

Public Law Project submission to the Scottish Government's Human Rights Bill consultation

October 2023

About us

1. Public Law Project (PLP) is a national legal organisation concerned with improving access to justice and effective public law remedies, promoting the protection of human rights, and securing the rule of law, particularly for those who are part of marginalised groups or communities. We are comprised of an expert research team, specialist caseworkers and lawyers, a dedicated events and training team, and public policy professionals.
2. PLP's principal focus is on the public and administrative law of England and Wales. In this consultation response we, therefore, make no claim to be specialists in Scottish law or practice. As such, we limit our answers to those areas where we have specialist research, policy or legal interests and hope our answers provide helpful advice and recommendations to the Scottish Government in refining their welcome proposals.

Executive summary

3. PLP supports the Scottish Government's objective of directly incorporating into Scottish legislation the International Covenant on Social, Economic and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Rights of Persons with Disabilities (CRPD); and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). These treaties reflect PLP's own view that socio-economic rights are part of the foundational bedrock of a civilised and compassionate society, as essential as any traditional human right.
4. Moreover, this is an important opportunity for the Scottish Government to demonstrate that international human rights law is a force for good and that Scotland regards itself as part of the international legal order that values human rights and compliance with legal obligations. As an organisation committed to these ideals, PLP strongly welcome the Scottish Government's initiative.
5. Further, PLP welcomes the collaborative approach that the Scottish Government has sought to take. In working closely with Scottish civil society, particularly the Human Rights Consortium Scotland, and those with lived experience of human rights violations through the Lived Experience Boards, the Scottish Government has taken a refreshing approach to the development of human rights policy that ensures as far as possible it reflects people's real needs and priorities. PLP would also like to take this opportunity to congratulate civil

society colleagues in Scotland for their dedicated work over many years in helping the Scottish Government reach this point in human rights development.

6. Our key recommendations include:

- **Direct incorporation:** The Bill should directly incorporate the international treaties into Scottish law. This will highlight the direct importance of international law to the protection of human rights in Scotland.
- **Duties on public bodies:** The Bill should impose two types of duties – procedural and compliance. The procedural duty should involve an obligation on public bodies to have “meaningful” or “effective regard” to the rights in the treaties when making decisions. The compliance duty should involve an obligation to respect the Minimum Core Obligation (MCO) of the rights and an obligation to progressively realise the rights over time. The procedural duty should apply no later than 6 months from the Bill’s Royal Assent. The compliance duty should come into force no later than two years after the Bill receives Royal Assent. After these two years, the procedural duty should operate alongside the compliance duty. Both procedure and outcomes matter and the Scottish Human Rights Bill should reflect this. This would impose ongoing discipline on public bodies to consider human rights in initial decision-making and to achieve outcomes compliant with the incorporated human rights.
- **Go as far as possible:** We appreciate that certain matters touched on by the Bill – such as equal treatment – are reserved to Westminster and that following recent UK Supreme Court jurisprudence the Scottish Parliament cannot impose obligations on UK-wide public bodies. Therefore, in respect of the equality treaties – CEDAW, CRPD and CERD – the Scottish Government seeks to impose only a procedural duty. PLP encourages the Scottish Government to engage with the UK Government to see if agreement can be reached to make the Bill cover as many public bodies as possible, both reserved and Scotland-only. PLP further encourages the Scottish Government to demonstrate more proactively that its proposals go as far as possible within the devolution settlement and to engage with civil society and legal professionals in an ongoing way to see if alternative options can be found to go even further.
- **Equal protection:** There should be an equality provision in the Bill ensuring that everyone is able to access the rights on the same footing. The provision could read as follows: “The enjoyment of the rights and freedoms set forth in this Bill shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, health or disability, age, sexual orientation, gender identity, socio-economic situation, or other status.” Further, when interpreting this provision, courts should be required to take account of General Comments and Recommendations by relevant UN Human Rights Treaty Bodies including the Committee on Economic, Social and Cultural Rights and the decisions of European Court of Human Rights on Article 14, which relates to non-discrimination in the protection of human rights.
- **Ensuring accountability:** The Bill should apply to all bodies carrying out functions of a public nature, including private or charitable bodies acting under a contract or other arrangements with a public body. Moreover, the Bill should contain a provision defining expressly what a “public function” is, setting out a non-exhaustive list of factors for courts to consider, such as whether the function involves coercive powers normally exercised by the state and the extent to which the inadequate performance of the function would interfere with fundamental rights.

- **Ensuring individuals do not have to challenge the state alone:** PLP strongly supports the Scottish Government’s proposal to expressly identify in legislation that advocacy organisations and others are permitted to pursue litigation provided they have a “sufficient interest”. It is not fair that individuals should be expected to shoulder the emotional, practical and financial burden of challenging unlawful or discriminatory systems when organisations with a sufficient interest could carry out that function and are better able to manage those stresses.
- **Interpretive principles:** The Bill should contain a purpose clause requiring the judiciary to interpret the legislation in light of the principles of dignity, freedom, equality, justice, and participation. The Bill should also allow Scottish courts to consider international legal materials when interpreting the legislation, such as General Comments and Recommendations, concluding observations, and the jurisprudence of international and foreign courts. The Scottish Government may also wish to insert a provision into the Bill re-affirming the universality, indivisibility, interdependence and interrelation of human rights, declaring that the Bill is designed to work in tandem with other existing human rights protections in Scotland, including the Human Rights Act 1998.
- **Effective review and remedies by courts:** The Bill should make clear that the appropriate standard of judicial review is “proportionality” and that judges do not have to defer to the Scottish Government or Scottish Parliament just because a decision relates to socio-economic matters. To do otherwise would create paper rights without effective independent enforcement and accountability by judges. We would also recommend allowing a more proactive approach by the courts to the enforcement of remedies. Public authorities can take prolonged periods of time to act on orders, with little follow up on implementation. We recommend that the Bill should empower judges to have a continuing role supervising the implementation of a judgment. Finally, where legislation is found to be incompatible with the rights, PLP believes that quashing incompatible legislation is an indispensable remedy, as could be a declarator of incompatibility signalling that the Scottish Parliament should change the law.
- **Guidance:** The Scottish Government should develop detailed guidance in several areas, including: what role dignity should play for public bodies in satisfying their duties under the Bill and Scottish Ministers publish guidance around the interpretation of the equality provision and the phrase ‘other status’, to specify evidence and criteria public bodies should apply in considering groups whose rights are at risk. This should draw on the relevant UK and European Court of Human Rights caselaw, as well as General Comments by UN Human Rights Treaty Bodies.
- **Promoting a human rights culture:** Access to justice is a continuum with courts at the very end as a backstop, rather than the default option. Therefore, PLP endorses structures which encourage public bodies to reflect on their decisions and resolve disputes about human rights early. This is good for the individual as their rights are vindicated more quickly; good for the public body as resources, reputation and trust are not squandered; and good for the taxpayer as the public’s money is not spent on unnecessary litigation. This aim is best achieved through entrenching a human rights culture in public bodies over time so that decision-makers value and respect human rights in their professional attitudes, policies, conduct and habits. We, therefore, recommend that the Scottish Public Services Ombudsman publishes an updated complaints handling framework referring specifically to how to effectively protect human rights and empowering the SPSO to issue declarations of non-compliance where a public body has failed to comply with these standards. Further, we support: specific reference to human rights in the SPSO’s remit; allowing the SPSO to consider oral complaints; granting the SPSO own initiative powers; consideration of making

some SPSO recommendations legally binding; allowing advocacy organisations to pursue individual and systemic complaints at the SPSO; and allowing collaborative working between the full range of complaints bodies.

- **Training:** To promote a human rights culture, the Bill should place a duty on Scottish public bodies to provide ongoing human rights training to their staff, ideally drawing on case studies so that decision-makers are assisted to make the most human rights compliant decisions in real life. The Scottish Government may wish to consider whether already existing training, capacity-building and information campaigns on the Human Rights Act 1998, Equality Act 2010 and other human rights frameworks should be integrated with those that will be implemented through the Bill framework.
- **Access to courts:** The Scottish Government should engage an expert public law academic or practitioner to lead a review on the barriers that Scottish residents face effectively accessing judicial review and providing recommendations on procedural reforms. The chair could then engage people with experience of Scottish judicial review, including practitioners, individuals, and advocacy organisations. Ensuring that procedural rules do not unduly impede access to justice and thus the effectiveness of these human rights and duties is critical. PLP further encourages the Scottish Government to pay greater mind to legal aid and to guarantee as soon as possible that enough funding will be allocated to make these rights a reality.
- **Public awareness:** The Bill will only be effective if the public know what their rights are. The Scottish Government may, therefore, wish to undertake a 'lessons learned' exercise in relation to any awareness-raising undertaken on the Human Rights Act 1998 and to develop plans for a public awareness campaign. This should make clear both the strengths and limitations of the rights being enacted. Expectations management is as important as rights consciousness.
- **Evidence-based human rights policy:** There should be an obligation on Scottish public bodies to attempt to gather data on the protected characteristics of individuals they provide services for or exercise power over, and any detrimental effects caused.

Question 1: What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?

7. PLP supports the Scottish Government's proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill. Dignity is a central concept in international human rights law, and is explicitly referenced in the International Covenant on Social, Economic and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Allowing courts to consider dignity when interpreting the rights in the Bill would therefore be in line with international standards and the United Nations (UN) human rights framework.
8. Furthermore, PLP supports the proposal of the Human Rights Consortium Scotland (the Consortium) that the Bill should include a purpose clause drawing on other key human rights principles in addition to dignity, to ensure a shared and consistent understanding and

interpretation of rights in the Bill.¹ The Scottish Government may wish to consider concepts such as freedom, equality, and justice for this purpose clause (all of which can be found in the ICESCR Preamble). Another key concept, as noted by the Consortium, is participation, which has become increasingly central in the UN human rights framework.²

9. As most scholars on dignity as a legal concept note, there is no consensus on its meaning. Dignity is interpreted differently across international, regional and national contexts. This means dignity and the way it affects the rights under the Bill can be localised, and shaped and interpreted in a way that makes it most relevant to Scotland.³
10. The Scottish Government may therefore wish to develop guidance for duty-bearers on what role the Scottish Government considers dignity should play, and how a consideration of dignity impacts specific rights in the Bill. These considerations should also form part of any training for public bodies. Any guidance and training should provide clear examples of what impact the value of dignity has on specific rights, including through case studies.
11. The Scottish Government may wish to include a provision setting out what sources courts can and/or should draw upon when using dignity and other human rights concepts to interpret the rights in the Bill. This would predominantly consist of international treaties and materials, including General Comments and other sources from the relevant UN Treaty Bodies for ICESCR, CERD, CRPD and CEDAW. The Scottish Government may further wish to consider whether the jurisprudence on dignity of the European Court of Human Rights and European Committee of Social Rights could add value and direction for the Scottish courts.
12. As dignity is an abstract and variable concept dependent on context, any guidance would need to give the courts sufficient flexibility to continue developing, through caselaw, a conception of dignity most relevant for Scotland. Any guidance for duty-bearers should be periodically updated to reflect these developments through caselaw.
13. In this context, PLP supports Just Fair's suggestion that care must be taken that 'human dignity' sets a higher bar than mere protection from destitution and allows the judiciary to build on this concept in a progressive manner.⁴

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

14. PLP supports the Scottish Government's proposal to allow for dignity to be a key threshold for defining content of minimum core obligations (MCOs). This would allow for a value-based (rather than purely needs-based) evaluation of MCOs, which would reflect the

¹ Human Rights Consortium Scotland's Guide to responding to the Human Rights Bill for Scotland Consultation (August 2023), <https://hrcscotland.org/wp-content/uploads/2023/08/Final-HRCS-Guide-to-responding-to-Human-Rights-Bill-for-Scotland-consultation-August-2023-1.pdf>, p. 12.

² G. A. Mosissa, *A Re-examination of Economic, Social and Cultural Rights in a Political Society in the Light of the Principle of Human Dignity* (2021), <https://doi.org/10.1017/9781839700361>, p. 183.

³ C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law*, 19:4 (2008), <https://doi.org/10.1093/ejil/chn043>, p. 720.

⁴ Just Fair, 'Briefing on Just Fair written evidence to "A Human Rights Bill for Scotland: consultation"' (October 2023), <https://justfair.org.uk/wp-content/uploads/2023/09/Briefing-on-JF-Human-rights-Scotland-Bill-submission.pdf>, p. 2.

centrality of dignity in the international framework and provide a minimum standard that reflects the purpose and values of the Bill.

15. PLP strongly supports the Scottish Government's proposal that MCOs be developed through a participatory process. Using dignity as a threshold could help rights-holders engage with the legal norms surrounding MCOs and the Bill in general, by providing a clear value people are familiar with to offer a basic sense of what the Bill aims to do.⁵ This may therefore increase, and improve the quality of, public engagement and participation with the Bill.
16. PLP further supports the proposal of using the Committee for Economic, Social and Cultural Rights' interpretations and practices in other countries as building blocks for MCOs. PLP agrees with the Scottish Government that caselaw from other countries can provide valuable guides to an extent, which then need be adapted to the Scottish context.
17. As noted in the consultation, in a number of countries MCOs are linked to a constitutional right to a social minimum, in which the key consideration is whether the dignity of the rights-holder has been violated.⁶ In the specific context of MCOs, PLP suggests that to function as a 'threshold', dignity may need to be similarly viewed as a baseline right, which expands the scope of the State's negative and positive obligations. This would need to be reflected in judicial guidance, and in guidance for rights-holders and duty-bearers. As noted in PLP's response to question 3, the Scottish Government and courts may wish to draw on the experience of other jurisdictions in implementing the rights in the Bill. Germany's right to an 'Existenzminimum' could provide a valuable example of how the concept of dignity can be used in combination with other rights and provisions to provide MCOs that reflect the values and purpose of the international human rights framework.
18. In the context of MCOs too, PLP supports Just Fair's recommendation that 'human dignity' should be interpreted in a progressive manner in line with Scotland's legal, social and cultural context, and go beyond a simple guarantee against destitution.

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

19. PLP agrees with both the Scottish Government's proposal and the Consortium's response. As the consultation highlights, the purpose of incorporation is to give maximum effect to the human rights in the treaties while maintaining a strong link with the international system. Materials such as General Comments/Recommendations, concluding observations, and the

⁵ E. Webster, *The Underpinning Concept of 'Human Dignity'* (June 2020) (Academic Advisory Panel Briefing Paper), <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-elaine-webster---dignity/aap-paper-elaine-webster---dignity/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BElaine%2BWebster%2B-%2BDignity%2BFINAL%2B%25281%2529.pdf>, p. 15.

⁶ A. Flegg & K. Boyle, 'Economic, Social and Cultural Rights: International Legal Obligations – An Explainer', *Access to Justice for Social Rights: Addressing the Accountability Gap* (May 2022), https://dspace.stir.ac.uk/retrieve/a0d9b086-e59f-44da-a091-4f0a0676afd8/02-Briefing%20%20International%20Obligations_18MAY22.pdf, p. 6.

jurisprudence of international courts should be taken into account when interpreting the rights to ensure consistency in the meaning and application of the rights in the Bill.

20. It is important to emphasise, however, that the international standards for the protection of the rights as set out in the materials form a floor and not a ceiling for the domestic application of the rights. We therefore also support the inclusion of a provision, as suggested by the National Taskforce, specifying that nothing within the framework of the Bill should affect any provisions of domestic or international law which are "more conducive to the realisation of the rights within the framework."⁷

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

21. PLP supports the Scottish Government's proposal that the text of the four international human rights treaties – ICESCR, CEDAW, CERD, and CRPD – should be directly incorporated into Scottish legislation through scheduling the treaties to the Bill. We agree with the Scottish Government that:

On balance, we consider the direct treaty text approach is preferable. Transposing the rights in an amalgamated way creates significant risk that we could lose the meaning behind the treaties and that the Bill could move away from the standards, principles and practices of international law. This would create challenges for the future interpretation of the rights as they could lose their context as rights taken directly from international standards.⁸

22. We would, however, support modifications that make the text of the treaties gender neutral. The Preamble to the ICESCR, for example, reads that "everyone may enjoy *his* economic, social and cultural rights, as well as *his* civil and political rights" (emphasis added). This masculine language should be updated to be gender neutral.
23. In addition, this is an important opportunity for the Scottish Government to demonstrate that international human rights law is a force for good and that Scotland regards itself as part of the international legal order that values human rights and compliance with legal obligations. These objectives favour direct incorporation of the treaty texts. Like with the UK-wide Human Rights Act 1998, while there can be a tension between showing respect for the international rule of law and making provisions feel fully owned by domestic legal orders and people, it is difficult to see how any of these treaties could be considered out of place in the Scottish context. The treaties relate to human rights of critical importance to the Scottish Government and people.
24. The Scottish Government is right that this will require careful preparation so that both public bodies and individuals understand what is owed by them and to them. At the very least, this will require detailed guidance and training for public bodies on how both to take account of human rights in decision-making and how to comply substantively. This should include engaging with civil society organisations in Scotland to deliver training on the

⁷ National Taskforce for Human Rights Leadership Report, March 2021, p.33

⁸ <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2023/06/human-rights-bill-scotland-consultation/documents/human-rights-bill-scotland-consultation-june/human-rights-bill-scotland-consultation-june/govscot%3Adocument/human-rights-bill-scotland-consultation-june.pdf>, p.17.

treaties where appropriate. The Scottish Government should also consider a public information campaign to raise Scottish residents' awareness of these new protections. Importantly, this should promote understanding on the limits of these duties as well as their strengths. Expectations management is as important as rights consciousness so as to avoid disappointment.

25. Finally, we note that, while the Scottish Government proposes placing both a procedural duty and a duty to comply on public bodies in relation to the ICESCR and the right to a healthy environment, the Consortium has expressed its disappointment that the Bill will contain only a procedural duty in relation to the three equality treaties because equal treatment is reserved to Westminster. We endorse the view of the Consortium that the Scottish Government should more proactively demonstrate that its proposals go as far as possible within the devolution settlement.

Question 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.

26. PLP supports the Consortium's request for the Scottish Government to go as far as possible within the limits of devolution in incorporating the rights from CEDAW, CRPD and CERD (including, where possible, with a duty to comply attached to these rights). As requested by the Consortium, the Scottish Government may wish to consider the treaties on a right-by-right basis and give reasons where it is not able to incorporate a right and/or attach a duty to comply to it.⁹

Question 12: Given 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?

27. If possible within the devolution arrangement, the Scottish Government may wish to include a provision in the Bill re-affirming the universality, indivisibility, interdependence and interrelation of human rights (as set out in the United Nations' Vienna Declaration 1993), as well as setting out that this Bill will fit into, and work in tandem with, other existing human rights protections in Scotland, including the Human Rights Act 1998.
28. Existing scholarship and reports by NGOs working in this area suggest that there has been a lack of public engagement with the Human Rights Act 1998, and that the public has not developed a feeling of 'ownership' over the rights in the Act.¹⁰ The Scottish Government may therefore wish to undertake a 'lessons learned' exercise in relation to any awareness-raising undertaken on the Human Rights Act 1998. It may wish to consider not only how the

⁹ Human Rights Consortium Scotland's Guide to responding to the Human Rights Bill for Scotland Consultation (August 2023), <https://hrcscotland.org/wp-content/uploads/2023/08/Final-HRCS-Guide-to-responding-to-Human-Rights-Bill-for-Scotland-consultation-August-2023-1.pdf>, pp. 19-20.

¹⁰ Dr Elaine Webster, 'The Underpinning Concept of "Human Dignity"', *Academic Advisory Panel to the National Taskforce for Human Rights Leadership* (June 2020), <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-elaine-webster---dignity/aap-paper-elaine-webster---dignity/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BElaine%2BWebster%2B-%2BDignity%2BFINAL%2B%25281%2529.pdf>, p. 15.

framework around the Bill can improve on this, but also how the Human Rights Act 1998 can be incorporated into the new Bill's framework to help create a sense of ownership by rights-holders around the Scottish human rights framework as a whole.

29. PLP therefore supports the Consortium's conclusion that the duties and rights under the Human Rights Act should be fully included in the implementation of the Bill.¹¹ This should include the Human Rights Act 1998 being part of guidance, training and capacity-building for public bodies, and information campaigns and awareness-raising for rights-holders.
30. The Scottish Government may wish to consider whether relevant already existing training, capacity-building and information campaigns on the Human Rights Act 1998, Equality Act 2010 and other human rights frameworks should be integrated with those that will be implemented through the Bill framework. This could help create stronger understanding of the interconnectedness of human rights protections, and an increased sense of ownership that goes beyond the Bill and across already existing protections.

Question 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?

31. PLP agrees that there should be an equality provision to ensure everyone is able to access the rights in the Bill.

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

32. PLP recognises that the inclusion of an equality provision involves complex considerations around the equal opportunities reserved policy area under the devolution arrangement. PLP does not have specific expertise in devolution and recognises that its recommendations may not be suitable in their exact form under the reservation.
33. However, PLP supports the proposal of modelling the equality provision on article 14 of the European Convention on Human Rights (ECHR). PLP suggests that the equality provision should read along the lines of: "The enjoyment of the rights and freedoms set forth in this Bill shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, health or disability, age, sexual orientation, gender identity, socio-economic situation, or other status."
34. PLP therefore suggests that the following grounds be explicitly mentioned in addition to those usually contained in article 14 ECHR:
 - Health or disability, including mental health
 - Age

¹¹ Human Rights Consortium Scotland's Guide to responding to the Human Rights Bill for Scotland Consultation (August 2023), <https://hrscotland.org/wp-content/uploads/2023/08/Final-HRCS-Guide-to-responding-to-Human-Rights-Bill-for-Scotland-consultation-August-2023-1.pdf>, pp. 33-4.

- Sexual orientation
 - Gender identity
 - Socio-economic situation.
35. PLP suggests that the Scottish Government may want to include ‘health or disability’ to re-affirm its commitment to securing the rights equally for those affected by disability. As the Bill will incorporate the CRPD, CERD and CEDAW, the Government may wish to explicitly name all groups protected by these treaties in the equality provision (sex, race, colour and association with a national minority already being part of article 14).
36. PLP notes the Taskforce’s recommendation that LGBTI+ and elderly people should be afforded explicit protection in the Bill and supports the Consortium’s conclusion that these groups should be explicitly mentioned in the equality provision. As noted in the consultation, the goal of incorporating CEDAW, CERD and CRPD is to ensure those most at risk of being marginalised and having their rights breached are protected and actively considered by public bodies when they are making decisions and delivering services. The Equality and Human Rights Commission’s 2018 report, ‘Is Scotland Fairer?’ noted that LGBTI+ people and older people were among the groups that experienced the starkest inequalities in accessing their rights.¹² Given the discrimination and barriers these groups face, they should therefore be specifically noted in the equality provision, to ensure they too are at the forefront of public bodies’ minds when making decisions and providing services. This may also help affected individuals from these groups feel like they can own and claim the rights in the Bill.
37. Finally, PLP suggests that the equality provision include a commitment that the rights in this Bill be inclusive and equitable for those marginalised by socio-economic status. The UN Committee for Social, Economic and Cultural Rights confirmed in its General Comment No. 20 that the term “other status” in the ICESCR equality provision includes discrimination based on “economic and social situation”.¹³ Inequality and poverty are often associated with poorer outcomes in relation to human rights, as noted by the Equality and Human Rights Commission in its 2018 ‘Getting Rights Right’ report.¹⁴ Such a commitment would be in line with the purpose of the Bill, as well as its commitment to the central concept of dignity. It would also help integrate the Bill further into Scotland’s existing rights mechanisms, including the Fairer Scotland Duty.
38. If possible within devolution limits, PLP would recommend a provision in the Bill requiring the courts to take into account the UK and European Court of Human Rights caselaw on article 14 ECHR to aid them in interpreting the equality provision. Furthermore, courts should be

¹² Equality and Human Rights Commission, ‘Is Scotland Fairer? The State of Equality and Human Rights in 2018’ (2018), https://www.equalityhumanrights.com/sites/default/files/is_scotland_fairer_accessible.pdf, p. 11.

¹³ UN Committee on Economic, Social and Cultural Rights (42nd session), General comment no. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights) (2009), para. 35.

¹⁴ Equalities and Human Rights Committee, ‘Getting Rights Right: Human Rights and the Scottish Parliament’, 6th Report, 2018 (Session 5), <https://sp-bpr-en-prod-cdneq.azureedge.net/published/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3/EHRiCS052018R6Rev.pdf#:~:text=Getting%20Rights%20Right%3A%20Human%20Rights%20and%20the%20Scottish,to%20equal%20opportunities%20and%20upon%20the%20observance%20of.>

required to consider General Comments and Recommendations by relevant UN Human Rights Treaty Bodies (including the Committee on Economic, Social and Cultural Rights).

39. Article 14 has a significant body of caselaw which could aid the courts in interpreting the equality provision. The European Court of Human Rights has interpreted the meaning of “other status” relatively widely; modelling the equality provision on article 14 would therefore guarantee access to the rights in the Bill to a wide range of people. For example, although not explicitly stated in article 14 itself, the European Court of Human Rights has recognised, among others, the following examples of “other status”: age, gender identity, sexual orientation, health and disability, parental and marital status, immigration status, status related to employment, being a prisoner, membership of an organisation, and place of residence. As noted above, this should be supplemented by General Comments and Recommendations by UN Treaty Bodies, including by the Committee on Economic, Social and Cultural Rights, which has recognised ‘other status’ as including disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation. This would allow the courts to interpret the clause according to international standards and ensure protection for a wide range of groups whose rights are at risk.
40. In addition, PLP supports the Consortium’s suggestion that consideration should be given to a requirement that Scottish Ministers publish guidance around the interpretation of the equality provision and the phrase ‘other status’, to specify evidence and criteria public bodies should apply in considering groups whose rights are at risk.¹⁵ This should draw on the relevant UK and European Court of Human Rights caselaw, as well as General Comments by UN Human Rights Treaty Bodies. It should specify groups that are covered by the provision and the term ‘other status’, and what a public body should consider to comply with the equality provision.

Question 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?

41. While PLP accepts that reference to ‘other status’ in the equality provision would, if the approach of the European Court of Human Rights and the Committee on Economic, Social and Cultural Rights is followed, sufficiently protect the rights of LGBTI+ and older people, we nevertheless support the Consortium’s conclusion that LGBTI+ and older people should be specifically mentioned to avoid any doubt and as political recognition of these groups.

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

42. See PLP’s response to question 15.

Question 18: Do you think the Bill framework needs to do anything additionally for LGBTI and older people?

¹⁵ Human Rights Consortium Scotland’s Guide to responding to the Human Rights Bill for Scotland Consultation (August 2023), <https://hrcscotland.org/wp-content/uploads/2023/08/Final-HRCS-Guide-to-responding-to-Human-Rights-Bill-for-Scotland-consultation-August-2023-1.pdf>, p. 37.

43. PLP believes that the Bill should impose on public bodies two additional duties besides those already suggested in the consultation. The first concerns data collection and the second concerns ongoing staff training. However, we believe that these duties should relate to all protected characteristics rather than just LGBTI+ people and older people.
44. On data collection, the Equality and Human Rights Commission's 2018 report, 'Is Scotland Fairer?', specifically noted that the data and evidence collected on many people who share protected characteristics is insufficient. The limit of such data on the experiences of LGBTI+ people was specifically noted.¹⁶ There should, therefore, be an obligation on Scottish public bodies to attempt to gather data on the protected characteristics of individuals they provide services for or exercise power over, and any detrimental effects caused.
45. On training, we direct the Scottish Government to our answer to Question 28. PLP believes that the need for training in order to engender a human rights culture in Scottish public bodies was overlooked in the consultation and requires serious thought. This should include placing a duty on Scottish public bodies to provide ongoing human rights training to their staff, ideally drawing on case studies so that decision-makers are assisted to make the most human rights compliant decisions in real life.

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

46. PLP supports the Scottish Government's proposal that the duties in the Bill should apply "to bodies carrying out functions of a public nature, including private bodies acting under a contract or other arrangements with a public body."¹⁷ Modern public services are provided by a wide range of bodies – public, private, and charitable – and there would be a significant accountability gap if individuals could not make claims against those bodies even when they were exercising public powers and functions.
47. Equally, PLP believes that the Scottish Human Rights Bill should not simply refer to "public functions", as this is an ambiguous phrase. In cases about the application of the Human Rights Act 1998 such as *YL v Birmingham City Council*,¹⁸ commercial care homes for the elderly funded via contracts with local authorities have escaped accountability under human rights law because care provision was not deemed to be a "public function".
48. We encourage the Scottish Government to take a functional rather than institutional approach to defining public functions. This could involve outlining in a provision a non-exhaustive list of factors for courts to consider, such as whether the function involves coercive powers normally exercised by the state and the extent to which the inadequate performance of the function would interfere with fundamental rights.
49. Further, we endorse the suggestion of the Consortium that Scottish Ministers should engage with the UK Government to see if agreement can be reached to apply the Bill's

¹⁶ Equality and Human Rights Commission, 'Is Scotland Fairer? The State of Equality and Human Rights in 2018' (2018), https://www.equalityhumanrights.com/sites/default/files/is_scotland_fairer_accessible.pdf, p. 16; 75.

¹⁷ <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2023/06/human-rights-bill-scotland-consultation/documents/human-rights-bill-scotland-consultation-june/human-rights-bill-scotland-consultation-june/govscot%3Adocument/human-rights-bill-scotland-consultation-june.pdf>, p.29.

¹⁸ [2007] UKHL 27.

duties to some or all reserved public bodies. While a result of the devolution settlement rather than Scottish Ministers, application of the duties only to devolved public bodies would create gaps in protection, legal complexity, and confusion and disappointment for individuals. There should, therefore, be an attempt to produce equalised protection through negotiations with the UK Government.

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

50. PLP supports the proposal of the Scottish Government to impose an initial procedural duty on public bodies designed to foster a human rights culture within the Scottish public sector. We further support the idea in the consultation that this should be a broad duty applying to “policy or programme development, new legislation, as well as budgetary processes and decision-making.”¹⁹ A narrower procedural duty would produce undesirable gaps in protection and could foster an assumption that human rights are only relevant to some decisions.
51. While the Scottish Government does not expressly define what this initial procedural duty should contain, PLP believes that this should be a duty to have “effective regard” or “meaningful regard” to people’s human rights. While we accept the Consortium’s stance that the “due regard” test is well-known by courts, PLP’s view is that too often the “due regard” test is too weak a standard to foster genuine or systemic cultural change in public bodies. This has also been recognised by the UK Parliament. The House of Lords Select Committee on the Equality Act 2010 and Disability, for example, in a 2016 report, highlighted at paras 332 to 346 that the “due regard” duty had often been too weak and should move towards a duty to take all proportionate steps to achieve the human rights concerned.²⁰ Therefore, in line with the Scottish Government’s goal to increase the legal protection of human rights, we would encourage the Bill to establish a more protective procedural duty than the current “due regard” formulation.
52. In addition, we endorse the view of the Consortium that the initial procedural duty should apply no later than 6 months from the Bill’s Royal Assent. Given the well-known character of the “due regard” duty, with preparation we agree that this is adequate time to give frontline public bodies the guidance needed.

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

53. PLP supports the Scottish Government’s proposal to impose on public bodies a duty to comply with the core human rights contained in the treaties being incorporated. We further support the method of incorporation – that is, a duty to comply with the MCO comprising the human right and a duty to progressively realise the right over time. The Scottish

¹⁹ <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2023/06/human-rights-bill-scotland-consultation/documents/human-rights-bill-scotland-consultation-june/human-rights-bill-scotland-consultation-june/govscot%3Adocument/human-rights-bill-scotland-consultation-june.pdf>, p.31.

²⁰ <https://publications.parliament.uk/pa/ld201516/ldselect/lddeqact/117/11702.htm>

Government is right that a duty focused on human rights compliant outcomes rather than just procedure is critical to the effective protection of these important human rights.

54. We endorse the view of the Consortium that the duty to comply should come into force no later than two years after the Bill receives Royal Assent. We further endorse the Consortium's stance that after these two years the procedural duty should operate alongside the duty to comply. Both procedure and outcomes matter and the Scottish Human Rights Bill should reflect this. This would impose ongoing discipline on public bodies to consider human rights in initial decision-making and to achieve outcomes compliant with the incorporated human rights.

Question 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?

55. As our response to Question 28 illustrates, although PLP understands that litigation is a last resort, we support the Consortium's concerns over the narrow set of questions related to access to justice in the consultation.²¹ PLP notes that the Lived Experience Boards identified a range of barriers to access to justice which need to be improved to enable individuals to vindicate their rights.²²
56. PLP supports the Consortium's proposals in relation to access to justice, including the proposal that the Bill includes a right to an effective remedy; the need to ensure justice on systemic issues; and the importance of improving accessibility, affordability and timeliness of justice.²³
57. The consultation does not propose a new statutory procedure for enforcing the human rights and duties in the treaties. As a minimum, we advise the Scottish Government to take a similar approach as that under section 7(1)(b) of the Human Rights Act 1998 that human rights can be relied on in any legal proceedings. However, as a common route of legal accountability is via judicial review proceedings, PLP recommends that the Scottish Government engages an expert public law academic or practitioner to lead a review on the barriers that Scottish residents face effectively accessing judicial review and providing recommendations on procedural reforms. The chair could then engage people with experience of Scottish judicial review, including practitioners, individuals, and advocacy organisations. Ensuring that procedural rules do not unduly impede access to justice and thus the effectiveness of these human rights and duties is critical.
58. PLP would further encourage the Scottish Government to pay greater mind to how legal advice services are provided, particularly to those who cannot afford them, through legal aid.

²¹ Human Rights Consortium Scotland's Guide to responding to the Human Rights Bill for Scotland Consultation (August 2023), <https://hrcscotland.org/wp-content/uploads/2023/08/Final-HRCS-Guide-to-responding-to-Human-Rights-Bill-for-Scotland-consultation-August-2023-1.pdf>, p. 48.

²² Human Rights Bill Lived Experience Board Reports, Block 2 (May 2022), <https://hrcscotland.org/human-rights-bill-lived-experience-board-reports/>.

²³ Human Rights Consortium Scotland's Guide to responding to the Human Rights Bill for Scotland Consultation (August 2023), <https://hrcscotland.org/wp-content/uploads/2023/08/Final-HRCS-Guide-to-responding-to-Human-Rights-Bill-for-Scotland-consultation-August-2023-1.pdf>, pp. 49-50.

59. This part of our submission will identify that Scotland has an opportunity to learn from the English and Welsh access to justice crisis. It will also explain how acting on those lessons could facilitate Scottish leadership in human rights and achievement of other aims identified in Part 8.

Learning lessons from England and Wales

60. PLP welcomes the consultation's commitment to "ensure there are routes to remedy available when there has been an individual or systematic infringement of people's human rights."²⁴ Further, we are encouraged that the Scottish Government seeks to make existing enforcement mechanisms more effective and procedurally fair. PLP seeks clarity on how the Scottish Government will ensure that those mechanisms are made accessible to those people who cannot afford private legal representation and secure that legal aid services are financially sustainable for providers.

61. PLP's position is in line with the views expressed in sessions of the Human Rights Bill Lived Experience Board. One participant illustrated the point well, saying "on paper, these human rights are great. But in practice, you know, what are our human rights? You know, why can't access basic human rights in society?" (Session 1&2).²⁵ Our position is informed by our experience of legal aid services in England and Wales where the provider base has shrunk by more than a third;²⁶ most of the country now lacks any local provision for welfare, immigration, community care or education;²⁷ and many remaining providers lack the resources to train new staff.²⁸ The situation is now so bad that people seeking legal aid services are at risk of being effectively denied access to justice and are unable to enforce their rights. For example, PLP has recently published evidence in its report *Access to legal aid in 2023: An ocean of unmet need*, which shows that to secure legal aid advice or representation for refugees and asylum seekers, support organisations make an average of 16 referral attempts over a period of months.²⁹

62. To this end, PLP welcomes the £31 million additional funding that the Scottish Government has made available to legal aid providers as a first step in safeguarding the future of Scottish legal aid. PLP encourages the Scottish Government to use this Bill as an opportunity to build on the progress they have made in securing the financial sustainability of legal aid services. Doing so will be necessary to position Scotland as an international leader in human rights, which should not be understood as a 'something for nothing' offer; therefore, PLP commends the Scottish Government for "*remain[ing] committed to reforming the current system of legal aid to place to the user at its centre*"³⁰ but would welcome confirmation that

²⁴ Scottish Government, 'A Human Rights Bill for Scotland: Consultation' (June 2023), page 10.

²⁵ Human Rights Consortium Scotland 'Human Rights Bill Lived Experience Board Reports: long-form report on Session 1&2' (February-March 2022), page 1.

²⁶ House of Commons written question 121917, answered 21 February 2022.

²⁷ <https://www.lawsociety.org.uk/campaigns/legal-aid-deserts>

²⁸ Over 40% of provider respondents reported not offering training positions due resource issues - LAPG 'Legal Aid Census' (2021).

²⁹ Public Law Project, 'Access to immigration legal aid in 2023: An ocean of unmet need' (September 2023), page 38 – available at <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>

³⁰ Scottish Government, 'A Human Rights Bill for Scotland: Consultation' (June 2023), page 39.

legal aid is understood as integral to building a human rights culture in Scotland, for the reasons set out below.

Resourcing legal aid could facilitate Scottish human rights leadership and other aims identified in Part 8.

63. The provision of legal aid is inherent to the rule of law³¹ and failure to provide it can amount to a breach of the ECHR.³² Beyond this, there is a risk that if the Scottish Government continues to promote human rights, but does not secure that the system of enforcement is accessible and financially sustainable, then human rights might appear removed from the lives of ordinary people. This risk has also been highlighted by the Human Rights Bill Lived Experience Board. One participant explained it by saying “they’ll talk to you about prisoners, about migrants and all the rest of it. But that’s about the extent of the knowledge – they don’t realise that the human rights actually apply to everybody.” (Session 1&2)³³
64. PLP is encouraged by the Scottish Government’s efforts to tackle the perception of human rights as foreign or remote. We strongly support the Bill’s aim to “continue to build a human rights culture where [...] people understand what their rights are and how to access them.”³⁴ This necessarily means that rights are, in fact, accessible, and that the Scottish legal aid market is financial sustainable.
65. PLP therefore considers that legal aid resourcing is squarely within the scope of this Bill as a necessary pre-condition for rights’ accessibility and of the continued development of a human rights culture in Scotland. We encourage the Scottish Government to provide greater clarity on how access to rights will be provided through legal aid and believe that doing so will support the aims identified in Part 8 of the Bill: improving initial decision-making and joining-up advocacy services.
66. PLP is encouraged by the emphasis placed on ‘getting things right the first time’ in the consultation (both in terms of initial decision-making and of initial complaints). PLP believes that the aims of “further embed[ding] equality and human rights across government and public services”³⁵ and “better implement[ing] rights in practice [and] respond[ing] appropriately to rights issues as they arrive”³⁶ will be supported by a sustainably resourced independent legal aid sector. Independent legal advisors can improve initial decision-making by setting out the law applicable to a case clearly to the decision-maker, who will be weighing-up a wide range of factors and may lack the experience to identify human rights

³¹ See further: Public Law Project – Ravi Low-Beer and Joe Tomlinson, ‘*Financial Barriers to Accessing Judicial Review: An Initial Assessment*’ (April 2018), available at:

<https://publiclawproject.org.uk/content/uploads/2018/05/Financial-Barriers.pdf>

³² Article 6(1) ECHR entitles everyone to a fair and public hearing in the determination of their civil rights, which may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court (*Airey v. Ireland* 6289/73 1979, §26).

³³ Human Rights Consortium Scotland ‘*Human Rights Bill Lived Experience Board Reports: long-form report on Session 1&2*’ (February-March 2022), page 4.

³⁴ Scottish Government, ‘*A Human Rights Bill for Scotland: Consultation*’ (June 2023), page 10.

³⁵ *Ibid*, page 51.

³⁶ *Ibid*, page 9.

issues as they arise.³⁷ PLP would welcome confirmation that the Scottish Government envisage an independent legal aid providers as a key pillar in getting things right the first time.

67. PLP commends the Scottish Government for recognising that “advocacy services play a crucial role in helping rights-holders navigate the system [of routes to remedy]”³⁸ and aiming to “create and promote a multi-institutional approach so that institutions in Scotland – Government, Parliament, public bodies, courts and independent scrutiny bodies – can work together to ensure that rights are upheld.”³⁹ PLP seeks to support this aim and highlight the role of legal advisers in joining up advocacy services. Very often, legal aid providers function as an intermediary between their clients and other advocacy and advice services; however, such work is unremunerated and places extra strain on overstretched practitioners.⁴⁰ Therefore, PLP would welcome further clarification on the place of legal aid services within the Scottish Government’s plan for joining up advice service.

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

68. PLP supports the Scottish Government’s objective of helping public bodies to “get things right first time” so that litigation is less necessary for resolving disputes about human rights. Access to justice is a continuum with courts at the very end as a backstop, rather than the default option. Therefore, we endorse structures which encourage public bodies to reflect on their decisions and resolve disputes about human rights early. This is good for the individual as their rights are vindicated more quickly; good for the public body as resources, reputation and trust are not squandered; and good for the taxpayer as the public’s money is not spent on unnecessary litigation.

69. Further, PLP endorses the notion that this aim is best achieved through entrenching a human rights culture in public bodies over time so that decision-makers value and respect human rights in their professional attitudes, policies, conduct and habits. It is important to acknowledge that law on its own will not make this happen. There is a difference between the theory of legal obligations and the day-to-day reality of public administration. As the Joint Committee on Human Rights has put it at para.156 of its 2018 report on enforcing human rights: “Public authorities are under a duty to act compatibly with the Human Rights Act (s.6), including in administrative decision making. However, as the case of the Windrush generation detainees demonstrates, this does not always happen.”⁴¹ As the consultation rightly suggests, counteracting this will require a multi-institutional approach so that the

³⁷ For a clear articulation of how legal advisers can improve government decision-making, see Kian Leong Tan *‘The Case for Legal Representation in Administrative Review Systems’* PL 2023, Jul, 385-392.

³⁸ Scottish Government, *‘A Human Rights Bill for Scotland: Consultation’* (June 2023), page 38.

³⁹ *Ibid*, page 2.

⁴⁰ Jo Hynes *‘Overstretched and unsustainable: a case study of the immigration and asylum legal aid sector’* (April 2023) found that in England and Wales, 73% of survey respondents do ‘unseen’ or ‘unbillable’ work, including as assisting vulnerable clients with non-legal matters. Similarly, the Law Society of Scotland *‘The financial health of legal aid firms in Scotland’* (2017) found that one third of work conducted by civil legal aid providers in unremunerated.

⁴¹ <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/66910.htm>

Scottish Government, Scottish Parliament, public bodies, judiciary and independent scrutiny bodies all play their part in making this aspiration come closer to reality.⁴²

70. In line with the Scottish Government's objective to strengthen existing infrastructure, we agree that as a starting point an updated complaints handling framework referring to human rights from the Scottish Public Services Ombudsman's (SPSO) Complaints Standards Authority is a good option. We further support the proposal of empowering the SPSO to issue declarations of non-compliance where a public body has failed to comply with these standards.
71. Equally, it is important not to focus only on frontline complaints handling. This itself is not enough to foster a human rights culture. We agree with the Consortium that greater detail and transparency is needed about specific actions that the Scottish Government, Scottish Parliament, judiciary, public bodies, and scrutiny bodies will be required to take to foster a human rights culture in Scotland. This could include, for example, an obligation on public bodies to provide an ongoing human rights training programme for decision-makers. Training is referred to only once in the Scottish Government's consultation and as such is an area where policy needs to develop significantly to make a real difference.

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

72. PLP supports the changes proposed by the Scottish Government to the SPSO. Empowering ombudsmen to take on greater responsibilities for human rights would be in line with the emerging international consensus, as expressed in instruments such as the Venice Commission's 2019 *Principles on the Protection and Promotion of the Ombudsman Institution*.⁴³
73. Further, PLP agrees with the Scottish Government's view that it initially makes sense to build on existing institutional infrastructure rather than create entirely new institutions. In agreement with almost all other respondents, as PLP and the UK Administrative Justice Institute (UKAJI) put it in our joint submission to the Joint Committee on Human Rights inquiry into whether there should be a new UK-wide Human Rights Ombudsperson: "Another public body without clear functional demarcation from others would add complexity and expense and risk unhelpful duplication and jurisdictional conflict."⁴⁴
74. On the proposals in the consultation:
75. **Specific reference to human rights in the SPSO's remit:** We support this proposal. While complaints reviewers can already refer to human rights in their decisions about maladministration, this is not systemic and has been the result of organic development in ombudsmen practice rather than because of any legal obligation to consider human rights.

⁴² <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2023/06/human-rights-bill-scotland-consultation/documents/human-rights-bill-scotland-consultation-june/human-rights-bill-scotland-consultation-june/govscot%3Adocument/human-rights-bill-scotland-consultation-june.pdf>, p.9.

⁴³ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e)

⁴⁴ <https://committees.parliament.uk/writtenevidence/109436/pdf/>

The Equality and Human Rights Commission, for example, developed guidance for ombudsmen on the relevance of human rights to maladministration.⁴⁵ Consequently, we agree that a specific legislative reference to human rights will make clearer that human rights are essentials rather than optional extras. Moreover, given that public bodies will become aware that their decisions can be challenged using human rights through this additional route, the proposal should help inculcate human rights thinking further into frontline decisions.

76. **Enable the SPSO to receive complaints orally:** We support this proposal. Particularly when written complaints can now be received through comparatively informal means such as X (Twitter), there is no compelling reason why the SPSO should not receive coherent complaints via telephone or virtual teleconferencing, for example. This will enable a greater number of legitimate complaints to be taken forward, thereby facilitating access to justice and access to effective remedies.
77. **Granting the SPSO “own initiative” powers and permitting the SPSO to receive complaints from advocacy organisations:** We support this proposal. Distinguishing it from other ombudsmen in the devolved nations such as the Public Services Ombudsman for Wales (PSOW) and the Northern Ireland Public Services Ombudsman (NIPSO), the SPSO does not currently have “own initiative” powers. The need for own initiative powers has been put lucidly by the SPSO herself: “The most vulnerable in society are often the most dependent on public services and that dependence can make them reluctant to complain. There is fear of upsetting an organisation who may have real power over your life. Complaints processes, however designed, can feel like an additional hurdle for someone who may have multiple interactions with public bodies. The ability of an Ombudsman to step in when there is evidence that there may be real problems affecting a group...is an important part of the key role of an Ombudsman – ensuring fairness in the relationship between the citizen and the state.”⁴⁶
78. While no specific model is advocated in the consultation, PLP recommends consideration of the PSOW model of allowing the choice of “extended” and “wider” investigations. The former is when an existing individual complaint is extended to include investigation of systemic problems and the latter is a proactive investigation of a systemic problem without an existing complaint from an individual.⁴⁷
79. Furthermore, PLP also supports the proposal to allow the SPSO to receive suggestions from advocacy organisations about problems which could be subject to own initiative investigations. That said, we do believe there is a case for going further and specifically providing in legislation that advocacy organisations are permitted to bring complaints to the SPSO either on behalf of individuals or to challenge a systemic human rights concern. Advocacy organisations are among the first institutions to hear of systemic frontline problems; better equipped than public bodies to compassionately support individuals and groups to mobilise complaints; are trusted to a greater extent by marginalised communities;

⁴⁵ <https://www.equalityhumanrights.com/en/advice-and-guidance-human-rights-multipage-guide/human-rights-and-complaints-ombudsman-schemes>

⁴⁶ <http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-nipso/submissions/30.scottish-ombudsman.pdf>

⁴⁷ <https://www.ombudsman.wales/own-initiative-investigations/>

and are better able to shoulder the burdens of challenging state power than individuals on their own.

80. We note, however, that the Scottish Human Rights Consortium has concerns with the Scottish Government's proposal to permit the SPSO to pursue own initiative investigations. This is on the basis that the Consortium believes that more thought is required before granting the SPSO this power, rather than, for example, the Scottish Human Rights Commission. The Consortium adds that because the Children and Young People's Commissioner for Scotland cannot undertake investigations where this duplicates the work of another complaints body, empowering the SPSO could disempower the Commissioner.
81. These concerns deserve close attention. Therefore, as with the proposal below concerning non-binding recommendations, we advise that the Scottish Government proactively engages with the Consortium, the SPSO, the Scottish Human Rights Commission, and other scrutiny bodies prior to reaching a conclusion. It is critical that if own initiative powers are enacted for the SPSO they enjoy public confidence and are practically feasible. This should include – as we recommend below – enabling joint working between the SPSO, Scottish Human Rights Commission, and the Children and Young People's Commissioner for Scotland and other scrutiny bodies where this will lead to more effective investigations.
82. **Continue non-binding recommendations:** PLP acknowledges the difference of opinion on this matter between the Scottish Government and the Scottish Human Rights Consortium. The Scottish Government intends that SPSO recommendations should continue to be non-binding, while the Consortium does not accept this proposal. While the Scottish Government's proposals are in line with widespread practice both in the UK and internationally, PLP encourages the Scottish Government to engage with the Consortium and the SPSO before reaching a conclusion.
83. As with our answer in relation to own initiative powers, we underline that this question should not be reduced to a binary everything or nothing – either that all recommendations must be binding or none of them can be. With thought, it may be feasible to devise a scheme whereby, for example, recommendations for financial compensation under a certain amount are binding, while recommendations requiring long-term or systemic change continue to be advisory to allow greater scope for flexibility, responsiveness to circumstances and change, and collaboration between the SPSO and public body.
84. **Interaction between SPSO, judicial review and other complaints bodies:** PLP is pleased that the Scottish Government is open to further reforms, such as examining the interaction of the SPSO with judicial review and other complaints bodies. PLP has experience of cases where ombudsmen in England, for example, have refused to consider a complaint where there is ongoing litigation only tangentially related to the details of the complaint. Litigation and ombudsmen serve different functions and one should not undermine the pursuit of the other. Courts are concerned with violations of legal rights and duties, whereas ombudsmen are concerned with maladministration. PLP is of the view that, except where there is tangible prejudice to one or the other, it should be possible to pursue both routes of redress; one related to legal issues, one related to issues of administration.
85. On the interaction between the SPSO and other complaints bodies, PLP endorses the approach taken by the Scottish Government that wherever possible this should be

collaborative. Importantly, as the Scottish Human Rights Consortium points out, sometimes Scottish legislation does not enable collaboration – such as for the Children and Young People’s Commissioner for Scotland – and the Scottish Government should address this as a matter of urgency. An example to draw upon may be section 11ZAA of the Parliamentary Commissioners Act 1967 and 33ZA of the Local Government Act 1974, which permit joint working between the Parliamentary and Health Service Ombudsman (PHSO) and Local Government and Social Care Ombudsman (LGSCO).

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

86. PLP supports the Scottish Government’s proposals for a liberal approach to standing, mirroring the “sufficient interest” test in judicial review rather than the “victim” test under s.7 of the Human Rights Act 1998. The narrow “victim” test has demonstrably prevented important issues being litigated and prevented victims from securing justice.
87. For example, when the criminalisation of abortion was challenged on human rights grounds before the UK Supreme Court in *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review*,⁴⁸ the Justices determined that the Commission did not have standing under s.7 because it was not a direct victim of the prohibition of abortion. Similarly, in the Court of Appeal of England and Wales in *R (Dan Jarvis MP and David Davis MP) v Prime Minister*,⁴⁹ two Westminster MPs were prevented from pursuing a legal challenge against the Prime Minister’s failure to hold a full public inquiry into allegations of complicity in torture and rendition against the UK Government related to the war on terror. This was because under s.7, they were not direct victims of the conduct themselves. Narrow standing rules such as s.7 can perpetuate serious injustices and human rights violations, and stymie legitimate, non-vexatious legal challenges.
88. Equally, in recent cases in England and Wales, it is important to acknowledge that the broader “sufficient interest” test has itself been narrowed by the judiciary, restricting access to justice and accountability. In *R (Good Law Project and Runnymede Trust) v Secretary of State for Health*,⁵⁰ for example, the High Court of England and Wales found that neither the Good Law Project nor the Runnymede Trust had standing to pursue a claim suggesting that there had been discriminatory practices in the appointment of government officials during the Covid-19 pandemic.
89. Therefore, PLP strongly supports the Scottish Government’s proposal to expressly identify in legislation that advocacy organisations and others are permitted to pursue litigation provided they have a sufficient interest. It is not fair that individuals should be expected to shoulder the emotional, practical and financial burden of challenging unlawful or discriminatory systems when organisations with a sufficient interest could carry out that function and are better able to manage those stresses.
90. The result should also be that human rights violations are addressed earlier because advocacy organisations are often closest to frontline problems. Instead of the courts

⁴⁸ [2018] UKSC 27.

⁴⁹ [2021] EWCA Civ 972.

⁵⁰ [2022] EWHC 298 (Admin).

needing to wait for an individual with the willpower and confidence to pursue litigation, advocacy organisations can help ensure human rights issues are resolved earlier – either through litigation or other routes.

91. It is also the case that advocacy organisations are normally highly expert in their issues of interest and, though less common, can have extensive experience in litigation, both strategic and for individuals. This will help ensure that the Scottish judiciary receives the expert information it needs and that the litigation is likely to be managed efficiently given professional knowledge of court rules. For these reasons, we strongly support the Scottish Government’s proposals in relation to standing.

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

92. We agree with the Consortium that the priority is ensuring that “people who experience violations of rights in the Bill must be able to access justice and accountability through the courts”.
93. Reasonableness as articulated in the *Wednesbury* case requires claimants to meet a very high threshold of establishing that a decision was so unreasonable that no reasonable decision-maker could have reached it. Setting this test as the standard of review would significantly hinder the ability of individuals to challenge violations of the rights contained in the Bill. It would also be inconsistent with judicial practice, which does not regard reasonableness as a single concept defined by the narrow contours of the *Wednesbury* case.
94. While concepts such as ‘anxious scrutiny’ emerged in the pre-HRA case law to facilitate a more intensive standard of review in cases involving fundamental individual rights, we would prefer a definition of reasonableness that draws upon international guidance. In particular, the criteria for the assessment of reasonableness as set out by the Committee on Economic, Social and Cultural Rights lists the following factors: (a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights; (b) whether the State party exercised its discretion in a non-discriminatory and nonarbitrary manner; (c) whether the State party’s decision (not) to allocate available resources is in accordance with international human rights standards; (d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights; (e) the time frame in which the steps were taken; (f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.⁵¹
95. The enactment of the Human Rights Act 1998, however, has meant that proportionality is the standard applied in most current cases alleging breaches of rights. While it has been contended by academics and, on occasion, the courts, that proportionality and modified unreasonableness are not too conceptually distinct, the proportionality test retains a few key advantages for rights-holders. As mentioned, proportionality is the test used under the Human Rights Act 1998, as well as the Equality Act 2010; therefore its use in the Human Rights Bill would promote consistency in rights adjudication. Proportionality is also a

⁵¹ https://www2.ohchr.org/english/bodies/cescr/docs/e_c_12_2007_1.pdf

structured test with distinct stages, which decision makers should be able to apply to their initial decisions to reduce the risk of rights violations. The application of these stages in cases involving violations of the Human Rights Bill could be adapted to include many of the factors listed above. Most importantly, proportionality, unlike unreasonableness, places the burden on decision-makers to provide reasoning for their actions, promoting a culture of justification in decision-making.

96. It should be acknowledged, however, that substantive review, whether reasonableness or proportionality, does not always entail a more intensive form of review, or necessarily benefit claimants. It is not uncommon for tests of reasonableness, and even proportionality, to become tempered in their application by margins of discretion/appreciation. Deference can be appropriate in respecting the difference in institutional competences between the courts on one hand, and the legislature and executive on the other.
97. However, for the rights in the treaties to be given meaningful effect, PLP believes that their consideration by the courts must go beyond the existing jurisprudence on reasonableness. This includes giving greater weight to the voices of the individuals affected by violations, and a more nuanced understanding of the contexts in which denials of human rights occur. Standards of review also go hand in hand with effective remedies, the importance of which we discuss in our answers to questions 35-37.
98. We would therefore welcome the adoption of a reasonableness test that goes well beyond the narrow confines of *Wednesbury* or preferably, proportionality, as the standard of review. We stress that regardless of the label given to the standard of review, it should be informed by reference to factors such as those currently set out by the Committee on Economic, Social and Cultural Rights above, and any that the Committee may go on to develop.

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

99. We disagree that existing judicial remedies are sufficient, both in their nature and in the way they are sometimes granted, to deliver effective relief for rights-holders. We welcome the Scottish Government's consideration of a broader conception of remedies than are currently available.
100. Rights cannot be fully realised without the ability to obtain an effective judicial remedy. Remedies breathe life into access to justice by ensuring that something tangible arises out of the - often arduous - engagement of individuals with the court process. They sit at the centre of the rule of law as authoritative statements of, and in some cases instructions for rectifying, unlawful action by public officials.
101. In substance, there is little difference in the remedies available for judicial review in Scotland compared to England and Wales. Scottish remedies equivalent to declarations, injunctions, quashing, mandatory and prohibitory orders, and damages, provide a broad toolkit for judicial relief.
102. In relation to damages, one barrier to effective remedy is the inconsistency in the ability of tribunals to award compensation. In certain cases, especially in the social security context,

individuals seeking damages have to pursue additional civil claims, usually in the County Court and occasionally in the High Court. This undermines the role of tribunals in facilitating readily available justice in a user-friendly and low-cost manner. We recommend that this inconsistency is remedied in the context of claims raising violations of the rights incorporated by the Bill.

Question 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?

103. Courts possess a very flexible discretion to grant relief, which lends itself to a more holistic approach to addressing violations of rights. Currently, the practice of granting relief in judicial review tends to involve a balancing exercise whereby the relief requested by an individual is weighed against broader factors, such as whether the issue has become academic, whether the remedy promotes good administration, and any (detrimental) impact on third parties.
104. In addition to the more effective use of existing remedies, we welcome the adoption of structural interdicts and other hybrid remedies. These are well-suited to securing justice for groups and communities by ensuring that government departments collaborate to tackle systemic failures, which often affect multiple individuals, and by preventing the re-occurrence of rights violations. The dialogic nature of this approach preserves the appropriate balance of power between the courts and the executive, while ensuring that the latter is meaningfully held to account and held to the guarantee of non-repetition.
105. We would also recommend a more proactive approach by the courts to the enforcement of remedies. In *Craig v HM Advocate*⁵², the Supreme Court stated that that the courts ordinarily refrain from making coercive orders; that is, orders that go beyond declarations by striking down administrative acts or mandating that the government take specific action, in the “clear expectation that the executive will comply with a declaratory order” [44]. This statement is based on the constitutional principle of mutual trust between the courts and the Government.
106. However, it arguably only holds weight when both sides demonstrate equal respect for the rule of law. Public authorities often take prolonged periods of time to act on orders, with little follow up on implementation. The recent use of suspended quashing orders exemplifies one way in which a supervisory role can be created for the courts over the implementation of remedies. In *R (ECPAT UK) v Kent CC, SSHD*,⁵³ the judge attached strict conditions on the public authority for the suspension of a quashing order, and found that it would sometimes be necessary in such cases to hold a further hearing to check that these conditions had been complied with.
107. We recommend that there is a similar continuing remedial role for the courts in the Human Rights Bill, which would also complement the introduction of structural interdicts and hybrid remedies in more complex cases.

⁵² [2022] UKSC 6

⁵³ [2023] EWHC 2199 (Admin)

Question 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?

108. As emphasised in our response to question 35, PLP believes that quashing or ‘striking down’ incompatible legislation is an indispensable remedy. Declarators of incompatibility could also be useful tools, sending stronger messages of unlawfulness to political institutions than ordinary declarators, while granting those institutions time and flexibility to respond in the most appropriate manner. However, as mentioned above, their availability as a form of relief should not in itself deter the courts from striking down instruments where appropriate.
109. Data in relation to England and Wales shows that instances of declarations of incompatibility being issued under Section 4 Human Rights Act 1998 have historically been low compared to ordinary declarations.⁵⁴ This could be due to several reasons, one of which may be the frequency with which courts use the interpretive provision in Section 3 Human Rights Act 1998. As pointed out by the Independent Human Rights Act Review, there is a lack of clarity about when the courts are using Section 3 interpretive methods, particularly when other common law grounds of challenge are involved.
110. If, in the Human Rights Bill, exhaustion of the interpretive condition will similarly be a necessary pre-condition to the grant of a declarator of incompatibility, guidance or training for the judiciary may be appropriate to ensure that the courts are clear about their interpretive methods, and the factors that are at play when determining whether to grant a declarator of incompatibility.

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

111. Please see the responses to questions 20 and 21 for PLP’s views on the initial procedural duty and the duty to comply.
112. As noted in those responses, PLP supports the Scottish Human Rights Consortium’s conclusion that timescales need to be specified in the Bill. PLP supports the Consortium’s proposed timeline of commencement no more than six months after Royal Assent, with the duty to comply coming into force no more than two years later. As set out by the Consortium, the duty to comply should run alongside, rather than replacing, the initial procedural duty.⁵⁵

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

113. PLP fully agrees with the Scottish Government’s recognition that guidance for duty-bearers will be key for the effective implementation of the Bill. In developing this guidance,

⁵⁴ <https://ukconstitutionallaw.org/2022/11/24/saba-shakil-bridging-the-gap-between-remedial-reform-and-judicial-practice-a-study-of-challenges-to-delegated-legislation/>

⁵⁵ Human Rights Consortium Scotland’s Guide to responding to the Human Rights Bill for Scotland Consultation (August 2023), <https://hrcscotland.org/wp-content/uploads/2023/08/Final-HRCS-Guide-to-responding-to-Human-Rights-Bill-for-Scotland-consultation-August-2023-1.pdf>, p. 62.

the Scottish Government may wish to consult with civil society organisations and experts, as well as engaging in a participatory process with rights-holders.

114. Such guidance should either be accessible for rights-holders or should be published as a separate accessible version specifically for rights-holders, ideally in multiple languages. The Government may wish to include an obligation for duty-bearers to display relevant guidance for rights-holders clearly and prominently on their websites and refer to it in other relevant materials aimed at rights-holders. This would ensure that rights-holders are able to engage in conversations with duty-bearers early on about their rights.
115. PLP further agrees with the Scottish Government that the rights in the Bill should form explicit considerations in budgeting decisions to ensure sufficient financial capacity. Furthermore, it may be helpful if guidance published for duty-bearers includes specific guidelines for how budgeting needs to take these rights into account.
116. To ensure that decisions, policies and services take the rights in the Bill into account in a meaningful and effective manner, PLP suggests that public bodies could be encouraged to engage more regularly with human rights research, including funding that research so that it exists to begin with. Engaging with experts and NGOs in more structured, regular ways could assist public bodies to make better evidence-based decisions which meaningfully realise the rights in the Bill, without creating undue onus on the public bodies to undertake large swathes of research themselves.
117. PLP further suggests that training and awareness-raising for decision-makers will be crucial for ensuring the rights are properly taken into account. Training on the human rights implications of public bodies' decisions should be compulsory for duty-bearers, and should be at least in part specific to decision-makers' area of work. The Scottish Government may wish to consider whether this fully integrated training on the overarching Scottish human rights framework should be developed, including the Bill, the Human Rights Act 1998 and the Equality Act 2010. The Scottish Government may further wish to conduct a 'lessons learned' exercise on what has and has not worked in public body training on human rights previously. It may be useful for the training materials to include case studies based on common lived experience, as well as key conclusions from participatory processes. This could help decision-makers understand the perspectives and needs of rights-holders.
118. It may further be helpful to include training for decision-makers on how to demonstrate and explicitly explain how a person's rights were evaluated and applied in a given decision, to ensure rights-holders understand how their rights were taken into account from the point of the initial notification of the decision. It may be useful to have pre-prepared material on specific rights, which can be sent to the subject of the decision, along with the decision itself. It is PLP's experience in England and Wales that such considerations are often not explicitly set out by decision-makers in their initial decisions. Such a practice would facilitate transparency and create accountability for duty-bearers, ensuring that they demonstrably take rights into account where necessary. It would also help rights-holders claim their rights and support public awareness.

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

119. Providing effective information and raising awareness of rights is crucial for ensuring that individuals understand their rights and feel empowered to challenge violations. Information and awareness raising also foster a sense of ownership of rights, which can insulate human rights frameworks from political attacks. The vulnerability of the Human Rights Act 1998 to such attacks can be said to stem in significant part from a lack of sense of ownership of the rights contained in the European Convention on Human Rights.
120. There is a strong culture of civil society network and capacity building around human rights in Scotland, as exemplified by the education and engagement of children and young people in the leadup to the UNCRC Incorporation (Scotland) Bill. This participation was the product of targeted and effective campaigning, and the Human Rights Bill would benefit from a similar approach. Alongside general campaigning, there should be further support for grassroots, frontline and representative organisations, particularly financially, in reaching out to and engaging with the communities which are most affected by the incorporation of the treaties. This is particularly important when considering the potential for marginalised individuals to be excluded from engagement due to, for example, digital illiteracy and lack of English language proficiency.
121. We thus echo the Consortium's calls for detailed consideration and further progress on this issue, and recommend that any large-scale public awareness campaigning is accompanied by a more targeted approach that recognises the role best played by community and member organisations. We also endorse the Consortium's recommendations for the establishment and funding of a National Network for Human Rights Information, Education, Legal Services and Advice.

Contact

Lee Marsons

Senior Research Fellow at Public Law Project

l.marsons@publiclawproject.org.uk

Saba Shakil

Senior Research Fellow at Public Law Project

s.shakil@publiclawproject.org.uk

Rachel Solomon

Research Assistant at Public Law Project

r.solomon@publiclawproject.org.uk

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