Law Society of Scotland

Consultation Response

A Human Rights Bill for Scotland

October 2023

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Scottish Government consultation*: A Human Rights Bill for Scotland*.[1] We have the following comments to put forward for consideration.

Executive Summary

We welcome the opportunity to comment on the Scottish Government's ambitious plans to create a new framework for embedding international human rights in Scotland. Whilst we consider the plan to be highlight laudable, we note the complexity of the proposals; potential legal issues in relation to international human rights and the existing national rights arrangements across UK and Scottish law; the need to be able to enforce those rights quickly and economically; and the issue of the resources required for proper implementation by public authorities.

We consider that the proposals do not include sufficient detail about the enforcement of the rights; the resources which will be needed for full implementation; the relationship between existing rights and international rights; and the practical effect which will be achieved by incorporation. In our view, the Scottish Human Rights Bill (SHRB) must contain such provisions. The Government must make clear why the bill is necessary and how it will comply with the rule of law requirement for reasonable certainty in any rule with a sanction.

We highlight the need for balanced and participative engagement and communication with affected stakeholders whilst the policy and legislative formulation of the substantive rights develops.

Part 4: Incorporating the Treaty Rights

In respect of the proposal to allow for dignity to be considered by the courts in interpreting the rights in the Bill, we acknowledge that human dignity is the basis of fundamental rights and is an underpinning interpretive consideration in international human rights jurisprudence. We highlight a number of references to dignity in the four major rights instruments which the Scottish Government intends to incorporate in

[1] A Human Rights Bill for Scotland: Consultation - Scottish Government - Citizen Space

Scots law. We also refer to relevant EU caselaw confirming that a fundamental right to human dignity is part of EU law.

We note the intention that the rights incorporated by the SHRB should be interpreted in accordance with international human rights law, taking in to account the various reference to dignity.

We highlight the existing respect for dignity in the criminal justice process, where the legal framework is designed in various ways to respect the dignity of the accused, complainers, victims and witnesses.

We note that there may be circumstances where challenges may arise regarding balancing the dignity of different parties to a case or dispute, and situations where the question of what is respectful of human dignity is highly contested.

Given that dignity is a term which already has wide application in international law, we consider that its use as an interpretive principle for courts and tribunals interpreting the rights set out in the SHRB should not fetter the discretion of the court or tribunal. We do not consider that courts should be required to treat dignity as a material consideration.

We call, however, for clarity on the intended effect of allowing courts to consider dignity in interpreting the rights in the SHRB and question whether the proposed provision for this in the interpretive clause of the Bill is required. We also note that there is no suggestion that human dignity will be defined by the Bill, and call for clarity on how the Bill will ensure consistency with the principle of human dignity as understood in international law. We highlight that the concept of human dignity must be flexible enough to encompass cultural differences and provide a coherent principled basis for court decisions.

On the proposals to allow for dignity to be a key threshold for definition the content of Minimum Core Obligations (MCOs), we call for further clarity. We suggest that using dignity as a ‘key threshold’ goes beyond its use as an interpretive principle (see above) and may require further definition alongside the other elements of the proposed MCO.

We call for the understanding of what constitutes dignity for the purposes of the MCO to be influenced by a collaborative process involving persons whose rights are likely to be impacted.

We suggest that a court or tribunal determining a question in connection with the treaties incorporated by the SHRB should be able to take into account treaty body decisions; general comments, observations and recommendations; and reports resulting from days of general discussion. We question, however, how the courts will determine the weight to be attached to different materials. We also note that the wider the gulf between the text of the treaty and the domestic provisions, the greater the potential difficulty in relying on such materials. We further highlight the challenges which may arise in interpreting open-textured concepts such as dignity, which may have different meanings in different contexts, and where international jurisprudence and different treaty bodies interpret the same concepts in divergent ways. We suggest that the SHRB should allow for flexibility of interpretation.

We note the proposed model of incorporation set out in the consultation paper, known as the adaptation model. Whilst we highlight some of the known challenges with this model, we acknowledge that some

adaption is required to ensure that the SHRB is within the legislative competence of the Scottish Parliament.

We call, however, for further clarity on a number of points, including: how the SHRB will ensure consistency and coherency between the rights in all the treaties, including where rights may overlap or require to be balanced; how the SHRB will ensure that the letter and spirit of the incorporated rights are upheld notwithstanding the adaption method; what is meant by the initial procedural duty for International Covenant on Economic, Social and Cultural Rights (ICESCR) rights and the right to a healthy environment; the distinction between the proposed initial procedural duty and the proposed procedural duty in relation to the equality treaties; whether private bodies performing public functions will be regarded as falling within the definition of Scottish public authority; how the proposed approach of the SHRB will void the equal opportunities reservation under the Scotland Act 1998, Schedule 5, section L2; and how the proposed different approach to protection for rights in the equality treaties will give those rights "legal effect in a coherent framework".

We suggest that as the Convention on the Rights of Persons with Disabilities (CRPD) includes rights that are specific to disability and in a manner which requires non-discrimination in rights enjoyment for people with disabilities, CRPD rights must be enforced as strongly as ICESCR rights.

Part 5: Recognising the Right to a Healthy Environment

We welcome the consideration of measures aimed at better securing and enforcing environmental rights.

On the proposed basis for defining the environment, we broadly agree with the distinction between the substantive and procedural aspects of the right to a healthy environment. However, we question the reference to the Aarhus Convention and note that the Aarhus definition is reflected in the Environmental Information (Scotland) Regulations 2004. We suggest that there may be merit in incorporating the Aarhus convention directly, rather than relying on it informing the interpretation and application of other rights.

We call for greater detail and guidance around the procedural and substantive aspects of the rights proposed in relation to a healthy environment, and how these will be implemented. Without this, we question how courts can reach coherent and consistent decisions in line with the rule of law requirement for reasonable certainty in any rule which carries a sanction, whether civil or criminal. We also highlight that consideration of this topic more widely will engage a range of areas within devolved and reserved competence, for which consideration of impacts on the internal market will also be required.

We disagree with the proposed approach to the protection of healthy and sustainable food as part of the incorporation of the right to adequate food in ICESCR, rather than as a substantive aspect of the right to a healthy environment. We consider that the right to adequate food in the ICESCR and the environmental aspects of food production are separate matters and need to be treated separately.

We agree with the proposed approach to including safe and sufficient water as a substantive aspect of the right to a healthy environment.

We would welcome greater clarity on the scope of the rights being claimed by legal persons.

We highlight that it is difficult to understand how it is possible to have a right to a healthy environment without also considering the right to have an environment free from climate change.

Part 6: Incorporating Further Rights and Embedding Equality

We suggest that the SHRB should not aim to be a comprehensive compendium of all human rights in Scotland. Whilst we do not consider that existing human rights provisions should be repeated or duplicated, we suggest that the SHRB could contain a declaration that the HRA, the Equalities Act 2010 and other enactments including the SHRB and any other relevant rule of law form part of the law relating to human rights in Scotland.

We note our concern about the decision not to make any provision with respect to the Convention Against Torture.

We highlight that the consultation paper is silent as to what is meant by embedding “participation in the framework” of the SHRB or how it is proposed to be achieved. We highlight existing guides to good practice in public participation under other international treaties, and our concerns about the need for democratic accountability in this process. We also suggest that consideration should be given to any potential interaction with the Public Sector Equality Duties.

Whilst we agreed that everyone should be able to access the rights incorporated in the SHRB, we question whether it is necessary to do to by having an equality provision in the Bill and how this policy intention will be achieved given the Equal Opportunities reservation under the Scotland Act 1998 Schedule 5, section L2. We highlight specific considerations in relation to the rights of disabled people and older people.

We also highlight that the simplest approach to defining the groups to be protected by any equality provision may be to incorporate, by reference, the protected characteristics in domestic equality law.

Part 7: The Duties

We note the general intention to apply the regime to private actors and private bodies when they are performing a public function. We would welcome greater detail on the intended operation of this and any potential interaction with the Equal Opportunities reservation contained in Schedule 5 section L of the Scotland Act 1998.

We would also welcome clarity on the proposed approach to defining duty-bearers in the SHRB, and to defining “functions of a public nature”.

On the proposed initial procedural duty intended to embed rights in decision making, we would welcome further clarity on how the proposed duties arising under the SHRB will be framed. In particular, we note the conceptual difference between a ‘duty to have regard’ and a ‘duty to comply’. We also note the need for the Bill to address the question of what happens when rights conflict. We call for clear guidance for bodies discharging the procedural duty, and clarity on who will oversee and support the implementation of the duty. In addition, we call for appropriate resourcing and capacity-building for duty-bearers. We would also

welcome clarity on whether it is intended that the initial procedural duty will be retained when the compliance duty comes in to force.

We consider that a duty to comply is inevitable if the rights in the SHRB are to be meaningful. However, we highlight some concerns about the democratic legitimacy of the proposed approach of defining MCOs via a further participatory process rather than in the Bill. We call for clarity on the training, guidance and resources which will be provided to Scottish public authorities to help them comply with this proposed duty.

Any reporting duty on public authorities must be proportionate and cost effective, and supported by adequate training, guidance and resources. We would welcome clarity on the interaction with existing reporting duties for public authorities, which we suggest could be aligned with duties to report under the Bill, and on proposed application to private bodies performing public functions.

We call for clarity on when MCOs will apply, and accountability on government or public bodies to demonstrate how they will go about progressive realisation over time. We consider that there may be situations where the rights breach is so egregious that it should be seen as breaching the MCOs, even although it may be difficult to secure. Given progressive realisation will mean that the nature and extent of duties and rights will change over time, we highlighted the need for consideration of how this will be reflected in a way that nonetheless offers clarity on rights and duties.

We understand the rationale for treating the right of a healthy environment in the same manner in the SHRB as economic, social and cultural rights. However, we recognise the potential challenges in relation to reserved and devolved matters.

We agree that Scottish Ministers should be under a statutory duty to publish a Human Rights Scheme reporting to the Parliament on the implementation of the legislation by Scottish Ministers and by Scottish Public Authorities. We make a number of suggestions for the content of the scheme.

Part 8: Ensuring Access to Justice for Rights Holders

In order for rights holders to understand and enforce their rights we call for adequate funding of advocacy services, and for legal advice and assistance to be made available. We call for the Scottish Government to be under a duty to report on how they have supported advocacy services and enhanced the system of legal advice and assistance.

On the proposal in relation to front-line complaints handling mechanisms of public bodies, we note the significant increase in powers for the SPSO and highlight that there should be a commensurate increase in resourcing. We also seek clarification on what force any ‘declaration of non-compliance’ issued by SPSO would have.

We welcome that the Scottish Government acknowledges that “Access to legal aid is an important aspect in supporting rights-holders to claim their rights through the courts, where they choose to”. We highlight that any reform should be adequately funded to ensure that Civil Advice & Assistance and Civil Legal Aid is available to individuals seeking advice or representation before any Court or Tribunal.

We highlight the need for complaints handling processes to be fair and transparent, potentially including an opportunity for representations for others affected by the issues under consideration. We note the particular need for careful consideration of the powers envisaged for the SPSO to exercise its "own initiative investigation". We call for further detail on how SPSO complaints will interact with other complaints processes. We also highlight the need for complaints process to be sufficiently expeditious to deliver remedial action where it is urgently required, and for the system to support the ability of groups to take actions on behalf of their members or as representatives.

We highlight concerns regarding the very wide-ranging expansion of the SPSO remit as an incidental aspect of addressing the development of the human rights regime in Scotland, and the tension between the SPSO system which is based on maladministration and recommendations and the protection of legally recognised rights. We call for clarification on the relationships between seeking recourse through the SPSO (and other non-judicial routes) and asserting rights, given the time limits for taking court action. We highlight that in some situations legal action will be necessary from the start.

We welcome the proposal to remove the restriction on the SPSO receiving oral complaints, but call for more information on the process.

On the proposals in relation to scrutiny bodies, we agree that scrutiny bodies can play an important role in holding devolved public services to account in relation to human rights and helping to drive culture change in service delivery. However, we call for further clarity on the proposals and the reasons for them. We also call for clarity on the additional resources to be given to scrutiny bodies to enable them to meet their obligations; the consequences where scrutiny bodies fail to meet the requirements of the SHRB; how scrutiny bodes will be able to identify and refer human rights issues; and how they will be able to share information with each other.

We note proposals for additional powers for the Scottish Human Rights Commission, highlighting that the ability to raise proceedings in the name of the Commission may reduce the need for litigation by individuals, enable the Commission to address structural issues and adopt a more strategic approach, and create more human rights compliance. We call for the Scottish Government to produce evidence including projections about how often these powers may be exercised, and the additional resources required to make the powers effective. We also highlight the need for consideration of data sharing arrangements with, and the need to avoid overlap with the powers of, the SPSO.

We consider that the Children and Young People's Commissioner Scotland should have similar powers to the SPSO and the SHRC, subject to the above calls for evidence to support the proposals and the need to avoid unnecessary duplication of investigative work or litigation.

We take the view that the rules for standing under the SHRB should follow the existing statutory rules under the Court of Session Act 1988 section 27B(2)(a) as amended by section 89 of the Court Reform (Scotland) Act 2014 namely the "sufficient interest test". We would welcome clarification on the proposed test (if any) for the court to grant permission to intervene to the SHRC or CYPCS. We also note that there may be merit in considering whether other scrutiny bodies or human rights organisations should have standing.

On the approach to assessing 'reasonableness' under the SHRB, we recognise that there is a case for a higher standard of review than *Wednesbury* and suggest that for consistency with both the HRA and the *de facto* position under the principle of legality, proportionality would seem to be the standard to adopt. However, we highlight that this would represent a substantial change to a key area of Scottish public administrative law, and call for wider consultation on the consequences of any proposed changes.

We highlight conflicting views on whether existing judicial remedies are sufficient in delivering effective remedy for rights-holders, and how any changes to the remedies available to the court should be made.

In the event that a court finds legislation incompatible with the rights in the SHRB, we consider that courts should have the power to declare legislative provisions unlawful on human rights incompatibility grounds. The Courts should have power to require a process of review and reconsideration to enable that the relevant rights to be delivered in a reasonable timescale without the disruptive effect of legislative provisions becoming immediately unlawful and ineffective.

Part 9: Implementing the New Scottish Human Rights

We support a sequenced approach to implementation, to allow the Scottish Government to prepare and consult upon the appropriate guidance and implementing regulations and to allow Scottish public authorities time to be in a position to implement the duties incumbent upon them. We call for an indication of the proposed timescale for brining legislation in to force.

We agree, subject to ensuring democratic accountability, with the Scottish Government's proposal to engage in a participatory process in the creation of the MCOs. We take the view that the conclusions of the participatory process must be agreed by Parliament and given legislative form - at a minimum delegated legislation subject to a super-affirmative procedure – and this needs to be specified on the face of the SHRB. Further detail on the process must be consulted upon before the SHRB is published.

On the proposal for enhancing the assessment and scrutiny of legislation introduced to the Scottish Parliament in relation to the rights in the SHRB, we call for further clarification of the proposals. We highlight that in our view, it would not be appropriate (and might even be an unlawful modification of the Scotland Act's provisions on competence) to make a statement of compatibility with the SHRB a precondition of a Bill being introduced, either legislatively or via the Ministerial code. We suggest that the Scottish Parliament processes for assessing the scrutiny of Bills in relation to human rights under the Bill should be the same as their scrutiny of legislative competence issues.

We recognise that Scottish public authorities will be best placed to answer questions on how Scottish Government and partners can effectively build capacity for delivery of the rights in the Bill, and provide effective information and raise awareness for rights-holders. However, we do highlight the benefits for all of a clear, consistent and coherent scheme, and the need for adequate resourcing and training.

Introductory comments

The Scottish Government's ambitious plans to create a new framework for embedding international human rights in Scotland are highly laudable. They ought to ensure that people in Scotland are aware of their rights and that they can exercise them to the extent of the law. However, we note the complexity of the proposals, potential legal issues in relation to international human rights and the existing national rights arrangements across UK and Scottish law, the need to be able to enforce those rights quickly and economically and the issue of the resources required for proper implementation by public authorities.

How will the Scottish Government intend to deliver and ensure the enforceability of the broad spectrum of human rights involved?

The proposals do not include sufficient detail about:

a. The enforcement of these rights.

b. The resources which will be needed to fully implement all the international covenants and conventions and new domestic rights.

c. The relationship between existing rights provisions and the international suite of rights.

d. The practical effect which will be achieved by this incorporation. The Consultation Paper makes no reference to any other European or other country which has incorporated these rights and does not explain what effect it has had.

In our view the Scottish Human Rights Bill (SHRB) will need to contain such provisions. It must be clear why the proposed Bill is necessary, and the gaps which existing in current law that the proposed Bill would fill. It must be clear how the law will allow judges and the legal system generally to implement coherent decisions in practical cases, consistent with the rule of law requirement for reasonable certainty in any rule with a sanction- civil or criminal.

The consultation proposals are themselves complicated, lengthy and lacking in detail. We note that effective and accessible consultation is in and of itself an access to justice issue.

We consider that whilst the policy and legislative formulation of the substantive rights develops, engagement and detailed communication with affected stakeholders will be extremely important. This process must be balanced and participative, with representations from all sectors and civic society – and the design of any future framework must balance these considerations.

By way of background, we note our previous involvement in the National Taskforce for Human Rights Leadership and the Working Group supporting the Taskforce.

Consultation Questions

Part 4: Incorporating the Treaty Rights

1. What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?

Dignity is an important underpinning interpretive consideration in International Human Rights jurisprudence. We note that dignity is referred to in the four major rights instruments which the Scottish Government intends to incorporate in Scots law. We acknowledge that human dignity is the basis of fundamental rights. The Universal Declaration of Human Rights confirms this in the first paragraph of its preamble: "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*."[2]

Some other examples drawn from the covenants and conventions which the Scottish Government seeks to incorporate into Scots law include:

a. The preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which states: *The States Parties to the present Covenant, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person.*

b. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW): *Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women, Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex…*

c. The preamble to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD): *Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion… Considering that the Universal Declaration of*

[2] OHCHR | Universal Declaration of Human Rights - English

Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin.

d. Finally in the Convention on the Rights of Persons with Disabilities (CRPD) the concept is mentioned on several occasions: in the preamble, and articles 1 (Purpose), 3 (General Principles), 8 (Awareness-raising), Article 16 (Freedom from exploitation, violence and abuse) and 24 (Education).

In the *Kingdom of the Netherlands v European Parliament and Council*,[3] the Court of Justice of the European Union at paragraph 70 confirmed that a fundamental right to human dignity is part of EU law: *"It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed."*. In the opinion of Advocate General Jacobs at paragraph 197: *"There can be no doubt in my view that the rights invoked by the Netherlands are indeed fundamental rights, respect for which must be ensured in the Community legal order. The right to human dignity is perhaps the most fundamental right of all and is now expressed in Article 1 of the Charter of Fundamental Rights of the European Union, 174 which states that human dignity is inviolable and must be respected and protected."*

We understand:

- that the policy intention of the Scottish Government is that the rights which are incorporated by the SHRB should be interpreted in accordance with international human rights law;
- that objective would be achieved by providing that those rights should be interpreted in accordance with that law; and
- that that interpretation would take account of what is stated in the preamble to each Treaty, including the various references, in different ways, to dignity.

In the criminal law context, the dignity of all those going through the criminal justice system should be, and to a great extent already is, a key consideration at all stages of the criminal justice process. From a criminal justice perspective, CEDAW, ICERD and CRPD are of likely to be of relevance where the accused or a witness is a rights holder under these conventions.

The existing criminal justice legal framework is designed in various ways to respect the dignity of the accused, complainers, victims and witnesses. These include special measures for vulnerable witnesses, the Victim's Code for Scotland, the scope for victims or their next of kin to make a victim statement, the provisions in place to prevent delays in trials, the right to legal representation during police interviews and a formal appropriate adult scheme. The Victims Witnesses and Justice Reform (Scotland) Bill[4] includes more measures to improve complainers' and witnesses experience of the criminal justice process, such as

[3] [2001] ECR1-I-7079

[4] Victims, Witnesses, and Justice Reform (Scotland) Bill – Bills (proposed laws) – Scottish Parliament | Scottish Parliament Website

embedding the principles of trauma informed practice and the entitlement of complainers in rape and serious sexual offences to independent legal advice and representation. All of these measures implicitly acknowledge the inherent dignity of the human person. However, existing measures are not always effective in practice for example the recent Irish extradition case where the Irish High Court refused to extradite a person to Scotland on humanitarian grounds relating to the Scottish authorities not being able to guarantee that the accused's mental health needs would be specifically attended to and concerns regarding standards of service provided by GEOAmey, the contractor responsible for prisoner transfer and custody. Work needs to be done to ensure, so far as is practicable and sustainable, that existing rights are upheld and can be enforced before adding an additional layer of legislation.

There may be circumstances where challenges may arise regarding balancing the dignity of different parties to a case or dispute, and situations- such as decisions on withdrawal of medical treatment- where the question of what is respectful of human dignity is highly contested.

Dignity is a term that has wide application in international law. Provided that the term 'dignity' is clearly understood within the context of the SHRB as an interpretative principle arising from international law this would not fetter the discretion of any Court or Tribunal. The SHRB should ensure that this only requires a Court to interpret the rights set out in the Bill using dignity as a guiding principle, and not a material consideration. We note the analysis of Dr Webster in the briefing paper for the Academic Advisory Panel to the National Taskforce for Human Rights Leadership.[5]

However, what is the intended effect of the proposal to allow for dignity to be considered by courts in interpreting the rights in the SHRB? How will the courts interpret the treaty rights if each one is tested against the principle? Indeed, it is not clear what the Consultation Paper means when it states on page 14-

"Our proposal is to achieve this by ensuring the interpretative clause of the Bill allows courts to consider dignity when adjudicating on the rights in the Bill"

What is it intended that "consider" should mean in this context?

Is it necessary to have a special provision in the interpretative clause in the SHRB providing that the rights in the Bill should be interpreted and applied in accordance with the principle of human dignity?

There is no suggestion that "human dignity" will be defined in the SHRB. Instead, it will be a matter for the court to determine when "*interpreting the treaties, including their preambles, as well as accompanying guidance, concluding observations, and international jurisprudence*".

How will the SHRB ensure that what is meant by the principle of human dignity in the SHRB is the same as that understood in international law?

Vagueness may be acceptable in respect of a principle but is not acceptable if dignity is to be treated as a right in this context. Although there is a general acceptance of the concept of human dignity it has been

[5] The Underpinning Concept of 'Human Dignity', June 2020, https://strathprints.strath.ac.uk/77785/1/Webster_AAP_2021_The_Underpinning_Concept_of_Human.pdf

noted that, in the jurisprudence, there is no common substantive conception of dignity and it is a concept which is *"culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting, conceptions".*[6] On the other hand it has been suggested that *"a substantive ….dialogue on the meaning of human dignity is vital to the future of the human rights experiment".*[7] To be applied in practice, the concept of human dignity must be flexible enough to encompass these cultural differences and provide a coherent principled basis for court decisions.

2. What are your views on our proposal to allow for dignity to be a key threshold for defining the content of MCOs?

We note that the consultation states "*Our intention is therefore for human dignity to be integrated into the framework as a fundamental value which can be used in reading and interpreting the framework as a whole.*" It is not clear what the Consultation Paper means when it states on page 14-

"We also want to ensure that the process for defining minimum core obligations (MCOs) as part of the framework recognises human dignity as a key threshold for defining this content and delivering them in practice"

It is not explained what is meant by dignity being a key threshold for defining the content of MCOs or how it is used to define that content. The use of the term "Key Threshold" suggests a more concrete (and inappropriate) role than just an interpretative principle (see our comments above).

As above, there is no suggestion that "human dignity" will be defined in the SHRB. Instead, it will be a matter for the court to determine when "*interpreting the treaties, including their preambles, as well as accompanying guidance, concluding observations, and international jurisprudence*".

Taking into account what we have said about dignity in question 1 as it relates to a principle which works though the treaties, there may be a distinction in recognising human dignity in that sense and ensuring that the Minimum Core Obligation (MCO) recognises human dignity as a key threshold, which we believe needs better definition. The Scottish Government would need to set out in the SHRB the other elements of an MCO.

The collaborative process of developing MCOs should influence the understanding of what constitutes dignity for the purpose of defining the content of MCOs, particularly where the issue concerns the obligations of public bodies to provide support and assistance to individuals. Previous caselaw (for example the majority decision of the UK Supreme Court in the case of *McDonald v Kensington and*

[6] McCrudden, C. 'Human Dignity and Judicial Interpretation of Human Rights' 19 EJIL (2008) 655 at 698

[7] Carozza, P.G., 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' 19 EJIL Vol 5 (2008) 931 at 944

Chelsea[8]) has arguably set a high threshold before it can be said that a person's dignity has not been upheld. This engagement process must involve persons whose rights are likely to be impacted.

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

We take the view that a court or tribunal which is determining a question in connection with the treaties incorporated by the SHRB may take into account: – (a) treaty bodies decisions, (b) general comments, observations and recommendations; and (c) reports resulting from days of general discussion. The matters to be included are more than the travaux préparatoires but they might all be useful to be "taken into account" by a court when interpreting a treaty text. The question remains however, how will the courts be able to determine the weight to be put on different materials?

As an example, in the context of the UN Convention on the Rights of the Child (UNCRC), we note the work of the UN Committee on the Rights of the Child. The third optional protocol on a communications procedure (OPIC) sets out an international complaints procedure for child rights violations. Though the UK has yet to ratify this optional protocol, decisions on complaints in jurisdictions that have ratified this optional protocol may be pertinent in considering whether UNCRC requirements are being met in Scotland. We highlight recent decisions around age assessments of unaccompanied children in Spain, CRC/C/81/D/22/2017[9] and CRC/C/81/D/16/2017.[10] It would be appropriate for courts in Scotland to be able to consider these decisions of the UN Committee, notwithstanding the third optional protocol remaining to be ratified, and in so far as any judgment on such issues would be competent for a Scottish court to make.

However, we also note that given the use of the adaptation method of incorporation (see below) the wider the gulf between the text of the treaty and the domestic provision, the greater the potential difficulty in relying on treaty body jurisprudence, general comments, travaux préparatoires etc. in line with the potential interpretive provision.

Account will have to be taken of the potentially problematic nature of the justiciability and relevance of the international jurisprudence in construing the meaning of open-textured concepts such as "dignity" in the domestic setting, bearing in mind that this term will have different meanings in different contexts (see our comments above). There is also the risk of confusion where international jurisprudence and different treaty bodies interpret the same concepts that feature in human rights and equalities treaties in widely divergent ways. As such, any legislation that is directed at the domestic courts and tribunals to put into effect and implement should take this possibility into account.

[8] [2011] UKSC 33

[9] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%252FC%252F81%252FD%252F22%252F2017&Lang=en

[10] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%252FC%252F81%252FD%252F16%252F2017&Lang=en

Where treaty bodies' interpretations of certain rights differ we agree that the SHRB should allow for flexibility of interpretation. For example, this could be specifically addressed by prescribing machinery to guide the domestic courts and tribunals, such as (1) specifying preferred treaties or treaty bodies, with one treaty body's interpretations taking precedence over others, or (2) identifying a hierarchy of sources, e.g. with international jurisprudence taking priority and a second and third order priority.

4. What are your views on the proposed model of incorporation?

The proposed model of incorporation comprises the 5 elements set out on page 18 of the Consultation Paper. The proposal to reproduce the direct text from the Treaties might seem to be the better way of incorporating the rights rather than attempting to restate them. This is known as the adaption model.[11] We note that this approach has been described as cumbersome and problematic in that it can allow national and linguistic sensitivities to come into play, potentially distancing the domestic legal framework from the treaty.[12]

However, in order to ensure that the SHRB is within the competence of the Scottish Parliament, the text of the Treaties would **need** to be amended to remove anything which could relate to any of the reserved maters in the Scotland Act 1998. We have the following questions about the consultation approach:

- How will the SHRB ensure that the rights in all the treaties are "read, interpreted and applied consistently and coherently with one another" which is stated to be "a fundamental consideration" (page 17)? What approach will be adapted where rights may overlap or require to be balanced?
- How will the SHRB be able to ensure that the letter and spirit of the rights which it seeks to incorporate are upheld when using the adaptation method?
- Regarding the core ICESCR rights and the right to a healthy environment, it is not clear what is meant by the initial procedural duty upon public bodies or when it becomes a duty to comply with them. Can the Scottish Government clarify this issue?
- It is proposed that the initial procedural duty and the duty to comply will be imposed, so far as possible, on private sector bodies. What is the distinction between the proposed initial procedural duty and the proposed procedural duty in relation to the equality treaties to ensure that all the rights in the equality treaties are treated in a holistic way?
- The Scotland Act 1998 section 126(1) provides that "Scottish public authority" means any public body (except the Parliamentary Corporation), public office or holder of such an office whose functions (in each case) are exercisable only in or as regards Scotland. This can be contrasted with the definition of "public authority" in the Human Rights Act (HRA) section 6 (3). In section 6 "public authority" includes…(b) any person certain of whose functions are functions of a public nature…". Can the

[11] See the Venice Commission *REPORT ON THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES IN DOMESTIC LAW AND THE ROLE OF COURTS*, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e, at para. 23.

[12] Echoing Klabbers *International Law* (2nd edn, Cambridge University Press 2017) p. 327

Scottish Government confirm whether private bodies performing public functions will be regarded as falling within the definition of Scottish public authority?

- How will this approach avoid the equal opportunities reservation under the Scotland Act 1998, Schedule 5, section L2? Are the proposals intended to fall within the exception relating to Scottish public authorities?
- It is not clear how “by taking a different approach to protection for rights in the equality treaties compared with the core ICESCR rights and the right to a healthy environment.”, give those rights “legal effect in a coherent framework” (page18)? What does this mean?

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

Whilst it might be said that the CRPD sets out rights that already exist in other treaties it is important to recognise that the CRPD in fact includes rights that are specific to disability and in a manner which requires non-discrimination in rights enjoyment for people with disabilities. We therefore consider that CRPD rights must be enforced as strongly as ICESCR rights, and we particularly emphasise the importance of there being strong duties around rights of Independent Living (Article 19 CRPD), Habilitation (Article 26 CRPD) and Protection from Abuse (Article 16 CRPD).

The ICESCR and CRPD both contain equality provisions, the UK as a state party to both treaties, is required to give effect to the rights in accordance with these provisions and, indeed, section 58(1) Scotland Act 1998 allows the UK Government to prevent devolved legislation which is inconsistent with such international obligations thus inferring the need for compliance with these treaty equality requirements in Scottish devolved legislation.

Part 5: Recognising the Right to a Healthy Environment

6. Do you agree or disagree with our proposed basis for defining the environment?

We are supportive of and welcome the consideration of measures aimed at better securing and enforcing environmental rights under Scots Law.

We broadly agree with the distinction between the substantive and procedural aspects of the right to a healthy environment. However, we question the reference to the Aarhus Convention.

The Aarhus Convention was created to empower the role of citizens and civil society organisations in environmental matters and is founded on the principles of participative democracy.

The Convention establishes a number of rights to the individuals and civil society organizations with regard to the environment. The Parties to the Convention are required to make the necessary provisions so that public authorities, at a national, regional or local level, will contribute to these rights to become effective. The Aarhus Convention provides for:

- *Access to environmental information:* The right of the citizens to receive environmental information that is held by public authorities.
- *Public participation in environmental decision making:* The right of the citizens to participate in preparing plans, programmes, policies, and legislation that may affect the environment.
- *Access to justice:* The right of the citizens to have access to review procedures when their rights with respect to access to information or public participation have been violated.

The Convention's Protocol on Pollutant Release and Transfer Registers (PRTRs) entered into force in October 2009. It enhances public access to information through the establishment of coherent, nationwide pollutant release and transfer registers (PRTRs). PRTRs are inventories of pollution from industrial sites and other sources.

The reference which approximates to a right to a healthy environment is that mentioned in the preamble and in the Article 1 objectives as "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being." It does not as the paper states make "specific reference to ecosystems and the biosphere.".

There is reference in Article 2.3 which covers definitions which describes (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; (b) Factors, such as substances , energy, noise and radiation… (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment…".

The Aarhus definition is reflected in the Environmental Information (Scotland) Regulations 2004 (S.S.I. 2004/520). What definition of "environment" will the Scottish Government use?

Furthermore Part 5 is brief and lacks clarity around how the statements in the consultation will translate into clear and workable provisions in the SHRB. Much greater detail and guidance is required around the procedural and substantive aspects of the rights proposed in relation to a healthy environment. Without this, it is challenging to consider how one can comply with the proposals if the intended content and effect is unclear.

We consider that, whilst these rights are expressed in the consultation as though they are law, without further detail there is a concern that they cannot be used by courts as normative parts of the law with any confidence, or to ensure that coherent and consistent decisions are reached and implemented. This is particularly important in the context of the rule of law requirement for reasonable certainty in any rule which carries a sanction, whether civil or criminal.

A clear statement of what, legally, is going to change and the legal status of the rights following the proposals is essential to better understand the proposals.

Whilst we welcome including substantive aspects relating to clean air, safe and sufficient water, non-toxic environments, healthy ecosystems and biodiversity, and safe climate – more detail and further discussion will be required around how these will be assessed. We take the view that noise and light pollution should be included as elements affecting a healthy environment.

The consultation should be explicit that the rights being considered are not absolute and that there will be legitimate reasons why one individual's rights have to give way to those of others.

More generally, there will be challenges in implementing and determining how any authority in Scotland can take responsibility for a "safe climate".

We also note that the aviation industry has not been discussed in the consultation and consider that this will be relevant in this context. Consideration of this topic more widely will engage a range of areas within devolved and reserved competence, for which consideration of impacts on the internal market will also be required.

7. If you disagree please explain why.

Not applicable.

8. What are your views on the proposed formulation of the substantive and procedural aspects of the right to a healthy environment?

We agree that the distinction drawn seems adequate but there are no international materials relating to this new right similar to those which the courts could use to interpret the rights in the treaties. What materials can the courts take into account when interpreting this right? Would the right to a healthy environment include a right to have an environment free from climate change? If so, how would it be realised?

There may be merit in incorporating the Aarhus convention directly, rather than relying on it informing the interpretation and application of other rights.

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

We do not agree with the Scottish Government's approach. The Scottish Government will need to explain more clearly why the right to adequate food in ICESCR should provide adequate protection for the environmental aspects of food production. These are separate matters and need to be treated separately.

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

We agree with the Scottish Government's proposed approach to including safe and sufficient water as a substantive aspect of the right to a healthy environment for the reasons set out on page 22 of the Consultation Paper.

11. Are there any other substantive or procedural elements you think should be understood as aspects of the right?

See comments at question 8 regarding the benefits of incorporating the Aarhus convention directly.

We would also welcome greater clarity on the scope of the rights being claimed by legal persons. For example, we note that in some cases, e.g. Article 15 of the International Covenant on Economic, Social and Cultural Rights, it might be possible for groups or companies to claim the benefit of the rights.

It is difficult to understand how it is possible to have a right to a healthy environment without also considering the right to have an environment free from climate change.

Part 6: Incorporating Further Rights and Embedding Equality

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

It is not clear whether it is intended that the SHRB should simply be concerned with incorporating the rights in the equalities treaties (and the right to a healthy environment) or whether it is intended that that the

SHRB should be a comprehensive compendium of all human rights in Scotland. We take the view that the Bill should be limited to the former objective.

It would be difficult for the SHRB to be a comprehensive compendium of human rights in Scotland without including at least references to the common law and to UK Acts (such as HRA, and the Equality Act 2010).

The SHRB could contain a declaration that the HRA, the Equalities Act 2010 and other enactments including the SHRB and any other relevant rule of law form part of the law relating to human rights in Scotland. That kind of formulation would avoid any modification of the HRA. It is consistent with the interdependence and indivisibility of all categories of rights.

We do not consider that existing human rights provisions should be repeated or duplicated.

We are concerned about the decision not to make any provision with respect to the Convention Against Torture, aspects of which are wider than Article 3 ECHR. In particular, we believe reference should be made to OPCAT, and the longstanding argument by the UK National Preventive Mechanism (NPM) that formal legal status should be given to the mandate of its constituent members. These include several bodies established under devolved powers (the Mental Welfare Commission for Scotland, the Care Inspectorate, HM Inspectorate of Prisons for Scotland, Independent Custody Visitors Scotland and Scottish Human Rights Commission).

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

The Consultation Paper is silent as to what is meant by embedding “participation in the framework” of the SHRB or how it is proposed to be achieved.

The Aarhus Implementation Guide produced in 2014 and the Maastricht Recommendations on Promoting Public Participation in Effective Decision Making in Environmental Matters prepared under the Aarhus Convention produced in 2015 (both of which are not legally binding) provide a guide to good practice in public participation. The findings of the Aarhus Convention Compliance Committee (the “ACCC”) also contribute to the interpretation of Convention obligations. The Committee on the Rights of Persons with Disabilities General Comment No. 7 (2018) states “*on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*” and we consider this may have application to and beyond persons with disabilities.

However, see our concerns about the need for democratic accountability of this process.

Consideration should also be given to any potential interaction with the Public Sector Equality Duties.

14. What are your views on the proposed approach to including an equality provision to ensure everyone is able to access rights in the Bill?

Whilst it may be agreed that everyone should be able to access the rights incorporated in the SHRB, is it necessary to do so by having an equality provision in the SHRB?

How does the Scottish Government seek to implement this policy intention given the Equal Opportunities reservation under the Scotland Act 1998 Schedule 5, section L2?

The ICESCR list does not include physical or mental disability. CRPD rights must be enforced as strongly as ICESCR rights. Consideration may also need to be given to the specific needs of older people- although not protected by a specific treaty, they should have equal access to the rights within the SHRB. Consideration should be given to the 1991 United Nations principles for older people.[13]

15. How do you think we should define the groups to be protected by the equality provision?

We do not agree that an equality provision should apply to everyone without limitation. Such an approach might either be redundant, or prohibit arguments that the interpretation of the rights has particular adverse effects on specific groups. Both domestic equality law and Art 14 ECHR identify particular prohibited grounds of discrimination, in the latter case allowing enhanced protection to be given to the substantive rights.

The issue is what, if anything, can be done that does not impinge on the equal opportunities reservation. The Scottish Parliament can impose enhanced equality duties on Scottish public authorities, but it cannot alter the protected characteristics. The simplest approach might therefore be to incorporate those protected characteristics by reference.

Another matter that should be considered is that any provisions in the SHRB must not cut across the terms of the Equality Act 2010 and in particular, those which permit duty bearers to objectively justify direct discrimination on the basis of the protected characteristic of age, e.g. see section 13(2) of the Equality Act 2010.

16. Do you agree or disagree that the use of 'other status' in the equality provision would sufficiently protect the rights of LGBTI and older people? If you disagree, please provide comments to support your answer.

The domestic courts and tribunals need clear language in the legislation and should be able to rely on the existing case law and jurisprudence on the definition of these terms that aligns with that decided under the

[13] https://social.un.org/ageing-working-group/documents/fourth/AWAZUNprinciplesforolderpersons.pdf

Equality Act 2010. It makes no sense for these terms to have two different meanings, i.e. one for the purposes of the Equality Act 2010 and another for the purposes of the proposed human rights legislation.

See our comments above regarding the protection of older people.

If the groups in the question were specifically mentioned, it may still be necessary to have a category of "other status".

The Scottish Government should explain how this would apply in the light of Article14 ECHR which provides:

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

17. If you disagree, please provide comments to support your answer.

See our responses above.

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

See our responses above.

Part 7: The Duties

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

We note the general intention to apply the regime to private actors and private bodies when they are performing a public function. We would welcome greater detail on the intended operation of this, for the reasons set out below.

If it is to be argued that the SHRB is only compatible with the Equal Opportunities reservation under the Scotland Act 1998 because it falls within the exception relating to Scottish public authorities, the duties under the SHRB should only apply to Scottish public authorities.

The Consultation Paper states that *"Our view is that the duties should apply, so far as possible, to bodies carrying out devolved public functions*".

We note that the Equal Opportunities reservation contained in Schedule 5 section L of the Scotland Act 1998 applies to equality duties, and not to substantive rights incorporated by the SHRB. It may be questionable whether such private bodies would be regarded as a Scottish public authority falling within the exception in the Equal Opportunities reservation in respect of equality duties. If the extension of duties to private bodies carrying out public functions is confined to matters arising within devolved competence and not governed by UK legislation, there should be no objection.

We would also welcome clarity on the proposed approach to defining duty-bearers in the SHRB, and to defining "functions of a public nature".

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

We take the view that there is a conceptual difference between a "duty to have regard" and a "duty to comply".

We would welcome further clarity on how the proposed duties arising under the SHRB will be framed. What appears to be intended by the proposed initial procedural duty is a duty upon duty bearers to have regard to the rights in the Bill when exercising their devolved functions. It is assumed that duty bearers could be subject to judicial review if they fail to have regard to those rights but a duty to have regard leaves open the possibility that the substance of the right will *not* be complied with.

To what extent, therefore, is it intended that the duty to have regard to those rights differs from a duty to comply with those rights and how would this be achieved? Will the duty to comply with only apply to MCOs?

The SHRB would need to address the question of what happens when rights conflict. There may be a risk of authorities being required to have regard to so many things, often pointing in different directions, that the whole purpose of giving those issues special weight is defeated.

The procedural duty will be of little value unless there is clear guidance about what bodies need to do to discharge that duty. Whilst it may become clearer in due course it is important that it is there is certainty about who will oversee and support the implementation of the duty in the same way that the Equality and Human Rights Commission does for the Equality Act duties.

It is not clear whether it is intended that the initial procedural duty will be retained when the compliance duty comes in to force- we would welcome further clarity on this.

The initial procedural duty must also be supported by appropriate resourcing and capacity-building for duty-bearers.

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

Such a duty is inevitable if the rights are to be meaningful.

However, we are concerned that the MCOs will not be included in the SHRB, but defined through a further participatory process which lacks detail. There are questions about the democratic legitimacy of that process and how the content of the MCOs will be approved.

Scottish Public Authorities are already under a duty to comply with the Public Sector Equality Duty under section 149 and Part 3 of schedule 19 of the Equality Act 2010. In respect of the Equality Treaties Scottish Public Authorities will be aware of the need to comply with the existing equality duty.

The Scottish Government should make clear what creating a duty to comply will mean in practice for Scottish public authorities in respect of the core ICESCR rights and the right to a healthy environment and also the more developed rights in CRPD. What training, guidance and resources will be provided to Scottish public authorities to help them comply with this duty?

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

The Scottish Government in imposing such an obligation must ensure it is proportionate and cost effective.

The Scottish Government must provide adequate training, guidance and resources so that Scottish public authorities can meet these obligations.

We would welcome clarity on the interaction with existing reporting duties for public authorities and on proposed application to private bodies performing public functions.

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

The duties to report are contained in the The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. These regulations have been amended on many occasions since 2012 by changes to the list of authorities and other details. It would be relatively easy to provide for regulation making powers in the SHRB which would align the duties to report under the bill with the existing regulations in terms of report content and deadlines. Not only is this administratively more practical for public authorities, but it promotes a cohesive, joined-up and holistic approach to implementing equality and human rights obligations in Scotland.

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

The consultation paper is not clear about when MCOs apply. We note for example *"In international law, the minimum core of a right must be complied with immediately unless it is demonstrably impossible for the state to do so" (*page 31) and "*Setting a minimum core for Scotland has the potential to be significantly impactful in determining the most basic needs of people in Scotland that must be prioritised and realised immediately*"(page 33) and *"it is important to recognise and emphasise the nature of MCOs as being a very basic floor of rights protection that can be met immediately and all times by duty-bearers*."(page 33).

On the other hand, the references to the procedural duty and to the Scottish Government's proposal for a participatory approach for defining what falls within the minimum core of each right suggest that MCOs will not apply immediately. Is it intended that those public bodies that can should comply with MCOs from the start?

Whilst progressive realisation recognises that certain rights cannot be delivered immediately, it is essential that there is accountability on government or public bodies to demonstrate how they will go about progressive realisation over time. Further, we consider that there may be situations where the rights breach is so egregious that it should be seen as breaching the MCOs, even although it may be difficult to secure. An example of this is the situation of the significant number of autistic people in hospital for want of appropriate community provision.

Given progressive realisation will mean that the nature and extent of duties and rights will change over time, consideration will need to be given to how this will be reflected in a way that nonetheless offers clarity on rights and duties.

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

The right to a healthy environment has been described as a 'pre-condition' of some of the rights in the ICESC (e.g. the right to health and a decent standard of living).[14] As such, we understand the rationale for treating it in the same manner in the SHRB as the economic, social and cultural rights under the ICESC Treaty. However, the difference would seem to be the lack of recognition by the UK Government of the right to a healthy environment.[15] We would not want the incorporation of the economic, social and cultural rights being held up as a result of an impasse between the UK and Scottish Governments over reserved/devolved matters. If agreement can be reached with the UK Government prior to the SHRB being placed before Parliament, we would support its inclusion.

[14] See https://www.escr-net.org/rights/adequate-healthy-environment

[15] See *UN General Assembly Right to a Healthy Environment good practice guide* (A/HRC/43/53) at appendix 2

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

We agree that Scottish Ministers should be under a statutory duty to publish a Human Rights Scheme reporting to the Parliament on the implementation of the legislation by Scottish Ministers and by Scottish Public Authorities. We also agree that the

Scheme should cover the following:

a. Implementation including public participation in that process and any Guidance published.
b. Reports to the Parliament.
c. Plans to introduce further legislation to give effect to the human rights framework.
d. Plans for access to justice in relation to the rights in the SHRB.
e. Reports on how the Scottish Government has embedded human rights in budget processes.
f. Information and awareness raising about the Bill.
g. Scotland's Second National Action Plan for Human Rights (SNAP2).

The Scottish Government should also set out:

1. The legal basis on which it would report to the UN, Council of Europe and other international bodies on compliance with treaty obligations, responses to recommendations from international institutions and implementation of judgments of the European Court of Human Rights in areas of devolved competence; and
2. monitoring and evaluation and impact assessments

Part 8: Ensuring Access to Justice for Rights Holders

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

We agree with the Consultation paper which states that "*Advocacy services are there to provide support and representation to empower individuals to claim their rights*.". Indeed, there may be no point to creating rights if the rights holders are not able to understand their rights and to enforce them through lack of resources, or though lack of clarity as to how and against whom widely-drawn rights can be enforced. That is why advocacy services will need to be adequately funded and legal advice and assistance be made available.

We note that there are many disadvantaged communities who may benefit from advocacy around rights, including people with mental illness, disability, BME people and those whose first language is not English. We note that advocacy may mean different things to different people depending on the issue being addressed, the degree of support needed by the individual and the nature of the matters they need support and advocacy around.

In relation to advocacy, the Scottish Mental Health Law Review discusses ways to improve advocacy which are of wider relevance than simply the duties in the Mental Health (Care and Treatment) (Scotland) Act 2003. Consideration should be given to recommendations 4.6 to 4.12 of the Review.

Consideration should also be given to how the SHRB provisions would engage with the provisions around trauma-based practice in the Victims, Witnesses and Justice Reform (Scotland) Bill and with the Victims and Witnesses (Scotland) Act 2014.

There needs to be a better acceptance by Government of the asymmetric relationship characteristic of conflict between the individual and the state. Rights-holders must be enabled to assert their rights as necessary. This involves not only the right to be heard, but also the right to respond to conduct by the state which impacts on the exercise of rights.

The Consultation paper notes at that Scottish Government are "*carefully considering the approach taken in the UNCRC Bill",* such as requiring Scottish Ministers to set out arrangements such as advocacy services, as part of the Children's Rights Scheme. We note that the provisions in the Children (Scotland) Act 2020 relating to advocacy services for children engaging with the civil courts have not yet been commenced.

As much as the services which will be under a duty to provide services and to report on how they have complied with the SHRB, so the Scottish Government should be under a duty to report on how they have supported advocacy services and enhanced the system of legal advice and assistance.

Advocacy and advice services are distinct services which have to be properly resourced and fully accessible according to the circumstances in which rights holders may find themselves at the point at which they require to assert their rights. That is to say that the system must be designed and operated in such a way that the rights holder is at the focus of concern. This entails the availability of both advocacy and advice services, including legal aid, wherever appropriate. The Scottish Human Rights Commission could play an advisory role in this regard. Collaboration between advocacy groups could be encouraged to avoid duplication (although overlaps are inevitable given the intersectional nature of many issues).

More generally, it is crucial that appropriate funding is made available to advocacy services, the third sector and public bodies to fully implement proposed reforms and that this is supported by appropriate capacity building to ensure that all duty bearers understand and are resourced to meet their duties.

28. What are your views on our proposals in relation to front-line complaints handling mechanisms of public bodies?

We note the proposals '*To help public authorities develop their front-line complaints processes in relation to the rights in the Bill"* (page 39). Under this proposal, the SPSO would be able to "*issue declarations of non-compliance when a specified public authority is found to have acted incompatibly with these updated procedures*."

Whilst this may be a pragmatic method to ensure that 'rights' considerations are front loaded into the decision maker's own complaints processes, the proposals represent a fairly significant increase in powers for SPSO and it is important that there should be a commensurate increase in resourcing. It is not clear that there has been a real policy consultation, in advance of the current consultation, on whether such an expansion is appropriate given that SPSO is itself part of the Administrative Justice system. It is unclear what force any 'declaration of non-compliance' would have under this proposed power. We would note the Outer House of the Court of Session would continue to exercise its supervisory jurisdiction over any final SPSO decision, by way of petition for Judicial Review.

We welcome that the Scottish Government acknowledges that "Access to legal aid is an important aspect in supporting rights-holders to claim their rights through the courts, where they choose to" (page 39 of the consultation document). Any reform should be adequately funded to ensure that Civil Advice & Assistance and Civil Legal Aid is available to individuals seeking advice or representation before any Court or Tribunal

Other complaints handling processes such as the SPSO will need to be updated to take account of the broad sweep of rights infringement which could be the basis of a complaint. Given that "Human rights are often a core part of the issues" that SPSO deals with and the proposal is to develop "a more specific human rights remit for when the SPSO is dealing with an escalated complaint," will the SPSO be expected to categorise human rights complaints as pre or post SHRB complaints in order to avoid confusion about what law applies?

Further, whilst the SPCO currently considers maladministration issues in private, we would question whether an extended remit would require opportunities for other people potentially affected by the issues under consideration to have the chance to make representations for the procedure to be fair and transparent. This may be particularly relevant where the original public body's procedure allows for representations or objections from opponents or interested parties.

The powers envisaged for the SPSO to exercise its "own initiative investigation" raise interesting issues. The merits of own initiative powers are a contested issue, requiring careful consideration. In particular the SPSO's impartiality must be strengthened through this process. Will the Scottish Government provide the SPSO with additional resources to undertake own initiative investigations?

We note that the Scottish Government is still to consider how SPSO complaints interact with other "complaints" processes. Detail on this point would be appreciated before the SHRB is introduced.

"Getting Things Right First Time" as proposed in the consultation paper requires attention to and support throughout the initial participative and decision-making procedures, review and appeal opportunities and ensuring that those taking decisions have the expertise and resources to do so properly. Complaints processes must be sufficiently expeditious to deliver remedial action where it is urgently required. We understand that, currently, complaints dealt with by the SPSO will be allocated to a case worker within 4 months and then 95% of decisions are decided within 12 months. We would question whether these timescales are sufficiently expeditious to deal with urgent cases.

The system must support the ability of groups to take actions on behalf of their members or as representatives.

29. What are your views in relation to our proposed changes to the Scottish Public Services Ombudsman's remit?

We are concerned at the very wide-ranging expansion of the SPSO remit as an incidental aspect of addressing the development of the human rights regime in Scotland. Developing the geometry of supervision of Administrative Justice issues in Scotland might require a specific initiative. The SPSO's role and remit has been rapidly expanding in recent years to such an extent that it now performs executive functions that would not normally be associated with the traditional role of an Ombudsman. This raises serious issues of principle including the question of the accountability of the SPSO to the Scottish Parliament.

It must be recognised that there is a tension between the SPSO system which is based on maladministration and recommendations, and the protection of legally recognised rights. The relationship between seeking recourse through the SPSO (and other non-judicial routes) and asserting rights must be clarified, especially in relation to time-limits for taking court action so that an aggrieved party does not lose the chance to gain a legal remedy through having initially attempted to seek recourses through the less formal routes. The 'Table showing routes to resolve violations of rights' implies that legal action should only follow after a complaints process has been undertaken up to and including the SPSO. That does not reflect the law at the moment, and nor should it be the case for every human rights violation. In some situations legal action will be necessary from the start, and in others (for example cases involving mental health or capacity law) a judicial body may already be involved.

Whilst we do not quibble with the policy aims we have concerns about the development of SPSO powers in particular without a proper policy appraisal, given especially SPSO's emerging multifaceted role not only as a supervisory body but also as a major decision making body on individual disputes between citizen/user and state.

We welcome the proposal to remove the restriction on the SPSO receiving oral complaints. We recognise that some, especially vulnerable people, struggle to articulate their complaints in writing so this will help by not excluding people. More information is needed, though, on the process and if there will be a separate process for vulnerable people.

30. What are your views on our proposals in relation to scrutiny bodies?

We note the proposals to enhance the roles of scrutiny bodies. These include:

1. Requiring scrutiny bodies to
   a. assess the bodies they oversee in light of the human rights obligations in the SHRB, and to consider how these bodies can further mainstream human rights in the Bill; and
   b. inform the SHRC of any systemic human rights issues they come across, as well as informing other relevant organisations (such as the SPSO, the Children and Young People's Commissioner Scotland, the Mental Welfare Commission and Environmental Standards Scotland) of any systemic human rights issues that may be relevant to their organisations.
2. Enabling scrutiny bodies to work more closely with each other – by sharing information about human rights matters, working together on human rights issues and letting other scrutiny bodies know if there may be overlap in the issues they are looking at.

We agree that scrutiny bodies can play an important role in holding devolved public services to account in relation to human rights and helping to drive culture change in service delivery. We note the policy aim. We also note that the Consultation paper does not amplify the reasons for this proposal.

As regards the first bulleted point, 'the obligation to assess and consider' would benefit from some specification of what is to be assessed and considered, against what criteria.

As regards the second bulleted point, the reference to "enabling joint working" is imprecise and may risk intruding into reserved areas.

As regards the third bulleted point, we support an obligation (i) to report any systemic human rights issues and (ii) to inform other relevant organisations. proposed however it is too general and undeveloped.

Any overlap between the powers of the SPSO and the SHRC should be avoided at all costs since any such overlaps would simply create confusion.

There needs to be greater clarity about the impact of these enhanced roles for scrutiny bodies. There is merit in bringing all relevant scrutiny bodies into the broad enforcement provisions of the SHRB and this is likely to result in more comprehensive monitoring than the SHRC could achieve by itself. In some cases scrutiny bodies working in a particular field may be better able to pursue legal action over systemic human rights failures. For example, the Scottish Mental Health Law Review recommended (11.6) that the Mental Welfare Commission "*should have the power to initiate legal proceedings to protect the human rights of any person or group covered by mental health and capacity law*". Similar powers may be appropriate for other scrutiny bodies.

Scrutiny bodies would themselves be duty bearers under the SHRB, and a key way in which they will discharge those duties will be in incorporating them into their scrutiny activities. This might simply be a question of reporting, rather than specific enforcement, and they could be required to report issues directly to the SHRC.

What additional resources will scrutiny bodies or those bodies which are overseen be given to meet the obligations which they may be required to meet? What consequences will scrutiny bodies face if they fail to fulfil the requirements of the SHRB? How will scrutiny bodies be enabled to identify and refer human rights issues they come across? How will scrutiny bodies be able to share information with each other?

31. What are your views on additional powers for the Scottish Human Rights Commission?

The additional powers which are proposed for the SHRC are:

a. Powers to bring or intervene in civil proceedings under the SHRB; and
b. An investigatory power which allows for accountability for systemic issues relating to the rights in the Bill (relating to civil matters).

The SHRC has been inexistence since 2008 but since then has only intervened in one case *Shakar Hakar Omar Ali v Serco Ltd, Compass SNI Ltd and the Home Secretary*.[16]

We note that the SHRC is the only National Human Rights Institution (NHRI) in the UK which does not have the power to raise proceedings on its own name (compared with the Equality and Human Rights Commission and the Northern Ireland Human Rights Commission).

If the SHRC could raise proceedings in its own name that may reduce litigation by individuals, thereby reducing the potential adverse personal pressures on individuals arising from pursuing litigation. The SHRC would also be able to address structural issues that affect large sections of the population, and to adopt a more strategic approach by selecting the strongest example of a particular issue to be advanced as a test case.

The SHRC's lack of financial resources has not allowed for further interventions, which is why it has only happened once.

Increasing the SHRC powers to bring and intervene in cases may create more human rights compliance.

The Scottish Government should produce evidence including projections it has made about how often the power may be exercised. The current budget for the SHRC is £1.3 million. What additional resources will the SHRC need to make the power effective rather than illusory?

Changes to information exchange between the SPSO and SHRC will need to be carefully assessed in the light of existing Data Protection laws.

Furthermore, is there a possibility that the additional powers proposed for the SHRC will overlap with, and replace, the proposed changes in the remit of the SPSO?

[16] [2019] CSIH 54

32. What are your views on potentially mirroring these powers for the Children and Young People's Commissioner Scotland where needed?

Given the importance of these matters to the rights of children in Scotland, it would seem sensible to ensure that the Children's Commissioner has similar powers to the SPSO and SHRC in this regard.

Increasing the powers of the Children and Young People's Commissioner Scotland so that the Commissioner can bring and intervene in cases may create more human rights compliance. It would be helpful for the Scottish Government to produce evidence to support the need for this power. This evidence should include projections it has made about how often the power may be exercised and what additional resources the Commissioner will need to make the power effective rather than illusory. As in the case of the SHRC is there not a danger of creating too many scrutinising and investigative bodies?

There should be a mechanism in the SHRB to ensure that the SHRC and the Commissioner do not unnecessarily duplicate investigative work or litigation.

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

We take the view that the rules for standing under the SHRB should follow the existing statutory rules under the Court of Session Act 1988 section 27B(2)(a) as amended by section 89 of the Court Reform (Scotland) Act 2014 namely the "sufficient interest test". This would overall be of benefit to users of the system and supports the proposal.

The general rules should apply rather than creating a new exception unless the Treaties provide otherwise as Article 34 of the ECHR does.

Further to our comments in response to questions 31 and 32 above, to the extent that there is an intention to confer additional powers on the SHRC and the CYPCS it is unclear what the proposed test (if any) would be for the Court to grant permission to these bodies to intervene, or how these powers would be conferred.

As above, there may be merit in considering whether other scrutiny bodies or human rights organisations should have standing. For example, it has been suggested that relevant NGOs of good standing should have the ability to take cases.[17] We also consider that cost protections, as apply to environmental bodies under the Aarhus Convention, should apply.

The other preliminary issues of timing and alternative remedies need to be addressed so that parties are not discouraged from using, or suffer if they used, other recognised means of seeking redress.

[17] See the discussion on Collective Advocacy in the Scottish Mental Health Law Review Final Report (2022)

34. What should the approach be to assessing 'reasonableness' under the Human Rights Bill?

There is a case for a higher standard of review than *Wednesbury*, as there is a risk of that blurring the distinction between the initial 'have regard to' duty and the subsequent duty to comply. For consistency both with the HRA and the *de facto* position under the principle of legality, proportionality would seem to be the obvious standard to adopt.

However any proposal to amend the legal test and principles the Courts should apply to Judicial Review proceedings would represent a substantial change to a key area of Scottish public administrative law. There should be wider consultation on the consequences of any proposed changes.

35. Do you agree or disagree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders?

We agree that there should be a human rights culture that should permeate the ways in which the administration goes about its business. At each turn of policy making and executive action there should be legal or administrative awareness of basic rights and needs. But at some point there will be policy prioritisation in how resources are used and that is where tensions will arise between groups that are having their rights or expectations met and those who are not.

There are a number of conflicting views which have been expressed in connection with this proposal.

On the one hand, the Scottish Government should consider whether all current judicial remedies are appropriate for the kind of rights covered by the SHRB and that existing remedies could benefit from some updating.

For instance, would specific performance, or damages, always be appropriate? At a practical level, in a period of economic constraint and public expenditure restrictions can Government always be legally accountable to satisfy competing demands and rights?

As a first stage there could be administrative findings against a body. At the stage of litigation, there may be categories of case where a declaratory judgment of a failure to comply with certain human rights might be the most appropriate, or at least realistic, remedy for a petitioner to receive.

Some consider that existing judicial remedies are insufficient. Judicial review and application to the Court of Session is too high a bar if Scotland is to be serious about rights being accessible. There is little clarity about how the new legislation might influence decisions by lower courts and tribunals in particular subject areas. The consultation suggests that "*We want to build on existing structures and put human rights at the heart of the system, rather than create separate, additional processes for human rights complaints"*, but has not followed this logic in relation to existing legal processes.

For example, the Scottish Mental Health Law Review proposed that a range of remedies should be available to the Mental Health Tribunal for Scotland as the first-tier tribunal, for example where adequate support had not been provided to justify a deprivation of liberty. The SHRB could make some provision for lower courts and tribunals to address human rights failings without the need for some form of judicial review process; and that this should be supplemented by a comprehensive consideration of how far human rights legal remedies need to be developed in particular areas of law. There should also be a power for a lower court or tribunal to remit, if necessary, a human rights question to the Court of Session.

Not all existing remedies will be suitable for progressive realisation issues. The Human Rights Taskforce considered that a court might direct that the Scottish Government should address a progressive realisation issue over a reasonable timeframe, for example over 3-5 years and it is difficult to envisage how this can be achieved without supplemental provisions and measures.

On the other hand, existing Court remedies are considered by others to be wholly sufficient in delivering effective remedies. If the remedies available to the Court are to be changed, this should be done by the Lord President via the Scottish Civil Justice Council and not by Act of the Scottish Parliament.

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

As above, there are a number of views on the sufficiency of existing remedies. So far as possible the rights holder ought not to be prejudiced by the failure of the state to honour the right. However, we accept that this policy objective may be difficult to achieve in practice. The Courts will have to balance private right and public interest. This may not be easy in a period of economic constraint and public expenditure restrictions.

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

This may depend upon what proposals are brought forward in the reconsideration of the UNCRC Bill. This will also apply to the proposal to have something similar to section 101 of the Scotland Act 1998.

Legislation which is non-compliant cannot be permitted to continue to regulate the rights in question. Whilst a declaratory power might be appropriate there may be a need to allow a transitional power to protect third party interests which might otherwise be prejudiced by the cutting down of the legislation The Court may use the existing power of declarator to hold legislation unlawful on compatibility grounds. That would render the legislation in question unenforceable and so would presumably achieve the desired effect of any challenge.

We consider that courts should have the power to declare legislative provisions unlawful on human rights incompatibility grounds. The Courts should have power to require a process of review and reconsideration

to enable that the relevant rights to be delivered in a reasonable timescale without the disruptive effect of legislative provisions becoming immediately unlawful and ineffective.

Part 9: Implementing the New Scottish Human Rights

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

We agree with a sequenced approach to implementation which will allow the Scottish Government to prepare and consult upon the appropriate guidance and implementing regulations. Scottish Public authorities must be allowed sufficient time to be in a position to implement the duties incumbent upon them including in the first place the procedural duty. We consider that an indication of the proposed timescale would be useful.

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

We agree, subject to ensuring democratic accountability, with the Scottish Government's proposal to engage in a participatory process in the creation of the MCOs. We take the view that the conclusions of the participatory process need to be agreed by the Parliament and given legislative form - at a minimum delegated legislation subject to a super-affirmative procedure – and this needs to be specified on the face of the SHRB. Further detail on the process must be consulted upon before the SHRB is published.

The participatory process must include all those potentially affected, thus involving especially the sort of private bodies that might exercise public functions and hence fall within the scope of the rights protection.

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

We agree with the broad scope of the Human Rights Scheme.

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

We note it is intended that Public Bills will be accompanied by a statement of compatibility about the extent to which the proposed Bill complies with the specific requirements provided for in the SHRB. This statement would be published alongside the statement of legislative competence as well as the similar statement that will be required under the UNCRC Bill. The consultation paper asserts that *"These*

statements would ensure that all future proposed Public Bills lodged in the Scottish Parliament are assessed against a much fuller spectrum of civil, political, economic, social, cultural, environmental, and children's rights.".

However, it is not clear from the Consultation Paper whether it is proposed:

- that the statement should be similar to that required by section 31(1) of the Scotland Act 1998 – that the Minister considers that the Bill is compatible with the rights in the SHRB or
- that it should state whether or not the bill is compatible with the rights in the SHRB i.e. allowing a negative statement. But if so how does this square with the possibility that incompatible legislation might be quashed (see Question 37)?

This statement will however be very different from the statement of legislative competence in as much as if a bill does not comply with the SHRB that will not affect the competence of the legislation. It will merely be declaratory in effect. It would therefore not be appropriate (and might even be an unlawful modification of the Scotland Act's provisions on competence) to make a statement of compatibility with the SHRB a precondition of a Bill being introduced, either legislatively or via the Ministerial code.

A negative statement would nevertheless still have value in relation to a Bill, as it would require Ministers to be clear about the position if such decisions were being made although there are opposite views on this issue.

The Scottish Parliament processes for assessing the scrutiny of Bills in relation to human rights under the Bill should be the same as their scrutiny of legislative competence issues.

More generally, the quality and depth of assessments accompanying Bills is an area which should be considered and strengthened.

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

This is a question for the Scottish public authorities to answer based on their experience of the implementation of the HRA and the Freedom of Information Act.

A clear, consistent, and coherent scheme will make it much easier for all concerned to operate the system effectively and efficiently. Additionally, we consider that providing adequate resources and training are key elements.

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

This is a question for the Scottish Government and public authorities to answer based on their experience of the implementation of the HRA and the Freedom of Information Act.

If the other elements of the system work well, including for monitoring and reporting, the case for a further system at this level is not strong, other than to extent that it can be used to fulfil reporting obligations under international obligations.

44. What are your views on monitoring and reporting?

See our response to the relevant questions earlier in the paper.

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