

Response ID ANON-6XVX-YK6H-X

Submitted to A Human Rights Bill for Scotland: Consultation
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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?

Allow

Please give us your views:

We agree with this proposal and support Human Rights Consortium Scotland's (HRCS) recommendation for courts to be required to consider dignity when interpreting rights, and also HRCS's call for the Bill to include a purpose clause emphasising dignity, universality, participation and other key human rights principles.

2 What are your views on our proposal to allow for dignity to be a key threshold for defining the content of minimum core obligation (MCOs)?

Allow

Please give us your views:

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

If so, please identify these, explain why and how this could be achieved.:

We support the inclusion of these laws, materials and mechanisms.

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

Please give us your views.:

Whilst we accept there are practical reasons for having an initial procedural duty, we would prefer to see more detail on the approach, and timescales, for moving to a duty to comply.

5 Are there any rights in the equality treaties which you think should be treated differently?

No

If so, please identify these, explain why and how this could be achieved:

We welcome the incorporation of a broader range of rights, including ICERD, CEDAW and CRPD, into Scotland's domestic legal framework. We note HRCS's concern that significant rights within these frameworks are currently limited to being procedural duties within the proposed Bill. We would like to see the Scottish Government work closely with human rights organisations and organisations representing groups with protected characteristics to ensure that these rights are adequately protected in the Bill.

Part 5: Recognising the Right to a Healthy Environment

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

Agree

7. If you disagree, please explain why:

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

Please give us your views:

We support the approach. Whilst procedural aspects such as awareness-raising, public participation in decision-making and capacity building are not as essential to protect as the substantive elements, it is important to recognise that they are key to ensuring the substantive aspects are met. We would therefore like to see procedural aspects made as strong as possible in the Bill.

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 International Covenant on Economic, Social and Cultural Rights (ICESCR), rather than inclusion as a substantive aspect of the right to a healthy environment?

Disagree

Please provide your reasons why:

We agree with Environmental Rights Centre Scotland that the right to healthy and sustainably produced food is a core feature of the substantive right to a healthy environment. Whatever approach is taken should make it as straightforward as possible for people to have these rights met. We would therefore be inclined to agree with the ERCS that the right to healthy and sustainable food should be included as a substantive aspect of the right to a healthy environment.

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?

Agree

Please give us your views:

We agree that there is a distinction between the importance of water for drinking and for health of wider environment.

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

No

If yes, please specify what substantive or procedural elements and explain how this could be achieved :

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?

Please give us your views:

We endorse the HRCS recommendations to make links within statutory guidance and regulations wherever possible. We also suggest that such links to other relevant areas of legislation and policy could be extended to include links to participation and empowerment arrangements which are pertinent to human rights (See our answer to Q14). How this might be done is exemplified in guidance for part three of the Children and Young People Act 2014 <https://www.gov.scot/publications/statutory-guidance-part-3-childrens-services-planning-children-young-people/pages/17/> which sets out a range of aspects of other policies and legislation that must be taken into account when implementing the Children and Young Peoples Act.

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

Please give us your views:

We endorse the consortium view on this question including all of the bullet points listed and offer the following additional observations and suggestions.

We recognise the need to embed all thinking about human rights, equalities and individual and collective empowerment in a linked narrative. This should be expressed as plainly as possible and help citizens, policy makers and service providers to see the bigger picture and develop a sense of common cause of how these areas are embedded in a rights based approach which exists in a broader process of constructive public participation.

Ultimately, rights cannot exist without an ambitious, healthy, effective system of participation which is explicit in its aims, open to scrutiny of its processes and subject to continuous improvement on how it reaches those whose voices are most often denied and therefore are most in need of support to realise their human rights. For this reason, very explicit rights to effective participation, co-designed by rights holders, are fundamental to this.

Recent equalities Judicial reviews (eg McHattie vs South Ayrshire Council) have highlighted how failures in engagement and participation arrangements in public service decision-making materially undermine citizens rights under the Equalities Act. We believe that clarity in how appropriate participation must be conducted is instrumental to the realisation of human rights generally and in relation to a number of international treaty and Scottish policy expectations that regular dialogue will form the basis of a rights-based framework.

Poor participation should be recognised as one of the key human rights implementation processes where poor practice leads to de facto denial of rights. We would suggest that stating this prominently on the face of legislation would highlight rights to fair processes and how these should be delivered. Perhaps more importantly, this would act as a discipline on all stakeholders in the wider system to guard against "participation" which was tokenistic or manipulative and therefore contributes to a denial of rights by rubber stamping decisions affecting the human rights of communities.

We promote this idea not because we are keen to see a huge increase in legal interventions and costly damages claims, but because we think the potential for legal recourse on the quality of participation processes, as they affect human rights, will ensure that that sufficient care is taken when designing and implementing participation and fully deliver the right to a voice implied in human rights duties expressed in treaties and/or UK and Scottish Legislation.

Rights and the Empowerment Ecosystem

We believe that there is a growing raft of legislation and policy in Scotland that seeks to make connections between the morality of a rights based approach - with both human rights and broader equalities considerations and the effectiveness of services in understanding and targeting limited resources to disadvantaged communities of place and interest. The centrality of enabling empowering approaches which amplify the voices of rights holders and potential rights holders in these initiatives further strengthens the argument for making participation a cross-cutting theme within human

rights legislation.

These seek to place duties and legitimate expectations on public agencies, civil society and the wider body politic to support the less powerful to have their voices heard and needs met within a democratic context. In Scotland this thinking is rooted in a long history of activism characterised by struggle in response to oppressive circumstances by human rights holders. More recently a progressive paradigm for policy development has emerged. This is embodied in the Scottish Approach to policy making and in individual initiatives like the Community Empowerment Act, Fairer Scotland Duty, Planning Scotland Act and the community engagement duties in legislation such as our Children and Young Peoples Act or Community Justice legislation.

When taken alongside Scotland's Equalities laws, SNAP and now new human rights legislation, we would urge the Scottish Government to systemically connect the declaration of a distinct Scottish framework for human rights with the right implementation processes and this must include the mechanisms for public participation and community empowerment as well as those which exist to realise the rights of individuals.

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?

Please give us your views:

It is logical to base the identification of those population segments with additional equalities needs and/or protected characteristics from within the existing treaties to be incorporated into Scots law. We would also support the inclusion of LGBTQi people within the duties of the Act and of older people and those affected by pregnancy and maternity to ensure consistency with the Equalities Act 2010. It is important that all groups who face additional barriers are able to assert their human rights and it is therefore fundamentally important that there is a specific equality provision in the Bill.

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

Please give us your views :

The groups that should be protected by equality provision should be defined both by existing legislation and treaties as outlined but also on the basis of protected characteristics. We would also like to see recognition of those groups that are excluded or disenfranchised due to poverty or other forms of social exclusion. This will be more difficult to achieve in practice, but it is important that economic disadvantage and exclusion is a key contributory factor in human rights considerations.

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?

Agree

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

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

Yes

Please give us your views:

We agree with a proposal by HRCS that there should be a requirement on Scottish Ministers to publish guidance on interpreting 'other status'.

Part 7: The Duties

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

Please give us your views:

We agree that the duties in the Bill should not only apply to public bodies but also to those carrying out public functions which will include a substantial number of private sector organisations. This will have implications for scrutiny and accountability, but it is vitally important that the duties under the Bill can't be ignored by non-public sector organisations.

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

Please give us your views:

We welcome the sunrise clause in the Bill but would hope that that this is very clearly timebound. We think that preparation for the Bill implementation should be sufficient to avoid the need for a long 'sunrise' period before the duty to comply comes fully into force.

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

Please give us your views:

A duty to comply is a fundamental part of the Bill. We welcome this but would like to see greatest concentration on ensuring that duty-bearers move beyond minimum core obligations to best practice at the earliest stage as described in the Progressive Realisation section in the consultation document.

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?

Please give us your views:

We think that all public bodies and those private bodies who are implementing public functions should be required to report on planned and delivered actions to meet their human rights obligations as set out in the Bill. We feel that frameworks such as Audit Scotland's Principles for Community Empowerment (see our response to Q30) would help to frame this and would allow public bodies in particular to cross-refer to work they are doing on community empowerment and broader participation.

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

Please give us your views:

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 minimum core obligations (MCOs) and progressive realisation?

Please give us your views:

We agree with this proposal.

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

Please give us your views:

Environmental rights are of vital importance and we agree they should fall under the same duties as these other important rights.

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

Please give us your views:

We agree with this proposal and would recommend that for best effect/impact it should be co-produced with rights holders, civil society and duty bearers.

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?

Please give us your views on advocacy:

We endorse the recommendations and arguments made by the HRCS on access to justice, individual and collective advocacy, and promotion of a rights-enabling environment in Scotland where legal remedies should not be required but where they are they are accessible to individuals or groups of people with common concerns and experiences.

Specifically, we wish to see the rights of communities of place and identity strengthened in this context including the right to take forward public interest litigation. We also suggest that the Bill should include how public service complaints procedures and specific participatory interventions such as participation requests under the Community Empowerment Act could be strengthened to make other forms of statutory rights more human rights compliant without the need for judicial review of other legal remedies. This could both provide routes for rights holder to pursue rights collectively without the need for full court action therefore providing solutions closer to the point of origin of issues and extend the framework of regulation to more processes with the effect of creating more favourable conditions for compliance with the broader legislative intent.

Since freedom of association and rights to self-organise are intrinsic to achieving human rights we feel that the use of the term advocacy must be flexible enough to include self-organised groups who may be skilled advocates in their own right or representative organisations supported by an extended array of advocacy services. This could include disability groups, parent of children with ASL needs, tenants representatives or community councils. The definitions of terms such as collective self-organisation and advocacy should be flexible and inclusive.

We suggest that these should be made explicit in the guidance and schedules of the Bill in the way similar to how categories of community organisation are described in parts Two and Three of the Community Empowerment Act duties and guidance. They should be tested through consultation with representatives from self-organised representatives groups, including but not limited to, with those with lived experience who may organise in a less formal way than other groups provided they can demonstrate their representativeness

Please give us your views on legal aid:

We believe legal aid is vital in supporting people who would otherwise face significant financial and other barriers to claim their rights. Reform should be geared towards addressing inequality, both in relation to the legal system and inequality more generally.

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

Please give us your views:

Our experience of front-line complaints handling mechanisms is limited but in some areas the process seems to be overwhelmed and there are long backlogs of cases requiring resolution. Assuming a reasonable test of a human rights case suitability to be dealt with as a complaint that seems likely to increase the numbers of cases. When coupled with a need to invest significantly in the knowledge and skills of those dealing with complaints we suggest

that whilst these systems should be responsive to human rights issues, they would need significant investment in terms of staffing and infrastructure them to provide an effective first tier point of resolution.

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

Please give us your views:

We would generally support the Bill's proposals for the reform of the SPSO. In our recent exploration of their role in relation to public agencies and participation requests it seemed that they lacked not only jurisdiction but also capacity to come with the levels of demand and complexity of that process. We would suggest that they would need substantial investment in order to meet the task of dealing with an increase in throughput of legitimate human rights cases which we suggest would, initially at least, not be resolved locally.

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

Please give us your views:

We agree with the thrust of the Scottish Government's proposals and the HRCS response that scrutiny bodies should have human rights added to their remit. We also recognise the HRCS point that consideration is needed on ensuring capacity of these bodies around human rights for this to fulfil its full potential. In line with our earlier comments on relationships between the different aspects of rights-based and empowerment approaches in Scotland we would like to highlight the Joint Scrutiny Bodies Principles for Community Empowerment Publication.

<https://www.audit-scotland.gov.uk/publications/principles-for-community-empowerment>.

This is a very helpful development of what scrutiny bodies should look for in relation to empowerment legislation and policy in Scotland and will hopefully drive more detailed analysis of this in future. However, it has very few references to human rights, and it would be helpful if the Bill was explicit in setting out expectations of how this type of mechanism could advance human rights issues in service inspections and audits of community planning arrangements where human rights issues should be being addressed in line with the legislative intent.

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

Please give us your views:

It feels helpful to have these bodies (SHRC and SPSO) able to intervene in cases and coordinate with each other.

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

Please give us your views:

It feels helpful to have these bodies (SHRC and SPSO) able to intervene in cases and coordinate with each other.

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

Please give us your views:

We would support the government's aspiration to deliver a broad and flexible approach to the "standing" issue in the context of maximising ability of organisations seeking to pursue judicial review or seek other forms of legal or quasi-legal restitution on behalf of groups of rights holders who may lack capacity or face other challenges that inhibit their ability to pursue appropriate routes to resolve their denial of rights. By definition, this would need to go beyond the victim test in both the UNCRC Bill and the Human Rights Bill to be effective. This would increase access to advocacy for those need it.

We would support a clear systematic approach to assessing whether claims to an appropriate standing were reasonable and logical. However, since the impact of an action on the human rights of individuals and social groups may not always be immediately obvious, it is very important that those seeking to take cases are supported to demonstrate how systemic and sometimes indirect actions can lead to poor outcomes for citizens and society. As a result, the determination on who should be recognised under the "standing" and "sufficient interest" rules should be determined with this broader array of indirect interests given reasonable weight.

This should be determined on a case by case basis rather than ruling out some types of claimants on the basis of more reductionist standing categorisations. For example a Third Sector Forum representing citizens whose rights are affected by the actions of a community planning partnership or integrated joint board closing a mental health service should be able to mount a challenge based on issues such as whether the consultation on issues such as the closure of a service was adequate and whether participation structures deliver or inhibit the human rights of those more directly affected.

We think that this type of approach should take an explicit pro-rights holder starting point on terms of access to the judicial process to ensure greater access to justice for a wider range of rights holders. Doing so would increase the potential for court decisions with positive systemic outcomes to improve the human rights environment for more citizens in the long run.

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

Please give us your views:

We broadly support the government's thinking regarding reasonableness and we also endorse the HRCS suggestion to simplify the test of reasonableness which states that the chief consideration is that people who experience violations of rights in the Bill must be able to access justice and accountability through the courts.

Within our own area of practice, we particularly welcome comments in the Bill which highlight the importance of properly designed consultation and participatory processes and the role of impact assessments. We are aware that these considerations seem to be prominent in recent judicial reviews in South Ayrshire and legal opinions on related consultation arrangements for other issues such as the proposed closure of libraries in Aberdeen. Therefore addressing them in the Bill makes sense.

We recognise that public bodies must be able to discharge their duties in making decision about activities under their control and which they often have legal duties to deliver while balancing extremely difficult choices about resources. However, there is a significant body of literature and experience of participation practice that identifies that some approaches to "consultation" or "participation" can be counterintuitive in their impacts by creating an illusion of sharing power and acting on rights holders' views where in fact the process can conceal how decisions affecting rights are being made, when and by whom. The same is true of equality and human rights impact assessments which to not properly involve those affected by the decision.

We would propose that to open these processes to adequate scrutiny and improve the standard of participation, consultation and engagement within a rights-based approach, these should be co-designed alongside rights holders as citizens or community groups, users of services or those affected in other ways to ensure that consultation process would provide robust engagement and where possible deliberative processes to explore alternatives to proposed actions which safeguard the rights of those affected.

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

Agree

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

We support the view of the SHRC in supporting the Scottish Government's intention to maximise the opportunity for appropriate remedies on human rights issues. This includes support for the proposal to bring structural interdicts to bear in Scotland as we feel these would have the potential to deliver generalized and preventative protection to marginalised groups of rights holders arising from lessons learnt in particular cases.

We also think it could be useful for the courts to have at their disposal an ability to instruct a policy and practice review process across a wider range of related service contexts following the outcome of a particular specific legal outcome which addresses a violation of rights. This could have the effect of reducing the need for other cases on the same of similar issues with broader positive outcomes for rights holders.

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?

Please let us know your views. :

We think it is essential that legislation regarding the right to participate and be engaged as a community in service planning, delivery or evaluation or have access to community empowerment, should be explicitly positioned within the ambit of the provisions of the Human Rights Bill and Incorporation of the UNCRC Bill. This should also be the case with other service specific legislation with duties to engage the community in decision-making such as the Children and Young People Act 2014, Planning Scotland Act 2019 or Community Justice Act 2016.

Part 9: Implementing the New Scottish Human Rights Act

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

Please give us your views:

The proposals for bringing the legislation into force seem appropriate and measured. We think, however, that preparation for Bill (Act) implementation should be carried out well in advance and that therefore, the sunrise clause, wouldn't need to be for an over-lengthy period of time.

39 What are your views on our proposals to establish minimum core obligations (MCOs) through a participatory process?

Please give us your views:

We welcome the proposal to establish MCOs through a participatory process and would go further to recommend that a process of Progressive Realisation should be co-produced with rights holders and duty bearers.

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

Please give us your views:

Again, this is welcomed, and we would recommend that such a scheme is co-produced with rights holders, civil society and duty bearers.

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?

Please give us your views:

We agree fully with this. The Human Rights Bill should be cross-cutting in its impact and influence over all other areas of legislation introduced by the Scottish Parliament.

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

Please give us your views:

This is a crucial area for successful implementation of the Bill. There is a need to ensure that all staff across the public sector (and other sectors with public implementation duties) are well-trained in all aspects of human rights, both in terms of general awareness and specific roles and duties. There is a clear case for rights holders to be involved in this training (both its design and delivery). The training/support needs to be planned and delivered in advance of full compliance with on-going refresher and update training provided on an annual basis.

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

Please give us your views:

There is a need for good, clear and accessible information to be provided for rights-holders (and the general population) across the country. This should be designed and co-produced in conjunction with rights holders and civil society and should draw on good practice and principles such as those contained within the National Standards for Community Engagement.

44 What are your views on monitoring and reporting?

Please give us your views:

We agree with HRCS that the SHRC should have a role in monitoring and scrutinising government and public body rights reporting. We also strongly agree with the HRSC that success can only be evidenced through the participation of people whose rights are most at risk.

Building on this, we see a monitoring role for a reference group or panel made up of people representing groups whose rights are most at risk. The pre-existing Lived Experience Board which is referred to in the consultation could potentially carry out such a role if adequately supported.

About you

What is your name?

Name:

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Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:

Scottish Community Development Centre

Please tell us which of the following categories best describe you (select all that apply):

Other

If other, please specify:

Independent charity

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response with name

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

I confirm that I have read the privacy policy and consent to the data I provide being used as set out in the policy.

I consent

Evaluation

Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:

Very satisfied

Please enter comments here.:

A consultation such as this should only be part of engagement but, for what it is, it works well.

Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:

Very satisfied

Please enter comments here.: