

Agenda Item	16
Report No	HC/35/23

THE HIGHLAND COUNCIL

Committee: The Highland Council

Date: 14 September 2023

Report Title: A Human Rights Bill for Scotland Consultation

Report By: Depute Chief Executive

1. Purpose/Executive Summary

- 1.1 The purpose of this report is to provide an overview of the Scottish Government's consultation on a Human Rights Bill for Scotland. The report summaries the objectives of the proposed Bill and the duties and obligations that would be placed on those delivering devolved public functions. The report also provides at appendix 1 a draft Council response to the consultation.

2. Recommendations

2.1 Members are asked to:

- i. Approve the draft response to the Scottish Government consultation on a Human Rights Bill for Scotland.

3. Implications

- 3.1 Resource - There is likely to be significant resource implications in delivering these duties, particularly around Minimum Core Obligations.
- 3.2 Legal - At this stage it is difficult to determine the legal implications that could occur from this potential legislation, however ensuring consistency of application and interface between devolved and reserved matters will need to be addressed.
- 3.3 Community (Equality, Poverty, Rural and Island) – The proposed Human Rights Bill will likely have implications around equality and poverty.
- 3.4 Climate Change / Carbon Clever - It is not anticipated there are any direct implications, however the Right to a Healthy Environment could potentially have an impact.

- 3.5 Risk – There is a potential risk over implementation of these duties.
- 3.6 Health and Safety (risks arising from changes to plant, equipment, process, or people) – It is not anticipated there are any significant Health and Safety implications.
- 3.7 Gaelic - It is not anticipated there are any Gaelic implications.

4. Introduction

- 4.1 In June 2023 the Scottish Government published their consultation on a Human Rights Bill for Scotland which seeks to incorporate international human rights standards into domestic law. The deadline for submitting a response to this consultation is 5 October 2023.

5. Background

- 5.1 An independent Advisory Group on Human Rights was asked to make recommendations “*on how Scotland can continue to lead by example in human rights, including economic, social, cultural and environmental rights*”. It reported in December 2018, recommending an Act of the Scottish Parliament.
- 5.2 A Taskforce was set up to progress these recommendations which reported in March 2021, making 30 recommendations for establishing a statutory framework for human rights to bring internationally recognised human rights into domestic law. Specifically, it was recommended that the new framework should incorporate four international human rights treaties into Scots law:
 - the International Covenant on Economic, Social and Cultural Rights;
 - the Convention on the Elimination of All Forms of Discrimination against Women;
 - the International Convention on the Elimination of All Forms of Racial Discrimination; and
 - Incorporation of the Convention on the Rights of the Child.
- 5.3 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; and include a right for older people.

6. Objectives of the Human Rights Bill

- 6.1 Part two of the consultation sets out the Scottish Government’s objectives in taking forward this legislation which are to:-
 - Build 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;
 - Provide a clear, robust and accessible legal framework that ensures all rights-holders in Scotland can understand and claim international human rights domestically and that all duty-bearers will better implement rights in practice, respond appropriately to rights issues as they arise, and be held to account when things go wrong;

- Incorporate into Scots law, within the limits of devolved competence: the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of Persons with Disabilities and the International Convention on the Elimination of all Forms of Racial Discrimination.
- Recognise and include the right to a healthy environment;
- Ensure the rights are incorporated in a way which ensures they can be enjoyed and accessed by everyone without discrimination via an equality provision, within the limits of devolved competence;
- Provide 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. This is with the aim of ensuring so far as possible that all law, policy and decision-making by Scotland's public authorities and services contributes to the advancement of the full range of international human rights standards contained in the Bill;
- Create and promote a multiinstitutional approach so that institutions in Scotland work together to ensure rights are upheld and create a human rights culture;
- Ensure 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; and
- Through the Bill and wider work, continue to build a human rights culture where duty-bearers place rights at the heart of their decision making, people understand what their rights are and how to access them.

7. Incorporating the Treaty Rights

- 7.1 Part four of the consultation sets out the proposed approach on incorporating the treaties.
- 7.2 The Scottish Government's intention is for human dignity to be integrated into the framework as a fundamental value which can be used in reading and interpreting the framework as a whole.
- 7.3 This will be achieved by ensuring that the interpretative clause of the Bill will allow courts to consider dignity when adjudicating on the rights in the Bill, with reference to the text of international treaties and materials.
- 7.4 The Taskforce also wants to ensure that the process for defining minimum core obligations, which are the obligations on the State to ensure the satisfaction of minimum essential levels of right, recognises human dignity as a key threshold for defining this content and delivering them in practice.
- 7.5 The rationale for this approach is to give the strongest possible protections whilst producing clear, accessible and workable law which functions effectively within devolved competence. Their proposed model attempts to strike a balance between the level of protection provided and the coherence and workability of the law.
- 7.6 A critical point in the development of this model has been consideration of how the rights within the equality treaties intersect with the equal opportunities reservation and how best to give those rights legal effect in a coherent framework. The model seeks to address this by taking a different approach to protection for rights in the equality

treaties compared with the core International Covenant on Economic, Social and Cultural rights and the right to a healthy environment.

8. Right to a Healthy Environment

- 8.1 Part five sets out the proposed approach to including the right to a healthy environment in the Bill.
- 8.2 The right to a healthy environment is yet to be enshrined within an international treaty. Despite this, more than 100 countries have enacted legislation which includes the right to a healthy environment in some form and it was formally recognised by the UN General Assembly as a human right in July 2022.
- 8.3 The Taskforce recognised that the right to a healthy environment is linked to the realisation of other rights to be incorporated in the Bill and based on several international standards. Following engagement with stakeholders, the Scottish Government considers that the right should be understood as having both substantive aspects and elements which set out a course of action (procedural aspects). Substantive aspects should be understood as including clean air; safe and sufficient water; non-toxic environments (in which to live, work, study and play); healthy ecosystems and biodiversity; and safe climate. Procedural aspects should be understood as including awareness raising, promoting education and capacity building; access to information; public participation in decision-making; ensuring effective, affordable and timely remedies; and suitable policies, planning and action.

9. Incorporating Further Rights and Embedding Equality

- 9.1 Part six sets out proposals on incorporating further rights into the Bill, and the approach to ensuring that the rights are delivered without discrimination.
- 9.2 The Taskforce has considered whether the Bill could restate the rights in the Human Rights Act 1998, so that all rights are in one place. Given the status of the Human Rights Act 1998 as an enactment which is protected from modification under the Scotland Act 1998, the Bill cannot have any substantive effect on these rights. There is a risk that attempting to restate the rights protected by the Human Rights Act 1998 could be seen to have an effect on those rights and could place the Bill at risk of challenge on legislative competence grounds, with limited benefits in relation to clarity, accessibility and the enjoyment of the rights.
- 9.3 The Taskforce also considered the potential for incorporation of the UN Convention against Torture alongside the four treaties. However, given it is already strongly accounted for within the constitutional settlement and other legislative provisions, it is not minded to take forward incorporation of UN Convention against Torture within this framework legislation.
- 9.4 The Taskforce also considered incorporation of the International Covenant on Civil and Political Rights but considered that the above rationale applies to this too given the Human Rights Act 1998 incorporates civil and political rights in the ECHR into domestic law and is itself protected from modification.
- 9.5 Participation is seen as a crucial aspect of taking a human rights approach and people should be more involved in meaningful decisions about services that affect them, and that public services need to do more to involve people who are often seldom heard, or even invisible, in existing participatory processes. In order to help achieve that, the

Scottish Government wants participation to be embedded within the relevant parts of the Bill, including the proposed Human Rights Scheme in order to support both implementation and accountability for progress. This is intended to align with the broader Scottish Government approach to participation; for example, the review of the operation of the Public Sector Equality Duty in Scotland is considering stronger duties in this area. However, they are mindful of the need for any duties related to participation to be deliverable in practice by public bodies.

- 9.6 Whilst the equality treaties are aimed at eliminating discrimination against women, disabled people and people and groups who experience racism, the purpose of an overarching equality provision would be to ensure equal access to the rights in the Bill for everyone. This would require duty-bearers to deliver the International Covenant on Economic, Social and Cultural Rights and the right to a healthy environment in a way that ensures equal access to all. One approach being considered is whether to model the equality provision on Article 2 of the International Covenant on Economic, Social and Cultural Rights or Article 14 of the European Convention on Human Rights. These provisions require the rights in the respective 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. This approach would enable LGBTI and older age to be protected through the use of 'other status'.
- 9.7 However, the Scottish Government is also considering whether LGBTI and older age should specifically be listed as grounds for protection, given the Taskforce noted that these groups lacked the protection of an international treaty and recommended explicit protection of them in the Bill.
- 9.8 The equality provision will have to operate within the limits of the equal opportunities' reservation in the Scotland Act 1998 and will need to operate within the wider Equality Act framework.

10. Duties

- 10.1 Part seven sets out the approach to designing the duties on those delivering devolved public functions, in relation to the rights in the Bill.
- 10.2 Initial Procedural Duty – will place an initial procedural duty on duty-bearers as soon as practicable after the Bill becomes an Act. This duty would focus on ensuring that the rights in the Bill are taken into account by duty-bearers, built into the fabric of their decision-making processes and adequately taken into account in the delivery of services.
- 10.3 Duty to Comply While the initial procedural duty will help to integrate the rights into decision making processes, for the Bill to help achieve a transformative impact, it will ultimately require a stronger duty of compliance. This duty would aim to ensure the need for specific rights - respecting outcomes to be fulfilled by duty-bearers, going beyond a duty focused on the process of decision making to a duty focused on compliance with the right.
- 10.4 Reporting The above duties would require a reporting duty for duty-bearers to be able to demonstrate the actions they are taking and intend to take to ensure the rights in the Bill are being advanced and built into decision-making.
- 10.5 Progressive Realisation of Economic, Social, and Cultural Rights and the Right to a Healthy Environment - This is based on the understanding that rights such as the right

to health and the right to an adequate standard of living can be continuously improved over time and in line with a country's resources.

- 10.6 Minimum Core Obligations (MCOs) for Economic, Social, and Cultural Rights and the Right to a Healthy Environment – In international law, economic, social, and cultural rights are broadly understood as requiring MCOs to be met. These are understood to be the basic minimum standard of delivering economic, social and cultural rights, and they set a minimum threshold which must be always upheld by a country irrespective of resources.
- 10.7 Duty to Publish a Human Rights Scheme – place a duty on Scottish Ministers to publish a Human Rights Scheme. This would allow for general measures of implementation to be captured clearly within the Bill's overall framework. The duty to publish a Human Rights Scheme will include a reporting duty on Scottish Ministers to report on actions taken in relation to the Scheme's requirements.

11. Ensuring Access to Justice for Rights-Holders

- 11.1 Part eight sets out proposals for improving access to justice (both non-court and court) for rightsholders who are seeking a remedy for when things go wrong in relation to the rights and duties contained in the Bill. It also covers the powers of the Scottish Human Rights Commission.
- 11.2 For The Scottish Government, strengthening the approach to accountability, advice and advocacy are key components to help resolve issues as quickly as possible and avoid, as far as possible, people having to go to court. Ensuring those components work well will help to make rights real for people and to embed a rights-based approach in public authorities and those who hold them to account. They want a move to a multi-institutional model of rights protection and stronger collaboration between duty-bearers who will be tasked with upholding the rights in the Bill.
- 11.3 The Scottish Government is also exploring the potential for the Scottish Human Rights Commission to have new powers in the following areas: -
- Powers to bring or intervene in civil proceedings under the Bill;
 - An investigatory power which allows for accountability for systemic issues relating to the rights in the Bill (relating to civil matters).

12. Highland Council Proposed Response

12.1 Principle

The Council is supportive of the principle of improving outcomes for Scotland's people and welcomes the opportunity to consider how such rights can be enshrined within the law. Whilst it is important to set out what those rights are, it is equally important to consider how such rights can be delivered and resourced.

12.2 Incorporating the Treaty Rights

The Council is supportive of incorporating the four treaties referred to in the consultation and can see merit in the adoption of wording in identical terms to that in the treaties subject to the limits of devolved competence. The Council also recognises that human dignity is key to underpinning all human rights although does have some concerns about how this might be defined to ensure that it is meaningful and objectively

applied. Such a definition will be key if dignity is to underpin the thresholds for defining minimum core obligations imposed on public bodies including local authorities.

12.3 Recognising the Right to a Healthy Environment

A healthy environment now has a higher focus, and the Council would be supportive of developing this concept of a right to a healthy environment further. There is a need to clearly define what is meant by this and to what extent it would overlap and interface with existing legislation such as but not limited to the provision of environmental health legislation and existing environmental safeguards. In developing this concept, consistency of legislation will be important. There may also be an overlap with public health legislation particularly insofar as there is mention of diet and nutrition.

12.4 Incorporating Further Rights and Embedding Equality

The Council is not able to comment on how a proposed Human Rights Act for Scotland would interact with the Human Rights Act 1998 which is protected from modification under the Scotland Act 1998. There could be merit in having all rights under the same legislative framework, however issues around devolved and reserved competencies would need to be addressed to deliver a robust and effective legislative framework form which to operate.

12.5 The Duties

While it is important to consider providing protection for rights holders there is also a need to provide clarity for those who will have an obligation to implement these duties. Sufficient time and resources for implementation will be key if there is to be meaningful changes for rights holders. The Council supports the proposal that duties will apply not just to the Scottish public sector landscape, but also any organisation fulfilling a devolved public function.

The Council is of the view that there needs to be a clear understanding of the resource implications of establishing Minimum Core Obligations (MCO) and indeed how such an obligation would be progressively realised beyond the MCOs.

12.6 Ensuring Access to Justice for Rights Holders

The Council recognises that this is crucial for such legislation to be effective. Access to advocacy and effective representation where appropriate and necessary is important. The Council is of the view that where possible the proposed legislation should seek to build upon legal principles which have already developed in terms of the Wednesbury principle of reasonableness as it would seem appropriate where possible to rely and build upon existing processes.

12.7 Implementing the New Scottish Human Rights Act

The Council supports the proposals in terms of implementation and welcomes the recognition by the Scottish Government that there will be a need for effectively build capacity across the public sector to deliver on these rights.

13. Conclusion

- 13.1 At this stage in the process there is limited information as to the implications and practicalities of delivering on the commitments of a proposed Scottish Human Rights Act and this is reflected in the draft Council response which is attached at appendix 1.

Designation: Depute Chief Executive

Date: 1 September 2023

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Appendix 1

Draft Response to the Scottish Government Consultation on A Human Rights Bill for Scotland.

Human Rights Strategy and Legislation Unit
Directorate for Equality, Inclusion and Human Rights
Scottish Government
Area 3H North
Victoria Quay
Edinburgh
EH6 6QQ

Dear Sir/Madam

Consultation on A Human Rights Bill for Scotland.

The Highland Council would wish to offer the following comments in relation to the Scottish Government's consultation on A Human Rights Bill for Scotland as follows: -

The Council is supportive of the principle of improving outcomes for Scotland's people and welcomes the opportunity to consider how such rights can be enshrined within the law. Whilst it is important to set out what those rights are, it is equally important to consider how such rights can be delivered and resourced. Local authorities are likely to be key to the delivery of those rights and therefore the Highland Council looks forward to more detail being provided on how the proposed new rights are to be framed. It is anticipated that such legislation will impose further public duties on local authorities, and a key aspect will be to ensure that authorities are adequately resourced to deliver those rights.

It is difficult to comment on the individual questions in full at this stage without further detail, however the Council has provided comments on each of the sections contained within the consultation document. The Council is committed to providing further input as required once draft legislation is provided for comment.

Incorporating the Treaty Rights

The Highland Council is supportive of incorporating the four treaties referred to in the consultation and can see merit in the adoption of wording in identical terms to that in the treaties subject to the limits of devolved competence. The Council also recognises that human dignity is key to underpinning all human rights although does have some concerns about how this might be defined to ensure that it is meaningful and objectively applied. Such a definition will be key if dignity is to underpin the thresholds for defining minimum core obligations imposed on public bodies including local authorities.

The Council notes that Scotland has a history of recognising human rights and adopting international treaties. As a result, there are many separate pieces of legislation which may well impact on what is now proposed. It would be helpful to understand how such an overlap would be managed. It might be appropriate to consider legislation comparable to the Equality Act in the UK which sought to bring all rights under the same umbrella. The Council is also aware that there are ongoing

conversations about the limits of devolved competence in terms of a recent challenge before the Supreme Court and the position in relation to UNCRC and the outcomes of that may well have an impact on how more overarching legislation could be framed.

Recognising the Right to a Healthy Environment

A healthy environment now has a higher focus, and the Highland Council would be supportive of developing this concept of a right to a healthy environment further. There is a need to clearly define what is meant by this and to what extent it would overlap and interact with existing legislation such as, but not limited to, the provision of environmental health legislation and existing environmental safeguards. In developing this concept, consistency of legislation will be important. There may also be an overlap with public health legislation particularly insofar as there is mention of diet and nutrition.

Incorporating Further Rights and Embedding Equality

The Highland Council is not able to comment on how a proposed Human Rights Act for Scotland would interact with the Human Rights Act 1998 which is protected from modification under the Scotland Act 1998. There could be merit in having all rights under the same legislative framework, however issues around devolved and reserved competencies would need to be addressed to deliver a robust and effective legislative framework from which to operate.

The Council would be supportive of modelling the equality provision on article 2 of the International Covenant on Economic, Social and Cultural Rights or on article 14 of the European Convention of Human Rights.

The Duties

While it is important to consider providing protection for rights holders there is also a need to provide clarity for those who will have an obligation to implement these duties. Sufficient time and resources for implementation will be key if there is to be meaningful changes for rights holders. The Council supports the proposal that duties will apply not just to the Scottish public sector landscape, but also any organisation fulfilling a devolved public function.

The Council is of the view that there needs to be a clear understanding of the resource implications of establishing Minimum Core Obligations (MCO) and indeed how such an obligation would be progressively realised beyond the MCOs.

Ensuring Access to Justice for Rights Holders

The Highland Council recognises that this is crucial for such legislation to be effective. Access to advocacy and effective representation where appropriate and necessary is important. The Council is of the view that where possible the proposed legislation should seek to build upon legal principles which have already developed in terms of the Wednesbury principle of reasonableness as it would seem appropriate where possible to rely and build upon existing processes.

Implementing the New Scottish Human Rights Act

The Highland Council supports the proposals in terms of implementation and welcomes the recognition by the Scottish Government that there will be a need for effectively build capacity across the public sector to deliver on these rights.

We would be happy to engage further as these proposals are developed.

Yours sincerely

Kate Lackie
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