the courts to notify the Commissioners (the SHRC and the Commissioner for Children and Young People in Scotland) where a court is considering making a strike down declarator or incompatibility declarator in relation to legislation or where a compatibility question arises in any proceedings before a court or tribunal.

We are exploring the potential for the SHRC to have new powers in the following areas, which would require the Human Rights Bill to amend the Scottish Commission for Human Rights Act 2006. In particular we see value in extending the powers of SHRC to include the following in support of Bill implementation, oversight and accountability:

- Powers to bring or intervene in civil proceedings under the Bill;

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

- An investigatory power which allows for accountability for systemic issues relating to the rights in the Bill (relating to civil matters).

We have noted a number of wider asks in relation to specific Commissioners focused on advancing rights for specific groups, or in specific areas. This includes proposals for Commissioners for women, disabled people and older people.

To the extent that any new powers for SHRC overlap with those we are considering for the SPSO, we would want to create clear expectations on information sharing. This is so that the SPSO can appropriately inform the SHRC of any relevant matters, as well as ensuring strong communications between the two bodies. We also want to consider mirroring any new powers for SHRC in the remit of the Children and Young People’s Commissioner Scotland (CYPCS), given the rights in the Bill will apply to children. We will engage further with the SHRC, the CYPCS and the Scottish Parliamentary Corporate Body on new powers or extension to the bodies’ general mandate, and we would welcome views on what specific powers the SHRC should have in order for the institution to play a key role within the multi-institutional framework for protecting and realising human rights we are seeking to build.

## Questions

31. What are your views on additional powers for the Scottish Human Rights Commission?
32. What are your views on potentially mirroring these powers for the Children and Young People’s Commissioner Scotland where needed?

## Accessing Justice through the courts

“

Whenever we’ve come across breaches, I’ve always felt that by speaking up, I’m speaking up for lots of people, but the burden does seem to be on me... in no way can I take on the entire right to play or right to education single handed, it’s quite an expectation.”  
“We don’t create the situation, it is created by the government not getting things right, by them not having enough controls in place to protect us in the first place. So, you know, why are we having to pay to go to court to say you’ve got it wrong? ”

**Member of Lived Experience Board**

Judicial remedies are one important part of making sure the Bill has a positive impact for rights-holders. In our approach to court routes to remedy under the Bill, we want to lessen the burden on individuals seeking justice, and to make it easier for those issues which affect many people to be identified and resolved.

## Who can raise cases

### Human Rights Taskforce Recommendation 23

Explicitly allow for bodies with ‘sufficient interest’ to bring proceedings on behalf of claimants.

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

‘Standing’ refers to who has the legal right to raise an issue with the courts for judicial review. The current test for standing in relation to judicial review proceedings in the Court of Session is the ‘sufficient interest test’ (except where based on the Human Rights Act 1998). This test requires an individual to “demonstrate a sufficient interest in the subject matter of the [judicial review] application”.<sup>30</sup> This means that individuals, as well as organisations wishing to advance a widely shared interest, may bring cases to court where they can demonstrate a sufficient interest. This is different to the narrower “victim test” under the Human Rights Act 1998, where a person must demonstrate, in effect, that they are directly affected by the breach they are alleging.<sup>31</sup> This largely restricts organisations from bringing public interest litigation and is less open than the sufficient interest approach.

The UNCRC Bill makes no specific provision on standing, which means that the ordinary rules about who can bring cases in court (in other words, the sufficient interest test) would apply to claims brought under that Bill. The UNCRC Bill also provides new powers to both the Children and Young People’s Commissioner for Scotland and the Scottish Human Rights Commission to bring or intervene in legal proceedings. We want to mirror this approach to standing for civil proceedings brought under the Human Rights Bill, so that

civil society organisations with a sufficient interest in a case will be able to bring proceedings if the courts deem it appropriate in a particular instance. Powers for SHRC and potentially CYPCS to bring or intervene in civil cases under the Bill would strengthen the ability of those bodies to support individuals and address systemic issues through the courts.

## Standard of review

### Human Rights Taskforce Recommendation 24

Include in the framework an approach to standard of review of the reasonableness of a measure that takes into account international human rights law standards and comparative best practices.

‘Standard of review’ means the legal standards that courts use to reach a decision about whether a decision maker has acted lawfully. The ‘*Wednesbury test*’<sup>32</sup> is one of a range of tests applied by the courts in judicial review proceedings on public law grounds. Under the *Wednesbury test*, a decision may be found to be unlawful if it is so unreasonable that no reasonable decision maker could have reached it. This is a high bar to overcome. Another test that the domestic courts apply is the ‘proportionality’ test under the Human Rights Act 1998 regarding ECHR compliance, which involves assessing whether any restrictions of a right by a decision-maker

30 [Court of Session Act 1988 - \(www.legislation.gov.uk\)](http://www.legislation.gov.uk) section 27B(2)(a), as amended by section 89 of the Courts Reform (Scotland) Act 2014.

31 To bring proceedings under the HRA, a person must be a victim for the purposes of Article 34 of the ECHR (Human Rights Act 1998 ss.7(1), (7)).

32 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223

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

are a proportionate means of achieving a legitimate aim. There are similarities between the tests, but where a court is applying the principle of proportionality it will generally look more closely at the correctness of the decision given the information available than it would by just applying the *Wednesbury* test.

Under the Human Rights Bill, we are considering whether the approach to assessing reasonableness should be different to the *Wednesbury* test, and are therefore considering whether we should lower the threshold for a decision-maker being found to have acted unlawfully. This is because we want to ensure that court remedies are as accessible as possible for rights-holders. We will further consider what such an approach could look like in practice, carefully taking into account other current approaches and international models, and the views of the courts, the legal profession and other stakeholders. Examples of international standards of review can be found in guidance prepared by the Committee on Economic, Social and Cultural Rights (CESCR).<sup>33</sup>

When considering this issue, we will also take account of other points which, depending on the circumstances, the courts may consider already when dealing with a judicial review. These include whether the decision-maker acted within their powers; carried out a consultation if required to do so or there was a legitimate expectation that a consultation would be carried out;

took account of responses made to any consultation; took account of relevant factors when making the decision; did not take account of irrelevant factors; and followed due process, including carrying out any required impact assessments.

## Judicial Remedies

### Human Rights Taskforce Recommendation 25

Further consider how the framework could provide for the full range of appropriate remedies under international law to be ordered by a court or tribunal when needed, including targeted remedies which could provide for non-repetition of the breach (such as structural interdicts).

In Scotland, a range of remedies are already available in relation to judicial review.<sup>34</sup> Specifically, the rules of the Court of Session state:

*“the court in exercising its supervisory jurisdiction in respect of an application for judicial review may... make such an order in relation to the question as it thinks fit, whether or not such an order was sought in the application, being an order that could be made if sought in any action or petition including an order for **reduction, declarator, suspension, interdict, implement, restitution, payment (whether of damages or otherwise)** and any interim order.”<sup>35</sup>*

This means there is quite a broad scope for the courts to order what they think is

33 [An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant](#)

34 The process for reviewing public decision-making in the domestic courts.

35 [Rules of the Court of Session, Chapter 58](#)

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

appropriate, such as a temporary decision pending further investigations, stopping or suspending something, or making an order for damages, for example.

The UN General Assembly has adopted basic principles and guidelines on remedies for serious international human rights violations.<sup>36</sup> Broadly speaking these can be summarised as:

- **Restitution**, which should wherever possible restore the victim to the original situation before the human rights violation occurred.
- **Compensation**, which is similar to payment of damages.
- **Rehabilitation** where a violation of the right has caused significant medical and psychological harm. This could include access to rehabilitation services (e.g. social services, medical services, or mental health services to ensure the claimant is supported in recovering from the harm caused by the rights violation).
- **Satisfaction**, which is wide-ranging and can include a number of aspects aimed at stopping continuing violations, disclosure of facts, an official declaration restoring dignity/reputation, public apology, sanctions, commemoration and tribute, and amendments to educational materials to reflect truth in relation to violations.
- **Guarantees of non-repetition (structural interdicts)** - this approach can include reviewing and reforming laws.

We are considering the extent to which

effective remedies can be provided under the current suite of domestic remedies already available to the courts in Scotland. This includes consideration of whether existing remedies could allow aspects of the structural interdict approach, as suggested by the Taskforce, to be used as a form of remedy in relation to the duties in the Bill. Structural interdicts are intended to address structural issues, which impact a large number of people, rather than individual issues. They could involve an aggregate of remedies, where the courts combine different options. However, they could also potentially involve a greater role for the courts in reviewing progress or approving plans of action. We will further consider the potential role of structural interdicts under the Bill. The choice of remedy in any particular case is of course a matter for the courts.

## Dealing with Incompatibilities

Like the Human Rights Act 1998, we propose including a provision so that, so far as possible, legislation falling within the ambit of the Bill must be read and given effect in a way which is compatible with the rights in the Bill. The equivalent provision in the UNCRC Bill on interpretation of legislation will be subject to reconsideration by the Scottish Parliament following the Supreme Court judgment on the legislative competence of that Bill, and we will be mindful of the terms of that judgment and the outcome of the reconsideration process in developing our proposed approach.

We are carefully considering appropriate

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36 [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law | OHCHR](#)

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

remedies for courts where they find an incompatibility in legislation falling within the ambit of the Bill. The UNCRC Bill contains provisions for strike down and declarators of incompatibility, although these provisions (among others) will be also subject to reconsideration by the Scottish Parliament following the Supreme Court judgment on the legislative competence of that Bill. We are mindful of the need to ensure remedies that best advance the realisation of the specific rights we are incorporating, and we are open to views on what remedy is appropriate in cases of relevant legislation being found incompatible. Our key considerations will be providing the best outcome for advancing the implementation of rights within a clear and accessible framework for remedy. We will also ensure that, in considering remedies for incompatible legislation in the Human Rights Bill, we remain mindful of the outcome of the UNCRC Bill reconsideration process.

## Questions

33. What are your views on our proposed approach to 'standing' under the Human Rights Bill? Please explain.
34. What should the approach be to assessing 'reasonableness' under the Human Rights Bill?
35. Do you agree or disagree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders?
36. If you do not agree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders, what additional remedies would help to do this?
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?

# Part 9: Implementing The New Scottish Human Rights Act



This part of the consultation covers our developing thinking for how we implement the Bill once it becomes law. This is vital in order to make rights ‘real’ for people. Thinking on implementation is at an early stage and will be developed further through the establishment of an Implementation Working Group over the summer.

“

When you are in need of help, you are in crisis and you are struggling... it’s the lack of joined up thinking between the services that you’re seeking help from and I think that’s a huge barrier... my experiences [on the] medical side, and doctor saying, well, it’s not my problem if you have housing issues, or if there’s issues within the home, and it shouldn’t be like that, it should be you have a problem and I am hearing your problem. Whether I can help you or not, it’s about referring you to the right support, so that the whole family is supported. And I think that’s a real barrier is that when you meet services that are

absolutely closed off, saying well, that’s not my problem. Move on, please... at the moment, all of the onus is on ordinary people to fight for their rights. And the way this bill should be implemented, it should be implemented in a way that people don’t need to fight anymore. ”

**Member of Lived Experience Board**

## Bringing the Act into Force

### Human Rights Taskforce Recommendation 12

Provide for a sunrise clause approach leading to a duty to comply which secures protection for rights-holders whilst also allowing duty-bearers time to prepare for full commencement of the legislative framework.

We will need to bring the Bill into force in order for the duties outlined earlier to become legally binding upon those delivering devolved public functions. We intend to commence these duties in a sequenced fashion (one after the other, with periods of time in between), in order



# Part 9: Implementing The New Scottish Human Rights Act

to allow public bodies time to prepare for the Bill (once an Act) coming fully into force. The Lived Experience Board stressed the importance of moving forward with implementation quickly, given the increasingly challenging environment around the cost of living and inequality, and we will have this at the forefront of our minds as we move forward. Public bodies have indicated that they will need time to become familiar with the new standards and ensure they have the right infrastructure in place to support implementation and compliance. We would expect that civil court rules will be required to help implement the legislation. In line with usual practice, the Scottish Government would prepare a policy paper to go to the Scottish Civil Justice Council putting forward proposals for court rules.

For the proposed initial procedural duty, which we expect would be the first substantive duty to come into force, we believe that guidance would need to be prepared to assist public authorities in discharging it. We would work closely with stakeholders on the content of that guidance. This means that an appropriate period of time will be needed after Royal Assent, to allow us to develop and consult on guidance.

## Question

38. What are your views on our proposals for bringing the legislation into force?

## Minimum Core Obligations

### Human Rights Taskforce Recommendation 13

That there be a participatory process to define the core minimum obligations of incorporated economic, social and cultural rights, and an explicit duty of progressive realisation to support the effective implementation of the framework, which takes into account the content of each right.

Part 7 of this consultation covers duties and sets out our proposals for a duty to comply, including a requirement to deliver a minimum core of economic, social and cultural rights and the right to a healthy environment. We will create provision for this participatory process to take place for the development of the MCOs for Scotland which would form an important aspect of implementation following the commencement of the future Act. This participatory process would therefore need to take place in advance of the compliance duty coming into force.

## Question

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

# Part 9: Implementing The New Scottish Human Rights Act

## Human Rights Scheme

### Human Rights Taskforce Recommendation 15

Provide a duty on Scottish Ministers to publish a human rights scheme for the giving of further effect to the rights contained within this framework, to be held accountable for its implementation, to report specifically on how a duty to take the statutory human rights framework into account during the budgetary process was met, progress made on Scotland's National Action Plan for Human Rights, and to provide for periodic reporting duties on implementation plans for the Scottish Government and public authorities.

As set out earlier, we want to include a duty on the face of the Bill for Scottish Ministers to publish a Human Rights Scheme. The purpose of this would be to ensure the development, publishing and reporting of progress – providing an overarching plan for implementation for Scottish Government. The Scheme would provide an opportunity for scrutiny of the Scottish Government's past and upcoming activities to give effect to the rights and duties in the framework. This could broadly follow the approach in the UNCRC Bill in relation to the Children's Rights Scheme, which we are keen to align with, where appropriate, to ensure consistency.

Our proposed Scheme will help to ensure that there is Ministerial accountability for implementation and commencement of the future Act through a duty to report to Parliament, and that there is a

formal process in place for Parliament and others to scrutinise progress. We propose that the Scheme would initially require to be laid before Parliament in order to establish its scope. Thereafter, there would be a reporting cycle in which Scottish Ministers would be under a duty to carry out the necessary evidence gathering and consultation work to periodically publish a detailed report on the matters covered by the Scheme. We want to set out a Parliamentary procedure for Ministers to amend the Scheme's contents, include requirements in relation to the types of evidence and information (such as UN treaty committee recommendations) that must inform the development of the Scheme and include named groups who should be consulted as part of this process, as well as the ability to consult other persons or groups considered appropriate. The Bill could set out some specific groups whom Scottish Ministers must consult in preparing the Scheme proposal, and also as part of meeting their reporting duty. This could include rights-holders, given the Lived Experience Board emphasised the importance of monitoring and accountability in driving greater respect for human rights, as well as ensuring resources were prioritised to tackle human rights issues.

We think that the Scheme could potentially cover the following aspects:

- **Plans for implementation.** We are considering ways in which the Scheme could function so as to allow for scrutiny of the Scottish Government's actions with regard to future implementation of the Bill and past performance.

# Part 9: Implementing The New Scottish Human Rights Act

- **Scotland's Second National Action Plan for Human Rights (SNAP2).** The Scheme could include an update on the progress of actions within SNAP2.
- Any plans to **introduce further legislation** to give effect to the human rights framework set out in the Act.
- Plans or proposals for improvements to **access to justice** in relation to the rights in the Bill through complaints mechanisms, access to information, advocacy and representation.
- Reporting on Scottish Government activities to further **embed human rights in budget processes**.
- The extent to which **public participation** continues to inform the implementation of the Bill.
- **Information and awareness raising** work undertaken and planned in relation to the Bill.
- **Guidance** published and planned to support implementation of the Bill
- **Domestic and international accountability**, including reporting to the Scottish Parliament and to the UN, Council of Europe and other international bodies on compliance with treaty obligations, responses to recommendations from international institutions and implementation of judgments of the European Court of Human Rights in areas of devolved competence; and
- **Human rights monitoring and evaluation** and **impact assessments**.

## Question

40. What are your views on our proposals for a Human Rights Scheme?

## Parliamentary scrutiny

### Human Rights Taskforce Recommendation 14

Pre-legislative assessment to be included in the framework – which could include a requirement to certify that any proposed Bill complies with the rights contained within the framework and demonstrate where the proposed Bill contributes to the advancement of such rights.

We want to ensure that legislation introduced to the Scottish Parliament is assessed against its compliance with the rights contained in the Human Rights Bill. This is to make sure that, when scrutinising and voting on future legislation, the Scottish Parliament is satisfied that this legislation is rights-compliant and rights-fulfilling and can contribute to the advancement of the rights contained in the new Human Rights Bill.

Under the Scotland Act 1998, it is already the case that a Member (including the relevant Scottish Minister) must make a statement on or before introducing a Bill confirming that, in their view, that it is within the legislative competence of the Scottish Parliament. This includes consideration of whether the Bill is compatible with the rights secured by the Human Rights Act 1998. Similarly, the Presiding Officer of the Scottish Parliament must make a statement of compatibility in relation to each Bill being considered. These statements are the product of detailed assessments, seeking to ensure that Bills being introduced to the Scottish Parliament meet legislative competence requirements, including requirements to act compatibly with the ECHR.

# Part 9: Implementing The New Scottish Human Rights Act

To enhance human-rights related assessment and scrutiny of new legislation, we wish to explore requiring Public Bills (Government Bills, Members' Bills and Committee Bills) to be accompanied by a statement of compatibility about the extent to which the proposed Bill complies with the specific requirements provided for in the Human Rights Bill. This statement could be published alongside the statement of legislative competence discussed above as well as the similar statement that will be required under the UNCRC Bill. These statements would ensure that all future proposed Public Bills lodged in the Scottish Parliament are assessed against a much fuller spectrum of civil, political, economic, social, cultural, environmental, and children's rights.

Parliamentary scrutiny of draft Bills and consultations on Bill proposals is ultimately a matter for the Scottish Parliament, as is scrutiny of Bills once they have been formally introduced. The Scottish Government will therefore engage with the Scottish Parliament and invite it to consider whether there are any enhancements it may wish to consider making to its approach to legislative scrutiny to complement the enhancements to pre-legislative assessment which the Scottish Government is proposing.

## Question

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

## Guidance and capacity building for public bodies

### Human Rights Taskforce Recommendation 17

Ensure the Framework allows for making statutory and non-statutory guidance, which should be developed through consultation with key stakeholders, including rights-holders.

### Human Rights Taskforce Recommendation 18

The Scottish Government takes steps to ensure that public authorities are supported to effectively implement the framework through provision of adequate resources and clear guidance on their duties.

Guidance is crucial to supporting effective implementation. We therefore want to bring forward guidance for public authorities and those subject to the duties in the Bill to aid effective implementation. We will consider closely the form, content and scope of this guidance, working closely with a broad range of stakeholders to determine this.

Capacity building across government and public authorities will be essential to ensure effective implementation. We will develop a plan, working closely with our recently established Implementation Working Group, which is aligned with our work to build capacity in relation to UNCRC Bill implementation, reform the operation of the Public Sector Equality Duty in Scotland, and further embed equality and human rights across government and public services.

# Part 9: Implementing The New Scottish Human Rights Act

## Information and awareness raising for rights-holders

### Human Rights Taskforce Recommendation 20

The Scottish Government, working with civil society, community-based stakeholders and public authorities, should develop effective ways to make sure that people have the information that they need about their rights and easy access to advice on rights.

### Human Rights Taskforce Recommendation 28

The Scottish Government should develop a large-scale public awareness campaign about the new framework.

Having available, accessible information on the rights in the Bill, and human rights more generally, is absolutely vital in order to allow rights-holders to claim them. Working with stakeholders, we will develop plans for information and awareness raising, including a campaign that is aligned with future timescales for implementation.

## Monitoring and Reporting

### Human Rights Taskforce Recommendation 30

Further consideration should be given to the development and strengthening of effective monitoring and reporting mechanisms at all levels and duties at both national and public authority levels, recognising that this will be important to secure better compliance with the framework. It should include consideration of a National Mechanism for Monitoring, Reporting and Implementation, as recommended by the First Minister's Advisory Group on Human Rights Leadership.

Monitoring and reporting are key to realising the rights in the Bill and we view this as a need to assess both previous action and future plans. Our developing approach to monitoring and reporting is reflected elsewhere in this consultation, particularly in relation to the proposed reporting duty for certain public authorities and the Human Rights Scheme. We have considered whether or not to establish a National Mechanism<sup>37</sup> and are of the view that the Scottish Government already carries out the core functions identified in UN guidance, which notes that a "Ministerial model" is one example of good practice. We want to strengthen our approach in this area and will take forward work to consider how best to do so.

<sup>37</sup> [National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms | OHCHR](#)

# Part 9: Implementing The New Scottish Human Rights Act

## Questions

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

43. How can the Scottish Government and partners provide effective information and raise awareness of the rights for rights-holders?

44. What are your views on monitoring and reporting?

# Part 10: Next Steps



This part of the consultation sets out next steps following the publication of this document.

## The Consultation

### Human Rights Taskforce Recommendation 27

The Scottish Government should adopt an innovative and human rights-based approach towards engaging the public in developing the framework including the guidance and its implementation.

The consultation will run for 16 weeks and close on Thursday 5 October 2023.

Everyone with an interest should have the opportunity to offer their views to inform this Bill. During the consultation period, the Scottish Government will make sure as many people as possible know about the consultation and are encouraged and supported to take part. This will include a series of regional discussion events with a focus on in-person meetings over a range of urban, rural and remote communities. We will seek to meet with specific rights groups who face historical and ongoing societal barriers to having their voice heard in public consultations. We will publish information packs so that

community groups can hold their own discussions and, if they wish, submit a group response to the consultation. Across all this work we will maximise good use of accessibility resources so that as many people as possible are able to get involved.

The Advisory Board and Executive Board will continue to meet throughout the consultation period and over the rest of the Bill development process. They will help the Scottish Government stay in close contact with the broader network of Scotland's civil society, third sector and public authorities to prepare those sectors, as well as frontline public services, the judiciary, scrutiny bodies and others, to implement the Bill. We will continue to review the remit and membership of these groups to ensure they are fit for purpose as the Bill develops. We will remain open to engaging with organisations, community groups and individuals over and above our Boards and the engagement that will arise once the Bill is introduced to the Scottish Parliament. Our programme of activity to accompany the consultation, as well as the feedback we receive from the consultation itself, will help inform of us of where to place particular focus once the consultation analysis is complete.

## Part 10: Next Steps

It is also vital that we keep informing our work with the views of people with lived experience of facing barriers to accessing their human rights. The work of our Lived Experience Board has been hugely valuable and welcomed. A key point of learning we have heard consistently from each group in the Board is that the Scottish Government must demonstrate to each group how we have used the information they've shared with us. With this in mind, we have published a paper that responds to the Board's feedback. We also intend to meet each group of the Board to hear their feedback directly. The views of people with lived experience of human rights issues must continue to shape this Bill. This was a key recommendation of the Taskforce, and in working with the Lived Experience Board to develop the consultation we have seen the importance of public participation in real time. The contributions of the members of the Lived Experience Board helped bridge the gap between human rights as abstract concepts and the real impact felt in people's lives when their human rights are not fulfilled.

We are considering how best to renew and refresh our Lived Experience Board, ensuring that future work in this space helps to underpin effective Bill implementation for those who need it most.



# How to respond



We are inviting responses to this consultation by Thursday 5 October 2023.

Some sections of this consultation may be more relevant to particular individuals than others. Therefore, you may wish to only answer the questions or sections you find most relevant.

We encourage you to submit a response, regardless of how many questions you would like to answer.

Please respond to this consultation using the Scottish Government's consultation hub, [Citizen Space](#). You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of Thursday 5 October 2023.

If you are unable to respond online, please complete the Respondent Information Form which can be found on [Citizen Space](#) and send with your completed questionnaire to:

Human Rights Strategy & Legislation Unit  
Directorate for Equality, Inclusion and Human Rights  
Scottish Government  
Area 3H North  
Victoria Quay  
Edinburgh EH6 6QQ

Or by email to [HumanRightsOffice@gov.scot](mailto:HumanRightsOffice@gov.scot)

Please note that you are welcome to submit a response in the form of a Word document, BSL video or audio clip.

## **Accessible and alternative versions**

We have produced accessible and alternative versions of the consultation, including Easy Read, audio, large print and Gaelic translation versions. These versions are available on the Human Rights Bill [consultation page](#). If you require an additional, alternative version please email us your request at [HumanRightsOffice@gov.scot](mailto:HumanRightsOffice@gov.scot).

There is a glossary of legal and human rights terms available on CitizenSpace.

## **Handling your response**

If you respond using the consultation hub, you will be directed to the 'About You' page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

# How to respond

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, information about other ways to respond is available at the Scottish Government's Human Rights Policy web page (<https://www.gov.scot/policies/human-rights/>).

To find out how we handle your personal data, please see our privacy policy: [Privacy -gov.scot \(www.gov.scot\)](http://www.gov.scot/privacy)

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision-making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

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