

Response ID ANON-6XVX-YBJT-N

Submitted to A Human Rights Bill for Scotland: Consultation
Submitted on 2023-10-05 15:55:03

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?

Not Answered

Please give us your views:

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)?

Not Answered

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.:

There are several concerning issues with the proposal to increase the legal weight of General Recommendations and Concluding Observations:

(a) The UK ratified CEDAW in 1986 and all General Recommendations and Concluding Observations post-date that agreement to be bound by the Articles of CEDAW. Elevating the legal weight from "slight" [1] and non-binding to an interpretive aid for the court would be giving judicial significance to views and recommended provisions that the member state has not explicitly agreed to. The UK has on occasions strongly disagreed with the CEDAW Committee's recommendations and Engender has pointed to recommendations in the most recent Concluding Observations that are plain erroneous due to the Committee's lack of familiarity with what is going on in each nation. [2]

(b) It is not specified if it is just Concluding Observations for the UK or if those for other UN member states would be included as well. There are very often contradictions and inconsistencies from country to country, for example, the committee said in its Concluding Observation to the UK in 2019 to "Review and amend the public sector equality duty in order to address situations of intersecting forms of discrimination, such as discrimination faced by...transgender women" [3] yet it also advised Portugal in 2022 that "It notes with concern, however, the gradual dilution of the concept of "sex" and its replacement by the concept of "gender" across policies and legislation...recommends avoiding the broad use of the concept of "gender" when addressing the rights of women." [4]

An analysis into the growth of the concept of gender identity and how it is structurally displacing sex in policy and language warns that aspects of the Committee's observations and recommendations constitute a misunderstanding of discrimination based on sex and actually violate the very obligations of the treaty to realise substantive equality between men and women. [5]

(c) The Scottish Government argued in court for a reversal in legal weighting to be applied to CEDAW with the Article 1 reference to sex to be disregarded in preference for the elevation in status of the General Recommendations and Concluding Observations since they were believed to support the Government's "transwomen are women" policy, and therefore confirmed, in their opinion, that CEDAW embraced self-identification. [6] Although the judge supported this position [7], her decision was overturned in its entirety at appeal to the Inner House. [8]

Further discussion and absolute clarity is required on the Scottish Government's current position regarding CEDAW. Does the Scottish Government now accept the UN's definition of sex as the biological differences that distinguish males and females, along with the Inner Court's ruling that "sex" and "gender reassignment" should not be confused or conflated, or does it see the incorporation of CEDAW and its General Recommendations and Concluding Observations as a way to embed self-identification into Scots law?

References:

[1] Para 35, R (A) v Secretary of State for Health (Alliance for Choice and others intervening) [2017] UKSC 41, [2017] 1 WLR 2492
<https://www.supremecourt.uk/cases/docs/uksc-2015-0220-judgment.pdf>

[2] Para 35(f), CEDAW Concluding observations on the UK as annotated by Engender
<https://www.engender.org.uk/content/publications/Engender-annotated-concluding-observations-formatted.pdf>

[3] Para 16(c), CEDAW Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland
<https://digitallibrary.un.org/record/3801131?ln=en>

[4] Paras 18 and 19, CEDAW Concluding observations on the tenth periodic report of Portugal
<https://digitallibrary.un.org/record/3987034?ln=en>

[5] The Erasure of Sex: The Global Capture of Sex: The Global Capture of Policies on Sex by Gender Identity Activists and the Effects on the Rights of Women and Girls

<https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1366&context=dignity>

[6] UN Convention on the Elimination of all forms of Discrimination Against Women: A case study in the Scottish courts
<https://forwomen.scot/28/09/2023/cedaw-a-case-study-in-the-scottish-courts/>

[7] For Women Scotland v Lord Advocate and Scottish Ministers [2021] CSOH 31
<https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021csoh031.pdf>

[8] For Women Scotland v Lord Advocate and Scottish Ministers [2022] CSIH 4
<https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csih4.pdf>

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

Please give us your views.:

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

Not Answered

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

The proposal to put the rights from the four treaties into the Bill using the same wording as in the treaties themselves, removing anything that is reserved to the UK Parliament is fraught with problems. If the Scottish Government is unable to be clear at the point of consultation about which Articles in the treaties would remain and which come under reserved areas it does not give confidence that they have the wherewithal to navigate this complex area of law in a manner that is not going to lead to an extended period, at great public expense, of legal battles with Westminster. The Scottish Government has not yet found a way to resolve the Supreme Court ruling on the UNCRC bill and enact any meaningful legislation so it may be premature to embark on incorporating other treaties which very much look like they will be similarly fragmented and incoherent.

Wholesale incorporation of CEDAW has only been achieved at the constitutional level either during a process of reinvention, such as in South Africa, or in the absence of a system of comprehensive domestic legislation, such as in Colombia. We are not aware of any country incorporating CEDAW where there already exists a comprehensive framework of primary and secondary equality legislation in place, particularly one with such a devolved settlement as Scotland.

Successive Labour and Conservative UK Governments have declined to incorporate CEDAW into UK law on the basis that CEDAW rights are given effect through a range of domestic laws, primarily through the Equality Act 2010 and the Human Rights Act 1998. Both have stated that incorporation of CEDAW would create duplication and a hierarchy of rights, and that prioritising women's (or any one specific characteristic) rights would be disproportionate and detrimental to the balancing of nine equally protected characteristics in the Equality Act. [1]

We tend to agree with this view and do not see any explanation from the Scottish Government to counter the points made. The provisions in the Equality Act prohibits direct and indirect discrimination, harassment, victimisation and other specified conduct, with certain exceptions permitted as lawful where appropriate. These apply across the board to both public and private actors over a vast field of everyday relations and interaction whether in the workplace, or in regulation of the profession, the provision of goods and services, the provision of accommodation, or in the operation of charities, schools and universities or private clubs and associations.

By comparison, what is proposed in the Human Rights Bill would be a small part of this and strictly limited to Scottish public bodies as duty bearers, and even then would have to exclude UK public bodies in Scotland as a result of the Supreme Court decision on the UNCRC bill. Initially, at least, these bodies would have only a procedural and due regard duty and no duty to comply. It's hard to see how this would represent an improvement for women, particularly when the PSED in the Equality Act already places a legal obligation on these bodies to consider and give due regard to women when making decisions, with a range of remedies available through the courts and regulatory and enforcement bodies.

In addition, it is difficult to see how the Scottish Government can expect public bodies to comply with broader CEDAW rights when, in our experience, the Government itself has shown poor understanding of its equalities obligations - please see our submission to the CEDAW Committee earlier this year evidencing that equal and inclusive representation of women in decision-making systems in Scotland has been increasingly impaired by violations of Article 7 and 8 rights in conjunction with Article 2, 5 and 14 under CEDAW as well as Article 18, 19 and 21 rights under the International Covenant on Civil and Political Rights. [2]

Looking through the Articles of CEDAW there are many ways to improve women's lives without the complex legal exercise of incorporating, and in many ways duplicating, CEDAW rights into Scots law. As was also said by the Lived Experience Board, existing laws are not upheld and the problems caused by that are not solved by making more laws. Under-funding and under-resourcing for women exiting domestic abuse, housing, health and support services are key, and saying to women we will give you a law to enforce the right to a warm, dry house is a hollow statement when Government funded rape crisis centres have closed their waiting lists and when homelessness has increased 9% in the last year, [3] with more than 6,000 families with children living in temporary accommodation for more than a year [4]. Legal aid remains unobtainable by many with the system seemingly on the brink of collapse, [5] and the Government has made little headway in tackling issues such as increasing availability of affordable housing throughout Scotland. An enforcement right for a non-existent service or resource does not conjure that service or resource into existence and Parliamentary time would surely be better directed at resolving the fundamental issues.

The obvious gap in legislation for women's rights is with addressing prostitution. A vote for common guidelines to tackle prostitution as a form of violence against women was very recently passed by the European Parliament [6] and it would be a better use of the Scottish Government's time to make progress on implementing similar with the long promised Nordic Model [7] for Scotland.

References:

[1] Labour Government, Para 5, Response by the UK and Northern Ireland to Select Recommendations of the UN Committee on the Elimination of all forms of Discrimination Against Women following the examination of the UK and NI's 5th and 6th Periodic Reports on July 10 2008
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85468/one-year-on-report.pdf

Conservative Government, Para 3, United Nations Convention on the Elimination of all forms of Discrimination Against Women United Kingdom's Eighth Periodic Report 2011-2017

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/698249/UN_convention_on_the_elimination_of_all_forms_of_d

[2] CEDAW: Equal and inclusive representation of women in decision-making systems, submission by For Women Scotland
<https://forwomen.scot/18/02/2023/cedaw-equal-and-inclusive-representation-of-women-in-decision-making-systems/>

[3] The Times, 06 September 2023, "Equality and opportunity drive Yousaf's mission statement of 14 bills"
<https://www.thetimes.co.uk/article/equality-and-opportunity-drive-yousafs-mission-statement-of-14-bills-3n68qvmm8>

[4] The Herald, 25 September 2023, "Thousands of families in temporary accommodation for more than a year"
<https://www.heraldscotland.com/news/23812786.thousands-families-temporary-accommodation-year/>

[5] Law Society of Scotland, 20 October 2022, "Legal aid crisis hitting Scotland's most deprived families"
<https://www.lawscot.org.uk/news-and-events/law-society-news/legal-aid-crisis-hitting-scotlands-most-deprived-families/>

[6] Euronews, 15 September 2023, "Freedom for sex workers, jail for their clients? MEPs call for measures to tackle prostitution"
<https://www.euronews.com/my-europe/2023/09/15/freedom-for-sex-workers-jail-for-pimps-meps-call-for-measures-to-tackle-prostitution>

[7] Nordic Model Now! What is the Nordic Model?
<https://nordicmodelnow.org/what-is-the-nordic-model/>

Part 5: Recognising the Right to a Healthy Environment

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

Not Answered

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:

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?

Not Answered

Please provide your reasons why:

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?

Not Answered

Please give us your views:

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

Not Answered

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 do not see any benefit to a copy and paste of the Human Rights Act 1998 into the proposed Bill. The HRA is well established with a high level of public awareness in Scotland so it would be a completely unnecessary duplication which can only confuse people and risk the perception that rights under the

HRA have been lost or changed.

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

Please give us your views:

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:

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

Please give us your views :

The consultation document states "The Taskforce also recommended that the framework should include the right to a healthy environment; include an equality clause which aligns with the Equality Act 2010 and provide equal access to the rights contained within the Bill for everyone, including LGBTI people." However, neither of the proposed groups: "older people" or "LGBTI people" align with the Equality Act.

The relevant protected characteristics in the Equality Act are "age", "sexual orientation" and "gender reassignment". What trans activists groups refer to as "intersex" is not a standalone protected characteristic but is some 40 or so different medical conditions. People with these Differences of Sex Development (DSDs) are already protected under "sex" (no-one is in-between the sexes, it is not a spectrum) and insofar as their particular medical condition under "disability". The Scottish Government should think carefully before risking exceeding their devolved competence by confusing, conflating or modifying protected characteristics.

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.:

A very similar definition is in the Scotland Act L2 exception: "Equal opportunities means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions." [1]

Older people are already protected under "age", LGB under "sexual orientation" and, as explained in the answer to the previous question, people with DSDs under "sex" and "disability", There is no common feature uniting "LGBTI people" and any such grouping would be contrary to the carefully laid out separate and distinct protected characteristics in the Equality Act.

We are not sure what is meant by the "T" but assuming it refers to people who hold the protected characteristic of "gender reassignment" then there is not generally an issue with this protected characteristic being specifically mentioned in the proposed Human Rights Bill. However, we do not consider it necessary. All parties involved in the judicial review on the Gender Representation on Public Boards Act fully accepted that gender reassignment was included in the L2 definition; it was never in dispute at any point. And the decision by the Inner House makes it clear that the Scottish Government could have legislated for provision for any protected characteristic, including gender reassignment. This case law from the highest court in Scotland puts the matter beyond doubt. [2]

[1] L2 Equal opportunities, Scotland Act 1998

https://www.legislation.gov.uk/ukpga/1998/46/schedule/5/part/II/crossheading/head-I-miscellaneous_paragraph-wrapper63n2

[2] For Women Scotland v Lord Advocate and Scottish Ministers [2022] CSIH 4

<https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csih4.pdf>

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

No

Please give us your views:

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:

Please give us your views on legal aid:

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

Please give us your views:

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

Please give us your views:

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

Please give us your views:

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

Please give us your views:

This proposal seems to be an unnecessary reach for powers and responsibilities that are currently under the remit of the Equality and Human Rights Commission who are tasked with upholding the Equality Act including advice and guidance, investigation, enforcement and legal action regarding breaches in respect of women, disability and age. Given that the SHRC did not share the well-founded concerns of the EHRC on the impact on women's rights by the Gender Recognition Reform bill, or would even meet with women's groups to explore the issues, this is of particular concern. This has potential for fraught cross-border conflict over responsibilities and budgets.

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:

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

Please give us your views:

The Scottish Government attempted to prevent legal action by our organisation after our legal standing under "sufficient interest" had already been established by the court, when they argued in written submissions to the Inner House that the judicial review appeal on the Gender Representation of Public Boards Act should only be allowed to be taken by relevant regulatory bodies, such as the EHRC. Presumably, under the proposed Human Rights Bill this would in future include the SHRC, an organisation funded by the Scottish Government and influenced by the same ideological policy that "transwomen are women". While we agree that the "sufficient interest test" is preferable to the "victim test" the Scottish Government must make it clear that it will not leverage organisations such as SHRC to prevent individuals or other organisations pursuing action, particularly where there is an ideological difference.

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

Please give us your views:

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

Not Answered

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?:

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. :

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:

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

Please give us your views:

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

Please give us your views:

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:

As with the example of the Gender Representation on Public Boards Act, which was subsequently found to be unlawful because of an amendment made at Stage 2 of the bill's progression through Parliament, it is possible for incompatibility to find its way into a bill as it proceeds through the committee stages and amendments are made. It would therefore be good practice to assess compatibility and equality impact, not just when a bill is introduced to

Parliament, but also after final amendments have been incorporated into a bill, and before a final vote by Parliament.

A commitment to review all previous legislation passed by the Scottish Parliament would also provide reassurance that all legislation, not just future legislation, is compliant with the UN treaties.

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:

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:

44 What are your views on monitoring and reporting?

Please give us your views:

About you

What is your name?

Name:
Trina Budge

What is your email address?

Email:
info@forwomen.scot

Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:
For Women Scotland

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

Rights holder

If other, please specify:

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?:
Slightly dissatisfied

Please enter comments here.:

This is a very complex area of law and it is apparent the Scottish Government was not able to clearly spell out the boundaries of what could be achieved under devolved laws. It is unrealistic therefore to expect not-for-profit organisations and ordinary members of the public - never mind inviting children to

respond! - to answer detailed and lengthy consultations on constitutional issues. At times we very much felt we needed the advice of expert legal counsel.

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.: