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## A Human Rights Bill for Scotland

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On October 5<sup>th</sup> the Scottish Government's consultation on a new Human Rights Bill for Scotland closed. Amnesty Scotland welcomes the proposals to strengthen the human rights framework and we have responded to the consultation. For ease, we have provided an executive summary of the proposals below, alongside a summary of our analysis. The consultation can be read in full at: <https://www.gov.scot/publications/human-rights-bill-scotland-consultation/>

The Scottish Government is proposing to introduce a new piece of legislation with the stated aim of:

- Building on existing human rights and equality protections, enshrined in the Scotland Act 1998, Human Rights Act 1998 and Equality Act 2010, within the limits of devolved competence.
- Providing a clear, robust and accessible legal framework that ensures everyone can understand and claim international human rights domestically;
- Incorporating into Scots law, within the limits of devolved competence:
  - the International Covenant on Economic, Social and Cultural Rights (ICESCR);
  - the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
  - the Convention on the Rights of Persons with Disabilities (CRPD); and
  - the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)
- Recognising and including the right to a healthy environment.
- Including an 'equality provision' that ensures the rights in the new legislation can be enjoyed by everyone within the limits of devolved competence.
- Providing a clear set of duties for public bodies (including, so far as possible, private actors) carrying out devolved public functions in Scotland in relation to the rights of the Bill.
- Ensuring there are routes to remedy available for when there has been an individual or systemic infringement of people's human rights and that the remedies are accessible, affordable, timely and effective.

### **Amnesty's recommendations**

We welcome the Bill and have campaigned for it alongside rights organisations and individuals in Scotland for a number of years. The new legislation has the potential to be transformative for people in Scotland by obligating public bodies to uphold a much wider range of rights. Amnesty's over-arching priority is to ensure that incorporation is led by, and results in, tangible improvements for rights holders, especially those who face the greatest barriers to enjoyment of rights and those whose rights are most at risk.

Broadly speaking, we have concerns about the duties contained in the Bill and a lack of detail about how the Bill will ensure access to justice. Under the current plans, the ICESCR rights and the right to a healthy environment will begin with a procedural duty and move towards a duty to comply, with the procedural duty falling away. Conversely, the ‘special protection’ treaties – CEDAW, CERD and CRPD - will have only ever a procedural duty attached to them. Amnesty believes the ‘dual’ procedural and substantive duties are complementary and mutually reinforcing, so they should apply to all rights to the maximum extent possible under the devolution settlement. In particular, there should be a stronger duty to comply for several specific substantive rights contained within those treaties. Failure to address this undermines the aims of the treaties and risks making access to justice for rights holders very difficult when breaches do occur.

We have called for the Bill to achieve the following outcomes:

1. **Taking a maximalist approach:** the legislation must offer the most effective means of protecting, promoting and fulfilling rights, within our constitutional arrangements.
2. **Building a human rights culture:** the legislation will be the foundation of human rights culture in Scotland. Equality, non-discrimination, equity and respect for human dignity will be core values. The legislation will result in tangible improvement for rights-holders. People who face the biggest barriers to realising their rights, and those whose rights are most at risk, must be prioritised.
3. **Bringing Scots law into line with international human rights standards:** existing and future laws passed by the Scottish Parliament, and scrutinised by our courts and tribunals, must be compatible with the rights given effect by the legislation. Urgent steps must be taken to rectify incompatibilities identified.
4. **Establishing a floor not a ceiling:** the legislation will provide a trusted reference point for human rights standards, but public bodies in Scotland must continually strive to promote, protect and fulfil human rights, without discrimination and without regression.
5. **Keeping step:** the legislation will be a living instrument which will keep step with developments in international human rights law.
6. **Empowerment and access to justice:** the rights will be enforceable by rights holders, with robust and accessible routes to effective remedy, adequate resourcing to ensure individuals can access information, education, advice, representation and independent advocacy where needed.
7. **Accountability and transparency:** there must be clear mechanisms to ensure responsibility, answerability and enforceability. This will include robust reporting duties and monitoring mechanisms; there must be coherent and accessible pathways to ensure scrutiny; rights violations must not fall through the gaps between scrutiny bodies.
8. **Legal certainty:** the legislation must be clear and accompanied by accessible information to ensure that individuals can name and claim their rights and that duty bearers are clear as to their powers and duties under the Bill.
9. **Participation and collaboration:** People should be actively involved in decisions that affect their rights. Implementation and operation of the legislation will be rights-holder led.
10. **Taking an intersectional approach:** to the legislation and developing practice around it will recognise people’s multiple identities and the need to address intersectional forms of discrimination and inequality they face in overcoming barriers to their rights.

There are four main parts of the consultation, as follows.

## 1. Incorporating the treaty rights

### **Interpretation**

The Scottish Government proposes to include a section within the Bill known as an 'interpretative clause' which will set out that courts can consider the concept of human dignity and make reference to the treaty preambles, accompanying guidance and concluding observations and other materials when adjudicating. We support this proposal, but have warned that the clause must be clearly drafted so that public bodies and rights-holders know what to expect. UN treaties have additional material associated with them known as 'General Comments'. These are usually further reaching than the stand-alone treaty in terms of their recommendations. Their inclusion in an interpretative clause can strengthen rights protections. Rather than pick and choose specific materials for inclusion, we have asked the Scottish Government to include a catch-all of 'other relevant mechanisms at international or regional level.' An interpretative clause could also be used to make clear that the rights can only be upheld within the limits of the Scottish Parliament's powers.

Human dignity and other values or principles such as autonomy and participation could also be embedded through a 'principles clause', which could also emphasise that rights are indivisible, inter-related and interdependent.

### **Participation**

Participation is fundamental to a human rights-based approach and should be both a principle that underpins the legislation and a specific right built into the implementation of the Bill. For example, the right to participation for citizens in setting human rights budgets, monitoring and evaluation processes, and setting Minimum Core Obligations. To achieve full participation of groups that have been historically excluded, duty bearers should have powers and duties which enable them to target participation proactively and to hear from communities whose rights are most at risk, as well as clear guidance materials to support them to do so. It is crucial that participation mechanisms are inclusive, meaningful and lead to tangible change. The time and input of participants must be respected, valued and accompanied by clear policies around paid participation with a view to co-creating empowering and meaningful solutions.

### **Minimum Core Obligations**

Minimum Core Obligations or MCOs are the minimum essential levels of each of the rights that must be upheld. It is important to emphasise that the duty to meet these obligations is not new and has been a requirement in the UK for decades, however bringing them into Scottish law will mean that if they are breached, rights-holders can seek justice much more easily, either in court or by an administrative route such as a tribunal or ombudsman.

We have called on the Scottish Government to appoint an independent body with expertise in economic and social human rights to; develop targets for Scottish duty bearers in relation to MCOs, ensure that those whose rights are most at risk are closely involved in developing these targets through a participatory process, and that there is a clear process for reviewing and raising

MCOs regularly to ‘progressively realise’ rights. There must also be a clear link between the MCOs and approaches to budgeting to ensure that resources are allocated to urgently address areas of life in which human rights are most at risk in Scotland.

## **Model of Incorporation**

The ‘models’ used to incorporate international treaties into domestic law vary globally. Some countries use a written constitution to achieve this. Because Scotland’s Parliament is a devolved legislature within the UK state this approach isn’t possible. The two models suggested most frequently in the Scottish context are: a ‘full and direct’ approach, which reproduces all four treaties in the Bill, removing any text that relates to areas reserved to the UK Parliament; alternatively, an ‘adaptation/transposition’ approach would adapt the treaty texts, changing the wording of rights for the Scottish context. The approach favoured by the Scottish Government is the first, full and direct model. Both approaches have pros and cons and Amnesty has not favoured one over the other. The most important thing is ensuring that rights are incorporated as fully as they can be and that they are enforceable and result in tangible improvements in people’s lives.

No matter what model is agreed upon, it is essential that the Scottish Government sets out a clear analysis of which treaty rights would have to be removed as falling within a reserved area, and how they would approach areas such as social security, employment and equal opportunities where there are both reserved and devolved elements. In addition, some of the rights within the special protection treaties are civil and political in nature and, to achieve the aims of the treaties and retain their coherence, they should not be removed unless strictly necessary. It will also be important to help rights holders navigate rights which have been removed as well as overlaps between different treaties.

## **The Right to a Healthy Environment**

Because the Right to a Healthy Environment isn’t covered by a treaty, the Scottish Government has proposed including it in the Bill. Current plans suggest the Government will use the definition of environment set out in the Aarhus Convention, the leading international agreement on environmental democracy. Amnesty supports the use of the Aarhus definition and have called on the Government to ensure the Convention’s preamble, and first two articles, are emphasised in the Bill to acknowledge that *‘adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself’* and *‘the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.’*

We are concerned that the proposals don’t include more detail on how victims of environmental rights breaches will access justice, particularly as this has been a systemic problem in Scotland and the UK, identified by the governing institutions of the Aarhus Convention. Given the urgency of the climate crisis, it is essential that the rights are immediately enforceable and are not considered to be subject to progressive realisation and maximum available resources and there must be no retrogression.

We have also called for recognition of the right to healthy and sustainably produced food and the right to adequate sanitation. Safe and sufficient water must address wastewater and pollution from sewage, agricultural discharge, and other sources, and the impacts of climate change on water.

## **2. Incorporating Further Rights and Embedding Equality**

### **UN Convention Against Torture**

We have called on the Scottish Government to look again at the UN Convention Against Torture (UNCAT), as we believe by incorporating the UNCAT Article 1 definition of torture into Scots law the Bill would bridge existing gaps between the UK definition of torture and the UNCAT. The Bill should also incorporate a right to rehabilitation for survivors of torture and ensure private actors carrying out delegated state duties are subject to the same duties as state actors.

### **Equality Provision**

The Scottish Government has proposed including an ‘equality provision’ – a clause within the Bill which sets out that everyone whose rights are contained in the special protection treaties (CEDAW, CEDR and CRPD) also should enjoy the access to ICESCR rights and the right to a healthy environment without discrimination. One approach the government has proposed is to model this clause on Article 2 of ICESCR which requires the rights in treaties to be secured without discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. There is an important question around which groups will be explicitly included in this clause. While ‘other status’ is included in an attempt to make sure everyone is captured by the clause, there are key groups both with and without standalone treaties who may benefit from being specifically named, to put the protections afforded to them by the new legislation beyond doubt – including disabled people, older people, LGBTI+ people and care experienced people.

Because ‘equal opportunities’ is an area of power reserved to the Westminster Parliament, Scottish ministers will need to take care to ensure nothing in this Bill attempts to legislate in that area, and this may be difficult to navigate. However, we have highlighted that there are exceptions which allow the Scottish Government to legislate on equalities in relation to the devolved functions of public authorities, so long as the legislation supplements and does not contravene the Equality Act 2010. The parameters of these exceptions are untested, but we have urged ministers to be bold and ensure the Bill goes as far as it can in protecting and fulfilling the rights of all, paying particular regard to those who face the most significant barriers.

### **The Duties**

Amnesty has called for the duties to apply to public bodies and private actors carrying out public functions to the maximum possible extent within the devolution settlement. We are concerned that the current proposals do not make clear to duty bearers and rights-holders which public and ‘hybrid’ bodies are covered and when they are covered. It is essential that the new Bill provides clarity on whether private actors providing public functions have an obligation to respect, protect, and fulfil human rights. One approach towards achieving clarity about ‘who is covered’ would be to have a schedule, which could be amended by secondary legislation, setting this out in more detail, following the approach of the Freedom of Information Act 2000 and the Equality Act 2010. The definition must also translate in the context of the right to a healthy environment, where most polluters are private bodies, having regard to the Aarhus definition of public authority, which

includes legal persons having public responsibilities or functions, or providing public services, in relation to the environment under control of the state.

Regarding the procedural duty, Amnesty has called for more clarity about how it will be scrutinised and enforced, which body would have oversight, and crucially whether it would be justiciable by rights holders.

Overall, we advocate for the duty to comply and the procedural duty to apply in tandem to all rights in the four treaties that fall within devolved competence. For this to operate successfully in either model of incorporation, there will need to be clear and accessible information to clarify which rights are substantive, enforceable by individuals and within devolved competence. Whichever form the duties ultimately take, implementation must be informed by the input of rights-holders, especially those whose rights are most at risk, as well as robust mechanisms of accountability and a range of remedies to ensure that incorporation leads to tangible change for rights-holders.

The Bill must be accompanied by an extensive capacity building programme. It is essential that duty bearers are given sufficient financial and practical resource including clear guidance to ensure that these duties will make a tangible difference to the lives of all people in Scotland, especially those whose rights are most at risk.

## **Human Rights Scheme**

The current plans are to place a duty on Scottish Ministers to publish a Human Rights Scheme. This would serve in some ways as a monitoring and accountability tool which would obligate Ministers to report on what actions have been taken to uphold the rights in the Bill. Amnesty agrees that the publication of a Human Rights Scheme would be a positive step towards achieving accountability and building a human rights culture. The consultation indicates that the Human Rights Scheme could serve as a way for Ministers to publish their plans for implementation and report on progress. However, there is a need for further detail of the scheme's requirements and goals. It is essential that the Human Rights Scheme should be shaped by contributions from people with lived experience and those whose rights are most at risk. It could also present an opportunity to explore and review human rights budgeting measures to ensure that allocation of funding is non-discriminatory, and that additional funding is available for the benefit of historically marginalised and disadvantaged groups.

### **3. Ensuring access to justice for rights-holders**

Ensuring effective access to justice is incredibly important. Without it, the Bill will fail in its aims.

We support the overarching goal of the proposals that administrative as well as judicial remedies need to be accessible, affordable, timely and effective. However, there are areas of uncertainty which require fuller explanations to facilitate meaningful participation in shaping and implementing the legislation. These include:

- More detailed proposals on how the Bill will ensure that both judicial and administrative remedies are accessible, affordable, timely and effective;
- How public interest litigation will be supported through the provisions of the Bill;

- How financial and practical barriers to access to justice under the Bill will be addressed through policy and fiscal measures as well as legislative reform;
- How the Government will collect and analyse disaggregated data on human rights violations against people sharing protected characteristics and on how the justice system is providing access to effective remedies;
- Which Courts and Tribunals will be able to provide remedies to rights holders;
- How will administrative and judicial mechanisms for redress and their time limits interact.

Wider access to justice reforms is needed in the Scottish civil and administrative justice system in order to make sure that rights-holders are able to access a remedy for a breach of their rights in practice. What can be done on the face of the Bill is to ensure there is an express right to an accessible, affordable, timely and effective remedy, as a means by which gaps in access to justice can themselves be challenged.

#### **4. Implementing the new Scottish Human Rights Act**

While public bodies will need a reasonable time period to prepare, fast and full implementation of the Bill once it is passed is vital. The UK committed to implement all of the rights contained in the proposals many years ago by ratifying the treaties, and the Scottish Government's plans have been well established for a number of years. These discussions are not new, and reforms are urgent for people in Scotland whose rights are most at risk.

Rights-holders, duty bearers and those operating in the advice, representation and independent advocacy sector require clarification of the timescales for the staged and full implementation of the Bill, in order to prepare for implementation.

We also support calls for an audit of existing legislation to determine compatibility with the Bill. An audit should:

- Identify Acts of the UK Parliament (and amendments to Acts of the UK Parliament) that are within devolved powers and impact on human rights and make necessary amendments to bring them into the scope of the Human Rights Bill;
- Commission a comprehensive audit of the extent to which all devolved legislation complies with the relevant treaties/rights;
- Make amendments identified through the audit. Review and update the audit on an ongoing basis through the Bill's Human Rights Scheme, taking into account evolving international standards, guidance and recommendations. This audit work should commence immediately, and this process does not need to wait for the Bill to be passed in its final form.

