

Towards a New Model of Incorporation:

A legal opinion



Introduction

Established via an act of the Scottish Parliament in 2006, the Scottish Human Rights Commission is Scotland's National Human Rights Institution (NHRI). We have a general duty to promote awareness, understanding and respect for human rights in Scotland. We deliver analysis and outputs to fulfil our mandate to promote human rights. In particular, we exist to promote best practice in relation to human rights, including to provide guidance (Section 3) and monitor law, policies and practice (Section 4) to ensure compliance with international human rights standards.

The Commission is part of the international human rights system and is accredited by the United Nations as an 'A Status' human rights institution. This means the Commission is granted a monitoring role at the UN on the actions of the state in Scotland to uphold human rights.

We are an independent public body, accountable to the people of Scotland through the Scottish Parliament. We have the function of advising MSPs on the implications of proposed legislation on the human rights of people in Scotland.

The Commission therefore has a role in providing advice on the approach taken to fulfil the stated ambition of the Scottish Government to deliver a Human Rights Bill for Scotland. The Commission's core concern is that a new law results in a system which strengthens human rights in the daily lives of people in Scotland.

Executive Summary

2.1 Making rights real:

The ambition of the Scottish Government's proposed Human Rights Bill is welcome.

Human rights are universal and indivisible. They are not political. They do not respect borders. They are fundamental and belong to every single one of us.

Human rights become real when public services are designed to uphold, promote and be accountable for violations of human rights. Greater protections for our human rights in law can help by providing a baseline for holding government and public bodies to account and to uphold the human rights of the people of Scotland.

The Commission is concerned that people in Scotland continue to experience human rights violations. This is evidenced in UN Treaty Monitoring reports, Commission publications, and regulatory reports in health, education, criminal justice, social care, housing, and by civil society and media investigations.

The opportunity to strengthen human rights obligations in Scots Law presents a moment to reflect on the whole system – legislation, policy and resources – required to make human rights real.

The Commission is concerned that access to justice for human rights in Scotland is already too difficult to navigate for many people. The outcome of this proposed legislation must not create further complexity in the system.

2.2 The issue of devolved competence:

In light of recent Supreme Court rulings on the competence of the Scottish Parliament to incorporate human rights treaties into Scots Law, it is vital that an objective approach is taken to interrogating the design of this Bill. This is essential to ensure that it achieves an accessible human rights system where:

- People in Scotland can name and claim their rights.
- Duty bearers are clear on their responsibilities.
- Accountability mechanisms are accessible and relevant.

The reality of the devolved legislative context around human rights incorporation in the UK is very technically complex. The experience of the UNCRC (Incorporation) (Scotland) Bill and the Supreme Court judgement of October 2021 has an undeniable impact on the approach of this Bill.

Uncertainty over scope for stronger legal protection of human rights under devolution needs to be brought to a close.

Careful consideration must be given to the model of incorporating international human rights treaties into Scots Law to achieve the greatest protection and promotion of human rights.

This requires expertise in constitutional law, which is challenging for many of the civil society organisations, duty bearers, and individuals who have an interest in this Bill.

To inform this process, the Commission therefore offers a legal opinion, prepared by independent senior Legal Counsel, on the model of incorporation which maximises the rights protections within the possibilities of devolved competence.

2.3 Proposed Incorporation Approach:

In the consultation document, the Scottish Government proposes to take a 'full direct' approach to incorporating four international human rights treaties, with different duties attached to the treaties.

These treaties are: the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Discrimination against Women (CEDAW), the International Convention on the Elimination of Racial Discrimination (CERD), and the Convention on the Rights of Persons with Disabilities (CRPD).

The Scottish Government suggests:

1. Reproducing all four treaties in the Bill, removing any text that relates to areas reserved to the UK Parliament.
2. Recognising and including the right to a healthy environment in the Bill.
3. For core ICESCR rights and the right to a healthy environment:
 - a. Putting an initial procedural duty on public bodies (and, so far as possible, private actors) delivering devolved public functions to build the rights into the fabric of their decision-making. This would apply for a period of time following the Bill passing to give duty-bearers time to prepare for a subsequent compliance duty;
 - b. Moving to a duty to comply with the rights, for public bodies (and, so far as possible, private actors) delivering devolved public functions. The duty to comply will be demonstrated by progressively realising the rights and ensuring the delivery of minimum core obligations;
 - c. Including an equality provision (within the limits of the equal opportunities reservation)¹ to ensure:
 - i. Equal access for everyone to the rights; and
 - ii. That the provisions of the “equality treaties” inform the interpretation of the core ICESCR rights and the right to a healthy environment for those protected groups.
4. Putting a procedural duty² on duty-bearers, in relation to the CERD, CRPD, CEDAW (within the limits of the equal opportunities reservation). This is intended to ensure duty-bearers are considering all rights in these treaties in a holistic way both when delivering ICESCR rights and in their overall decision-making.
5. Including an interpretative provision in the Bill that ensures all the rights can be interpreted in light of international human rights standards and the concept of human dignity.

2.4 Analysis:

International treaties are not designed to be directly incorporated into all domestic legal systems. The ‘direct’ approach to Incorporation as proposed by the Scottish Government is not the only approach possible.

There is a legitimate concern that this approach may lead to weaker protections in law than promised in the policy intent for the human rights of disabled people, women, older people, LGBT+ people, and people from ethnic minority backgrounds in Scotland. It must be remembered that these treaties also include specific civil, political, economic, social and cultural rights too. It may also create complexity in the human rights system in Scotland by introducing a layer of protections for the rights found in one treaty – the ICESCR – and a different duty for the other treaties (CERD, CRPD and CEDAW), which will then be considered differently by duty-bearers.

An alternative model for the Scottish Government to consider is to adapt the treaty texts, making the necessary changes to the wording of rights to both adapt them to the domestic Scottish context and ensure they fall within devolved competence.

This also recognises the core principles that rights and duties must be clear and easily accessible to all. This includes duty-bearers, who must understand what they need to do to make rights real, and rights holders, so they can identify and assert their rights.

In general terms, this approach would be more likely to:

- Provide clarity and accessibility, for duty-bearers and rights-holders.
- Ensure alignment with international law.
- Make the relevant rights stronger and effectively protected.
- Allow for leadership for rights to be furthered.
- Ensure rights fall within devolved competence, navigating the equal opportunities reservation, adapting the language of rights in a way that ensures the Bill is within the competence of the Scottish Parliament.

2.5 A Legal Opinion:

In August 2023, the Commission sought external specialist legal counsel on this advice on the potential model of incorporation. This opinion has been prepared by James Mure KC, a renowned expert on constitutional law.

The Commission's brief to the legal opinion has been informed by an analysis of the international human rights treaties as they interface with devolved competence prepared for the Commission by Professor Aileen McHarg, Professor of Public Law and Human Rights at Durham University. Both opinions are published alongside this paper.

Finally, the Commission is clear that it would welcome more powers to protect and promote the human rights of the people of Scotland. It is critical that, whatever the model of incorporation which emerges, these powers are not limited to the human rights treaties which are incorporated into Scots Law via the Human Rights Bill, and that our remit remains to promote the human rights of the people of Scotland under all international Human Rights treaties (as is currently the case).

Key points of the Legal Opinion Prepared for the Scottish Human Rights Commission in September 2023 on the Scottish Government's consultation on a new Human Rights Bill for Scotland

In relation to the Scottish Government approach to incorporation Mr Mure KC said:

- The Consultation does not present a compelling argument for discounting the alternative approach of drafting fresh rights in Scots law. It also does not

recognise that international treaties are not designed to be directly incorporated into all domestic legal systems.

- The slow and uncertain nature of the discussions around the UNCRC incorporation Bill means that the proposal in the Consultation to “mirror the UNCRC Bill’s proposed approach” to incorporating and imposing duties seems misguided at this stage. Therefore, the Bill will need to be carefully drafted to ensure that it does not fall foul of the limits on legislative competence contained in the Scotland Act 1998 as interpreted in that judgment. That is likely to involve some loss of the rights contained in the treaties.
- The Scottish Parliament lacks legislative competence to transpose or directly incorporate such rights without some trimming or re-drafting, and there is a particular difficulty in “removing any text that relates to areas reserved to the UK Parliament.” Given this, there will be text that relates both to reserved and non-reserved areas, and which therefore will need to be amended, or hedged by potentially complex exclusions, to make clear its true scope within devolved competence.

In relation to the proposed procedural duties for CERD, CEDAW and CRPD, Mr Mure KC said:

- A Procedural duty is plainly not a duty as to outcome and therefore does not mandate any substantive decision in a particular case. Nor does such a duty require the authority to carry out a particular process when taking account of the rights.
- The Consultation offers no path to incorporating substantive rights found in CERD, CEDAW and CRPD (referred to here as ‘the equalities treaties’). The Consultation appears to not seek to incorporating substantive rights at all. It is not clear why this should be the case.
- The Commission has taken expert advice about the rights set out in these three treaties (Professor Aileen McHarg, 8 May 2022). From this advice it is clear that several important substantive rights could be incorporated within devolved competence. Given the Scottish Government’s ambition to incorporate international human rights standards set down in treaties already signed and ratified by the United Kingdom, the Consultation could have offered reasons for not including such rights which are in the treaties and not impacted by the equal opportunities reservation within the proposed Bill.
- The Consultation does not offer any explanation of why these three treaties (CERD, CEDAW and CRPD) require to be approached in this way. The Consultation recognises that some rights in these treaties may be capable of stronger incorporation than a merely procedural duty.

Question 5 specifically seeks ideas on this point. There is no simple way to navigate the equal opportunities reservation. The UK government’s concerns in respect to equal opportunities was recently underlined by its policy statement of

reasons on its decision to use powers under section 35 SA 1998 with respect to the Gender Recognition Reform (Scotland) Bill. A statement regarding this is currently under judicial review at the Scottish Government's request. The Consultation does not explain how the proposed Bill would deal with this reservation. I note, however, that the detailed exceptions to the reservation of equal opportunities provides a framework for indicating what the Bill can include. This means that the Bill should be capable of dealing with more than merely procedural duties in relation to the "equality treaties".

- There are various rights contained within the "equalities treaties" that would not appear to be impacted by the equal opportunity's reservation. To take a further example, article 4 of the CERD deals with incitement to racial discrimination and article 6 obliges states to assure to everyone effective protection and remedies against acts of racial discrimination. Where these matters concern devolved matters such as justice or education, I see no reason why they should not be incorporated into Scots law.

In relation to an alternative 'adaption' rather than 'direct incorporation' approach, Mr Mure KC indicated that:

- In principle, this model should be capable of providing a clear and accessible form of incorporation. It would enable the treaty rights to be written into the Bill within devolved competency, concentrating on the existing state of Scots law. People and advisers should find it easier to locate the context of the rights in Scots law. By avoiding duplication, it would reduce the risk of confusion and the costs of compliance.
- The aim must be to ensure that the treaty rights are truly made available to people as intended in the Conventions and without dilution. With an interpretative clause, a Bill adopting this model should be clear about the need to have regard to the international human rights background when interpreting and applying the rights. I see no obvious reason why the [adaptation] model should water down the rights as available in Scotland or lose their connection to the international sphere and the learning gained from it.
- A model that promotes clarity and accessibility is intrinsically more likely to provide stronger and more effective rights protection. Among the principal concerns with any model, therefore, are whether it will survive a challenge to the Bill's legislative competence, whether people, their advisers and the public bodies whose functions are affected will easily recognise how the text used impacts on existing and future functions within Scotland and whether as a result the newly stated rights cause services to improve and provide effective remedies where services fall short.
- A single text would provide greater clarity for both people and public authorities than would a series of up to four distinct parallel texts. This approach would require careful tailoring of the single merged text that is proposed.

Conclusion

The Commission welcomes the important progress and the leadership demonstrated by the Scottish Government in creating a new human rights legal framework for Scotland. However, the interpretation of the Supreme Court ruling on the mechanisms for incorporating international human rights treaties into Scots Law has significantly altered the context in which this Bill is drafted to achieve the long-stated policy intent.

The Commission is therefore highlighting potential challenges and complexities arising from the model proposed in the consultation, insofar as it does not necessarily:

- Provide the strongest possible protection for people's rights.
- Navigate devolution well.
- Appropriately address the equal opportunities reservation.
- Provide a clear, accessible and workable law.

Further consideration of alternative approaches is therefore recommended.

The adaptation approach is just one suggestion of an alternative approach to achieving the policy intent of the proposed Bill. It will be for the Scottish Government to consider all options and propose a final model, and in due course for the Scottish Parliament to fully consider, interrogate and pass legislation which achieves the best interests of the human rights of the people of Scotland, whilst navigating the increasingly complex challenges of devolution.

The Commission will continue to fulfil our role in this process by providing advice and guidance on compliance with international human rights standards in order to assist the development of legislation which can make a real positive impact to making human rights real for the people of Scotland.

The Commission is clear that it would welcome more powers to protect and promote the human rights of the people of Scotland. It is critical that, whatever the model of incorporation which emerges, these powers are not limited to the human rights treaties which are incorporated into Scots Law via the Human Rights Bill, and that our remit remains to promote the human rights of the people of Scotland under all international Human Rights treaties (as is currently the case).

Finally, regardless of approach taken from here, the people of Scotland, as rights holders, need more transparency and collaboration between the Scottish Government and UK Government to ensure that human rights protection is not delayed or weakened.

Further reading:

A fuller Commission report, the full legal opinion of James Mure K.C. and the analysis of rights by devolved competence produced by Professor Aileen McHarg for the Commission is available at www.scottishhumanrights.com

About the Commission:

The Scottish Human Rights Commission exists to serve the people of Scotland. It is Scotland's National Human Rights Institution, accredited as an independent body at the highest level within the United Nations human rights system³. Established by the [Scottish Commission for Human Rights Act 2006](#), it fulfils a broad statutory mandate to protect people's rights and hold government and public bodies to account for their human rights obligations.

For more information:

Please contact hello@scottishhumanrights.com

¹ The equal opportunities reservation means that the Scottish Parliament is limited in the way it can create new laws that are aimed at preventing, eliminating or regulating discrimination between persons on the grounds of certain protected characteristics, with some exceptions. These exceptions include encouraging equality or placing specific duties on Scottish public authorities.

² It is not clear at this stage what exactly a procedural duty would entail. If this was to be a 'due regard' duty, it would mean that duty bearers would have to consider human rights in their decision making, but they would not be legally required to act in a way that respects, protects or fulfils human rights. This differs from a 'duty to comply' which places legal requirements on duty bearers to act in a way that respects, protects or fulfils human rights.

³ [Third UN "A Status" award for Commission \(scottishhumanrights.com\)](#)

OPINION OF SENIOR COUNSEL
FOR
THE SCOTTISH HUMAN RIGHTS COMMISSION
in the matter of
A Human Rights Bill for Scotland: Consultation

Introduction

1. I refer to the letter of instruction dated 9 August 2023 from the Commission's Eleanor Deeming Johnstone and to our subsequent conversation on 14 August. I am asked to advise the Commission on its approach to this consultation paper issued by the Scottish Government in June 2023 to which responses are invited by 5 October. While my instructions propose two particular matters on which my views are sought, I am also invited to highlight any other issues that occur to me.

2. It is clear from my instructions that the key question of concern to the Commission is the manner in which the Scottish Government currently intends to approach the proposed incorporation of certain human rights treaties, namely: (i) the International Covenant on Economic, Social and Cultural Rights (ICESCR); (ii) the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); (iii) the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and (iv) the Convention on the Rights of Persons with Disabilities (CRPD). In the short time available to me, I have considered the papers

issued with my instructions and have also read some of the background literature concerning models of incorporation. The analysis provided in this Opinion cannot be a definitive treatment of the many themes presented in the academic literature, but it represents my own analysis of the issues raised by the competing approaches to incorporation, namely the model set out in the Consultation and the model preferred by the Commission.

The objectives of incorporating these human rights treaties

3. Section 2 of the Consultation sets out the Scottish Government's "high level objectives" for the proposed Bill. In short, these objectives are:-

- Build on existing human rights and equality protections within the limits of devolved competence.
- Provide a clear, robust and accessible legal framework ensuring that rights-holders can understand and claim their rights, while duty-bearers will better implement rights and be accountable.
- Incorporate into Scots law within the limits of devolved competence the four named human rights treaties.
- Recognise and include the right to a healthy environment.
- Ensure equal enjoyment of and access to such rights via an equality provision within the limits of devolved competence.
- Provide a clear set of duties for public bodies carrying out public functions in Scotland so that law, policy and decision-making all contribute to advancing human rights standards.
- Create and promote a multi-institutional approach.
- Ensure there are routes to accessible, affordable, timely and effective remedies where there has been any individual or systemic infringement.
- Continue to build a human rights culture.

The legal background of the devolution settlement

4. While it is not possible in this Opinion to discuss the legal background at length, it is worth noting some key points that are particularly relevant to the task that the Scottish Parliament will face due to the nature of the present devolution settlement for Scotland.

5. While the Scottish Parliament has the power to observe and implement international obligations, any enactment that it makes in that regard must nevertheless remain within the panoply of limits placed upon its legislative competence by sections 28 and 29 of the Scotland Act 1998 (“SA 1998”) along with the specific reservations set out in Schedules 4 and 5.

6. The difficulties posed by the state of the devolution settlement were made plain by the judgment of the Supreme Court in the reference by the Advocate General for Scotland of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill reported at 2022 SC (UKSC) 1. That judgment was issued on 6 October 2021. On 27 June 2023 the Cabinet Secretary for Social Justice provided the Scottish Parliament with the Scottish Government’s latest update on the Bill. From that statement it seems clear that over the past two years little real progress has been made in discussions between the UK and Scottish Governments, other than perhaps to highlight ongoing differences of understanding, policy and approach. When amendments to that Bill are presented to the Scottish Parliament later this year, they will show that its scope and coverage have been considerably reduced. Given the slow and uncertain nature of the discussions, the proposal on pages 16 & 29 of the Consultation to “mirror the UNCRC Bill’s proposed approach” to incorporating and imposing duties seems rather misguided at this stage.

The strength of the protection to be provided to certain categories of people

7. The Commission is concerned that when it comes to what the Scottish Government calls the “equality treaties” the Consultation proposes to impose upon duty-bearers only a procedural duty to *take account of* or *actively consider* the rights contained in them when making policy or other decisions and when delivering services. The precise meaning and scope of such a duty will depend upon the wording used in the eventual Bill and it will fall to the courts to interpret just what the duty-bearer must have regard to and what that means in practice. However, such a duty is plainly not a duty as to outcome and therefore does not mandate any substantive decision in a particular case. Nor, in the absence of special provision, does such a duty require the authority to carry out a particular process when taking account of the rights.¹ The Bill may make provision for particular account to be taken of documents issued by UN treaty bodies, and for Ministers to issue statutory guidance about the approach to be taken. Where the Bill is clearly intended to make domestic provision reflecting treaty rights, the courts will in any event have regard to those treaty rights when construing and applying the domestic provision.

8. Against this background it is too early to predict how the courts will interpret such a procedural duty or how easily an alleged breach might be challenged by judicial review. However, it is very likely that if the Bill were to be drafted in this manner, a failure to take account of a particular right or rights would indeed be open to challenge.

9. The Commission’s concern is that a procedural duty is radically different from, and weaker than, a substantive duty. As the Commission observes, it is not clear when the Scottish Government proposes or anticipates that the former duty will be transformed into the latter duty. Indeed, apart from an invitation to consultees to

¹ See *de Smith’s Judicial Review* (9th edn, 2023) at §5-072.

propose stronger protection in respect of some unspecified rights (see page 19), the Consultation offers no path to incorporating substantive rights found in ICERD, CEDAW and CPRD. It might be argued that public authorities should have some time to adjust to the direct application of these treaty rights, with the procedural duty acting effectively as a transitional provision. However, not only would such a two-stage approach postpone the time when all those in Scotland can benefit from the rights to be incorporated: the real difficulty is that the Consultation appears to set its face against incorporating such substantive rights at all.

10. It is not clear why this should be the case. The Commission has taken expert advice about the rights set out in these three treaties (Professor Aileen McHarg, 8 May 2022). From this advice it is clear that several important substantive rights could be incorporated within devolved competence. By way of example only, within the CRPD are such rights as: access to justice (art. 13); freedom from exploitation (art. 16); living independently (art. 19); personal mobility (art. 20); and education (art. 24). Given the Scottish Government's ambition to incorporate international human rights standards set down in treaties already signed and ratified by the United Kingdom, one might expect the Consultation to offer fuller reasons for not including such rights within the proposed Bill. These and various other rights in the three treaties are not obviously affected by the equal opportunities reservation.

Whether the proposals navigate the devolution settlement well

11. The Commission has set out two examples to show their concern that a full direct approach to incorporation, using the language found in the four treaties, could create confusion over competency.

The right to work (as contemplated in article 6 of ICESCR) recognises that everyone has the right to the opportunity to gain their living by work which they freely choose or

accept, and the State (duty-bearers) must take appropriate steps to safeguard this right. The satisfaction of this right falls mostly within the scope of what can traditionally be understood as employment law, and therefore, is a reserved area of law. However, a component of the right to work is also the obligation to provide technical and vocational guidance and training programmes (subsection 2 of article 6). Such training and guidance has to be read as a means to satisfy the right to work, and therefore, it has to be able to provide sufficient programs that allows people to freely choose a profession. If a full-direct approach was to be used by copy-pasting the totality of article 6, there will be confusion and challenge over the competency of the Scottish Parliament to enact such a right. If the approach was to only replicate subsection 2 of the right (vocational training), then such obligation would be read in isolation from the right, therefore potentially allowing for training to be based on government needs, not people's choices.

The right to social security (as contemplated in article 9 of ICESCR) simply recognises the right of everyone to social security, including social insurance. National insurance is reserved, and some important areas of social security are also reserved. There are however important aspects of social security that are devolved (disability benefits, carers benefits, among others). The lack of further explanatory wording to the right to social security opens the challenge about the competency of the Scottish Parliament to protect such broad right without clarification to its scope and limits. At the very least, the wording of the right would need to clarify that this protection is in relation to those aspects that fall within devolved competency. In that case, the text of the treaty would necessarily need to be amended and this would then not constitute a 'full and direct approach'.

12. At this stage we do not know how the draftsman will be instructed to tackle the task of "putting the rights from the four treaties into the Bill using the same wording as in the treaties themselves, removing anything that is reserved to the UK Parliament" (Consultation at page 16). However, it is clear from the Supreme Court's judgment in the UNCRC case that the Bill will need to be carefully drafted to ensure that it does not fall foul of the limits on legislative competence contained in the

Scotland Act 1998 as interpreted in that judgment. That is likely to involve some loss of the rights contained in the treaties, as the Cabinet Secretary's recent statement explained in the context of the UNCRC.

13. The Scottish Government takes the view that direct transposition would allow the Parliament "to more easily navigate the limits of devolved competence" (Consultation, page 17). I assume that this is because the Bill would, by textual deletion from the treaties, exclude any matters that the UK government regarded as outside legislative competence. The key question may be whether that process can achieve the certainty that the courts require, noting that the Parliament cannot rely upon the courts to use section 101 SA 1998 to clarify the scope and effect of the Bill. The Consultation (page 17) suggests that the direct approach is more likely to preserve the meaning, principles and standards of the original treaties and hence the context of the rights contained in them.

14. At this stage of the process, however, the Consultation does not present a compelling argument for discounting the alternative approach of drafting fresh rights in Scots law, drawing upon the precise language of the treaties but also the observations and comments, and the nature of the devolved statute book. International treaties are not designed to be directly incorporated into all domestic legal systems. Even where a state has a monist system, few are purely monist. The key question is whether in substance the domestic system respects the rights that the state has committed to on the international plane.² There is no obligation to use the precise language of the treaty. The Consultation proceeds on the basis that it would be easier and more effective to trim the treaty texts to exclude matters outside legislative competence than to set out anew the text of domestic rights that are both

² See for example the discussion of the UN Convention against Torture at pages 23-24 of the Consultation, where it is noted that the principles of that convention are already given domestic effect in Scotland through a range of legal provision.

fitted to the present devolved settlement and that demonstrate, within that settlement, the fullest respect for the rights that are written in the treaties on the international plane.

15. Neither task is straightforward. Each presents its own difficulties, and it is plain that the Scottish Parliament lacks legislative competence to transpose or directly incorporate such rights without some trimming or re-drafting. But there is a particular difficulty in “removing any text that relates to areas reserved to the UK Parliament” (Consultation, page 18). There will be text that relates both to reserved and non-reserved areas, and which therefore will need to be amended, or hedged by potentially complex exclusions, in order to make clear its true scope within devolved competence.

16. The Consultation (page 14) displays the Scottish Government’s aim of “maintaining a strong link to the international human rights system”, with duty-bearers and courts “able to read, apply and interpret the rights in line with international human rights law, materials and mechanisms”. That is a laudable aim and one with which I assume the Commission would agree. However, it is by no means inevitable that an adaptation approach would distance duty-bearers from the rights as understood and binding the state on the international plane.

The equal opportunities reservation

17. The Commission is concerned that the Consultation proceeds on the basis that the ICERD, CEDAW and CRPD are incapable of effective and coherent incorporation because of the equal opportunities reservation in Head L2 of Schedule 5 to the SA 1998. The Consultation proposes to place only a procedural duty on duty-bearers in relation to these “equality treaties”, again within the limits afforded to the Scottish Parliament in light of the equal opportunities reservation.

18. I agree that the Consultation does not in terms offer any explanation of why these three treaties require to be approached in this way. Pages 18-19 of the Consultation recognise that some rights in these treaties may be capable of stronger incorporation than a merely procedural duty. Question 5 specifically seeks ideas on this point. There is no simple way to navigate the equal opportunities reservation. The UK government's concerns in respect to equal opportunities was recently underlined by its policy statement of reasons on its decision to use powers under section 35 SA 1998 with respect to the Gender Recognition Reform (Scotland) Bill – a statement currently under judicial review at the Scottish Government's instance. The Consultation does not explain how the proposed Bill would deal with this reservation. I note, however, that the detailed exceptions to the reservation in Head L2 could provide a framework for indicating what the Bill can include. This means that the Bill should be capable of dealing with more than merely procedural duties in relation to the "equality treaties".

19. As I note in paragraph 10 above, there are various rights contained within the "equalities treaties" that would not appear to be impacted by the equal opportunities reservation. To take a further example, article 4 of the CERD deals with incitement to racial discrimination and article 6 obliges states to assure to everyone effective protection and remedies against acts of racial discrimination. Where these matters concern devolved matters such as justice or education, I see no reason why they should not be incorporated into Scots law. An example of the types of issue that can arise is found in the UN's Committee on the Elimination of Racial Discrimination in the case of *L.K. v. The Netherlands*, Communication No. 4/1991, U.N. Doc. A/48/18 at 131 (1993).

20. The Commission has provided me with an example of how an "adaptation model" for incorporation might include specific rights from CERD, CRPD and

CEDAW, adding specific sub-paragraphs to the general right to education set out in article 13 of ICESCR. Other comparable methods will no doubt be available.

Would the proposals provide clear, accessible and workable law?

21. It is perhaps too early to condemn the Scottish Government's proposals. Given the particular constraints under the UK constitution, there is no simple path for the incorporation of such treaty rights. I understand that both the Commission and the Scottish Government consider that some form of express incorporation should be undertaken to promote respect for these rights in the devolved statute book and to ensure that enforcement can take place where public authorities and other duty-bearers fall short. The immediate question is whether to encourage Ministers to prepare a draft Bill on a basis that is substantially different from that described in the Consultation.

22. As my instructions observe, in the UNCRC case the Supreme Court warned of the need for Acts of the Scottish Parliament to be adequately accessible and formulated with sufficient precision to enable citizens (and, I would add, public authorities) to regulate their conduct. The following aspects of the present proposals may cause concern in this respect.

22.1 The Scottish Government proposes to reproduce the text of all four treaties in the Bill, "removing any text that relates to areas reserved to the UK Parliament" (page 18). Some text may only relate to such reserved areas in one respect only. Is it to be entirely removed? Where topics are dealt with in more than one of the four treaties, such as education, will the reader understand the Parliament's intention in enacting overlapping or duplicative wording? As the Commission notes in their letter of instruction, the inclusion in the Bill of the text in article 13.2.b of ICESCR on the progressive introduction of free education would be

both otiose and confusing in a jurisdiction that has long enjoyed universal free education.

22.2 Related to that problem of basic textual content, is the issue of supporting explanations and statements. The Consultation refers to the Government's commitment "to providing a clear explanation of what the rights are and what they mean" (page 17). Such additional commentary by the executive would, it appears, sit alongside the General Comments, recommendations and observations of UN bodies (page 14). In order to understand the scope and effect of the Bill, therefore, citizens and their advisers, as well as public authorities, will need to have regard not only to the four treaties' texts to be set out in the Bill, but to a wide range of domestic and international commentary. This is not an obviously clear and accessible framework. Nor is it obviously necessary in order to promote the laudable aim of "maintaining a strong link to the international human rights system" (page 14). As the Commission notes, an interpretative clause can be used to oblige duty-bearers and courts to interpret rights in accordance with relevant comments, observations and reports.

22.3 The Supreme Court's comments underlined the concern that the UNCRC Bill made it difficult for public bodies to know just what their responsibilities and duties were in connection with that Convention. It might be thought that a principal reason for what appears to be an anticipated slow transition to full effectiveness of the proposed Bill, is that public authorities in particular will need to take time to understand the impact of the Bill on the performance of their statutory functions and on their preparation of policies. The task for the social worker or head teacher is likely to be made all the harder by an approach that eschews writing simple domestic legislation that accords with the rules found in

the publication “Drafting Matters!”³, in favour of directly incorporating text that is prepared at an international plane and that depends upon a surrounding structure of reporting and commentary reported by diplomatic means.

22.4 Where functions are within devolved competence, there is nothing to prevent the Scottish Parliament and Scottish Ministers from updating the statute book where appropriate to take account of, for example, the latest concluding observations by the relevant UN Committees.

Does the Consultation’s approach confuse requirements set out in international law?

23. The Commission correctly observes that ICESCR does not stipulate the specific means by which it is to be implemented in the national legal order. As General Comment 9 of the relevant UN Committee put it when describing the principles that follow from the duty to give effect to that Covenant:-

7. [...] First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant. The need to ensure justiciability (see para. 10 below) is relevant when determining the best way to give domestic legal effect to the Covenant rights. Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.

³ Second Edition, 2018 (Parliamentary Counsel Office)

8. Third, while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.

24. This last sentence may have legitimately influenced the Scottish Government's current approach. However, the UK has a complex constitutional structure, and when reporting on the UK as a signatory state UN Committees have noted the UK's general observation that there is no obligation to incorporate such Conventions into domestic law. As long as there has been no incorporation at a UK constitutional level, Scotland faces difficulties owing to the nature of the devolution settlement.

Potential advantages of an "adaptation" model

25. The Commission describes an adaptation model, using the treaty texts so far as possible within devolved competence, but making changes to the wording of rights in order not only to adapt them to the domestic Scottish context but also to ensure that they fall within devolved competence. In this section I consider whether this approach would likely have the advantages claimed by the Commission

Clarity and accessibility

26. In principle, I consider that this model should be capable of providing a clear and accessible form of incorporation. It would enable the treaty rights to be written into the Bill from the perspective of the devolved statute book, concentrating on the existing state of Scots law. Citizens and advisers should find it easier to locate the context of the rights in Scots law. By avoiding duplication, it would reduce the risk of confusion and the costs of compliance.

Alignment with international law

27. The aim must be to ensure that the treaty rights are truly made available to citizens as intended in the Conventions and without dilution. With an interpretative clause, a Bill adopting this model should be clear about the need to have regard to the international human rights background when interpreting and applying the rights. I see no obvious reason why the model should water down the rights as available in Scotland or lose their connection to the international sphere and the learning gained from it.

Making rights stronger and more effectively protected

28. Plainly, any model of incorporation ought to promote these aims. A model that promotes clarity and accessibility is intrinsically more likely to provide stronger and more effective rights protection. Among the principal concerns with any model, therefore, are (i) whether it will survive a challenge to the Bill's legislative competence; (ii) whether citizens, their advisers and the public bodies whose functions are affected will easily recognise how the text used impacts on existing and future functions within the devolved sphere; and (iii) whether as a result the newly stated rights cause services to improve and provide effective remedies where services fall short.

Furthering leadership for human rights

29. The key here is simply this: if the Bill were to fail in its aims, that would set back Scotland's aim to be an international leader in human rights. I am not qualified to comment on how international perceptions of Scotland might be affected by such failure, but confidence in the state's commitment to make these rights real and effective will surely ebb if the Bill is poorly drafted.

Falling within devolved competence and navigating the equal opportunities reservation

30. There is no simple way to navigate the equal opportunities reservation. The UK government's concerns with respect to equal opportunities were recently underlined by its policy statement of reasons on its decision to use powers under section 35 SA 1998 with respect to the Gender Recognition Reform (Scotland) Bill – a statement currently under judicial review at the Scottish Government's instance. The Consultation does not explain how the proposed Bill would deal with this reservation. I have noted above that the exceptions listed in Head L2 may provide a framework for a more positive statement of such rights.

Conclusion on the competing models

31. There is no doubt that implementing international obligations falls outside the reservation of foreign affairs in Schedule 5 of the SA 1998. However, as the case law reminds us, other limits apply to the legislative competence of the Scottish Parliament. The Commission's approach would require careful tailoring of the single merged text that is proposed. However, if that could be achieved, I would agree that a single text would provide greater clarity for both citizen and public authority than would a series of up to four distinct parallel texts. However, it should be born in mind that the single text would be supported by a series of comments and observations at an international level, that related to the discrete text that would now lie behind the new integrated or adapted text. That in itself would require some explanation and may cause some uncertainty.

32. At this point in the somewhat long drawn out process of incorporation, it may be advisable to focus on the key questions whether the Bill should contain one text or four; whether equalities issues really merit only procedural rights at this stage; and how the interpretative clause can assist the reader. On a broader note, I consider that the constitutional difficulties that the Bill will face have not been fully explained by the Scottish Government, and that a full consultation on a draft Bill should take place

well in advance of the Bill being introduced into the Scottish Parliament. The methods of incorporation employed in the countries listed at page 10 in my instructions did not face the conundrum of a devolved Parliament within a state whose central legislative authority professes a system of parliamentary sovereignty.

THE OPINION OF

James Mure KC

Axiom Advocates
Advocates Library
Parliament House
Parliament Square
Edinburgh
13 September 2023

ADVICE FOR THE SCOTTISH HUMAN RIGHTS COMMISSION ON THE INCORPORATION OF INTERNATIONAL HUMAN RIGHTS TREATIES WITHIN DEVOLVED COMPETENCE

General Principles

The scope of devolved competence is determined on a “reserved powers” basis. This means that the Scottish Parliament has a general competence to legislate (s.28(1) Scotland Act 1998 (SA)), subject to specific limits (set out in s.29 SA). The most important limits for present purposes are: 1. the prohibition on legislating incompatibly with Convention rights (s.29(2)(d) SA); 2. the prohibition on modification of certain “protected enactments” (s.29(2)(c) and Sch.4, Pt 1, para 1 SA); and 3. the prohibition of legislation which “relates to” matters reserved to the UK Parliament (s.29(2)(b) and Sch.5 SA).

Whereas a reservation under Sch.5 occupies the whole policy field, such that the Scottish Parliament may not legislate in that area at all, the protection of an enactment under Sch.4 does not do so. Rather, the Parliament has power to legislate in the same subject area, provided that it does not do so in a way which modifies (either expressly or in substance) the protected statute (*Reference re the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64).

Whether a Bill or Act relates to a reserved matter is determined by reference, first, to the scope of the reservation, determined by ordinary rules of statutory interpretation (and taking account of specific exceptions to the reservations) and, second, to the purpose of the devolved legislation, having regard (amongst other things) to its effect in all the circumstances (s.29(3) SA). “Relates to” requires more than a merely loose, incidental or consequential connection with a reserved matter (*Martin v Most* [2010] UKSC 10; *Imperial Tobacco v Lord Advocate* [2012] UKSC 61), but a provision which does materially impinge on a reserved matter will be *ultra vires* even if its main purpose relates to a devolved matter (*Imperial Tobacco*).

In addition, the Scottish Parliament may not modify the law on reserved matters, i.e., any statutory or other rule the subject matter of which is reserved (s.29(2)(c) and Sch. 4, Pt 1, para 2 SA). Again, this excludes incidental or consequential changes, as well as changes to the general rules of Scots private or criminal law, including the law of judicial review. The prohibition on modification of protected statutes and the law on reserved matters does not prohibit the Scottish Parliament from restating (without modification) such provisions (Sch 4, Pt 1, para 7 SA).

Applying these general principles, in the absence of any general reservation, the Scottish Parliament has competence to legislate in the area of human rights. In addition, “observing and implementing international obligations, [including] obligations under the Human Rights Convention” is expressly excluded from the international relations reservation (Sch.5, Pt1, para 7(2)(a) SA). However, the Human Rights Act 1998 (HRA) is a protected statute (Sch 4, Pt 1, para 1(2)(f) SA), so any legislation in this area must be consistent with its provisions. The obligation to legislate compatibly with Convention rights also means that Convention rights will take priority in the event of any conflict with other human rights treaty obligations (and is itself a provision protected from modification, along with related provisions concerning the enforcement of competence limits – Sch.4, Pt 1, para 4(1)). In addition, the observation and implementation of international obligations is only within devolved competence so far as the obligations in question do not fall within other reserved areas (see *Continuity Bill Reference* at [30]).

While a range of reserved policy areas may be relevant to the extent to which the Scottish Parliament is able to implement international human rights treaties, of particular importance is the reservation of “equal opportunities” (Sch. 5, Pt 2, head L2), which also has the effect of protecting the Equality Act

2010 against modification, as part of the “law on reserved matters”. However, the equal opportunities reservation is subject to exceptions. Broadly speaking, these allow for the encouragement (other than by prohibition or regulation) of equal opportunities and compliance with equal opportunities requirements, and the imposition of equal opportunity duties on public authorities in Scotland in relation to their devolved functions. In addition, a right or duty which is primarily concerned with the discharge of devolved functions will be within competence if it has only incidental or consequential effects on the equal opportunities reservation (cf. *Christian Institute v Lord Advocate* [2016] UKSC 51, where it was held that the data sharing provisions in the Children and Young Persons (Scotland) Act 2014 were consequential upon the general (devolved) statutory objective of improving the well-being of children and young people and therefore did not relate to the data protection reservation).

Question 1

What rights (or sections) of the following treaties fall within the devolved competence of the Scottish Parliament: ICESCR, CERD, CRPD, CEDAW? Please set out the extent to which those rights fall within devolved competence, and please refer to supporting documents.

Broadly speaking, four categories of rights/obligations may be distinguished:

1. Those which relate wholly or mainly to devolved policy areas;
2. Those capable of applying across a range of policy areas, both reserved and devolved;
3. Those which relate mainly to reserved matters, but which may be of partial or incidental relevance in devolved areas;
4. Those which relate wholly to reserved matters.

There should be no difficulty in legislating to incorporate treaty provisions falling within categories 1 to 3, though for the avoidance of doubt it would be worth including a general proviso that they are incorporated into Scots law only to the extent relevant to the performance of devolved functions.

Provisions falling into category 4 cannot be incorporated.

This appears to be consistent with the approach adopted in relation to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, to which no competence objection was raised in this regard.

ICESCR			
Article	Content	Within Devolved Competence?	Relevant Limit(s)
6	The right to work	Partly. Employment rights and duties, including industrial relations, health and safety, and job search and support are all reserved, but there are exceptions to which Art 6.2 could be applicable. In addition, Art 6.1 is potentially applicable in relation to devolved decision-making, e.g., the application of common law rules on restraint of trade/freedom to contract, the application of criminal penalties, social security	Sch.5, Pt, Head H

		decision-making, educational provision etc.	
7	Just and favourable conditions of work	Mostly not , but n.b. the exception of agricultural wages and holidays from the reservation of employment rights and duties.	Sch.5, Pt 2, Head H1 and H2
8	The right to form/trade unions etc; the right to strike	No . Industrial relations are reserved.	Sch 5, Pt 2, Head H1
9	The right to social security/social insurance	Partly . Social security is reserved but there are extensive exceptions. National insurance is reserved.	Sch.5, Pt 2, Heads A1 and F
10	Protection of the family/maternity/children and young persons	Mostly . Employment protection relating to pregnancy and maternity is reserved, as is discrimination on grounds of pregnancy/maternity/marital status. Pregnancy, maternity and various child benefits are devolved. Prohibition of child labour is probably devolved as relating to children's rights rather than employment.	Sch.5, Pt 2, Head F1, Exceptions 3, 4 and 9; Head H1; Head L2
11	Adequate standard of living, etc	Partly . Housing, land use, agriculture, fisheries and food policy are generally devolved. Some social security benefits are devolved. International relations and international trade are reserved.	Sch.5, Pt 1, para 7(1); Pt 2, Head F1
12	Physical/mental health	Mostly . Health is generally devolved (though medicines and some aspect of regulation of healthcare professionals are not). Some issues which may have a bearing on physical and mental health are reserved (e.g., health and safety at work). Environmental protection is largely devolved, but to the extent that this requires international co-operation, it is reserved. Convention rights may place limits on the action that can be taken in pursuit of health objectives.	E.g., Sch.5, Pt 1, para 7(1); Pt 2, Head B1 (misuse of drugs), B4 (firearms); C8 (product safety), G2 (health professions), H2 (health and safety at work); J4 (medicines) S.29(2)(d) (convention rights)
13	Right to education	Yes	

14	Compulsory primary education	Yes , but n/a	
15	Cultural participation, etc	Partly , insofar as relevant to entertainment licensing, education, arts funding, etc, but aspects of culture, scientific research and intellectual property are reserved.	Sch.5, Pt 2, Head B5 (film classification), Head C4 (intellectual property), C12 (UK research and innovation and research councils), K1 (broadcasting), K2 (public lending rights)

CERD			
<i>Article</i>	<i>Content</i>	<i>Within Devolved Competence?</i>	<i>Relevant Limit(s)</i>
1	Definition of racial discrimination	Probably not. Cannot redefine the protected characteristics specified in the Equality Act 2010, but these may not be applicable to all the equal opportunities exceptions, or to the extent that specific rights fall outwith the scope of the equal opportunities reservation.	Sch.5, Pt 2, Head L2
2	Elimination of discrimination etc	Partly , to the extent achievable within the exceptions to the equal opportunities reservation	Sch.5, Pt 2, Head L2
3	Condemnation of racial segregation and apartheid	Mostly not. Cannot prohibit racial segregation. Some softer actions may be possible.	Sch.5, Pt 2, Head L2
4	Incitement to racial hatred, etc	Partly. Devolved to the extent that it involves the criminal law, education, actions of public authorities. Prohibition of racist organisations may relate to the reservation of political parties and business associations. Convention rights will also be engaged.	Sch.5, Pt 1, para 6; Pt 2, Head C1 S.29(2)(d)
5	Equality before the law	Partly? Unclear whether equality before the law would be regarded as distinct from the equal opportunities reservation. If not, achievable only to the extent permitted by the exceptions to the reservation. Some aspects do appear to be distinct (e.g., right to security of	Sch.5, Pt 2, Head L2? E.g., Sch.5, Pt 1, para 6 (political parties), para 8 (civil service); Pt 2, Head B3 (reserved elections), B6 (immigration and nationality), H (employment)

		person/protection against violence) in which case whether they are reserved or devolved depends on their subject matter. E.g., political rights are only partially devolved; nationality is reserved; the right to work/join trade unions is largely reserved; free movement could only be guaranteed within Scotland. To the extent that provisions of Art.5 overlap with Convention rights, the latter would also prevail.	S.29(2)(a) (cannot legislate furth of Scotland) S.29(2)(d) (Convention rights)
6	Effective remedies	Partly? If substantive rights are devolved then remedies are also devolved, but remedies for racial discrimination contrary to the Equality Act are reserved.	Sch.5, Pt 2, Head L2
7	Combatting prejudice	Mostly yes. Ancillary to (mostly) substantively devolved policy areas, and in any case within the “encouragement” exception to the equal opportunities reservation.	Sch.5, Pt 2, Head L2

CRPD			
<i>Article</i>	<i>Content</i>	<i>Within Devolved Competence?</i>	<i>Relevant Limit(s)</i>
1	Purpose and definition of disability	Partly? Cannot redefine the protected characteristics specified in the Equality Act 2010, but that is not relevant for all purposes covered by the CRPD. For example, Head F.1 provides a different definition for the purpose of devolved disability benefits. There may be scope to define disability in line with CRPD in some areas of devolved competence.	Sch.5, Pt 2, Head L.2; Head F.1.
2	Definitions	Partly? Again, depends on whether in conflict with relevant Equality Act definitions	Sch.5, Pt2, Head L2

3	General principles	Yes. Not limited by subject matter.	
4	General obligations	Partly , to the extent that they fall within the exceptions to the equal opportunities reservation, or may be seen as ancillary to other devolved functions (e.g., health, education, or social care)	Sch.5, Pt 2, Head L2
5	Equality and non-discrimination	No. Squarely within the equal opportunities reservation.	Sch.5, Pt 2, Head L2
6	Women with disabilities	Partly? To the extent that the Equality Act definition of the protected characteristics applies, mixing of PCs seems to be prohibited, but might be relevant in other contexts.	Sch.5, Pt 2, Head L2; <i>For Women Scotland v Lord Advocate</i> [2022] CSIH 4
7	Children with disabilities	Yes	
8	Awareness-raising	Yes	
9	Accessibility	Mostly. May be limits to measures that can be taken in relation to communications	Sch.5, Pt 2, Head C10
10	Right to life	Yes	
11	Situations of risk and humanitarian emergencies	Yes (so far as understood to apply within Scotland and not to impose obligations of international assistance)	Sch.5, Pt 1, para 7(1)
12	Equal recognition before the law	Partly , to the extent that they go beyond the equal opportunities reservation, or fall within the exceptions to that reservation. Financial services are reserved.	Sch.5, Pt 2, Head A3, Head L2
13	Access to justice	Yes	
14	Liberty and security of the person	Yes	
15	Freedom from torture, etc	Yes	
16	Freedom from exploitation, etc	Yes	
17	Integrity of the person	Yes	
18	Liberty of movement and nationality	Partly. Nationality-related provisions are reserved. Freedom of movement and to choose residence might have some relevance to devolved functions, e.g. residential care for disabled persons (though Art.19 probably more relevant). Registration of children and right to know and	Sch.5, Pt 2, Head B6

		be cared for by their parents are devolved.	
19	Living independently, etc	Yes	
20	Personal mobility	Yes	
21	Freedom of expression	Mostly , so far as goes beyond or falls within the exceptions to the equal opportunities reservation. Impact on telecommunications reservation seems marginal only.	Sch.5, Pt 2, Head C10, Head L2
22	Respect for privacy	Yes	
23	Respect for home and family	Yes	
24	Education	Yes	
25	Health	Yes	
26	Habilitation and rehabilitation	Yes	
27	Work and employment	Partly . Some aspects are covered by the equal opportunities and employment reservations, but not all. E.g., access to training falls under devolved education policy; employment support for disabled persons is an exception to the employment reservation.	Sch 5, Pt 2, Head H3, Exception 1, Head L2
28	Adequate standard of living, etc	Partly . E.g. housing is devolved. Some aspects are covered by the equal opportunities reservation. Disability benefits are devolved, but state, occupational and personal pensions are reserved.	Sch.5, Pt 2, Head F1, Exception 1, Head F3
29	Participation in political and public life	Partly . Some elections and electoral registration are devolved. Political parties and the civil service are reserved. Business associations (including not for profits) are reserved, but charities and public bodies are devolved. There are exceptions from the equal opportunities reservation for the functions of Scottish public authorities and representation on public boards.	Sch.5, Pt 1, para 6, para 8; Pt 2, Head B3, Head C1, Head L2

30	Participation in cultural life, etc	Mostly. Broadcasting and intellectual property are reserved.	Sch.5, Pt 2, Head C4, Head K1
31	Statistics and data collection	Yes	
32	International co-operation	No	Sch.5, Pt 1, para 7(1)

CEDAW			
<i>Article</i>	<i>Content</i>	<i>Within Devolved Competence?</i>	<i>Relevant Limit(s)</i>
1	Definition	Probably not. Cannot redefine the protected characteristics specified in the Equality Act 2010, but these may not be applicable to all the equal opportunities exceptions, or to the extent that specific rights fall outwith the scope of the equal opportunities reservation	Sch.5, Pt 2, Head L2
2	Prohibition of discrimination, etc	Partly, to the extent that it extends beyond the reserved aspects of equal opportunities.	Sch.5, Pt 2, Head L2
3	Development and advancement	Partly. Constrained by substantive limits on competence (e.g., in economic field), and by reservation of Equality Act.	Sch.5, Pt 2, Head L2 (and Sch.5 generally)
4	Positive action/maternity rights	Mostly not. There is some scope to take positive action within the scope of devolved competence, but limited. Maternity discrimination is reserved.	Sch.5, Pt 2, Head L2
5	Elimination of prejudice/equal parenting	Yes	
6	Trafficking etc	Mostly. Appropriate measures cannot extend to international action.	Sch.5, Pt 1, para 7(1)
7	Political and public life	Partly. Some elections are reserved, as are the civil service and political parties. Non-discrimination by NGOs covered by the Equality Act and reserved.	Sch.5, Pt 1, paras 6 and 8; Pt 2, Heads B3 and L2
8	International participation	Mostly not? Limited to the extent to which Scottish Government itself participates in international affairs. Could perhaps mandate in relation to any international activities	Sch.5, Pt 1, para 7(1) and (2)(b); Pt 2, Head L2

		of Scottish public authorities under exceptions to equal opportunities reservation.	
9	Nationality	No	Sch.5, Pt 2, Head B6
10	Education	Yes	
11	Employment etc	Partly. Employment regulation is largely reserved, but a right to work may have broader relevance in devolved contexts. Some aspects of social security are devolved. Vocational training is devolved. Maternity/pregnancy discrimination is reserved. Child care provision is devolved.	Sch.5, Pt 2, Head F, Head H, Head L2
12	Health, etc	Yes. Health is devolved, as are maternity/pregnancy-related social security benefits.	Sch.5, Pt 2, Head F1, Exceptions 4 and 9
13	Other forms of discrimination	Partly. Financial services are reserved. Some aspects of family benefits are devolved. Cultural participation is limited by eg reservation of broadcasting.	Sch.5, Pt 2, Head A3, Head F1, Exception 3, Head K1
14	Women in rural areas	Mostly. May relate to financial services, energy and communications reservations.	Sch.5, Pt 2, Head A3; Head C10, Head D1
15	Equality before the law	Partly. Devolved to the extent that it goes beyond the equal opportunities reservation. Free movement etc limited to within Scotland.	Sch.5, Pt 2, Head B6, Head L2 S.29(2)(a)
16	Marriage and family relations	Yes	

Question 2

Does it fall within the devolved competence of the Scottish Parliament to incorporate (or re-incorporate) the ECHR into Scots law?

Please take into account the relevant sections of the Scotland Act, in terms of which the HRA has protected status, while “observing and implementing international obligations, [and] obligations under the Human Rights Convention” is devolved (as it is carved out of the reservation of foreign affairs).

Please also consider the role of the purpose test, referred to in Section 29(3) of the Scotland Act 1998, in determining whether such legislation would be within devolved competence.

There are four scenarios in which the Scottish Parliament might seek to incorporate the ECHR into Scots law.

i. UK human rights law remains unchanged

As noted above, it is clear that the Scottish Parliament can restate, for consolidation purposes, provisions both in protected statutes and in the law on reserved matters, provided it does not modify them. This would mean that it *could* incorporate Convention rights that are currently incorporated via the HRA (but not those, e.g., Art.13, which have not been incorporated), notwithstanding that some elements of those rights might relate to reserved matters (see table below). However, it *would not* be able to alter the legal effect of those rights in Scots law (both to the extent that this would modify the HRA and protected provisions of the Scotland Act itself). This would mean, for example, that no additional strike down powers, or new standing rights could be created.

It may be possible to *supplement* the provisions in the HRA by imposing additional duties on the Scottish Ministers or other public authorities, but this would depend on how expansively the notion of “modification” is read. For instance, Convention rights impact assessments, on the model of s.14 of the UNCRC (Incorporation) (Scotland) Bill, would probably be permissible, but new reporting duties following the issuing of a Declaration of Incompatibility, on the model of s.23 of the UNCRC Bill, might be regarded as modifying the legal effect of a Declaration. The approaches taken in the *Continuity Bill Reference* and the *UNCRC reference* suggests an expansive notion of “modification” is in play, but these cases have been heavily criticised, and may have been influenced by their particular facts.

ii. The HRA is replaced by a new UK bill of rights

The Scottish Parliament may have greater legislative freedom in this scenario, but this would depend on the terms of any replacement legislation and, in particular, whether it also becomes a protected statute (which seems likely).

Insofar as new UK legislation incorporates the same Convention rights as the HRA (which also seems likely), any Scottish restatement would be able to include those same rights, including any reserved aspects.

iii. The HRA is repealed without replacement

If the HRA is repealed without replacement, but the UK remains part of the ECHR, the Scottish Parliament would have the power to incorporate the Convention, by virtue of Sch.5, Pt 1, para 7(2)(a) SA (assuming that this remains unchanged). This would give the Scottish Parliament greater freedom to determine which rights to incorporate (e.g. it might want to incorporate Art.13 or some of the currently-unincorporated protocols), and how. However, it would *not* be able to incorporate substantive rights relating solely to reserved policy areas (and would need to make clear that rights affecting both reserved and devolved matters were incorporated only to the extent that they are within devolved competence).

Assuming that the Scottish Parliament remains subject to the obligation to legislate compatibly with Convention rights in this scenario, this would not impose any positive obligation to incorporate the ECHR, nor would it expand the range of rights that could be incorporated.

iv. The HRA is repealed and the UK withdraws from the ECHR

In this scenario, the Scottish Parliament would have no power to incorporate the Convention, as there would be no international obligation to which Sch.5, Pt 1, para 7(2)(a) SA would apply. However, it

would be free to *replicate* Convention rights in domestic law, so far as they are within devolved competence. Cf. the power in s.1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 to make provision “corresponding to” EU law. The Scottish courts could also be instructed to take account of relevant Strasbourg jurisprudence when interpreting such replicated rights. There was, for example, no objection *in principle* in relation to the provision in the earlier Continuity Bill (UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, s.10) requiring regard to be had to relevant CJEU case law when interpreting retained (devolved) EU law.

ECHR			
<i>Article</i>	<i>Content</i>	<i>Within Devolved Competence?</i>	<i>Relevant Limit(s)</i>
2	Right to Life	Mostly. Potentially relevant in relation to the armed forces and security services (reserved) as well as the police/judiciary (devolved), and some criminal offences (e.g., treason) are also reserved.	Sch.5, Pt 1, para 1 and 2(4), para 9, para 10
3	Prohibition of torture, etc	Mostly. Again, armed forces and security services are reserved.	Sch.5, Pt 1, para 1 and 2(4)
4	Prohibition of slavery/forced labour	Mostly? Forced labour might relate to the employment reservation. Slavery likely to be seen a matter of personal status and therefore devolved.	Sch.5, Pt 2, Head H
5	Right to liberty and security	Mostly? May be some specific powers of arrest attached to reserved functions.	
6	Right to a fair trial	Yes	
7	No punishment without law	Mostly (but could not apply to retrospective crimes created under UK statutes, even if otherwise within devolved competence)	S.28(7) and <i>UNCRC Reference</i>
8	Respect for private and family life, etc	Partly. Applicable in a range of contexts, some of which may be reserved.	Sch.5 generally
9	Freedom of thought, conscience and religion	Partly. Applicable in a range of contexts, some of which may be reserved.	Sch.5 generally
10	Freedom of expression	Partly. Applicable in a range of contexts, some of which may be reserved.	Sch.5 generally
11	Freedom of assembly and association	Partly. Specific reservations for business associations, and trade unions falls within reserved industrial relations.	Sch.5, Pt 2, head C1 and head H1
12	Right to marry	Yes	
13	Right to an effective remedy	Yes (if HRA repealed and not replaced)	

14	Non-discrimination	Yes	
A1P1	Right to property	Mostly. May be, e.g., compulsory purchase powers under reserved legislation.	
A2P1	Right to education	Yes	
A3P1	Right to free elections	Partly. Some elections are reserved.	Sch.5, Pt 2, Head B3
A1P4	Imprisonment for debt	Yes	
A2P4	Freedom of movement	Mostly not. Free movement applicable within Scotland only. Otherwise, immigration and nationality are reserved.	Sch.5, Pt 2, Head B6
A3P4	Expulsion of nationals	No. Nationality is reserved.	Sch.5, Pt 2, Head B6
A4P4	Expulsion of aliens	No. Immigration is reserved	Sch.5, Pt 2, Head B6
A1P6 (and A1P13)	Abolition of the death penalty	Mostly, other than for reserved offences, such as treason.	Sch.5, Pt 1, para 10
A2P6	Abolition of death penalty in time of war	No. Defence is reserved.	Sch.5, Pt 1, para 9
A1P7	Procedural safeguards re expulsion of aliens	No. Immigration is reserved.	Sch.5, Pt 2, Head B6
A2P7	Criminal appeals	Yes	
A3P7	Compensation for wrongful conviction	Yes	
A4P7	Double jeopardy	Yes	
A5P7	Equality between spouses	Yes	
A1P12	General prohibition of discrimination	Partly? To the extent that it goes beyond or falls within the exceptions to the equal opportunities reservation.	Sch.5, Pt 2, Head L2

Question 3

To what extent does it fall within the devolved competence of the Scottish Parliament to incorporate ICCPR? Is this affected by the protected status of the HRA and the overlap between the rights reflected in ICCPR and ECHR?

There would, I think, be no objection in principle to incorporation of the ICCPR on the ground that its content overlaps with that of the ECHR. This is a feature, to a greater or lesser degree, of many international human rights treaties, and it was also a feature of the European Charter of Fundamental Rights. The HRA governs the treatment in domestic law of incorporated Convention rights; it does not occupy the legislative field in the substantive areas covered by those rights. Accordingly, incorporation of other international treaties containing similarly- or even identically-worded rights would not, in my view, amount to a modification of the HRA, even if those rights were given a different status in Scots law. Note, for example, the fact that the Supreme Court in the *Continuity Bill Reference* raised no objection *in principle* to the proposed incorporation of the EU Charter as part of retained (devolved) EU law, even though it would have retained its supremacy over pre-Brexit domestic legislation.

However, since the Scottish Parliament cannot legislate incompatibly with Convention rights, in the case of conflict between the text or interpretation of the ECHR and the ICCPR, the former would prevail. The role of the ICCPR would therefore be limited to amplifying or supplementing the content of Convention rights.

In addition, as with other human rights treaties, the Scottish Parliament's ability to incorporate the ICCPR would depend on the extent to which its provisions fall within devolved competence as a matter of substance.

ICCPR			
<i>Article</i>	<i>Content</i>	<i>Within Devolved Competence?</i>	<i>Relevant Limit(s)</i>
6	Right to life	As for ECHR	
7	Prohibition of torture, etc	As for ECHR. Prohibition of forced participation in medical experiments may have incidental effects on regulation of health professionals, but unlikely to take outwith competence.	Sch.5, Pt 2, Head G2
8	Prohibition of slavery/forced labour	As for ECHR.	
9	Right to liberty and security	As for ECHR	
10	Rights of detained persons	Yes	
11	No imprisonment for debt	As for ECHR (A1P4)	
12	Liberty of movement	As for ECHR (A2P4)	
13	Expulsion of aliens	As for ECHR (A3P4)	
14	Right to a fair trial	Yes. More detailed than Art.6 ECHR.	
15	Retrospective penalisation	As for ECHR	
16	Recognition of legal personhood	Yes	
17	Interference with privacy, etc	As for ECHR. Specifically includes protection from unlawful attacks on honour and reputation; defamation law is devolved, though has some implications for reserved matters such as Art.9 Bill of Rights.	Sch.5, Pt 1, para 1(c)
18	Freedom of thought, conscience and religion	As for ECHR	
19	Freedom of expression	As for ECHR	
20	Prohibition of propaganda for war/prohibition of incitement to national etc hatred	Partly? Incitement offences are within devolved competence, subject to compliance with Convention rights. The ability to prohibit propaganda for war is more tricky. Might be regarded as	Sch.5, Pt 1 para 9 S.29(2)(d)

		relating to the defence reservation. Again, would be subject to compliance with Convention rights.	
21	Peaceful assembly	Yes	
22	Freedom of association	Partly. Specific reservation for business associations, and trade unions falls within reserved industrial relations.	Sch.5, Pt 2, head C1 and head H1
23	Right to marry and found a family	As for ECHR	
24	Rights of children	Partly. Nationality is reserved.	Sch.5, Pt 2, head B6
25	Participation in public affairs etc	Partly. Some elections and the civil service are reserved.	Sch.5, Pt 1, para 8(1); Pt 2, head B3
26	Equality before the law, etc	Partly? To the extent that it goes beyond or falls within the exceptions to the equal opportunities reservation.	Sch.5, Pt 2, Head L2
27	Minority rights	Partly. Applicable in a range of contexts, some of which may be reserved.	Sch.5 generally

Aileen McHarg

e8 May 2022