



A Human Rights Bill for Scotland

Response from the Scottish Council of Jewish Communities

Background information

The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland. SCoJeC advances public understanding about the Jewish religion, culture and community, by providing information and assistance to educational, health, and welfare organisations, representing the Jewish community in Scotland to Government and other statutory and official bodies, and liaising with Ministers, MSPs, Churches, Trades Unions, and others on matters affecting the Jewish community. SCoJeC also provides a support network for the smaller communities and for individuals and families who live outwith any Jewish community or are not connected with any Jewish communities, and assists organisations within the Scottish Jewish community to comply with various regulatory requirements. SCoJeC also promotes dialogue and understanding between the Jewish community and other communities in Scotland, and works in partnership with other organisations and stakeholders to promote equality, good relations, and understanding among community groups.

In preparing this response we have consulted widely among members of the Scottish Jewish community, and this response reflects the views of all branches of Judaism that have communities in Scotland.

Introduction

We strongly agree with the Minister about “the importance of all people being treated with dignity” and share her view that “*accountability must lie at the heart of the framework. Government, public bodies, the courts and independent scrutiny bodies all have a role in ensuring human rights are respected, protected and fulfilled*”.

We are, however, concerned that the consultation paper links Human Rights to a political agenda, regarding them as “constrained” so that “*only independence can allow us to fully incorporate all rights into domestic law*”¹. The objective should be to make Human Rights fully accessible to everyone regardless of the type of constitution and government in Scotland.

¹ Scottish Government consultation paper pp1-2
<https://www.gov.scot/publications/human-rights-bill-scotland-consultation/>

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?

We agree with Taskforce Recommendation 9 that “*human dignity is the value that underpins all human rights*”, and support the proposal that the courts should be enabled formally to take dignity into account in their deliberations.

However, as a number of judgements in recent end of life cases have explicitly stated, the concept of dignity is subjective and is influenced by religion and culture:

- “*dignity, the meaning of life and the sanctity of life mean different things to different people in a diverse, multicultural multifaith society*”
[Mr Justice McDonald in Manchester University NHS Trust v Fixsler [2021] EWHC 1426²]
- “*there is innate dignity in the life of a human being who is being cared for well, and who is free from pain. There will undoubtedly be people who for religious or cultural reasons or merely because it accords with the behavioural code by which they have lived their life prefer to, or think it morally right to, hold fast to life no matter how poor its quality or vestigial its nature*”
[Mr Justice Hayden in M v Mrs N [2015] EWCOP 76³]

For this reason, as Mr Justice Poole said in another case, “*the concept of dignity is unhelpful*” [Guys and St Thomas’ Children’s NHS Foundation Trust v Pippa Knight [2021] EWHC 25⁴]

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

In her recent statement to the Scottish Parliament on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (Reconsideration), the Cabinet Secretary for Social Justice observed that “[*Scottish Government*] *analysis ... has revealed that ... it would be extremely complex for users. ... Our assessment is that, as we seek more coverage in the compatibility duty, the provisions become more complex, uncertain and challenging*”.⁵

Whilst we agree with the proposal set out in the consultation paper that dignity should be a key threshold for defining the content of MCOs (Minimum Core Obligations), in view of this assessment, which would also seem to be relevant in relation to the incorporation of other international treaties, we are concerned that the complexities

² Manchester University NHS Trust v Fixler [2021] EWHC 1426

<https://www.judiciary.uk/wp-content/uploads/2022/07/Manchester-University-NHS-Foundation-Trust-v-Fixsler-judgment.pdf>

³ M v Mrs N [2015] EWCOP 76

https://www.judiciary.uk/wp-content/uploads/2015/11/2015_ewcop_76_fam_final_in_matter_-of_-n_21.pdf

⁴ Guys and St Thomas’ Children’s NHS Foundation Trust v Pippa Knight [2021] EWHC 25

<https://www.judiciary.uk/wp-content/uploads/2022/07/Guys-and-St-Thomas-v-Knight-judgment.pdf>

⁵ Official Report 27 June 2023: Statement by Shirley-Anne Somerville on the reconsideration of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

<https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=15396&i=131331&c=2508051#ScotParlOR>

described by the Minister may confound the objective to “*help duty-bearers and rights-holders to have a clear understanding of the purpose of MCOs within the framework*”.⁶ We would question whether there may possibly be simpler means to achieving this.

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

We agree that the General Comments, and Committee Recommendations can provide a useful tool in interpreting the various Conventions and Human Rights Treaties but, as stated in the consultation paper⁷, these may sometimes be contradictory, interpreting the same rights in different ways, and are not legally binding. In our view, it would create confusion amongst both rights-holders and duty-bearers, if the Bill were to give these interpretations legally binding status in domestic law.

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

The consultation paper states (p16) “*The UNCRC Bill took the approach of directly incorporating text from the United Nations Convention on the Rights of the Child into Scots law. For the Human Rights Bill, we would propose taking a broadly similar approach – putting 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. ...*”.

We are concerned that the pronounced similarity of what is proposed for the Human Rights Bill to the approach which the Supreme Court struck down in the UNCRC Bill as “*outside the legislative competence of the Scottish Parliament*” risks at best very long delays to improved access to Human Rights – the Supreme Court Judgement⁸ was handed down in October 2021 but a revised UNCRC Bill has only now – 2 years later – been brought before the Scottish Parliament.

We are very strongly supportive of improved access to Human Rights, and must, therefore, regret proposals that are likely to delay implementation, possibly for several years.

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.

Any list or other attempt at definition risks creation of a hierarchy of (in)equality, in which some protected characteristics always take priority over others. All groups should be protected in the same way. There will inevitably be occasions when the rights of different groups come into conflict, but care must be taken to ensure that no one group has the right always to take priority, which would create a hierarchy of (in)equality. Each case should be considered on an individual basis, ensuring that potentially conflicting rights are fairly balanced throughout the whole of society, thus

⁶ Scottish Government consultation paper p14

⁷ *ibid* p15

⁸ <https://www.supremecourt.uk/cases/docs/uksc-2021-0079-judgment.pdf>

avoiding a situation in which any one group is unfairly benefitted, ignored, or targeted.

Recognising the Right to a Healthy Environment

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

We do not wish to comment on this question.

7. If you disagree please explain why.

n/a

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

We do not wish to comment on this question.

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 wish to comment on this question.

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 do not wish to comment on this question.

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

We do not wish to comment on this question.

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?

Full access to Human Rights is the entitlement of every person in Scotland, but there are undoubtedly occasions when people have difficulty in accessing their rights, and legal redress, which is both lengthy and expensive, is impractical for the majority of people.

Although important, legislation can, however, only provide a partial solution, and we emphasise the importance of educational initiatives to raise awareness of Human Rights among a wide range of organisations and professions, in schools, and individuals from throughout Scottish society.

The Scottish Human Rights Commission advises that *“Most human rights issues do not need specialist legal advice and can be resolved by communication, advocacy and non-judicial complaints mechanisms: talking to those involved, seeking*

*advocacy support and using existing complaints processes where necessary.*⁹ The most effective way to implement their advice is not by legislation but rather by funding representative organisations that can help individuals access what they need – access not to courts but to services that respect and realise their Human Rights, and not just by *post facto* litigation.

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

We are satisfied with the model laid down in Parts 2 and 3 of the Community Empowerment (Scotland) Act 2015¹⁰ which requires public bodies to:

“(4)(6)(a) consider which community bodies are likely to be able to contribute to community planning having regard in particular to which of those bodies represent the interests of persons who experience inequalities of outcome which result from socio-economic disadvantage,

(b) make all reasonable efforts to secure the participation of those community bodies ...

(c) to the extent (if any) that those community bodies wish to participate in community planning, take such steps as are reasonable to enable the community bodies to participate ...”

and also enables community organisations to:

“(22)(1) ... make a request to a public service authority to permit the body to participate in an outcome improvement process.”

This dual approach, requiring public bodies proactively to seek out and engage community organisations, and facilitating proactive engagement from community organisations should also be followed with regard to Human Rights.

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?

The intended interplay between the proposed Bill and the Equality Act 2010 is unclear. Since the Supreme Court has confirmed¹¹ the Scotland Act 1998 provision that *“An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters.”*¹², an equality provision would, as recognised in the consultation paper, be constrained *“to operate within the limits of the equal opportunities reservation in the Scotland Act 1998”* and *“the need to consider how this will operate within the wider Equality Act framework”*¹³. We are concerned that its inclusion would risk significant delays in implementation if the UK Government chose to refer the Bill to the Supreme Court as has been done on

⁹ *A note on using the law to uphold human rights*, Scottish Human Rights Commission
<https://careaboutrights.scottishhumanrights.com/howaremyhumanrightsprotectedinlaw.html>

¹⁰ Community Empowerment (Scotland) Act 2015, Parts 2 and 3
<https://www.legislation.gov.uk/asp/2015/6/part/2>
and
<https://www.legislation.gov.uk/asp/2015/6/part/3>

¹¹ <https://www.supremecourt.uk/cases/docs/uksc-2021-0079-judgment.pdf>

¹² <https://www.legislation.gov.uk/ukpga/1998/46/schedule/4/paragraph/2>

¹³ Scottish Government consultation paper p26

several occasions, and would therefore prefer the Bill to reference the Equality Act 2010 rather than to introduce a free-standing duty.

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

Any list or other attempt at definition risks creation of a hierarchy of (in)equality, in which some protected characteristics always take priority over others. It also leaves groups that do not fall within the statutory list vulnerable to being discriminated against but not formally 'protected'. An obvious example is the omission of age discrimination from the Hate Crime (etc) Act – exacerbated by the provision for it to be added later, which in effect recognises that it should have been included! This is intrinsically unfair, and runs counter to the proposed objective. Couching a provision in general rather than specific terms would help avoid any one group feeling either ignored or targeted.

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.

See our response to Q15 above.

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

n/a

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

See our response to Q15 above.

The Duties

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

We agree with the proposal¹⁴ that the duties should apply to "*bodies carrying out devolved public functions*". We are, however, concerned that the Bill should not be lengthily delayed by legal and constitutional arguments, and therefore strongly urge that careful note should be taken of the Supreme Court judgement concerning Section 6 of the UNCRC Bill which rejected the Counsel for the Lord Advocate's contention that the extent of the duties "*would would be elucidated by the courts over time*"¹⁵, but instead found that "*[The Scotland Act] cannot have been intended to enable the courts to undertake, in substance, a rewriting of provisions enacted by the Scottish Parliament*".¹⁶

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

The scope of the envisaged initial procedural duty appears considerable, namely to "*focus on ensuring that the rights in the Bill are taken into account by duty-bearers,*

¹⁴ ibid p29

¹⁵ Supreme Court Judgement para 61

¹⁶ ibid para 79

built into the fabric of their decision-making processes and adequately taken into account in the delivery of services ... apply[ing] to policy or programme development, new legislation, as well as budgetary processes and decision-making”¹⁷, and would therefore require substantial time for consultation, planning, and implementation. Undue haste is likely to result in costly mistakes and ineffective policy; it is more important to get things right than that they should be speedily but poorly implemented.

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

If the Bill is enacted, public bodies should clearly have a duty to comply with its provisions. There should, however, be an explicit direction in the Bill that the duty is to be interpreted proportionately, creating a margin of appreciation to protect against unfeasible expectations.

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?

Monitoring, including reporting to ensure transparency, is essential for effective implementation in order to highlight both successful initiatives and those that require reconsideration.

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

We do not have sufficient information to answer this question.

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?

Demonstrating compliance is essential for monitoring and transparency purposes, but we do not have sufficient information to give an opinion on what method should be used.

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

We do not wish to comment on this question.

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

We support the proposed duty on Scottish Ministers to publish a Human Rights Scheme.

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?

Private advocacy and advice services will only be available to those who can afford

¹⁷ Scottish Government consultation paper p29

to pay for them, and it is not reasonable to rely on the goodwill of the Third Sector for this provision. Realistically, therefore, public funding will be required for the provision of comprehensive and reliable Scotland-wide Human Rights advocacy and advice services.

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

If they are to be genuinely effective rather than a tick-box exercise, procedures for handling complaints should be well-signposted, straightforward, transparent, and accessible, and should be subject to report as a routine area of the monitoring process.

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

We agree with the proposal formally to extend the remit of the Scottish Public Services Ombudsman to include Human Rights.

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

We agree with the proposal formally to extend the remit of scrutiny bodies to include Human Rights.

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

We support the proposal to enlarge the powers of the Scottish Human Rights Commission to enable it to “... *bring or intervene in civil proceedings under the Bill*”, and provide it with “*an investigatory power which allows for accountability for systemic issues relating to the rights in the Bill (relating to civil matters)*.”¹⁸

We note and support the intention to “*create clear expectations on information sharing ... so that the SPSO can appropriately inform the SHRC of any relevant matters*”¹² in areas where their powers overlap. We are, however, surprised that there does not seem to be a reverse expectation for the SHRC to share relevant matters with the Ombudsman, nor any expectation of information sharing between the SHRC and the Equality and Human Rights Commission, the more especially since the new powers proposed for the SHRC would create substantial overlap with the EHRC.

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

We agree that consideration should be given to mirroring powers subject to appropriate constraints, for the Children and Young People’s Commissioner Scotland.

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

While the proposal to give civil society organisations standing for civil proceedings under the Human Rights Bill may sound attractive, enabling those with sufficient

¹⁸ *ibid* pp41-42

interest in a case to bring proceedings if the courts deem it appropriate in a particular instance, in practice it may be both impractical and ill-advised. Very few civil society organisations will have sufficient resources to act in this way. Furthermore, while the majority of civil society organisations are reputable bodies committed to the furtherance of Human Rights, equality, and good community relations, some – perhaps those most likely to expend valuable resources on bringing proceedings – may have a very particular axe to grind, and regard even an initial hearing to learn whether their intervention is deemed appropriate as providing publicity for their position, in some cases to the disbenefit of other communities, or wider civil society.

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

We recognise that the *Wednesbury* test sets a very high bar, and therefore prefer the use of a *proportionality* test by the courts. We are, however, concerned that the proposal to “*lower the threshold for a decision-maker being found to have acted unlawfully*” even with the positive intention “*to ensure that court remedies are as accessible as possible for rights-holders*”¹⁹, may encourage spurious publicity-seeking cases with consequent waste of court time and funds.

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

We agree that existing judicial remedies are sufficient.

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?

n/a

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?

We do not have a view on this. However, we welcome the Scottish Government’s commitment to “*be mindful of the terms of [the Supreme Court UNCRC] judgment ... in developing [their] proposed approach*” to possible remedies in the event that a court finds legislation incompatible with rights in the Bill.

Implementing the New Scottish Human Rights Act

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

We agree with the proposals for gradual implementation, and emphasise the importance allowing public bodies sufficient time adequately to prepare for implementation – getting things right is more important than speedy but ineffective implementation.

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

We agree that community organisations should be involved in the development of

¹⁹ *ibid* p44

MCOs using a model similar to that included in the Community Empowerment (Scotland) Act 2015.

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

We support the proposed duty on Scottish Ministers to publish and lay before the Scottish Parliament a Human Rights Scheme in order to provide transparency in the development and implementation of the legislation, and an opportunity for scrutiny.

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 are content with the proposal to require a Human Rights compliance statement alongside the statement of legislative competence when a Bill is introduced in 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?

We do not have sufficient information to answer this question.

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

The Scottish Government has experience in producing many effective awareness-raising campaigns including about the deemed authorisation scheme for organ donation, covid-19, online safety, and “Hate has no home in Scotland”. We would support a similar campaign in relation to Human Rights.

44. What are your views on monitoring and reporting?

Monitoring is of vital importance in order accurately to assess progress towards “*Embedding international human rights in Scotland [to] further emphasise the importance of all people being treated with dignity*”. Reliable and accurate data is a prerequisite for effective monitoring, and we therefore urge that the Bill should include a duty to develop an effective and accurate system for recording and reporting both progress and problems in developing an improved Human Rights culture.