

Creating a modern constitution for an independent Scotland



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Foreword by the First Minister

This fourth publication in the ‘Building a New Scotland’ series sets out the Scottish Government’s proposals for how people in Scotland can create a written constitution that puts democracy, rights and equality at the heart of everything we do as an independent country.

To be a success, our written constitution must be one that the people of Scotland believe in.

It must also have the collective authority of the nation, so that those in power accept that, under the constitution, they are accountable to the people.

And it must do more than simply set out which institutions have what powers. It must also embody key fundamental values, so that the way that Scotland’s democracy works makes those values real.

In short, it means the people of Scotland having the direct opportunity to shape and build a better country.

The proposals in this paper set out how we propose Scotland should create a modern, written constitution to help achieve these aims. An independent Scotland could have:

- a constitution that would recognise that sovereignty sits with people who live in Scotland, not in a Westminster Parliament that does not reflect their political choices
- a constitution that would spread power among the institutions and communities of Scotland, rather than locating it in only one place: the Westminster government’s majority in the House of Commons
- a constitution that is clear and understandable, written by, rather than just for, people in Scotland
- a constitution that provides recognition of the NHS in Scotland, giving the right to access a system of health care, available free at the point of need
- a constitution that recognises and protects employment rights, including the right to strike
- a constitution that would build in compliance with international law, recognising that the challenges of the 21st century require global action and cooperation
- a constitution that would not be reticent or equivocal in its recognition of our human rights, but instead would put them, the protections of equality and the essential elements of our democracy above and beyond the daily political fray, rather than letting them be amended in the same way as any other law

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These are not abstract aspirations, separate from the day-to-day reality of people's lives. Better government results in better decisions for people's everyday lives. Eleanor Roosevelt said that human rights begin "close to home... the places where every man, woman and child seek equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere."¹

Independence would give Scotland the ability to continue its progressive approach to human rights and equality, without the current restrictions of the devolution settlement and without the threat of Westminster overruling our decisions or unwinding our advances. This would ensure that our human rights and equality protections could cover all policy areas, including those currently reserved to the Westminster Parliament.

With independence, we can build a better country on that fundamental right of every person in Scotland to be treated equally, and with a written constitution, Scotland can build a new home for democracy, rights and equality.



First Minister of Scotland

Rt Hon Humza Yousaf MSP

What our proposals would mean for you

The powers of independence would enable Scotland to put in place a modern, written constitution for Scotland, that clearly sets out and safeguards fundamental values, human rights and equality protections, as well as the key institutions necessary as an independent democratic state. This paper sets out how the current Scottish Government proposes to use those powers to create a constitution for an independent Scotland.

The proposals in this paper enable you to see:

- what could be included in a written constitution for an independent Scotland, including:
 - the key features of Scotland's democracy – the Scottish Parliament, the courts, and government bodies
 - recognition of the NHS in Scotland
 - human rights and equality protections, including the right to access a system of health care free at the point of need, the right to strike, and full protection of children's rights
- how people in Scotland could help shape Scotland's constitutional future, with the opportunity to be part of a Constitutional Convention, as well as contributing to the development of Scotland's new written constitution through the wider national conversation
- how people in Scotland would be able to vote on adopting the permanent written constitution, through a referendum on a new constitution
- how people in Scotland could hold future governments of an independent Scotland to account and ensure that they are required to uphold key human rights and equality protections
- how people in Scotland could exercise their constitutional rights in an independent Scotland, ensuring these rights would be protected and that there would be remedies in place if rights were breached

Summary

Introduction

This fourth paper in the ‘Building a New Scotland’ series sets out:

- how people in Scotland can shape how a newly independent country would work
- how independence could radically shift where power lies, by replacing Westminster sovereignty with the sovereignty of the people who live in Scotland
- how a written constitution could put rights and equality at its heart, including by protecting the right to strike and giving constitutional recognition to the NHS in Scotland
- how a permanent written constitution could be developed by the people in Scotland and their elected parliament, giving Scotland a constitution ready to take on the challenges of the future

The full publication provides more details on these proposals, including the evidence that informs them, as well as references to sources.

Why Scotland needs a written constitution

A constitution is a set of rules that guides how a country works. It includes:

- the principles setting out how the country must be governed
- what institutions the country will have (like parliament, government and the law courts) and the relations between them
- how powers are managed by those institutions
- key rights of, and, in the best instances, equality protections for, the people in the country

Unlike most countries, the United Kingdom does not have a single constitutional document. Instead, it has a range of laws, conventions, precedents and court judgments. The concept of ‘Westminster parliamentary sovereignty’, where ultimate authority rests with ‘the Crown-in-Parliament’, underpins the UK constitution.

The effect of UK parliamentary sovereignty is that Westminster can, at any time, by ministerial action or a simple majority in each House of Parliament, change the powers of the Scottish Parliament or Government. Laws made in Scotland by the Scottish Parliament, elected by the people of Scotland, can be overturned by the Westminster Parliament. Indeed, even devolution itself could be overturned by the Westminster Parliament, which could pass a law to repeal the Scotland Act and abolish the Scottish Parliament.

Independence would be an opportunity for people in Scotland to create a permanent, modern, written constitution for Scotland.

A single written document would establish the framework for Scotland as a modern, democratic state. It would set out and protect people’s rights.

The Scottish Government is committed to extending and protecting human rights and equality safeguards for people in Scotland. However, its ability to do so is limited by the devolution settlement. Independence would help Scotland to secure rights and further embed equality by putting them at the heart of its constitution.

A constitution for an independent Scotland would mark the end of Westminster parliamentary sovereignty in Scotland.

How to create a modern constitution

The Scottish Government believes that the constitution of an independent Scotland should be based on the sovereignty of the people and reflect Scotland's values as a modern, democratic, European nation.

To achieve this, the Scottish Government proposes:

- an interim constitution, which would take effect on the day of independence
- a permanent constitution created by the people through a legally-mandated Constitutional Convention
- a referendum to enable people in Scotland to decide the permanent constitution

An interim constitution

The interim constitution for Scotland would be developed through consultation and conversation with people in Scotland and would build on the strong foundations of government already in place. It would take effect on the day Scotland becomes an independent country, providing stability and clarity while a permanent constitution is developed.

The interim constitution would describe the type of state that Scotland would be: at the point of independence we would be a country with a constitutional monarchy and a parliamentary democracy. It would establish the sovereignty of the people and set out the key institutions of the state, as well as its democratic processes and independent regulatory and oversight bodies. This would ensure that institutions like the Scottish Government and the Scottish Parliament are accountable to the people. It would provide constitutional recognition of the NHS in Scotland. The Scottish Government also proposes that an interim constitution for Scotland should place a duty on the post-independence Scottish Government to pursue nuclear disarmament.

The interim constitution would embed human rights set out in the European Convention on Human Rights (ECHR), as well as the core international human rights treaties relating to economic, social and cultural rights and the rights of children, women, minority ethnic communities, disabled people and refugees, and the right to a healthy environment. The interim constitution would include a right to access a system of health care free at the point of need, and protect workers' rights, including the right to strike. It would also embed equality safeguards and include a duty to advance equality of opportunity for all.

With independence, these rights would cover both issues that are currently devolved and those that are reserved. Devolved areas are those where the Scottish Parliament has the power to make laws, like health and justice; currently reserved matters are those where the Westminster Parliament has the power to make laws, including foreign affairs, employment law and immigration. With independence any laws that are incompatible with these rights across reserved areas could then be struck down.

The interim constitution would also place a duty on the Scottish Parliament to establish a Constitutional Convention, post-independence, to draft a permanent written constitution for Scotland.

A permanent constitution

Drafting the permanent constitution should be a shared national endeavour. It should be an inclusive and an expansive process, reaching out to all of the people in Scotland. Members of a Constitutional Convention for Scotland should be recruited from across Scotland, ensuring that a wide range of people, communities and organisations, including experts and representatives of different groups across society, are involved in the shared national endeavour of creating a constitution.

It would be for the Constitutional Convention to present their permanent constitution to the Scottish Parliament, recognising that any modern constitution would need to be democratically and legally sound.

The draft permanent constitution would be considered by the Scottish Parliament, then put to the people in Scotland for them to endorse in a referendum. If approved, it would become the permanent, written constitution for Scotland.

In the Scottish Government's view, the permanent constitution should be a living document, capable of evolving over time in order to stay relevant. It should, however, also include constitutional safeguards that cannot be changed by a government with a simple parliamentary majority, but which can be amended when necessary.

The permanent constitution would be the basis on which all parliamentary and governmental activity takes place in an independent Scotland.

Protecting rights and equality

The Scottish Government is committed to fostering a strong human rights culture in Scotland, ensuring that constitutional human rights and equality protections are effectively implemented, monitored and reported on and that accessible remedies are available.

The Scottish Government would consider itself bound by the same international treaties and have, as a starting point, the same international human rights obligations as the UK has at the time of independence. Independence would also provide an opportunity for Scotland to consider the ratification of further international human rights treaties.

Conclusion

Independence would allow the people in Scotland to create a constitution that sets out how our country would work.

A new constitution would allow us to put rights and equality at the heart of Scotland's democracy.

Introduction

This publication, the fourth in the ‘Building a New Scotland’ series, sets out the Scottish Government’s proposals for a new written constitution for an independent Scotland:

- It explains why a written constitution would be needed, contrasting the Scottish tradition of popular sovereignty with the tradition of Westminster parliamentary sovereignty that currently applies across the UK.
- It also sets out the steps that could be taken to prepare a new constitution. These include the drafting of an interim constitution, which would take effect on the day of independence; the establishment of a Constitutional Convention, which would draft a permanent constitution through an inclusive and participatory process involving the people of Scotland as well as the Scottish Parliament, and a referendum to approve the permanent constitution.
- This publication describes the Scottish Government’s proposals for what the interim constitution should include and sets out proposals from the Scottish Government about issues it would like to see considered for inclusion within a permanent constitution, recognising that any decisions would be for the Constitutional Convention to consider.
- It concludes that the UK’s constitutional arrangements do not reflect or protect Scotland’s democracy and the rights of people who live in Scotland. Only with independence can the people of Scotland decide who governs their nation and how.

This Government believes that human rights and equality should be fundamental to the constitution of an independent Scotland. Discussion of human rights protections and equality provisions therefore runs throughout this paper. Human rights and equality play a central part in everyone’s everyday lives and need to underpin the foundations of an independent Scotland. Constitutions across the world safeguard key human rights and equality provisions, ensuring that governments with simple majorities in parliaments cannot easily overturn such protections.²

The need for a written constitution

Key points

Unlike most countries around the world, the United Kingdom does not have a codified constitution; the UK's constitutional arrangements are derived from a range of laws, principles, conventions, precedents and court judgments.

Many of these conventions and principles are not legally enforceable rules and there is often disagreement about their existence, meaning and application.

The founding principle of the UK's constitutional arrangements is parliamentary sovereignty, where ultimate power and authority rests with the 'Crown-in-Parliament' at Westminster.

Independence would allow Scotland to create a new, modern, codified constitution that replaces the doctrine of Westminster sovereignty with the Scottish constitutional tradition of popular sovereignty, where power and authority rest with the people of Scotland.

Scotland's clear direction of travel has been to extend and protect human rights and equality safeguards. However, Scotland's ability to do so is limited by the devolution settlement. Independence would change that.

The Scottish constitutional tradition

In the Scottish constitutional tradition, the people are sovereign.

This means that the ultimate source of political power should be people in Scotland themselves, and that those who exercise power should do so on their behalf and with their consent.³

The Claim of Right 1989, which underpinned the movement that led to the setting up of the Scottish Parliament, contains a modern recognition of the sovereignty of the people of Scotland. It has been endorsed by votes of both the Scottish Parliament and the Westminster Parliament.⁴ It begins by acknowledging "the sovereign right of the Scottish people to determine the form of government best suited to their needs"; a view supported by the majority of people in Scotland.⁵

Westminster parliamentary sovereignty

The Scottish tradition contrasts sharply with the constitution of the United Kingdom. Unlike almost all countries around the world, the United Kingdom does not have a codified constitution; instead, the UK's constitutional arrangements are derived from a range of laws, principles, conventions, precedents and court judgments.⁶ These conventions and principles are not legally enforceable rules and there is often disagreement about their existence, meaning and application.⁷ The only constitutional rule, principle or convention that operates with any consistency in the UK is Westminster parliamentary sovereignty.⁸ But as Lord President Cooper noted, in the case of *MacCormick v Lord Advocate* in 1953, "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law."⁹

Under parliamentary sovereignty, the ultimate authority rests with "the Crown in Parliament".¹⁰ The Westminster Parliament can make any law it wishes about anything at all, without legal constraint. It cannot bind itself, so any law can be repealed or amended, no matter how important or fundamental. In the UK, almost all constitutional rules are ordinary law and can therefore be changed in the same way as any law can, through simple majorities in both the House of Commons and House of Lords, and through UK Government use of the Parliament Acts of 1911 and 1949, which enable (in specific circumstances) the passage of legislation without Lords approval.¹¹

As we set out in ‘Building a New Scotland: Renewing Democracy through Independence’,¹² there is nothing in the UK’s current constitutional arrangements that protects or guarantees the fundamental features of Scotland’s democratic traditions, institutions or processes. Even conventions and principles that may have been thought to be commonly recognised and upheld accordingly can be set aside, as has happened regularly in recent years in Westminster.¹³ The UK’s constitution is uncodified, open to interpretation, and ultimately rests upon sovereignty – and therefore, power and control – being vested in the Westminster Parliament.¹⁴

Effects of Westminster sovereignty in Scotland

‘Building a New Scotland: Renewing Scotland’s Democracy’ sets out the evidence of the impact of Westminster parliamentary sovereignty on Scotland’s devolved institutions and self-government in Scotland. As that paper makes clear:

Under the UK’s constitution there is no way to entrench or protect devolution. It will always be vulnerable to being overridden by the exercise of UK Parliamentary sovereignty and decisions of the UK Government.¹⁵

Westminster sovereignty underpins the design and the operation of the devolution settlement.¹⁶ In the Lord Advocate’s reference to the Supreme Court on whether the Scottish Parliament had the power to legislate for an independence referendum, the Supreme Court held that the question of Scottish independence “evidently encompasses the question whether the Union between Scotland and England should be terminated, and the question whether Scotland should cease to be subject to the sovereignty of the Parliament of the United Kingdom.”¹⁷ The Supreme Court held that the proposed Bill was outwith the powers of the Scottish Parliament and reaffirmed Westminster parliamentary sovereignty.¹⁸

While the Scotland Act 1998 provides for the permanence of the Scottish Parliament, and requires a referendum in Scotland before it could be abolished,¹⁹ a Westminster government with a majority and able to secure the agreement of the Houses of Commons and Lords could decide to change that legislation, as it wished. Westminster parliamentary sovereignty can also constrain the ability of the Scottish Parliament to legislate effectively in areas where it has responsibility and is entitled to take different decisions to those taken by Westminster. Under the UK’s constitutional system, the Westminster government and Parliament can proceed despite the democratically expressed wishes of the people in Scotland – for example, in relation to the Brexit vote²⁰ – and even alter the powers of the devolved institutions unilaterally, without their agreement.

Section 35 of the Scotland Act empowers the UK Government to stop a bill passed by the Scottish Parliament from becoming law, if it has ‘reasonable grounds’ to believe that the bill in question would have an adverse effect on the operation of the law as it applies to reserved matters. This provides the UK Government with an effective veto over the Scottish Parliament’s powers in many circumstances.²¹

This veto has recently been exercised in response to the Scottish Parliament’s Gender Recognition Reform (Scotland) Bill, passed in December 2022 with a large majority and members from all five parties voting in favour of the legislation.²² This is the first time in 24 years of devolution that the Westminster government has chosen to exercise the section 35 power to make an order to block Royal Assent of a bill passed by the Scottish Parliament.²³ There is no guarantee that it will be the last.

The UK Internal Market Act (2020) represents another undermining of devolution and the powers of the Scottish Parliament. This is most recently illustrated by UK Government's unilateral decision to impose conditions²⁴ on Scotland's wholly devolved Deposit and Return Scheme Regulations²⁵ from the Internal Market Act. Scotland's regulations were consulted upon and approved by the Scottish Parliament before the introduction of the Act. By not agreeing an exclusion from the Act for glass, the UK Government is imposing the removal of glass from Scotland's scheme to echo a more limited scheme for England that the UK Parliament has not yet approved. In doing so, the UK Government is not only ignoring its own analysis²⁶ on the environmental, social and economic benefits of including glass in deposit return schemes, but also its own recognition that it is for each nation of the UK to decide on its approach to a deposit return scheme.²⁷ By dictating the scope of Scotland's scheme and undermining the expressed will of the Scottish Parliament to legislate as it determines for Scotland's environment, the UK Government is significantly and negatively impacting the operation of Scotland's scheme and challenging the effective operation of devolution.

Constitutional reform for Westminster

There have been repeated attempts to reform the UK's constitutional arrangements over recent decades.²⁸ Devolution itself is a form of constitutional change. However, all changes made have left Westminster sovereignty in place and none has resulted in a codified constitution.

More recently, the UK Labour Party's Report of the Commission on the UK's Future²⁹ and the Interim Report by the Independent Commission on the Constitutional Future of Wales³⁰ have set out proposals seeking to alter the UK's constitutional arrangements.

These proposals acknowledge that changes to the UK's constitutional arrangements are needed and, to that extent, are welcome. But in the Scottish Government's view, any reform short of moving definitively to a model of popular sovereignty is insufficient. Under Westminster sovereignty, even far-reaching reforms to Scotland's constitutional arrangements could simply be reversed, as other elements of the constitution once considered permanent, like our human rights law and the devolution settlement, can be, and have been.

Only independence can provide for the replacement of Westminster sovereignty with Scottish popular sovereignty.

Scottish popular sovereignty in the 21st century

It is only worth keeping a constitutional tradition if it offers something of value to people living today and protects important rights for future generations.

The Scottish Government believes that popular sovereignty remains the best way of ensuring good government for current and future generations of people who live in Scotland; and that Scotland's constitution should therefore be made by the people in Scotland. The proposals in this publication set out the process by which the Scottish Government believes that people in Scotland can take responsibility for designing their own constitution.

Popular sovereignty should mean that the people, as owners of that sovereignty, can choose to share that sovereignty. In an interconnected world, facing challenges no country can solve alone, it is essential that a modern constitution allows for power to be exercised at multiple levels, including internationally, on behalf of and with the consent of the people.

In the Scottish Government's view, popular sovereignty in the 21st century should mean that as the people change, so can the constitution. A modern tradition of popular sovereignty could recognise that sovereignty is held by the current population of Scotland in trust for future generations. As future generations' priorities change and as new challenges arise, they should have the power to reform their constitutional arrangements through democratic means. The constitution of an independent Scotland should, therefore, be a living document that provides constitutional safeguards for the fundamental features of democracy, human rights and equality, but that also can be amended.

Human rights and equality under the UK's constitution

Human rights and equality legislation offer vital protections for people across Scotland and the wider UK. However, as has been evident over recent years, these protections are vulnerable to change because of Westminster sovereignty. Westminster sovereignty also limits how far we in Scotland can go to advance human rights and embed equality. These issues are therefore useful examples of the limits of any constitutional outcome that does not give Scotland the full powers of independence.

The Human Rights Act 1998 is a key part of the UK's constitution³¹ and a fundamental part of the devolution settlement. It and the Equality Act 2010 are the foundation of equality and human rights protections in the UK, setting out the fundamental rights and equality protections to which the people of the UK are entitled. However, both can be changed by a Westminster government with a simple majority and able to secure the agreement of the Houses of Commons and Lords.

The Human Rights Act incorporates the rights set out in the European Convention on Human Rights into UK law. This includes rights to life, to liberty, to a fair trial, to freedom of thought, belief and religion and to freedom of expression. The Act requires all public authorities to act compatibly with these Convention Rights and allows people to take cases to court to ensure Convention Rights are upheld and enforced.

However, the Westminster government may still ask the Westminster Parliament to pass laws that it recognises may not be compatible with Convention Rights.³² For example in a statement accompanying the Illegal Migration Bill currently before the Westminster Parliament, the Home Secretary has stated:

I am unable to make a statement that, in my view, the provisions of the Illegal Migration Bill are compatible with the Convention rights, but the Government nevertheless wishes the House to proceed with the Bill.³³

If a court finds that an Act of the Westminster Parliament is incompatible with those rights, it cannot strike it down: it must instead issue a declaration of incompatibility.

In this way, even the Human Rights Act places Westminster sovereignty above the observation of human rights in the UK.

In addition, the EU Charter of Fundamental Rights gave the rights contained in the Human Rights Act a broader standing and provided stronger remedies. The Westminster decision not to retain the Charter following Brexit may result in these rights being diminished.³⁴

The Equality Act 2010 provides the legal framework in Great Britain for discrimination law,³⁵ which protects people from unfair treatment based on nine protected characteristics. It places duties on public authorities, including the UK and devolved governments, local governments and the courts.

But like the Human Rights Act, this legislation has no special status in the UK's constitution and could be amended or repealed at any time, effectively by any Westminster government with simple majorities in both the House of Commons and House of Lords, or even just a simple majority in the House of Commons through the use of the Parliament Acts of 1911 and 1949.³⁶

These arrangements mean that even subjects central to people's constitutional protections, like rights and equality are, because of Westminster sovereignty, vulnerable to being undermined by any government willing to do so.

Human rights and equality in Scotland

Since devolution, successive governments in Scotland have worked to extend and protect human rights and equality safeguards. As Alan Miller, Professor of Human Rights Practice at the University of Strathclyde and founding Chair of the Scottish Human Rights Commission, has said:

Scotland's human rights journey has been marked by an increasing ambition and internationalism and this has been clearly reflected across the political spectrum, the public sector and civil society – as evidenced in the unanimous vote in the Parliament for the United Nations Convention on the Rights of the Child (UNCRC) Bill.³⁷

However, Scotland's ability to continue on this journey or embed its approach is limited by Westminster sovereignty, by the devolution settlement and by the approach of the current Westminster government.³⁸

Equality of opportunity is a founding principle of the Scottish Parliament³⁹ and the Scottish Government is determined to advance equality for all and to tackle inequality.⁴⁰

Responsibility for equal opportunities is, however, mainly reserved to the Westminster Parliament and subject to specific and limited exceptions. For example, under one of these exceptions, the Scottish Parliament "has competence over the encouragement (other than by prohibition or regulation) of equal opportunities."⁴¹

The Scottish Government and Parliament have used their limited powers to help to deliver better outcomes for those who experience inequality and discrimination. For example, the Scottish Specific Duties⁴² impose duties on listed Scottish public authorities to enable them to perform better than their existing Public Sector Equality Duty under the Equality Act to have due regard to the need to advance equality, eliminate discrimination and foster good relations.⁴³

The Scottish Government has also brought into force additional equality protection. For example, the Fairer Scotland Duty implements for Scotland the socio-economic duty contained in the Equality Act 2010,⁴⁴ which the Westminster government has so far failed to commence, while the Scottish Parliament passed the Gender Representation on Public Boards (Scotland) Act in 2018 providing mechanisms to address the historic and persistent underrepresentation of women in public life.⁴⁵

In addition, the Scottish Parliament and Government have advanced rights and equality in devolved policy areas, such as housing. The Homelessness etc. (Scotland) Act 2003,⁴⁶ for example, removed the test of whether someone has a priority need for housing and ensured that, since 2012, everyone who is assessed as being unintentionally homeless has a right to settled accommodation. The Homeless Persons (Unsuitable Accommodation) (Scotland) Amendment Order 2020,⁴⁷ which previously prohibited local authorities from placing pregnant women or families with children into bed and breakfasts or hotels for more than seven days, was extended to all homeless households.

In addition, the Scottish Government's focus on Scotland's transition to a wellbeing economy means that "all economic activity should serve a purpose. It should be a means to meeting everyone's basic needs and improving our collective health and wellbeing, so that all of Scotland's people and places can thrive and prosper."⁴⁸ This transition is at the heart of the National Strategy for Economic Transformation, which includes bold actions, within the given constitutional arrangements, to take some of the vital steps necessary towards realising a wellbeing economy.⁴⁹ As part of this work, the Scottish Government has created a Centre of Expertise in Equality and Human Rights to advance understanding of and embed equality and human rights within the economic policy-making process.⁵⁰

However, the Scottish Government would like to go beyond these measures to secure in full the strongest equality protections for people in Scotland, something that the devolution settlement does not provide for and cannot guarantee.

For example, the Scottish Government sought to protect children's rights through the UNCRC Bill. Under the current devolution settlement, the Bill could only cover devolved matters, such as education and justice, not matters reserved to the Westminster Parliament such as immigration and armed forces laws. Furthermore, the Supreme Court ruled that that incorporation of the UNCRC into devolved law cannot affect the interpretation of Acts of the Westminster Parliament. The Westminster government has since stated that it does not intend to take any steps (including amending the devolution settlement in any way) to increase the effectiveness of UNCRC incorporation in Scotland.⁵¹

The Scottish Government is also committed to introducing a Human Rights Bill, as recommended by the National Taskforce for Human Rights Leadership.⁵² A consultation on the Bill has been published setting out how we intend to give effect to a wide range of internationally-recognised human rights, within the limits of devolved competence, and strengthen domestic legal protections by making these rights enforceable in Scots law.⁵³ This Bill will incorporate the rights contained in:

- the International Covenant on Economic, Social and Cultural Rights
- the Convention on the Elimination of All Forms of Discrimination against Women
- the Convention against the Elimination of All Forms of Racial Discrimination
- and the Convention on the Rights of Persons with Disabilities

In addition, the Bill will recognise and include a right to a healthy environment and make provision to ensure equal access for everyone, including LGBTI and older people, to the rights contained in the Bill.

This Bill will incorporate and extend a range of international rights in devolved areas. It will be unable to incorporate rights in respect of areas reserved to the Westminster Parliament, and unable to make these rights effective in ways that are incompatible with Westminster sovereignty.

It is vital that systems and processes that will enable people to realise their rights, including the rights contained in this legislation, are in place. This will require a holistic approach and cross-government action, including in relation to implementation and funding, to ensure the realisation of these rights and protections.

With independence, Scotland could make progress in advancing rights and equality in areas that are currently reserved and in ways currently prevented by the devolution settlement and by Westminster sovereignty.

Details of the history of developing, extending and protecting rights and equality in Scotland are set out in [Annex A](#).

The status of human rights in the UK

The status of human rights within the UK's constitutional framework has been undermined by the actions and publicly expressed attitudes of recent Westminster governments. Independence would enable Scotland to secure and protect people's human rights.⁵⁴

In June 2022, the Westminster government introduced the Bill of Rights Bill, which would repeal the Human Rights Act and replace it with a 'modern Bill of Rights.'⁵⁵

The Scottish Human Rights Commission described the Westminster government's proposals as "deeply regressive" and "based on false premises and a flawed consultation process."⁵⁶

After plans to shelve the Bill of Rights Bill by Prime Minister Liz Truss in September 2022,⁵⁷ the Westminster government indicated in December 2022 that it would continue to pursue it.⁵⁸ In January 2023, the UK Parliament's Joint Committee on Human Rights urged the UK Government not to continue with the Bill,⁵⁹ and while those proposals have not made progress at Westminster, they further emphasise the uncertain backdrop against which the Scottish Government is operating.⁶⁰

Whether the Bill becomes law or not, the fact that human rights protections can be repealed without cross-party support, the same way as any other law, demonstrates the vulnerability of rights under the UK's constitution.

As a matter of fundamental principle, the Scottish Government does not agree that the Human Rights Act 1998 needs to be reformed or replaced.⁶¹ The Scottish Government views the Human Rights Act 1998 as one of the most important pieces of legislation ever passed by the Westminster Parliament.⁶² It has a more than 20-year track record of delivering justice, including for some of the most vulnerable people in society.⁶³ It plays a critically important role in protecting human rights and fundamental freedoms throughout the United Kingdom. The Welsh Government has also spoken out against the Westminster government's proposals in similar terms to the Scottish Government.⁶⁴

The rights in the Human Rights Act 1998 sit at the heart of the devolution settlements in the UK, yet under Westminster sovereignty the Act could be repealed despite all three devolved legislatures refusing their consent to do so.

There is a similar risk to an array of rights from the Westminster government's Retained EU Law (Revocation and Reform) Bill (REUL Bill).⁶⁵ Laws which are derived from the EU and became part of our domestic law on EU exit, are known as Retained EU Law (REUL). The REUL Bill, which the Westminster Government is currently taking forward, includes powers for the UK Government to repeal or weaken rights and protections, for example, workers' rights, environmental protection and food standards. Although an unworkable "sunset clause" has been removed, the intent of the Bill remains to bring forward a reform and deregulatory agenda which is at odds with the views of Scottish Ministers. This includes rights derived from EU treaties, such as the right to equal pay for equal work.⁶⁶ The Bill empowers the Westminster government (and the Devolved Governments) to repeal or replace REUL, with little or no consultation or parliamentary approval required. Moreover, UK Ministers are granted 'concurrent powers' which allows them to act in policy areas that are the responsibility of Scottish Ministers without their consent. In addition to providing the rights and protections set out above, the laws at risk are significant for businesses and industry, providing the stability and certainty needed to plan and trade effectively in international markets. The Scottish Parliament has, therefore, voted to refuse consent for the Bill⁶⁷ and to refuse consent for amendments to the Bill.⁶⁸

A new constitutional future with independence

As long as Westminster sovereignty prevails, it remains open for any current or future Westminster Parliament to change Scotland's constitutional arrangements and decisions made by the Scottish Parliament, including any progress on advancing human rights and equality in Scotland. Increased devolution will not change this.

Independence would enable the people in Scotland to choose a new constitutional future, in which values and principles are embedded at the heart of a written constitution, alongside the powers, functions and institutions of the state.

Scotland already has strong and well trusted institutions,⁶⁹ including the Scottish Parliament, Scottish Government and an independent judiciary. This is all underpinned by a distinct and respected legal system that has always been autonomous from those in the rest of these islands since before the Union in the form of Scots Law and largely remains so, with a strong independent system of criminal prosecution headed by the Lord Advocate.

Scotland's parliamentary and governmental structures have proven their competence in managing and delivering their legislative and executive functions across devolved areas since 1999. The Scottish Government is already accountable to the Scottish Parliament, which, in turn, is accountable to the Scottish people.⁷⁰

The constitution of an independent Scotland could build on these strong foundations, as well as give them the protection that is only possible with a codified constitution.

Having a written constitution that reflects fundamental values demonstrates that Scotland is fully committed to the values shared by other European nations.⁷¹

How to create a modern constitution

Key points

The Scottish Government proposes that an independent Scotland should have a permanent written constitution, developed by people in Scotland. Independence would provide the opportunity to create a constitution based on the sovereignty of the people and reflect the fundamental values of Scotland as a modern, European nation.

To achieve this, the Scottish Government proposes:

- an interim constitution that would take effect on the day of independence
- a Constitutional Convention, which would draft the permanent constitution through an inclusive and participatory process involving the people of Scotland. The Constitutional Convention would take a human rights-based approach, putting people's human rights at the heart of policy and practice. It would be accompanied by a wider awareness-raising and engagement process
- a referendum to approve the permanent constitution

The Scottish Government proposes that the permanent constitution should include an amendment formula that would make it harder to change the constitution than is the case for ordinary legislation. This would reflect the foundational nature of the constitution, enable change to be achieved through consensual means and ensure governments are not able to undermine democratic institutions and processes or water down fundamental values and human rights with a simple majority in parliament, as is the case in the Westminster Parliament at present.

A process for building a constitution

Constitution-making is a central part of building a modern state, with a country's constitution being the vehicle for establishing and expressing rights, state functions and institutions and the relationship between power and accountability.⁷² Most countries around the world have codified constitutions (with New Zealand and Israel among the handful of exceptions),⁷³ reflecting choices they have made about the nature, structure and values of the country in question. The UK's constitutional arrangements make it a clear outlier on the international stage.

The Scottish Government proposes a process for drafting, adopting and implementing a written constitution for an independent Scotland that would be owned and driven by the people of Scotland. The process would be inclusive, participatory and transparent, providing an opportunity for people in Scotland to engage in an open debate about the sort of country Scotland wants to be. This process would involve children and young people, recognising their importance as part of Scotland's future.

The Scottish Government proposes:

- an interim constitution, to take effect at the point of independence
- a legally-mandated Scottish Constitutional Convention, taking place after Scotland has chosen independence, to lead the creation of a permanent written constitution
- a referendum to approve the permanent written constitution

This approach would reflect the global recognition that the direct involvement of citizens is a vital ingredient in constitutional development or amendment. Recent examples include the Netherlands in 2006, Ecuador in 2008, Iceland from 2010 to 2012, Ireland from 2013 to 2014 and Chile in 2021.

Other countries, such as South Africa from 1992 to 1997, have also followed a process of having an interim constitution before a permanent constitution was drafted, adopted and brought into force. Scotland could learn from these examples. Further information about the various methods for constitution-building used across different countries is provided in [Annex B](#).

An interim constitution

Scotland will need a working constitution on day one of independence to ensure that it can benefit from constitutional government during its crucial, formative years.

The Scottish Government in place at the time of a vote for independence will need to work with the Scottish Parliament and the people of Scotland to determine the details of the legislation that would establish an independent Scotland's interim constitution. This government will provide the people of Scotland with the information they need on the legislation for a draft constitution in advance of any vote for independence. Although explicitly temporary, an interim constitution would provide the stability and clarity needed for a new nation. It would ensure the continuity of existing democratic institutions required after independence, such as the Scottish Parliament, and underpin the new institutions required to ensure the functioning of the new state, such as a Scottish Central Bank.⁷⁴

The interim constitution could also put in place, transparently, some of the mechanisms required to support good government in an independent Scotland. It could give effect to some of the values and principles that would be especially important in the early days of a newly independent country.

The Scottish Government's initial proposals for the provisions of the interim constitution for Scotland are set out in the chapter 'What could be in a an interim constitution'. The biggest and most fundamental questions about changes to the structures of the state and the design of the constitution could not be settled immediately, however. These would be part of the fuller process of the Scottish Constitutional Convention, involving the people of Scotland in the preparation of an independent Scotland's permanent written constitution.

People in Scotland must be involved in the design of the interim constitution. The Scottish Government is committed to significant consultation and public and stakeholder engagement on a draft interim constitution for Scotland, following a vote for independence. There would be a range of opportunities, activities and platforms designed to be as inclusive and participative as possible.

The Scottish Government believes that this consultation and engagement must be designed to reach out to all of Scotland, regardless of whether or not they voted for independence. Targeted work to understand the perspective of those that did not vote for independence will be essential in securing a constitution that truly reflects the values of all of Scotland.

Legislation will be required to underpin the interim constitution.

It would come into effect upon independence and would remain so until the permanent constitution has been approved, enacted and implemented.

A Scottish Constitutional Convention

A Scottish Constitutional Convention would be set up to lead people in Scotland in a shared national endeavour to create the permanent written constitution for Scotland.

A constitutional convention is a body that brings people together to draw up a constitution or make changes to existing constitutional arrangements. It is a means of broadening and diversifying democratic involvement on key issues.⁷⁵

This process would ensure that the permanent constitution derives from and reflects the sovereignty of people in Scotland. Its task would be to produce a constitution for a modern European nation written by and for people in Scotland.

The Constitutional Convention would be an independent body, established by the Scottish Parliament through legislation and representative of Scotland. Legislation would determine how its membership would be selected, how it would be funded, a timeline for its work and a process for it to report.

The Constitutional Convention should adopt a human rights-based approach to its ways of working and to the constitution itself, as set out in Box 1 below. This would inform the constitution itself and the process of developing it.

Box 1: A human rights-based approach

A human rights-based approach ensures that the human rights of people are at the heart of policies and practices.⁷⁶ The Scottish Human Rights Commission has developed the following PANEL Principles to inform a human rights-based approach:

- **Participation:** this means ensuring that people have the right to participate in the decision-making processes that affect them. Participation must be accessible, free, active and meaningful
- **Accountability:** human rights must be effectively monitored and appropriate policies, laws, procedures and mechanism must be in place. People must be able to hold decision-makers to account and be able to seek redress
- **Non-discrimination and equality:** all forms of discrimination must be prevented, eliminated and prohibited. Those who face the largest barriers to having their rights realised should be prioritised
- **Empowerment:** this means that people understand their rights and are supported to participate in the development and decision-making processes linked to the policies and practices that affect them. Where necessary, people must be able to claim their human rights
- **Legality:** human rights must be recognised as entitlements that are legally enforceable. They must be protected, respected and fulfilled⁷⁷

The people of Scotland would be central to the decision-making process, with a range of opportunities to get involved and influence the development of the constitution. This approach would recognise the importance of the constitution as the foundation document for an independent Scotland. Particular care would be taken to ensure its development was inclusive, non-discriminatory and provided equal opportunities for people to influence it.⁷⁸

The Scottish Government proposes that the Constitutional Convention be appointed through a process like that for a citizens' assembly, building on the recent assemblies that have taken place in Scotland⁷⁹ and the work underway to include deliberative democracy as part of Scotland's democratic infrastructure. Scotland's Climate Assembly, for instance, ran a parallel process with the Children's Parliament to ensure the views, opinions and ideas of children were fully integrated into the Assembly. Scotland's Climate Assembly was the first national Assembly to include children in this way. The members could be recruited by random selection to be broadly representative of the people living in Scotland, while ensuring that people with, or who share protected characteristics, and the different regions of Scotland are appropriately represented.

A Secretariat would provide the Convention with independent, logistical support, alongside expert evidence, design and facilitation teams, with oversight and scrutiny from a Stewarding Group and the Scottish Parliament.

The Constitutional Convention members would be supported with advice from constitutional law experts and other experts as required. The Constitutional Convention may, for example, wish to learn from the work of the Council of Europe's Venice Commission⁸⁰ and UN experts, who can provide assistance in constitutional development and adoption processes.⁸¹ This would help to ensure that the drafting of the permanent constitution is informed by international best practice and expertise, as well as the wealth of experience and expertise already present in Scotland and indeed, the UK. The work of the convention could also draw on previous thinking on constitutional design, which has included the preparation of draft constitutions and proposals for features of constitutions of an independent Scotland.⁸²

The Constitutional Convention would engage with and take evidence from a wide range of interests in Scotland, including: civil society organisations; people with, or who share, protected characteristics; children and young people; churches and faith groups; trade unions; local authorities; politicians; and business interests.

Involving the people and communities of Scotland in varied and accessible ways would be key to creating a constitution by and for the people. The work of the Constitutional Convention would be supported by a wider awareness-raising engagement and consultation programme, securing maximum participation from people in Scotland.

People in Scotland will be able to make full use of their rights and protections in the constitution only if they know what those rights and protections are, what they mean and how to seek effective remedy when their rights are breached.⁸³ This is a fundamental part of taking a human rights-based approach to the constitution.

It is particularly important that children and young people grow up knowing that they live in a country with a modern, written constitution with clear, core values and principles, and what that means for their rights as individuals, as well as understanding how their country is governed. The legislation setting up the Constitutional Convention should, therefore, also provide for awareness-raising activity and education as part of the process of adopting and embedding the constitution. This activity would build on the work undertaken as part of the Constitutional Convention process and take the same inclusive approach.⁸⁴

More detailed information on proposals for the Scottish Constitutional Convention, including proposals for membership, and for accessibility and inclusion measures, are set out in [Annex B](#).

A referendum to approve the constitution

The legislation establishing the Constitutional Convention, considered, debated and passed by the Scottish Parliament, would also outline how the permanent Constitution of an independent Scotland, devised by the Constitutional Convention and presented to the Scottish Parliament, would be formally adopted by the people of Scotland.

The Scottish Government proposes that the permanent written constitution should be confirmed in a vote by the people of Scotland. For the constitution to embody and reflect the sovereignty of the people, it should only come into force if endorsed through a formal process by them, such as a referendum. This is in keeping with standard constitutional practice around the world.⁸⁵ Estonia's constitution, for example, was approved in a referendum in 1992.⁸⁶

If people in Scotland vote to adopt the permanent written constitution, then it would come into force. If people vote against adopting it, the interim constitution would continue in force until the people, through their elected Scottish Parliament, decide how to proceed.

A permanent written constitution for Scotland

The permanent written constitution of an independent Scotland would come into force if people in Scotland vote for it to do so.

But that would not be the end of the story of constitutional change in an independent Scotland.

A constitution makes real, in politics and in law, the belief that there are values and institutions deserving of greater protection than ordinary law. These values and institutions should not be vulnerable to change at the whim of the government of the day or of a simple majority in parliament.

But being able to amend a constitution is also an important guarantee of a constitution's ability to move with the times and reflect modern life. A constitution needs to be a living document too.

Striking the right balance between permanence and change, and achieving that democratically, would be a key issue that the Convention would need to consider.

Most modern European constitutions have provisions that make them more difficult to amend than ordinary legislation. Provisions on amendments tend to focus on one or a combination of the following factors: a requirement for a qualified majority, a need for multiple votes or decisions, the use of referendums, and instruction of time delays.⁸⁷

For Sweden's constitution to be amended, for example, the Swedish Parliament must vote for the amendment twice with a general election in between the two votes.⁸⁸ Alternatively, the first vote can be followed by a referendum.⁸⁹ If the majority of voters vote against the amendment, the Swedish Parliament cannot proceed with it.⁹⁰

Making a constitution harder but not impossible to amend reflects its fundamental nature. The Venice Commission considers this "an important principle of democratic constitutionalism, fostering political stability, legitimacy, efficiency and quality of decision-making and the protection of non-majority rights and interests".⁹¹

The Scottish Government, therefore, considers that an amendment formula should be included in Scotland's permanent constitution.

Individual governments would then not be able to use their simple majority in parliament to undermine key institutions or water down fundamental human rights – as is happening now in the UK Parliament and described in the chapter 'The need for a written constitution'. Any fundamental constitutional change would be subject to due process, scrutiny and transparency, set out clearly in the written constitution created by people in Scotland.

What could be in an interim constitution

Key points

The Scottish Government proposes that the interim constitution for Scotland would build on the strong foundations of government in Scotland. Any fundamental change should be for the Constitutional Convention to propose, for inclusion in the permanent written constitution.

The interim constitution would be agreed by the Scottish Parliament and would remain in place until a permanent constitution is endorsed in a referendum. It would establish the sovereignty of the people and set out the key institutions of Scotland as an independent democratic state. It would establish an independent Scotland as a parliamentary democracy retaining a constitutional monarchy at the point of independence, and the institutions necessary to sustain democracy, the rule of law, a functioning market economy, human rights and respect for and protection of minorities, setting Scotland on the path to EU accession.⁹²

The interim constitution would embed human rights set out in the European Convention on Human Rights and the core international human rights treaties relating to economic, social and cultural rights and the rights of children, women, minority ethnic communities, disabled people and refugees, and the right to a healthy environment. It would also embed equality safeguards and include a duty to advance equality of opportunity for all.

The interim constitution would also set out provisions securing the independence of local government and on citizenship and place a duty on post-independent Scotland to pursue nuclear disarmament.

It would also place a duty on the Scottish Parliament to establish a Constitutional Convention post-independence, to draft a permanent written constitution for Scotland.

The Scottish Government proposes that the interim constitution should build on the already strong foundations of government in Scotland, enhanced and adapted as appropriate to take advantage of the full powers and responsibilities of independence.

There may be a case for significant change to the way that Scotland is governed after independence. But the process for making decisions about that should be one that everyone in Scotland – whether they supported independence or not – should be part of. The Scottish Government, therefore, believes that any fundamental change should be for the Constitutional Convention to propose, for inclusion in the permanent written constitution, which would ultimately be judged by the people in a referendum.

But that is no reason not to be ambitious for the interim constitution. Strong constitutional protections can be put in place by building on what Scotland already has. There are also currently reserved matters, such as citizenship and defence, that an interim constitution would have to cover that the Scotland Act 1998 currently does not. On these issues and the interim constitution as a whole, the Scottish Government would seek to secure cross-party consensus.

This chapter sets out the Scottish Government's proposals for the interim constitution for Scotland.

The sovereignty of people in Scotland

That sovereignty lies with the people will be the fundamental political, constitutional and legal organising principle of an independent Scotland.

It is a principle charged with historical resonance, affirming the historic Scots constitutional tradition that Monarchs and parliaments are the servants of the people.⁹³

The interim constitution for Scotland would establish the sovereignty of the people in Scotland in line with this tradition and these principles.

It would set out that the authority of institutions like the Scottish Government, Scottish Parliament, local government and the Head of State is derived from the people and that they are, therefore, accountable to the people.

And it would set out how the people's sovereignty can be exercised: through the constitution, through democratic elections that are free and fair and referendums, through the courts, through independent regulatory bodies, and through the state signing up to treaties that bind it in international law.

Scottish statehood

The interim constitution would provide that the name of the state, under which it would participate in international organisations and sign international treaties, would be Scotland.

The interim constitution would also set out which territory constitutes Scotland: what land and seas would constitute the newly independent Scotland.

The interim constitution would describe the type of state that Scotland would be: an independent country retaining a constitutional monarchy at the point of independence, and a parliamentary democracy.

The interim constitution would also make arrangements for the establishment of important aspects and symbols of Scottish statehood, such as our national flag.

Human rights and equality

Human rights and equality would be at the heart of the interim constitution.

Under devolution, this Scottish Government has taken a 'maximalist' approach to incorporating human rights protections into devolved law, and a commitment to progressive incorporation of international rights treaties would continue in the interim constitution (and in due course to any advice it provided to the Constitutional Convention on the permanent constitution). At the point of independence, the Scottish Government would consider itself bound by the same international rights-based treaties and have, as a starting point, the same international human rights obligations as the UK has at the time of independence.

Independence would also provide an opportunity for Scotland to consider the ratification of further international human rights treaties, such as the Revised European Social Charter, which the UK signed in 1997 but has so far failed to ratify. Scotland could also consider ratifying optional protocols or removing or amending reservations to international human rights treaties to which the UK is already a State Party. While an independent Scotland would have to apply to join the Council of Europe as a new member, legal experts, such as Sionaidh Douglas-Scott,⁹⁴ have stated that the European Convention on Human Rights would continue to apply to Scotland without an interruption.

The interim constitution would embed human rights of individuals and communities, including rights protections contained in the European Convention on Human Rights and the core international human rights treaties relating to economic, social and cultural rights and the rights of children, women, minority ethnic communities, disabled people and refugees, the fundamental value of human dignity and the right to a healthy environment.

This Scottish Government would also include constitutional recognition of the NHS and a constitutional right to access a system of health care, available free at the point of need,⁹⁵ and constitutional protection for workers' rights, including the right to strike.

These individual and collective human rights provide a framework, in which everyone has rights based upon the human dignity inherent in everyone, as articulated in Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights."⁹⁶ These rights would include such rights as the right to an adequate standard of living, including the rights to adequate food, clothing and housing and the continuous improvement of living conditions.

This would mean that any laws – including on subjects that used to be reserved to the Westminster Parliament – which were incompatible with these rights, could be struck down.

The interim constitution would also fully embed equality safeguards, reflecting and giving constitutional status to key features of the Equality Act 2010, and include a positive duty to advance equality of opportunity for all. Having a positive duty would mean that those institutions and individuals on whom the duty fell would be required to act to fulfil and uphold those duties. An independent Scotland would be active in promoting and upholding rights and equality, ensuring that a holistic approach is taken and reflected in the systems and processes of government.

The structure of the state

The interim constitution would set out that:

- the Head of State of an independent Scotland would continue to be His Majesty King Charles III, so long as the people of Scotland desired it. The "personal union" of the Scottish and English crowns has been in place since 1603, when both Scotland and England were independent states, and the Monarch of England, Wales and Northern Ireland after Scottish independence could continue to be Monarch in Scotland as an independent state.⁹⁷ Scotland would join 15 other Commonwealth states⁹⁸ that currently have the King as Head of State.⁹⁹ The Scottish Government would support, and promote amongst the other Commonwealth States with the King as Head of State, an amendment to the rules on succession to the Crown to remove provisions on religious discrimination¹⁰⁰
- the Head of Government of an independent Scotland would continue to be the First Minister
- the legislature of an independent Scotland would continue to be the Scottish Parliament, with members of the Scottish Parliament being elected in regular, free and fair elections
- the executive in an independent Scotland would continue to be the Scottish Government, and it would continue to be accountable under the constitution to the Scottish Parliament, elected by the people in Scotland
- there would be a civil service to support government in Scotland, required to act with integrity, honesty, objectivity and impartiality in discharging its duties
- there would continue to be an independent judiciary and a robust and independent system of criminal prosecution and investigation of deaths, headed by the Lord Advocate, whose independence would be statutorily guaranteed

- the Court of Session (for civil matters) and the High Court of Justiciary (for criminal matters) would continue as the most senior courts in Scotland, and collectively would become the Supreme Court of Scotland
- oversight and regulatory public bodies, including Audit Scotland, the Scottish Public Services Ombudsman and the Children and Young People’s Commissioner would continue. The Scottish Human Rights Commission would continue to be Scotland’s National Human Rights Institution with additional responsibility for human rights matters previously taken forward in reserved areas by the Equality and Human Rights Commission
- new public bodies would be established where required, to take on the functions that applied across Great Britain or the United Kingdom, including Scotland, before independence. This would, for instance, include an independent Electoral Commission, a Scottish Central Bank and could include energy regulators and a Civil Service Commission for Scotland

These arrangements provide for continuity in the structures of democratic, accountable government in an independent Scotland, reflecting the fact that the existing Scottish institutions have served the country well and can be expected to develop and evolve with the full powers and responsibilities of independence. These arrangements would not change the status of any religion or of Scotland’s churches.

Local government

The interim constitution would reflect the structure, powers and responsibilities of local government in place immediately prior to the point of independence, and establish that local government would operate independently of central government in an independent Scotland.

Article 2 of the European Charter of Local Self-Government requires that ‘the principle of local self-government shall be recognised in domestic legislation and, where practicable, in the constitution.’¹⁰¹ The Scottish Government is committed to the Charter and supported the European Charter of Local Self Government (Incorporation) (Scotland) Bill in 2021. Although this remains a Members Bill, the Scottish Government will continue to support the Bill through reconsideration following a Supreme Court judgment that aspects of it were outwith competence. Independence would resolve the competence issue.

Continuity of law

The interim constitution would have to provide for the continuity of law in Scotland.

This would mean that all laws in force before independence in Scotland continue to be in force from independence, except where modified or repealed by the Scottish Parliament.¹⁰²

This would include primary sources of law such as Acts of the Westminster Parliament in both reserved and devolved areas where they formed part of the law of Scotland, Acts of the Scottish Parliament and the pre-1707 Parliament of Scotland, secondary legislation, the common law and retained EU law.

Island communities

The interim constitution would also include a provision reflecting and protecting the specific interests and needs of island communities.

Languages

The Scottish Government proposes to include provisions to recognise the languages of Scotland, including English, Scots, Gaelic and British Sign Language.

Nuclear disarmament

The Scottish Government proposes that the interim constitution should place a duty on the post-independent Scottish Government to pursue nuclear disarmament.

This should require the Scottish Government of the day to pursue negotiations with a view to securing the safe and expeditious removal from Scotland of nuclear weapons based here.

Defence

The Scottish Government proposes that there should be a provision on defence, outlining that there will be Scottish Armed Forces that will defend and protect Scotland's interests from external aggression or threat of war in accordance with international law, and participate in international humanitarian and peacekeeping missions.

The mission of the Scottish Armed Forces would be to guarantee the sovereignty of Scotland and to defend its territorial integrity, its citizens and the democratic constitutional order. The Scottish Armed Forces will seek to be a force for good and peace in the world.

Citizenship

The interim constitution would set out this Government's proposals for an inclusive and welcoming approach to the entitlement to Scottish citizenship. The interim constitution would grant Scottish citizenship to all British citizens living in Scotland at the point of independence and to all British citizens who were born in Scotland. There would also be a simple process for other British citizens with a close and enduring connection to Scotland to register as a Scottish citizen. Rules would be clearly set out to allow nationals of other countries to become Scottish citizens if they chose. More detailed policy proposals regarding citizenship will be set out in the Building a New Scotland series.

International law

The interim constitution would prescribe a democratic and transparent system for the scrutiny and ratification of international treaties.

Establishing the Scottish Constitutional Convention

The interim constitution would place a duty on the Scottish Parliament to establish a Constitutional Convention to draft the permanent constitution of Scotland. The Convention should be set up within the first parliament after independence.

Amending the interim constitution

The Scottish Government also proposes that the interim constitution should set out the arrangements for its own amendment. Given its importance, the interim constitution should be given a higher status in law than ordinary legislation of the Scottish Parliament. At present, there are certain features of the Scotland Act, relating to the essentials of Scotland's democracy, which the Scottish Parliament can amend, but only if a two-thirds majority of members of the Scottish Parliament vote for it.¹⁰³

The Scottish Government therefore proposes that the interim constitution should declare and provide that the same rule applies to the interim constitution itself: amendments would only be possible where a two-thirds majority of Scotland's elected parliamentarians vote for it. This would not supplant the process to be agreed and legislated for by the Scottish Parliament to create the Constitutional Convention and the processes for introducing the permanent constitution.

What could be in a permanent constitution

Key points

It would be for the people in Scotland, through a Constitutional Convention, their elected Scottish Parliament and a referendum on its adoption, to determine the nature of the permanent constitution, ensuring that Scotland takes an informed, open and innovative approach to its constitutional future.

While recognising the role of the Convention and the people of Scotland, the Scottish Government suggests that, as well as setting out the core institutions and practices of democratic statehood that will demonstrate that Scotland is fully committed to the values shared by other European nations and enable Scotland take its place on the international stage, a permanent constitution for Scotland could include provisions on:

- the Head of State
- a new type of Scottish Parliament, including considering the creation of a second chamber
- a clear commitment to nuclear disarmament
- independent regulatory and oversight institutions
- a wide range of rights and equality measures

As noted above in the chapter ‘What would be in an interim constitution’, it would be for the Constitutional Convention to develop and draft the permanent constitution of Scotland. This chapter sets out some proposals and ideas from the Scottish Government for key provisions that could be included in a constitution for Scotland.

Fundamental values

The Scottish Government would support the permanent constitution setting out and protecting fundamental values, such as the sovereignty of the people of Scotland, human dignity, equality, the rule of law, freedom, democracy and justice.

These fundamental values should inform and influence all other provisions of the constitution, be enforceable under the constitution, and play a central role in determining the meaning and implementation of the constitution.

Amending the constitution

The Scottish Government believes that, like the interim constitution, the permanent constitution should provide stability and guarantee fundamental rights and equality, while also being a living document that is able to evolve and remain relevant for future generations. Making a constitution more difficult to amend reflects the fundamental nature of it. The Constitutional Convention may, for example, consider whether amendments should have to be approved by the people in Scotland through referendums.

The Head of State

It is the Scottish Government’s policy that independence in itself would not result in a change to the Head of State, and that initially an independent Scotland would remain a constitutional monarchy. This would be the case for as long as the people of Scotland wish to retain the monarchy. The Scottish Government believes that the Constitutional Convention is the appropriate place to consider other models for the Head of State of an independent country.¹⁰⁴

State institutions

The Scottish Government proposes that the constitution should include provisions setting out the remit, powers and obligations of key state institutions, including the Scottish Parliament, the Scottish Government and the Scottish civil service.

The constitution should also ensure the independence of the judiciary and the role of the Lord Advocate.

The Scottish Government believes that the constitution should set out how these institutions relate to each other. It would be important for the people of Scotland to know who is responsible for what and how they can hold state institutions to account, if necessary.

Like the constitutions of most other democratic states,¹⁰⁵ the constitution of Scotland should ensure a separation and balance of power between different state institutions, including the three branches of government – the legislature (i.e. Parliament), the executive (i.e. the Government) and an independent judiciary. This separation of powers is a democratic standard,¹⁰⁶ ensuring that no single branch of government has absolute power. The Scottish Government believes that the permanent constitution should set out independent regulatory and oversight institutions, building on the institutions Scotland already has, such as the Scottish Human Rights Commission, the Standards Commission and the Ethical Standards Commissioner, to ensure that the three branches of government can be held to account.

Constitutional provisions should include how members of the Scottish Parliament are elected, ensuring that the voting system is not something that could be adjusted simply for the advantage of the government of the day.

The Scottish Government proposes continuing the use of proportional representation and the current electoral franchise (or right to vote).

Importantly, independence would mean that everyone settled in Scotland would have the right to vote in all elections in Scotland, as the narrower franchise used in UK general elections would no longer be relevant.¹⁰⁷

The development of a permanent written constitution would be an opportunity to consider whether the size and composition of the Scottish Parliament needed to change to reflect the additional responsibilities of independence.

The Constitutional Convention may, for example, want to consider whether Scotland should have a 'bicameral' parliament, that is one made up of two chambers rather than one, as at present. The Convention may also wish to look at whether the role of committees should be amended and whether the number of members of the Scottish Parliament should be increased to reflect the increased responsibilities of the parliament of an independent country.

Independence would give the people in Scotland the opportunity to consider innovative ways of doing democracy, such as looking at approaches to implementing deliberative democracy alongside representative democracy.

Local government

The Scottish Government believes that a constitution should enshrine the independence of local government, recognising the status, rights and obligations of elected local government. Constitutions of many European democracies, including Ireland¹⁰⁸ and Denmark,¹⁰⁹ contain such provisions.

The Scottish Government would also support the permanent constitution enshrining the principles of the European Charter to protect the functions and independence of local government.

Constitutional Court

Many, but not all, constitutions set up a specialised Constitutional Court. Constitutional courts act as the custodian of the constitution on behalf of the people. The composition and exact function of this court can vary.¹¹⁰ While Denmark has no specialised Constitutional Court, Germany's constitution, also referred to as its Basic Law, established the Federal Constitutional Court. Unlike supreme courts elsewhere, Germany's Federal Constitutional Court is not part of the judicial or appeals process, except for cases linked to constitutional or international law.

The Scottish Government considers it important that there should be an effective system for the enforcement of the constitution and the rights that arise under it.

The development of a permanent written constitution would be an opportunity for the Convention to consider the potential role of Scotland's supreme courts, including whether it would be desirable to create a Constitutional Court for these matters.¹¹¹

Island communities

The Scottish Government would support the constitutional protection of the specific interests and needs of island communities. This could take the place of a duty on the Scottish Government to take the needs and unique geographical character of island communities into consideration when it conducts its functions.

It would be vital that island communities have a direct influence over the nature and content of such a provision.

International law

Constitutions often require the consent of the state's parliament when key international agreements are ratified.¹¹²

The Scottish Government proposes that a similar requirement should be included in Scotland's permanent constitution, meaning that the scrutiny and ratification of treaties would be a transparent and democratic process.

Defence

Provisions on defence, including controls on the use of military power, are part of most constitutions in Europe and around the world.¹¹³ This includes NATO members, such as Denmark¹¹⁴ and the Netherlands.¹¹⁵

The Scottish Government would support the introduction of a constitutional safeguard in the permanent constitution with respect to the deployment of armed forces to ensure that military deployments are made in a transparent and legitimate way, and to ensure that the armed forces' functions of protecting Scotland's interests, and participating in international humanitarian and peace-keeping efforts, are subject to accountability.

Nuclear disarmament

The Scottish Government is committed to supporting and promoting nuclear disarmament.

Independence would allow Scotland to achieve this aim and unite with allies in working towards the longer-term ambitions of nuclear disarmament, arms control and non-proliferation, which all play an important role in preserving peace.

The Scottish Government would also support Scotland's permanent written constitution containing a constitutional prohibition on nuclear weapons being based in Scotland.

Citizenship

Most current constitutions around the world contain some form of provision on citizenship.¹¹⁶ The Constitutional Convention may wish to consider the inclusion of a provision on Scottish citizenship, including the rights and responsibilities of Scottish citizens, in a permanent constitution.

Languages

The Scottish Government proposes no changes to the status of the languages of Scotland, including English, Scots, Gaelic and British Sign Language.

The Constitutional Convention may, however, wish to reflect on whether these languages should be afforded specific constitutional protections. The Scottish Government would also suggest that the Convention consider the constitutional status of Gaelic and the Scots language, including its various dialects.

Human rights and equality

Many constitutions around the world set out key human rights and equality protections in their core elements and detail the obligations of state institutions in guaranteeing these rights.¹¹⁷ The UN recommends that human rights protections, including children's status as human rights bearers, people's right to dignity and individual autonomy and protections that respect human diversity, and principles of non-discrimination and equality should be included in constitutions.¹¹⁸ Embedding human rights protections in constitutions has improved respect for and knowledge of human rights in other states¹¹⁹ and makes rights and protections more accessible, tangible and understandable.¹²⁰

The Scottish Government wants to see a Scotland that is a world leader in incorporating, implementing and advancing equality and internationally derived human rights obligations in Scotland's constitution and beyond.

Independence would allow the Scottish Parliament to ensure that human rights protections in Scotland, including the UNCRC and the treaties and rights that are to be included in the Scottish Government's upcoming Human Rights Bill,¹²¹ cover both devolved and currently reserved policy areas.

The Scottish Government would support the permanent constitution continuing the rights and equality protections of individuals and communities covered by the interim constitution.

The Scottish Government would also support the permanent constitution containing a provision on non-discrimination in order to guarantee, explicitly, that constitutional rights and protections would apply to all people in Scotland, ensuring everyone has equal access to them.¹²²

In addition to a non-discrimination clause, the Scottish Government would support the permanent constitution going further and containing a positive provision to advance equality of opportunity for all.

Such provisions would provide enforceable legal protections, setting out the key rights of individuals and the obligations of state authorities. They would amount to a guarantee that human rights and equality protections in an independent Scotland would be more robust and effective than the protections that applied prior to independence. This would help to ensure that effective and accessible remedies are in place, so that the people in Scotland can hold public authorities to account when their rights have been breached.

This approach would reflect Scotland's commitment to international human rights obligations, which include an obligation to the principle of non-retrogression of human rights and to advance human rights.¹²³

Human dignity

The Scottish Government would support respect for human dignity being fully embedded in the permanent constitution of an independent Scotland.

Human dignity is the fundamental value that underpins human rights and a concept that research has found is well understood by the people of Scotland.¹²⁴

It is a principle that has been endorsed by Scotland's National Taskforce for Human Rights Leadership.¹²⁵

Human dignity is central to both international treaties and to many national constitutions. The Universal Declaration of Human Rights' preamble recognises the inherent dignity of all humans and Article 1 of the Declaration states that "All human beings are born free and equal in dignity and rights".¹²⁶ The EU Charter of Fundamental Rights states that "Human dignity is inviolable. It must be respected and protected."¹²⁷ Human dignity is also, for example, enshrined in the German constitution¹²⁸ and the South African constitution.¹²⁹

Scotland has already legislated to reflect the importance of human dignity. The Social Security (Scotland) Act 2018 states that "social security is itself a human right and essential to the realisation of other human rights", and that "respect for the dignity of individuals is to be at the heart of the Scottish social security system."¹³⁰

Equality and non-discrimination

Principles of equality and non-discrimination are included in most constitutions across the world, although in a variety of forms.¹³¹ They guarantee that everyone is equal before the law and has a right to equal treatment, as well as the right to equal protection of the law.¹³² These principles form a vital function in constitutions and, without them, the human rights included in the constitution have little meaning or impact.¹³³

The Scottish Government would support the inclusion of a positive duty on those public bodies and any institutions or organisations specified in the constitution to work to end prejudice and discrimination and advance equality for all in the permanent constitution. It also supports exploring a possible provision on fostering good relations, which would help to ensure full alignment with the Public Sector Equality Duty¹³⁴ and the Scottish Specific Duties.¹³⁵

Civil and political rights

Civil and political rights are currently incorporated into domestic law via the Human Rights Act 1998 and have constitutional protection in Scotland through the rights from the European Convention on Human Rights embedded in the Scotland Act 1998. These rights protect people's freedom from infringement by state institutions, organisations and individuals. They include the right to life, the right to a fair trial and freedom of thought and expression. These fundamental rights are vital for a democratic society.

Their inclusion in Scotland's permanent constitution could provide additional constitutional protections by, for example, ensuring that these rights protections cannot be amended or repealed with a simple majority in parliament.

The Constitutional Convention may also want to consider further provisions on public participation, reflecting the right to public participation in public affairs as expressed in Article 25 of the International Covenant on Civil and Political Rights.¹³⁶

Economic, social and cultural rights

The Scottish Government would support the permanent constitution including the economic, social and cultural rights as set out in the International Covenant on Economic, Social and Cultural Rights.¹³⁷ Such an approach would reflect Scotland's commitment to individual and collective human rights and its transition to a wellbeing economy, where all economic activity should serve to meet everyone's basic needs and improve the collective health and wellbeing of the people in Scotland.

Economic, social and cultural rights are fundamentally important to quality of life and wellbeing and include such rights as the right to an adequate standard of living, including the rights to adequate food, clothing and housing and the continuous improvement of living conditions. These rights play a vital part in ensuring that the structural inequalities in Scotland and across the world are adequately addressed. This is particularly important considering the impact of the pandemic and the current cost of living crisis.

The Scottish Government also proposes that such provisions should include a constitutional protection of workers' rights, including the right to withdraw labour. The right to join a trade union and to strike is included in several international human rights treaties¹³⁸ and in over 90 constitutions world-wide.¹³⁹ The constitutions of Portugal¹⁴⁰ and Sweden¹⁴¹ have, for example, provisions guaranteeing the right to strike.

Economic, social and cultural rights have increasingly been embedded in constitutions around the world.¹⁴² The right to health, for example, is included in some form in a slight majority of constitutions.¹⁴³ Portugal's constitution, for example, states that "the right to health protection shall be fulfilled... by means of a national health service that shall be universal and general and, with particular regard to the economic and social conditions of the citizens who use it, shall tend to be free of charge."¹⁴⁴ This has been shown to have a positive impact on the delivery of health services, even when factors such as the wealth of the relevant states is taken into account.¹⁴⁵ The permanent constitution could continue to include the right to access a system of health care free at the point of need.

Including obligations regarding economic, social and cultural rights in constitutions ensures that, for example, courts will require government to take reasonable measures to realise these rights.¹⁴⁶ The existence of such justiciable constitutional rights puts pressure on public authorities as duty-holders to act to realise rights more quickly.¹⁴⁷

Environmental rights

Embedding the right to a healthy environment would reflect Scotland's role as a leading nation in developing a wellbeing economy, ensuring that Scotland's economy is in service of our people and our planet. Alongside the right to a healthy environment, the permanent constitution could include specific content on the sustainable use of natural resources, Scotland's commitment to sustainable development and tackling climate change and the protection of the natural environment, including biodiversity.

Worldwide, 80 per cent of constitutions in force in 2020 included provisions on the protection of the environment.¹⁴⁸ Article 24 of the constitution of Greece, for example, makes protection of the natural and cultural environment an obligation of the state and a right of individuals. It obligates the state to "adopt special preventative or repressive measures for the preservation of the environment in the context of the principle of sustainable development."¹⁴⁹

While a constitutional provision does not guarantee the fulfilment of the right to a healthy environment,¹⁵⁰ the inclusion of environmental rights in constitutions has, overall, been linked to improved human rights and environmental outcomes, although the scale, precise language and scope of such provisions impact heavily on such effects.¹⁵¹ The Scottish Government recognises that it is vital that constitutional environmental rights are part of wider action across society on environmental rights and protections.

Land rights

The Constitutional Convention may wish to consider embedding the rights of communities to local land in the permanent constitution. This could build on the Scottish Land Rights and Responsibilities Statement,¹⁵² which is rooted in a human rights-based approach to land rights.

Human rights and equality monitoring and redress

Embedding human rights and equality in Scotland's constitution will not guarantee their realisation by itself. There will need to be a holistic approach focusing on realising of rights, including the implementation of legislation. It will be vital that the constitutional human rights and equality protections are effectively implemented, monitored and reported on and that remedies are available for those whose rights have been infringed upon.¹⁵³ These remedies "must be provided in a timely, accessible manner and there must be the availability of reparations where it is needed."¹⁵⁴

The role of National Human Rights Institutions and the Equality Regulator

National Human Rights Institutions play an important role in ensuring that human rights are respected, protected and fulfilled, including by monitoring and reporting on the policies and actions of public authorities. Doing so promotes good practice and helps ensure accountability. Provisions covering National Human Rights Institutions are included in several constitutions.¹⁵⁵ The UN considers that constitutional recognition of this kind is important in underlining the independent and objective role played by National Human Rights Institutions, as it enhances their standing within society in general and when dealing with other state institutions in particular.¹⁵⁶

Both the Scottish Human Rights Commission and the Equality and Human Rights Commission have important statutory functions under the current devolved settlement. Both are A-status UN-accredited National Human Rights Institutions, which are fully compliant with the requirements of the Paris Principles.¹⁵⁷ At present the work of both bodies is governed by ordinary domestic legislation.¹⁵⁸ In addition, the Children and Young People's Commissioner plays an important role in promoting and protecting the rights of children and young people in Scotland.¹⁵⁹

At present the UK has three separate, independent National Human Rights Institutions, reflecting the existence of the three distinct UK legal jurisdictions (Scotland, England and Wales, Northern Ireland). Recommended general practice is for a state to have only one UN-accredited National Human Rights Institution.¹⁶⁰ After independence, the current distinction between devolved and reserved areas of responsibility would cease to be relevant and the Scottish Human Rights Commission would assume responsibility as Scotland's sole National Human Rights Institution. Provision would continue to be made to ensure that the separate equality functions of the Equality and Human Rights Commission (for example in acting as an equality regulator, or in bringing legal challenges in relation to equality matters) continued to be exercised by an appropriate, independent Scottish body, either as part of the National Human Rights Institution or separately.

Both the National Taskforce for Human Rights Leadership¹⁶¹ and the First Minister's National Advisory Council on Women and Girls¹⁶² have recommended increasing the Scottish Human Rights Commission's powers. This is something that the Scottish Government is considering, in consultation with the Scottish Human Rights Commission and the Scottish Parliamentary Corporate Body, as part of wider proposals for the new Human Rights Bill.¹⁶³

It would then be for a future Constitutional Convention to decide how best to incorporate rights and equality provisions in a permanent constitution, and whether to include a provision on what institution or institutions would be best placed to take on equality and rights functions.

Granting constitutional protections to independent regulatory and oversight government institutions could ensure that future governments are monitored and can be held to account, when necessary. The Constitutional Convention could also consider further enhancing the status of the National Human Rights Institution, which alongside other independent regulatory and oversight government institutions are independent of the three branches of government and can be used to hold them to account.¹⁶⁴

Democratic engagement and fostering a human rights culture in Scotland

The Scottish Government is committed to promoting democratic engagement and fostering a strong human rights culture in Scotland. Democratic engagement and a strong human rights culture mean that people understand and are able to access their rights and the democratic processes that protect and give voice to those rights. Scotland needs a broad human rights culture and a strong institutional framework that makes these rights and equality protections real and enforceable. This entails not just legislative but also non-legislative actions. It is vital that there is wide political and societal buy-in, ensuring that state authorities, civil servants, private organisations, civil society and the general public understand and work to promote, uphold and realise these rights. This reflects that democracy is a "universal benchmark for human rights protection."¹⁶⁵

The Constitutional Convention and the awareness-raising, consultation and engagement programme linked to it would play an important role in fostering such support and awareness, helping to ensure democracy and human rights become more embedded into the everyday lives of the people of Scotland.

Conclusion

Independence would open choices to the people of Scotland. It would be a chance to do things differently and better, but also to continue doing the things we are already good at and to build on them.

The UK's constitution has allowed the Westminster government to disregard the decisions of the people of Scotland and undermine devolution.¹⁶⁶

Only independence can ensure that the people of Scotland decide who governs their nation and how.

And only independence will enable Scotland to complete its human rights journey and respect, protect and fulfil the range of internationally recognised human rights across Scotland.

The Scottish Government's proposals for an independent Scotland to have a modern, codified constitution, which derives its authority from the people of Scotland, would be a key milestone in that democratic and human rights journey.

A Constitutional Convention that would be responsible for Scotland's permanent written constitution, would ensure a participative and inclusive process by which the people of Scotland would shape their own constitution. And because this process should be open to all the people in Scotland, irrespective of how they might have voted in the referendum, the Constitutional Convention can only take place after the independence referendum.

The Scottish Government proposes that the adoption and implementation phase of the permanent constitution should be accompanied by an accessible awareness-raising campaign focusing on engagement and inclusion. The Scottish Government also believes that the permanent constitution, once drafted by the Constitutional Convention, should be confirmed in a vote by the people of Scotland.

A new constitutional settlement for Scotland, made in Scotland, would make a significant difference to the everyday life of the people of Scotland. It would enable the people of Scotland to make fundamental choices regarding how their state should be governed. It would enable us to build an independent Scotland that has democracy, human rights and equality at the heart of its foundation. Scotland would be able to continue to progress human rights and equality, without the limitations of the current devolution settlement and protected by independence from the Westminster government's attacks on devolution and human rights.

The Scottish Government believes that the process of the Constitutional Convention would provide an opportunity for the people of Scotland to engage in healthy debates about what the independent Scottish state, its institutions and core principles should be. The Scottish Government hopes that this would help lay the basis for future engagement and further build on the strong civil society that Scotland already has.

Having a highly informed and engaged population that can hold state institutions, including the Scottish Parliament and the Scottish Government, to account would play a vital part in ensuring that Scotland has a thriving modern democracy.

The Scottish Government wants to see a Scotland that is a world leader in incorporating, implementing and advancing human rights and equality. Only independence would enable Scotland to do so. As long as Scotland is a part of the UK, the people of Scotland will not have the level of constitutional protections for human rights and equality afforded to those countries that choose to embed those rights in codified constitutions. At present, the current and any future Westminster government could choose to undo any progress made in advancing human rights and equality in Scotland, including gains made under devolution.

The Scottish Government wants the people of Scotland to engage critically with our proposals and to examine how the constitution of an independent Scotland could and should work for the people of Scotland.

This paper aims to contribute to a wider conversation across Scotland about the proposals contained within it and what choices an independent Scotland should make.

Annex A: Human rights and equality in Scotland

Rights drawn from the European Convention on Human Rights are written into Scotland's devolution legislation. Laws passed by the Scottish Parliament that are incompatible with such Convention Rights are, simply, 'not law.'¹⁶⁷

Under the Scotland Act 1998, it falls to Scottish Ministers and the Scottish Parliament to observe and implement the UK's international obligations in devolved areas, including international human rights obligations. A Minister or Member of the Scottish Parliament is required to make a statement when introducing primary legislation that, within their view, it is within the legislative competence of the Scottish Parliament and therefore compatible with Convention Rights, and to provide a policy memorandum which sets out amongst other things the Bill's effects, if any, on human rights.

The Scotland Act also gives the Scottish courts the power to strike down Scottish Parliament legislation if it is found to be incompatible with Convention Rights.

Acts of the Scottish Parliament are, therefore, subject to stronger controls in relation to compatibility with Convention Rights than UK Acts are.

However, as the example of the UNCRC Bill demonstrates, the powers of the Scottish Parliament to protect and promote human rights even in devolved areas is limited. The Westminster Parliament ultimately has the power to alter human rights across both devolved and reserved areas and is not bound by the Human Rights Act. In an independent Scotland, the UNCRC Bill would, by now, already have been in force and the protections it provides to children would have commenced. Children would have been able to seek remedies and courts could already have been exercising their powers in relation to legislation and actions by public authorities that were incompatible with children's rights.

As outlined in this paper, the Scottish Government is determined to advance equality for all and to tackle inequality.¹⁶⁸ However, responsibility for equal opportunities is currently largely reserved to the Westminster Parliament, with only specific and limited exceptions. The Scottish Government has advanced equality legislation using these limited powers, for example with the Scottish Specific Duties and the introduction of additional equality legislation, including bringing into force the Fairer Scotland Duty.

In line with recommendations from the First Minister's National Advisory Council on Women and Girls,¹⁶⁹ the Scottish Government has pressed the Westminster government for the full devolution of equality of opportunity. However, only independence would give Scotland the full range of powers over equality law, allowing us to secure stronger equality protections, within and beyond a codified constitution.

Human rights and equality in Scotland since devolution

- 1998:** – The Consultative Steering Group publishes its ‘Shaping Scotland’s Parliament’ report, setting out four key principles that should inform how the Parliament works, including being accountable to the people, being open and accessible and promoting equal opportunities¹⁷⁰
- Scotland Act 1998, establishing the devolved Scottish Parliament and Scottish Government. Human rights are devolved¹⁷¹
 - UK Human Rights Act 1998, incorporating the European Convention on Human Rights into UK law¹⁷²
- 2003:** – Commissioner for Children and Young People (Scotland) Act 2003, establishing the Children and Young People’s Commissioner Scotland¹⁷³
- 2006:** – Scottish Commission for Human Rights Act 2006, establishing the Scottish Human Rights Commission¹⁷⁴
- UK Equality Act 2006, establishing the Equality and Human Rights Commission¹⁷⁵
- 2007:** – Equality and Human Rights Commission established
- 2008:** – Scottish Human Rights Commission established
- 2010:** – UK Equality Act 2010, bringing together existing equality legislation¹⁷⁶
- 2012:** – Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, imposing additional duties on specified Scottish public bodies¹⁷⁷
- 2013:** – Scotland’s National Action Plan on human rights 2013 – 2017, an initiative co-produced in partnership between the Scottish Government, the Scottish Human Rights Commission, civil society and the wider public sector, launched¹⁷⁸
- 2014:** – Children and Young People (Scotland) Act 2014, placing duties on Scottish Ministers and specific public bodies to report on their actions to progress and implement children’s rights set out in the UNCRC and increasing the powers of the Children and Young People’s Commissioner for Scotland¹⁷⁹
- 2016:** – Land Reform (Scotland) Act 2016, requiring Scottish Ministers to prepare and publish land rights and responsibilities statement, which must include a focus on the promotion of human rights (including rights set out in the International Covenant on Economic Social and Cultural Rights) and encouraging equal opportunities¹⁸⁰
- 2017:** – First Minister’s National Advisory Council on Women and Girls established¹⁸¹
- 2018:** – Fairer Scotland Duty (set out in Part 1 of the Equality Act) comes into force in Scotland¹⁸²
- The Social Security Act (Scotland) 2018 sets out that social security is a human right¹⁸³
 - Gender Representation on Public Boards (Scotland) Act 2018¹⁸⁴
 - First Minister’s Advisory Group on Human Rights Leadership is established to make recommendations on next steps in Scotland’s human rights journey and publishes its recommendations in December¹⁸⁵
- 2019:** – National Taskforce for Human Rights Leadership established to take forward recommendations of the First Minister’s Advisory Group on Human Rights¹⁸⁶

- 2020:** – First Minister’s National Advisory Council on Women and Girls publishes their 2020 Report and Recommendations¹⁸⁷
- 2021:** – Publication of the National Taskforce for Human Rights Leadership Report¹⁸⁸
- UNCRC Bill passed unanimously by the Scottish Parliament. The Bill was referred by the UK Government to the Supreme Court and, in October 2021, the Supreme Court ruled that certain aspects of the Bill were out with the powers of the Scottish Parliament¹⁸⁹
- 2022:** – First Minister’s National Advisory Council on Women and Girls Phase 2 established¹⁹⁰
- Scottish Parliament passes the Gender Recognition Reform (Scotland) Bill with support across all political parties represented in the Parliament¹⁹¹
- 2023:** – Westminster government makes an order under section 35 of the Scotland Act 1998, preventing the Scottish Parliament’s Gender Recognition Reform (Scotland) Bill from proceeding to Royal Assent¹⁹²

Upcoming:

- Scottish Human Rights Bill incorporating key human rights into Scots law, within limits of devolved competence
- A revised UNCRC Bill incorporating children and young people’s rights into Scots law

Annex B: A Scottish Constitutional Convention

This annex provides additional information on Scottish Government proposals for establishing a Constitutional Convention to develop a permanent constitution for an independent Scotland. The Scottish Government believes that the Constitutional Convention, as well as a wide awareness-raising, engagement and consultation programme on the permanent constitution, should be open, inclusive and non-discriminatory, providing opportunities for people and communities across Scotland to take part.

The design and governance of the Constitutional Convention would be clearly set out and its remit agreed by the Scottish Parliament.¹⁹³ There are, however, a number of key factors that can be set out now.

Constitutional Convention membership

The membership of the Constitutional Convention would reflect the diversity of the people who live here, and the process for recruitment of members would be designed to ensure fair and inclusive representation.

There are many ways in which Convention members could be selected to maximise representativeness. For example, members could be randomly selected to be broadly representative of the Scottish population. Criteria that could be taken into consideration as part of this selection include socio-demographic characteristics such as age, sex, disability, and minority ethnic communities, as well as household income, geography (ensuring participation from across Scotland's regions and rural and island communities), linguistic minorities and a measure of political attitudes, such as Scottish Parliament voting preference, to ensure participation from across the political spectrum.

Inclusion and accessibility

Taking a human rights-based approach entails putting inclusion and accessibility at the heart of the Constitutional Convention. Measures should be put in place to promote inclusion.

Both the Convention and the awareness-raising, engagement and consultation programme should focus specifically on engagement with people with, or who share protected characteristics. Information and engagement opportunities in British Sign Language, Gaelic, Scots and other key languages should be provided.

Building on the work on previous citizens' assemblies, the Convention could meet in person, with the option to draw on post-pandemic experiences of hybrid working to connect electronically with a wide range of people and organisations. Rural and island communities would be engaged with, represented and included.

People and groups who are socially or economically marginalised would be properly supported to contribute fully. The Scottish Government believes that Constitutional Convention members should be paid, and the cost of caring should be provided to ensure that all selected members can fully participate.

To ensure accessibility and that a lack of technological literacy or access to a digital device is not a barrier to participation, support, digital accessibility tools and digital devices could be provided. The Convention should recognise the importance of the members' different learning styles, with contributions being tailored to ensure the members have a shared understanding of the evidence. Scotland's Climate Assembly, for example, provides a useful model for inclusive approaches to citizen engagement.¹⁹⁴

Learning from international examples

There is an increasing global recognition that the direct involvement of citizens is a vital ingredient in constitutional development or amendment processes. Recent examples include the Netherlands in 2006, Ecuador in 2008, Iceland in 2010 to 2012 and in Chile in 2021. Ireland's reforms to their existing constitution in 2013 to 2014, also led to the convening of citizens' assemblies on same sex marriage and abortion legislation.

The methods used vary across these countries. They have included less formal crowd-sourcing of views from the general public in the initial stages and the more formal use of deliberative assemblies involving a randomly selected (or elected) group of the population to hear evidence and make recommendations, all of which can then be ratified either by parliament or through a referendum of the whole population.¹⁹⁵ In Ireland, participants were selected randomly while ensuring that the age, gender, socio-economic categories and geography of those selected was largely reflective of the wider society.¹⁹⁶ A steering committee of politicians and citizens approved the speakers and programmes for the Irish constitutional convention, ensuring the different perspectives and interests informed the discussion.¹⁹⁷

Scotland's Constitutional Convention could draw on and learn from these international examples to inform its approach.

Acronyms

ECHR	European Convention on Human Rights
REUL	Retained EU Law
REUL Bill	Westminster Government's Retained EU Law (Revocation and Reform) Bill
UK	United Kingdom
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child

Endnotes

- 1 Chair of the committee created by the United Nations Commission on Human Rights to draft the Universal Declaration of Human Rights, at the presentation of IN YOUR HANDS: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights, United Nations, New York, 27 March 1958. Cited in: United Nations (2022) [Human Rights Teaching Guide and Resources](#)
- 2 The practical implications and method of incorporation of any further rights and equalities treaties beyond those currently committed to by the Scottish Government would be a matter for the government of the day, and would take account of the commitment in this publication to including these in the interim constitution of a newly-independent Scotland
- 3 See for example, Mason, RA & Smith, M (2006) A Dialogue on the Law of Kingship among the Scots: George Buchanan's De Iure Regni apud Scotos with a new introduction by Roger A. Mason, Saltire Society, Edinburgh.; MacCormick, N., Questioning Sovereignty. Oxford University Press, 1999. For a critical analysis of the historic claim of popular sovereignty, see Kidd, C. Sovereignty and the Scottish Constitution Before 1707, Juridical Review, 2004, pp. 225-236
- 4 Anon, 1988. [A Claim of Right for Scotland](#), Edinburgh: [The Campaign]. The Scottish Parliament endorsed the Claim of Right on [26 January 2012](#), [28 March 2017](#) and [10 January 2023](#). The House of Commons endorsed the Claim of Right on [4 July 2018](#)
- 5 McCrone, D and Keating, M. [Exploring Sovereignty in Scotland](#). The Political Quarterly, 1 December 2022. The authors included questions on sovereignty in the Scottish Social Attitudes Surveys of 2019 and 2021, and found that a majority of people in Scotland agreed that "People in Scotland should have the ultimate right to decide for themselves how they should be governed" in both years (60% agreed in 2019 and 58% in 2021)
- 6 The Constitution Unit (2023) [Key constitutional terms and democratic practices: Explainers](#) (UCL)
- 7 The Constitution Unit (2023) [What are constitutional conventions?](#) (UCL)
- 8 McEwen, N. [The Sewel convention and Brexit | The Constitution Unit Blog \(constitution-unit.com\)](#), 2020. A. McHarg and A. L. Young, '[The Resilience of the \(Old\) British Constitution](#)', U.K. Const. L. Blog (8th Sept. 2021)
- 9 MacCormick v Lord Advocate, 1953 SC 396
- 10 House of Commons Library (2023) [The Crown and the constitution](#) (published 11/01/23)
- 11 Lilly, A. (12 May 2023) [Explainer: The Parliament Acts: What are the Parliament Acts and what do they do?](#), Institute for Government
- 12 Scottish Government (2022) [Building a New Scotland: Renewing democracy through independence](#), p. 21
- 13 See Hazell, R and Sayers-Carter, C. (2022) [Reforming the Prerogative](#) The Constitution Unit, p. 48: "This report contains examples of apparent conventions which ultimately lacked that binding quality: the proportionality principle in appointments to the House of Lords, violated by David Cameron and Boris Johnson (chapter 5); the requirement to consult the House of Commons before engaging in military action overseas, ignored by Theresa May (chapter 3)."
- 14 The Constitution Unit (2023) [What is the UK Constitution?](#) (UCL)
- 15 Scottish Government (2022) [Building a New Scotland: Renewing democracy through \(in\)dependence](#), p. 30
- 16 Torrance, D. (25 January 2022) [Research Briefing: Introduction to devolution in the United Kingdom](#), House of Commons Library, p. 5; and Paun, A. et al (16 January 2018) [Sewel convention: How the Sewel convention works in practice and what happens when devolved consent is withheld](#), Institute for Government
- 17 Supreme Court (2022) [Judgment: REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998, UKSC 31](#), para. 77
- 18 Supreme Court (2022) [Judgment: REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998, UKSC 31](#), para. 82
- 19 [Scotland Act 2016](#) TSO (The Stationery Office), 2016 (section 63A)
- 20 Scottish Government (2022) [Building a New Scotland: Renewing democracy through independence](#), p. 34
- 21 [Scotland Act 1998](#) TSO (The Stationery Office), 1998 (Section 35)

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- 22 Scottish Parliament (2023) [Bill and Laws: Gender Recognition Reform \(Scotland\) Bill: Stage 3 – Final changes and vote](#)

The Bill was also subject to extensive public consultation and engagement and the Presiding Officer of the Scottish Parliament and Law Officers were content that it was within the Parliament's powers to pass. In 2017, the Scottish Government consulted on the principles of reform to the Gender Recognition Act. A further consultation in 2019 focused on a number of specific aspects – including the requirement for applicants to live in their acquired gender for three months prior to submitting an application. The Scottish Parliament's Equalities, Human Rights and Civil Justice Committee also consulted on the Gender Recognition Reform (Scotland) Bill

Scottish Government (2018) [Review of the Gender Recognition Act 2004: consultation analysis](#)

Scottish Government (2021) [Gender Recognition Reform \(Scotland\) Bill: consultation analysis](#)

Scottish Parliament (2023) [Bills and Laws: Gender Recognition Reform \(Scotland\) Bill](#)

- 23 UK Government [Gender Recognition Reform \(Scotland\) Bill: statement from Alister Jack](#), 16 January 2023

- 24 UK Government [Scottish Deposit Return Scheme: UK internal market exclusion - \(www.gov.uk\)](#), 27 May 2023

- 25 [The Deposit and Return Scheme for Scotland Regulations 2020](#), TSO (The Stationery Office), 2020

- 26 Department for Environment, Food and Rural Affairs (2021) [Consultation on Introducing a Deposit Return Scheme in England, Wales and Northern Ireland](#)

- 27 UK Government (20 January 2023) [Introducing a Deposit Return Scheme for drinks containers in England, Wales and Northern Ireland - government response](#)

- 28 Under the Westminster Labour Government, the [Scotland Act 1998](#) set up the Scottish Parliament and the [Government of Wales Act 1998](#) set up a Welsh Assembly (now referred to as Senedd Cymru or the Welsh Parliament). The [Government of Wales Act 2006](#) gave legislative powers to the Welsh Assembly and established a separate Welsh civil service. [The Good Friday Agreement of 1998](#) led to the establishment of the Northern Ireland Assembly. The Westminster Labour Government also reformed the House of Lords with the [House of Lords Act 1999](#) removing most of the hereditary Peers, undertook electoral reform and incorporated key human rights and equality protections into UK law, including the [Human Rights Act 1998](#). Its [Constitutional Reform Act 2005](#) also set up the UK Supreme Court and increased the independence of the judiciary. Under Prime Minister Gordon Brown, the Labour Government also published [the 'An elected second chamber: further reform of the House of Lords' white paper in 2008](#), which committed the government to the creation of a 80% or 100% elected House of Lords, however this was never taken forward

The Conservative – Liberal Democrat coalition government agreed a number of constitutional reforms in their [2010 'The Coalition: our programme for government'](#) agreement. While the Five-Year Fixed Term Parliament Act was enacted, other reforms included in the agreement, including replacing the House of Lords with “a wholly or mainly elected upper chamber on the basis of proportional representation” were not put in place

None of these reforms have removed Westminster sovereignty or resulted in a single codified constitution

- 29 The Labour Party (2022) [A New Britain: Renewing our Democracy and Rebuilding our Economy](#)

- 30 Independent Commission on the Constitutional Future of Wales (2022) [Interim report](#)

- 31 The Constitution Unit (2023) [What is the UK Constitution?](#) (UCL)

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- 43 [Equality Act 2010, Section 149](#)
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- 51 Secretary of State for Scotland (3 May 2022) [Letter to Deputy First Minister and Cabinet Secretary for Covid Recovery](#)
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- States are expected to establish adequate administrative and judicial mechanisms for addressing claims of human rights violations and a failure to investigate such claims could give rise to a separate breach of human rights (UN Human Rights Committee, [General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant](#), 26 May 2004, para. 15).
- For remedies to be considered adequate, they must be affordable, timely, accessible and effective (Scottish Human Rights Commission (December 2020) [Adequate and Effective Remedies for Economic, Social and Cultural Rights: Background briefing paper for the National Taskforce on Human Rights Leadership](#)).
- An independent Scotland will need to meet these obligations. The enforcement of rights will be underpinned by a wealth of mechanisms, developed through legislation, as well as institutions working to enforce human rights. The role of the Scottish Human Rights Commission as Scotland's National Human Rights Institution will be of particular importance in this regard
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- 85 United Nations Office of the High Commissioner for Human Rights (2018) [Human Rights and Constitution Making](#), p. 14
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- 95 The precise wording of this right would be consulted on as part of the conversation with the people of Scotland about the terms of the interim constitution. It would draw on the longstanding legal protection in Scotland for a system of health care available free at the point of need, first set out in Part I: Section 1 of the National Health Service (Scotland) Act 1947, which states: (1) "It shall be the duty of the Secretary of State to promote the establishment in Scotland of a comprehensive health service designed to secure improvement in the physical and mental health of the people of Scotland and the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act"; and (2) "The services so provided shall be free of charge, except where any provision of this Act expressly provides for the making and recovery of charges."
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- 103 [Scotland Act 2016, Section 11](#)
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- 109 Folketinget (2013) [The Constitutional Act of Denmark of June 5th 1953](#), Article 82
- 110 Equality and Human Rights Commission (2014) [Equality, Human Rights and Constitutional Reform in Scotland: A report for the Equality and Human Rights Commission by Ewart Communications](#), p. 39
- 111 Research commissioned in 2014 by the Equality and Human Rights Commission found that civil society groups and non-governmental organisations generally believed that "a Constitutional Court should be established to adjudicate, expertly, on matters rather than using the general court system." Equality and Human Rights Commission (2014) [Equality, Human Rights and Constitutional Reform in Scotland: A report for the Equality and Human Rights Commission by Ewart Communications](#), p. 90
- 112 United Nations Office of the High Commissioner for Human Rights (2018) [Human Rights and Constitution Making](#), p. 99
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- 114 Folketinget (2013) [The Constitutional Act of Denmark of June 5th 1953](#), Article 19
- 115 [The Constitution of the Kingdom of the Netherlands 2008](#), Article 96
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- 128 [The German Basic Law](#), Article 1
- 129 [Constitution of the Republic of South Africa \(1996\)](#), Article 1 and Article 10
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- 137 [International Covenant on Economic, Social and Cultural Rights \(1966\)](#)
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- 143 Kavanagh, M. [The Right to Health: Institutional Effect of Constitutional Provisions on Health Outcomes](#), *Studies in Comparative International Development*, Vol 51, Issue 3, September 2016, pp. 328 – 364, p. 355
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