



“Recommendations for a new human rights framework to improve people’s lives”

Report to the First Minister

First Minister’s
Advisory Group
on Human Rights
Leadership

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December 10, 2018



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Foreword

It is an honour to have been asked to prepare this Report and recommendations on the steps needing to be taken to demonstrate human rights leadership in and by Scotland.



Professor Alan Miller
Chair, First Minister's Advisory Group
on Human Rights Leadership

Many thanks to all of my colleagues in the First Minister's Advisory Group on Human Rights Leadership and to everyone who gave time to talk with me over the past year.

I have listened to and learned from many people including those with direct lived experience of the denial of human rights, their advocates and a broad range of civil society bodies; from those working hard in the public sector to deliver services and from politicians across all of the political parties; from the judiciary and from the First Minister and Cabinet Secretaries.

Over the past three decades and more I have been active in the field of human rights. This has included being a lawyer for many years in Castlemilk in Glasgow, becoming unanimously elected and re-elected by the Scottish Parliament as the first Chair of the Scottish Human Rights Commission and now working with the United Nations. During this past year of conversations in Scotland my work with the United Nations has also taken me to New York and Geneva and countries around the world.

I have learned much and I would like to share three particular reflections.

Firstly, there is an urgent need of human rights leadership in today's world. The international rules-based order built primarily by the United Nations must be re-affirmed. It is under pressure from those pursuing self-interest. People around the world, generations to come and the planet itself deserve better.

Secondly, the leadership steps to be taken in and by Scotland are clear. They are outlined in the recommendations of this Report. The internationally recognised human rights belong to everyone in Scotland and must be put into our law. As importantly, they must then be put into our everyday practice. In this way people are empowered to lead lives of human dignity, to have a sense of worth.

Thirdly, we have reached a moment when there is a sense of ambition and Scotland is ready to take those leadership steps. This is a shared leadership. It rests not only with our politicians but with many of those I have met. It is to be shared by those such as NHS managers in the Highlands, local authority chief executives on the islands, head teachers in Aberdeen and Dundee, housing activists in Leith and community activists in Glasgow.

And yet it is more than this. It is to be shared in our relations with and responsibilities to one another and to our community. To quote from that beautiful Irish saying, often expressed by Mary Robinson – “it is in each other's shadow that we flourish”.

This year marks the 70th Anniversary of the Universal Declaration on Human Rights (UDHR). To borrow the words of Eleanor Roosevelt, the key architect of the UDHR and whose granddaughter I had the privilege of also meeting during this past year, universal rights “begin in small places, close to home....without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”

It is then with this sense of shared ambition that I present the Report to the First Minister and thank her for the opportunity to contribute to Scotland becoming a better country in a better world.

Professor Alan Miller
[Chair, First Minister's Advisory Group
on Human Rights Leadership](#)

December 10, 2018

“The recommendations will support people to exercise their rights, improve everyday access to justice and assist public bodies to carry out their duties.”

EXECUTIVE SUMMARY

Executive Summary

The First Minister has asked the Advisory Group on Human Rights Leadership to recommend the next steps on Scotland's human rights journey, including finding a way forward in the context of post-Brexit uncertainty.

This includes how to give effect to three guiding principles:

- non-regression from the rights currently guaranteed by membership of the European Union;
- keeping pace with future rights developments within the European Union; and
- continuing to demonstrate leadership in human rights.

These recommendations are to apply across the potential post-Brexit scenarios of current devolution, further devolution and of independence. It is not part of the mandate to advocate for any particular constitutional outcome.

The Advisory Group was asked to make recommendations encompassing the full range of human rights which include civil, political, economic, social and cultural as well as environmental rights.

In addition, the Advisory Group was to consider if and how to incorporate rights from the United Nations treaties into Scottish law and governance.

The Advisory Group's Recommendations

Recommendation 1:

An Act of the Scottish Parliament which provides human rights leadership.

Recommendation 2:

A public participatory process to be developed as a vital part of preparation of the Act and its implementation.

Recommendation 3:

Capacity-building to enable effective implementation of the Act so as to improve people's lives.

Recommendation 4:

A Scottish Government National Mechanism for Monitoring, Reporting and Implementation of Human Rights

Recommendation 5:

Development of human rights-based indicators for Scotland's National Performance Framework (NPF).

Recommendation 6:

Process for Implementation of Recommendations 1-5

Recommendation 7:

Integration of any further devolved powers into the framework as proposed in Recommendation 1 and, if independence, a written constitution including a Bill of Rights for Scotland.

Rights to be included in the recommended Act of the Scottish Parliament

Part 1: Civil and Political Rights and Freedoms (restated, in abbreviated form, from the Human Rights Act)

- right to life
- freedom from torture and from inhuman or degrading treatment or punishment
- freedom from slavery or servitude or being required to perform forced or compulsory labour
- right to liberty and security of person
- right to a fair trial
- freedom from punishment without law
- right to respect for private and family life, home and correspondence
- right to freedom of thought, conscience and religion
- right to freedom of expression
- right to freedom of peaceful assembly and to freedom of association, including the right to form and join trade unions
- right to marry
- right to protection of property
- right to education
- right to free elections
- right to non-discrimination in the exercise of all of these rights

Part 2: Economic, social and cultural rights

- right to an adequate standard of living, including:
 - right to adequate housing
 - right to adequate food
 - right to protection against poverty and social exclusion

- right to the enjoyment of the highest attainable standard of physical and mental health
- right to education
- right to social security and social protection
- right to take part in cultural life

The content of these rights and the corresponding duties will be outlined in schedules contained within the Act. The schedules will be developed having regard to relevant international standards. As well as outlining the content of rights, the schedules will also outline the duty to “progressively realise” such rights using the “maximum of available resources”.

Part 3: Environmental right

- right to a healthy environment

This overall right will include the right of everyone to benefit from healthy ecosystems which sustain human well-being as well the rights of access to information, participation in decision-making and access to justice. The content of this right will be outlined within a schedule in the Act with reference to international standards, such as the Framework Principles on Human Rights and Environment developed by the UN Special Rapporteur on Human Rights and the Environment, and the Aarhus Convention.

Part 4: Further specific rights

- rights belonging to children, women, persons with disabilities, on race and rights for older persons and for LGBTI communities

Introduction

The First Minister has encouraged the Advisory Group to be ambitious and it has been, while ensuring that this ambition is achievable.

Central to the Advisory Group's recommendations is a proposed Act of the Scottish Parliament to establish a new framework of human rights designed to improve people's daily lives.

This new framework needs to have **dignity** as its core value.

It needs to affirm that the human dignity of everyone underpins all our rights and our society. This is highlighted in the Preamble to the proposed new Act of the Scottish Parliament. The recommendations for the Act and for its implementation are people-centred and promote public participation. The new framework can become an anchor of Scotland's values and our responsibility to one another.

The new framework needs to be **contemporary**.

It needs to be a compass to help navigate through these times of uncertainty with the real risk of post-Brexit regression of rights and a need for leadership to bring about progress in people's daily lives. The Act will make human rights more relevant to everyday concerns by establishing a broader framework of human rights belonging to everyone. These include rights central to survival, wellbeing and development such as the right to an adequate standard of living for everyone. The recommendations also include the creation of a new Scottish Government body to operationalise the three guiding principles of non-regression from current EU rights protections, keeping pace with EU rights developments and continuing to demonstrate leadership. This is to be done through monitoring, reporting and overseeing the implementation of human rights post-Brexit.

The new framework needs to **enable** and support a process of improving laws, policies, practice and outcomes so as to continually improve people's daily lives.

The Act includes a duty on the government to take steps, including as part of budgetary processes and decision-making, to use the maximum of its available resources to achieve progressively the full realisation of the economic, social and cultural rights of everyone. The impact of legislation like the Human Rights Act has demonstrated that law can help drive everyday behaviour and culture change. The recommendations include aligning the development and implementation of the Act with the new Scotland's National Action Plan for Human Rights (SNAP). SNAP has already helped to progress this culture change and develop a broader practical understanding of human rights.

The new framework needs to provide for **accountability** which assures, and does not assume, that the Act leads to an improvement in people's lives.

The recommendations will support people to exercise their rights, improve everyday access to justice and assist public bodies to carry out their duties. In addition, they will help measure the actual impact on everyday living experience of people, for example, in the way the new National Performance Framework (NPF) Outcomes are measured.

The new framework will enable Scotland to be a responsible global citizen and to be judged positively against **international** standards.

The recommendations are based upon international standards and signal support for an international rules-based order largely built through the United Nations. Many of the rights provided by the Act are drawn from treaties of the United Nations.

Moreover, the recommendations can be implemented within the current or any future devolved arrangements of Scotland within the UK and can be further developed if Scotland were to become independent. For example, the scope and constitutional protection of the proposed Act could be further developed into a Bill of Rights as part of a written constitution of an independent Scotland.

Previous participatory processes have pointed to what kind of human rights progress needs to be made. The Advisory Group's contribution has been to explore further how progress can practically be made. It is built upon evidence from other participatory processes and from many valued contributions. In turn, these recommendations can only be considered and implemented through a future public participation process.

No matter what framework may be put in place, experience has shown that human rights stand or fall depending on how much they can be practically implemented in everyday life.

The Advisory Group has been guided by this insight of Eleanor Roosevelt who led the drafting of the Universal Declaration of Human Rights 1948 and who memorably stated (the gendered language of the times is acknowledged):

“Where, after all, do universal human rights begin? In small places, close to home..... so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seek equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”

“It is a step forward on the journey from identifying what further human rights progress needs to be made to recommending the practical steps by which progress can be made.”

CHAPTER 1

Terms of Reference, Methodology, Evidence Base, Scope of Engagement and Members of Advisory Group

The full Terms of Reference can be found in Annex C

In developing its analysis and recommendations the Advisory Group adopted a methodology focused on Structure, Process and Outcome.

Structure is the human rights commitment made in the legal and governance framework of Scotland.

Process is the effort made to implement such commitments.

Outcome is the result in real life of the commitments and efforts.

An evidence base was gathered from wide engagement carried out by the Advisory Group, as well as using the findings of previous participatory processes such as SNAP.¹

The scope of engagement was significant and is listed in Annex D. But due to time constraints and the technical nature of some of the subject matter, it cannot be properly described as a public participative process.


Notwithstanding this caveat, the Advisory Group benefited invaluablely from ongoing consultation with a Reference Group from civil society and from engagement around the country with a broad range of rights-holders and their advocates, through both events and an online survey. The Advisory Group also met with a wide variety of public bodies as duty-bearers, the judiciary and independent experts, through discussions and roundtable events.²

The contribution of the Advisory Group is best understood as being a link between the evidence from previous participatory processes and the recommended future participatory process. It is a step forward on the journey from identifying what further human rights progress needs to be made to recommending the practical steps by which progress can be made.

Members of the Advisory Group

NAME	BACKGROUND/EXPERIENCE	INTERESTS/AREA OF EXPERTISE
Dr Katie Boyle	University of Stirling	Models of Incorporation of international human rights obligations into the governance of Scotland
Prof Nicole Busby	Scottish Universities Legal Network on Europe and University of Strathclyde	EU employment and equality rights
Kavita Chetty	Head of Strategy & Legal, Scottish Human Rights Commission. (Representing the Commission)	The practical implementation of human rights in Scotland through law, policy and practice
Prof Paul Hunt	University of Essex; former UN Special Rapporteur on the Right to Health; former member of the UN Committee on the International Covenant on Economic, Social and Cultural Rights	International experience of implementation of economic, social and cultural rights, with emphasis on health
Dr Tobias Lock	Scottish Universities Legal Network on Europe and University of Edinburgh	EU Charter of Fundamental Rights
Shelagh McCall QC	Member of the Faculty of Advocates and former part-time member of the Scottish Human Rights Commission	Incorporation of international human rights obligations into judicial system of Scotland

NAME	BACKGROUND/EXPERIENCE	INTERESTS/AREA OF EXPERTISE
Prof Alan Miller (Chair)	Former Chair of the Scottish Human Rights Commission; member of First Minister's Standing Council on Europe; current Special Envoy of the UN Global Alliance of National Human Rights Institutions; independent expert with UNDP's Crisis Bureau	Scotland's human rights journey within its European and global context; experience and expertise gained as a past Chair of the Scottish Human Rights Commission (SHRC) and past Chair of the European Network of National Human Rights Institutions
Prof Elisa Morgera	Scottish Universities Legal Network on Europe and University of Strathclyde	Environmental Rights
Prof Aoife Nolan	University of Nottingham; member of the Council of Europe's European Committee on Social Rights	Economic and social rights, children's rights and human rights budgeting
Judith Robertson	Chair of the Scottish Human Rights Commission (Representing the Commission)	The practical implementation of human rights in Scotland through law, policy and practice
Gill Surfleet	Head of Secretariat to First Minister's Advisory Group on Human Rights Leadership	
Adam Bruton	Secretariat and Policy Officer to the First Minister's Advisory Group on Human Rights Leadership	



“This year marks the
20th anniversary of the
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human rights journey.”

CHAPTER 2

Scotland's Human Rights Journey

For purposes of this report, we are looking at the human rights journey under devolution.

However, the historical roots do need to be acknowledged. These include the Claims of Rights, the Scottish Constitutional Convention, and the civic and cross-party support at that time for a Bill of Rights for Scotland which was superseded by the Human Rights Act of 1998.³

The UK General Election of 1997 triggered a number of significant constitutional developments. It led to the Scottish devolution referendum of 1997. This in turn led to the Scotland Act 1998 which established the Scottish Parliament.⁴ In the same year, the Human Rights Act 1998 was passed. The combination of these two Acts was in effect to partially incorporate the European Convention on Human Rights (ECHR) into Scottish law and governance.⁵ The Scottish Parliament and Scottish Ministers were required to act compatibly with the ECHR or the courts could strike down their laws and decisions.

This year marks the 20th anniversary of the Human Rights Act and the Scotland Act and so we have reached a significant milestone on Scotland's human rights journey.

The next steps on this journey have already begun to emerge.

Since its inception in 2008 the Scottish Human Rights Commission, established by an Act of the Scottish Parliament in 2006, has called for the incorporation of the rights found in the UN treaties and belonging to everyone in Scotland.⁶

This call for the incorporation of rights was included in Scotland's first National Action Plan for Human Rights (SNAP) 2013-2017 which enjoyed broad support across the political spectrum and civil society.⁷ The second SNAP is expected to be launched next year and to reaffirm incorporation of such rights as a priority.

At an event on December 10, 2015 marking International Human Rights Day and the second anniversary of SNAP, Scotland's First Minister, Nicola Sturgeon, made a seminal speech. The First Minister committed to aligning Scotland's National Performance Framework (NPF) with the UN 2030 Agenda for Sustainable Development and with SNAP.⁸ She went on to say that incorporation of the rights from UN human rights treaties was "an important part of the debate on how we go further in ensuring that people's rights are at the heart of everything we do."⁹

The rights in UN treaties include not only the civil and political rights found in the ECHR, such as freedom of expression, the right to a fair trial, privacy and non-discrimination.¹⁰ They also include economic, social and cultural rights, such as: the rights to an adequate standard of living, including adequate housing; to the highest attainable standard of physical and mental health; to social security and work rights and the right to take part in cultural life.¹¹

The UN treaties also provide specific rights and protections against discrimination in the enjoyment of a wide range of human rights for women, children, persons with disabilities, and ethnic, religious and other minorities.¹²

Bringing together civil, political, economic, social and cultural rights and recognising environmental rights is international best practice and is what people want in order to improve their lives. These are rights which we know resonate most closely with people across society in Scotland and are supported by them.¹³

In recent years references to some of these treaties have begun to emerge in legislation passed by the Scottish Parliament. Examples include the Children and Young People (Scotland) Act 2014, the Community Empowerment (Scotland) Act 2015, the Land Reform (Scotland) Act 2018, and the Social Security (Scotland) Act 2018.¹⁴

This year has also seen the NPF refreshed and the introduction of an explicit Outcome that *"we will respect, protect and fulfil human rights and live free from discrimination"*.¹⁵

More broadly, a human rights-based approach towards law, policy and practice has begun to take root within the Scottish Government and an increasing number of public bodies, as well as throughout much of civil society. This approach sits very much within the framework of rights found within UN treaties and is influenced by the PANEL Principles of participation, accountability, non-discrimination, empowerment and legality.¹⁶

From a human rights perspective, there are many examples of progressive legislation and policies including in these areas:

- personal care for the elderly – Community Care and Health (Scotland) Act 2002;
- homelessness – Homelessness etc. (Scotland) Act 2003;
- climate change – Climate Change (Scotland) Act 2009;
- abolition of tuition fees – Education (Fees) (Scotland) Regulations 2011;
- land reform – Land Reform (Scotland) Act 2016; and
- social security – Social Security (Scotland) Act 2018.¹⁷

Progress then has evidently been made on Scotland's journey. However, it is critical to acknowledge that there are gaps and shortcomings too.

We have learned from the Reference Group and from rights-holders and their advocates that too many people are not enjoying their rights in everyday life.

In too many places services are not meeting needs. There are barriers to accessing the services, or just simply insufficient provision and there is inadequate availability of advice and independent advocacy.

This exists across Scotland and across sectors. It is particularly acute in some parts of the country, such as rural areas, and in some sectors, such as the care sector.

We have learned from public bodies, that there has been and remains a real challenge in securing sufficient funds and that budgets are inadequate to meet the growing demands upon public services.

This impacts on whether there are enough staff, equipped with appropriate resource, training and work conditions, to be able to deliver adequate public services and so implement their human rights duties.

We have also learned that, while there is significant good practice to be found, there needs to be more consistent human rights capacity across the diverse range of bodies which carry out monitoring, inspection, regulation, complaints handling and adjudication.

In short, there is inadequate practical implementation of rights and there is an everyday accountability deficit.

All of this leads to a denial of access to justice. This has been highlighted by civil society as a major problem, but it is a practical problem with practical solutions. It is a matter of political choice and priorities. What is needed is the political will to implement the solutions.

As we consider what should be the next steps on Scotland's journey, we need to learn from the lessons of today. Whatever is done needs to have accountability at its heart.

The UK influence on Scotland's journey

The Scotland Acts of 1998 and 2016 have determined the scope of the legislative and decision-making powers of the Scottish Parliament.¹⁸

The UK Parliament established a level playing field across the UK through the Human Rights Act 1998 as well as differentials across the devolved jurisdictions. For example, the Scotland Act 1998 provides an additional layer of human rights protection by requiring the Scottish Parliament and the Scottish Government to act compatibly with the ECHR. If they fail to do so then laws and decisions may be found to be unlawful by the courts.

The UK Parliament and Government have determined political priorities for UK-wide areas of policy. These have attracted mixed reactions. For example, while there is broad support in Scotland for the Human Rights Act, there are also deep concerns that austerity policies have been aggravating poverty and inequality which are seen as the biggest deniers of human rights in Scotland.

International influence on Scotland's journey

Many of the everyday rights and social protections we enjoy are the result of guarantees from EU law, for example, in employment, consumer and environmental standards, as well as data protection and equality. Some are the result of guarantees from ECHR, for example rights to free expression and assembly, privacy and a fair trial.

The broader UN system of human rights treaties, agreements and standards has influenced the explicit alignment of Scotland's National Performance Framework with the UN Sustainable Development Goals. The UN system has also influenced law and policy in such fields as climate change, land reform, child rights and social security.

But its influence has been rather ad hoc. Its potential value in further influencing our law, policy and practice has not been realised. A greater coherence and consistency need to be achieved by incorporating internationally recognised economic, social, cultural and environmental rights into our law.

The international rules-based order has been developed to help build peace and security, sustainable development, and to protect and promote human rights. It is now coming under pressure from some who seek to prioritise self-interest over international cooperation. By incorporating rights from the UN treaties, Scotland would be sending a welcome signal of support for this international rules-based order.

Closer to home this pressure is reflected in the Brexit debate which will be examined in the next chapter.

In this context, in the year of the 70th anniversary of the Universal Declaration of Human Rights, human rights are being presented by some as only giving special deals to minorities and not being relevant for everyday life for the majority.¹⁹ Their relevance to all today must be reasserted.

Just now in Scotland and in the UK, it is economic rights (which can be understood within the general human rights framework as essentially work rights) and social rights (such as the rights to an adequate standard of living, adequate housing, and the highest attainable standard of health) which are exactly what are relevant in everyday life.

To help improve people's lives these rights need to lie at the heart of government, parliament and the courts to allow for their development, implementation and assessment of law and policy.

The Advisory Group's recommendations are therefore designed to make human rights more real for people and more relevant in these times. They do this by including such rights within the proposed Act and enabling Scotland to demonstrate leadership by implementing these rights and improving people's lives.

Scotland's human rights journey to date and these influences are very relevant when considering next steps.

Human Rights Leadership – why now and what it actually is?

The stage we have reached on this journey indicates why there is the need for human rights leadership now both within and by Scotland.

Leadership needs to be seen in context.

Although there are many examples of leadership that can be claimed to have been taken in a number of areas since devolution, Brexit poses a clear risk of regression in terms of human rights. Now is the time to do all that can be done, within the limitations of devolution, to prevent such regression, to keep pace with progressive developments in the EU and to continue to provide leadership.

From a human rights perspective, a progressive approach to law and policy can be claimed to have been part of the political instinct of those in parliament and government in Scotland throughout the period of devolution. However, there is a demonstrable need for a greater coherence and consistency in law and policy and their practical implementation. This can be achieved by designing a new human rights framework which anchors Scotland's political instinct and values, particularly in times of post-Brexit uncertainty.

The primary purpose of the proposed contemporary framework of rights, with measurable steps to secure their consistent practical implementation and accountability in everyday life, is to achieve a continual improvement of people's lives.

This would certainly constitute leadership within the UK context.

Looking beyond the UK to an international context, some of this recommended new framework of human rights is more catch-up than leadership.

In giving increased legal status to economic, social and cultural rights, Scotland will in fact be joining scores of countries which have taken these steps in the past few decades, such as Belgium, Finland, Germany, Ireland, Portugal, Spain and Switzerland.²⁰

In giving increased status to environmental rights Scotland will be joining over 100 countries which have recognised the right to a healthy environment.²¹

At the same time, Scotland is already exercising international leadership. An example of this is its commitment to climate justice and carbon emission reduction targets. Another example is the explicit integration of the Sustainable Development Goals and human rights into the refreshed National Performance Framework.

By anchoring these internationally recognised values and rights in a contemporary framework, Scotland would be signalling its support for an international rules-based order. From there, it is best placed to navigate its way forward in these times of uncertainty.

It is, then, within this whole context and at this stage of Scotland's journey, that the First Minister's Advisory Group on Human Rights Leadership has been tasked to make its recommendations on the next steps to be taken to demonstrate leadership across all human rights.

“A potential impact of Brexit therefore is that it creates a significant gap in the protection of rights in Scotland. It has given an impetus to consideration of a new framework of rights for these times so as to, within the limitations of devolution, enable continued progress within Scotland.”

CHAPTER 3

Brexit

Potential impact

Under devolution and the Scotland Act 1998, there have been two pillars guaranteeing rights in Scotland, namely UK membership of the European Union (EU) and the European Convention on Human Rights (ECHR). Both the Scottish Government and the Scottish Parliament are legally required to act compatibly with the rights provided by the EU and ECHR.²² This framework is the closest thing Scotland has to a constitutional guarantee of rights.

Brexit removes the former pillar and imperils the latter.

UK withdrawal from membership of the EU is due to take place in March 2019. Many of the EU guaranteed rights fall within reserved areas such as employment, equality, data protection and immigration and so shall “return” to the UK Parliament. The EU (Withdrawal) Act 2018 excludes the EU Charter of Fundamental Rights from being retained in UK law.

One consequence of this is that the benefits of further potential developments of the EU Charter will not be enjoyed by people living in the UK. The Scottish Continuity Bill if upheld by the Supreme Court – would make the Charter continue to be binding, but only in so far as a Scottish public authority was implementing retained (devolved) EU law.²³

Following its withdrawal from the EU, the UK will obviously no longer be subject to the political constraints of EU membership and it would then be easier for the UK to either withdraw from the ECHR or repeal the UK Human Rights Act, so as to weaken the influence of the European Court of Human Rights within the UK. This may be regarded as consistent with the Brexit narrative of “taking back control” which includes removing or reducing the jurisdiction of the Court of Justice of the European Union within the UK.

A potential impact of Brexit therefore is that it creates a significant gap in the protection of rights in Scotland. It has given an impetus to consideration of a new framework of rights for these times so as to, within the limitations of devolution, enable continued progress within Scotland.

Analysis of how to respond

This potential impact of Brexit and how Scotland can respond was analysed by the First Minister’s independent Standing Council on Europe.²⁴

A series of four roundtables **were** held in Brussels and Glasgow with participants drawn from Scottish Ministers, European Commission officials, legal academics, civil society and independent experts.

Three guiding principles emerged from this process.

1. Scotland should explore ways and means to ensure non-regression from existing guaranteed rights;
2. Scotland should explore how not to be left behind and to keep pace with future progressive developments in the EU; and
3. Scotland should explore how to continue to provide leadership across all human rights.

The analysis included that, in looking at the spectrum of “soft” and “hard” post-Brexit scenarios, the further removed from membership of the EU we are, the greater the risk of regression. The analysis recognised the risk of rights being weakened through potential new free trade deals which fall below EU standards in such areas as employment, environment, food and health.

Responses to date

A report from this Standing Council on Europe roundtable series was submitted to the First Minister and recommended the adoption of these three guiding principles.

The principles were welcomed and have been reflected in the approach taken towards the Brexit negotiations by the Scottish Government.

This also prompted the First Minister to establish the Advisory Group on Human Rights Leadership and its mandate to operationalise these three principles with an emphasis on making recommendations on what steps Scotland should take to demonstrate human rights leadership.

Constitutional considerations for the Advisory group

In considering recommendations, the Advisory Group has taken fully into account the reserved/devolved division of powers while recognising that many of the EU guaranteed rights fall within reserved areas. It has recognised the constitutionally protected status of the Scotland Act 1998 and the Human Rights Act 1998.

This includes the ability of the UK Parliament to make, repeal or amend any legislation, including in devolved areas, and the inability of the Scottish Parliament to modify either the Scotland Act or the Human Rights Act.

All of this has the effect of limiting the scope of the rights content and the degree of constitutional protection which can be afforded to the Advisory Group's recommended Act of the Scottish Parliament.

These limitations are part of the current devolution settlement. Many of the rights previously guaranteed by EU membership, including work rights, are reserved to the UK Parliament. They obviously would not remain reserved if Scotland were to be given further powers under devolution or were to become independent, with the potential then of a written constitution containing a Bill of Rights which would not limit the scope of the rights which could be provided.

It is not part of the Advisory Group's remit to advocate for any particular constitutional arrangement. Rather this report concentrates on the here and now while referring as appropriate to different potential constitutional arrangements in a post-Brexit context.

“The Advisory Group’s recommendations have been significantly informed by evidence from previous studies and participative processes and through its engagement with a broad range of actors.”

CHAPTER 4

Key Findings

The Advisory Group's recommendations have been significantly informed by evidence from previous studies and participative processes and through its engagement with a broad range of actors.

Firstly, it may be helpful therefore to share some of the key findings as they relate to the Advisory Group's analysis of Structure, Process and Outcome.

Evidence from previous studies and participative processes

The "*Getting It Right*" research and analysis which provided the evidence base for SNAP is particularly relevant because it also adopted a Structure, Process and Outcome approach.²⁵

In short, it found the following:

Structure:

The human rights commitments within the legal framework largely attracted a "green" traffic light as a result of the incorporation of civil and political rights from the ECHR through the Scotland Act 1998 and the Human Rights Act 1998. However, it was noted that the structure was inadequate in that it did not incorporate the economic, social and cultural rights found within the UN treaties.

Process:

The efforts made to practically implement the human rights commitments largely attracted a "green/amber" traffic light. There was inconsistency and variability in human rights-based policy making across different policy areas. Public bodies did not have adequate human rights capacity. This applied both to service providers as well as to the everyday accountability bodies such as inspectorates, regulators and adjudicators.

Outcome:

The results in everyday lived experience of the human rights commitments and efforts to implement them largely attracted an "amber/red" traffic light. This, in part, was due to the failings identified above in Process, and a reality check that if people are not made aware of their rights and are unable to exercise them then they do not enjoy the benefits.

This research therefore pointed to a need to strengthen Structure through incorporation of economic, social and cultural rights into Scottish law and governance; to strengthen Process by improving the practical implementation of all rights and everyday accountability; and to strengthen Outcome by empowering people to know their rights and have the means of exercising and enjoying them.

Perhaps, above all else, this study confirmed the view of the Advisory Group of the fundamental importance of Process – or practical implementation – for both rights-holders and duty bearers. It is in this space for practical implementation and everyday accountability that rights either stand or fall.

Effective practical implementation and everyday accountability must be at the heart of any next steps on Scotland's human rights journey. There must be public participation throughout law making, implementation and impact assessment to make rights a reality.

Evidence from engagement with key actors

Structure:

Key findings from the Reference Group, rights-holders and their advocates:

People were positive about incorporation of rights drawn from UN treaties as part of a new framework of rights for Scotland. They were particularly positive about the possibility of an Act of the Scottish Parliament which would list rights belonging to everyone in the one place.

As regards law-making by the Scottish Parliament, findings included the need for meaningful public participation in shaping legislation. They also included the need for an enhanced role for Parliament's Equality and Human Rights Committee, which the Advisory Group understands has also been the subject of an ongoing inquiry by the Committee.²⁶

This enhanced role could include holding the Scottish Government to account for meeting its UN treaty obligations. This can be done by the Committee recommending the introduction of any necessary legislation. The enhanced role could also include the Committee being given the capacity to carry out fuller pre-legislative scrutiny of all legislation.

Key findings from public bodies as duty bearers:

There was a real concern that Brexit could lead to regression in rights and their underpinning values, and there was therefore an interest in exploring a new framework.

As part of this there was an instinctive interest in exploring the benefits of giving effect to rights from UN treaties. This was seen as potentially providing the advantage of an overarching and coherent framework, rather than the current ad hoc or piecemeal approach towards giving effect to such rights.

Given the potential Brexit impact of a reduction in European engagement, there was also a recognition that there could be valuable learning from international experience and benchmarking against practice beyond that of the rest of the UK.

Building upon emerging good practice

As regards law-making, this includes an enhanced role for the Scottish Parliament's Equality and Human Rights Committee, as previously mentioned, and also learning from international experience such as that of the Constitutional Law Committee in Finland.

The human rights-based approach taken towards the development of the Social Security (Scotland) Act 2018 can be built upon and further developed.

Process:

Key findings from the Reference Group, rights-holders and their advocates:

There is a widely shared concern about both the inadequate practical implementation of rights through policy and practice, as well as the inadequacy of everyday accountability across bodies carrying out inspection, regulation and adjudication. The inadequacy of everyday accountability is in part down to a lack of knowledge of rights, but also involves an inability to exercise them for a variety of reasons.

There was also a commonly expressed view that political statements on human rights, however welcome and well-intentioned, nevertheless amount to little more than rhetoric when not sufficiently put into practice.

Key findings from public bodies as duty bearers:

While there was definite interest, there was found to be a low level of awareness of the implications of giving effect to rights from UN treaties and how to practically implement them throughout law, policy and practice. All strongly emphasised the need to learn how to do so effectively in a stepwise and manageable manner. This was a key finding which influenced the recommendations made.

Building upon emerging good practice

As regards everyday accountability, examples include the new standards of the Prisons Inspectorate and Care Inspectorate.²⁷ In relation to empowerment, a positive example is that of the Leith housing project.²⁸

Outcome:

Key findings from the Reference Group, rights-holders and their advocates:

In short, civil society emphasised the need of assurances, and not assumptions, that there will be concrete and sustainable progress on the ground in improving people's lives. This should include public participation to ensure that the lived experience of rights-holders is understood when measuring outcomes.

Key findings from public bodies as duty bearers:

They recognised that the inclusion of an explicit human rights outcome in the refreshed National Performance Framework (NPF) means that it is timely to be considering how best to achieve it. Any new human rights framework could and should be aligned with the NPF.

Building upon emerging good practice

This includes the refreshed NPF Human Rights Outcome, and the ongoing Scottish Government led work to consider and develop relevant human rights-based indicators, which consider structure, process and outcome.²⁹

Outcome indicators by themselves can help tell "what" has happened in terms of results. Structure, process and outcome indicators taken together give not only the "what" but also the "why" and "how" more progress can be made in achieving the NPF Outcomes.

For example, it appears to be increasingly recognised that if there is no legal recognition of economic, social and cultural rights and if they are not then considered as part of policy and decision-making (such as in budget planning, allocation, spending and review), then the outcomes will not be as good as they could and should be. In short, there is a growing awareness of the need for coherence and alignment which can be provided by an overarching rights and policy framework.

Secondly, it may also be helpful to share some of the key findings relating to Effective Implementation and Accountability.

Rights-holders and their advocates repeatedly told us that they cannot fully enjoy their rights because there is inadequate implementation and accountability.

There are at least three aspects to this.

1. There is inadequate *legal implementation*. Laws giving people rights are not sufficiently put into policy and practice by public bodies. There are barriers to access to justice. These include: unavailability of independent advocates or legal representatives, who can support people in identifying human rights issues as well as providing representation; lack of an effective referral pathway once issues are identified; costs; delay and too much pressure placed on individuals.³⁰
2. There is insufficient *practical implementation*. Public service providers do not deliver these services in a way which sufficiently respects and fulfils the rights of people. This is often due to lack of resource but can also be due to a lack of training, awareness of rights, and sometimes just a lack of empathy and respect for dignity.
3. There is inadequate *everyday accountability*. Inspectors, regulators, complaints handlers and adjudicatory bodies do not consistently do enough to uphold the rights of people. This again can be the result of lack of resource and lack of training and awareness, although there is significant emerging good practice.

More is said in Chapter 5, particularly in Recommendation 3, about practical implementation, everyday accountability and the need for capacity-building.

However, there were some significant findings on legal implementation which it is helpful to share as they influenced Recommendation 1. This recommendation, detailed in Chapter 5, proposes an Act of the Scottish Parliament to introduce a new framework of human rights to improve people's lives and is central to all of the recommendations.

The findings relate to the kinds of duties which would work best in a new framework.

A “*duty to pay due regard*” to certain rights or duties has become relatively familiar.

For example, this was introduced in Wales with regard to the UN Convention on the Rights of the Child in 2011.³¹ It has also been applied in the public sector equality duties under the Equality Act 2010.³² In 2018 under the Fairer Scotland Duty which implements section 1 of the Equality Act, certain public authorities are required to pay due regard to how they can reduce inequalities of outcome caused by socio-economic disadvantage.³³

The Equality and Human Rights Commission, as the regulatory body for public sector equality duties, recently published a review of the experience of such duties.³⁴

In short, this review found that the duties appear to have had little impact in improving the actual outcomes for those persons with the protected characteristics provided for under the Equality Act.

Many public bodies appear to have approached the duties in more of an administrative or procedural manner instead of being focused on improving outcomes.

This may be due to a number of factors including whether there were appropriate reporting requirements, guidance and incentives to operationalise the duty.

Clearly, there needs to be an improvement in the implementation of the equality duties and it is welcome that in 2019 the Scottish Government is to carry out a review of the duties. As the regulator, the Equality and Human Rights Commission has an important role to play in this process of improvement.

The review of these duties is also timely in order to enable real progress to be made in achieving the NPF Outcomes, particularly the Human Rights Outcome that “*we will respect, protect and fulfil human rights and live free from discrimination*”.

All of this sits well with the preparation of the proposed Act, including the intended duties, as recommended by the Advisory Group. There is an opportunity to improve the public effectiveness, coordination and efficiency of “due regard” duties across the public sector.

A “*duty to comply*” is already well established in our law, e.g. under section 6 of the Human Rights Act 1998.

This duty of a public body is a necessary part of providing an effective remedy to a rights-holder. This is required under international human rights law.³⁵ It is a duty to provide an outcome which is consistent with the rights of the individual, and not simply a duty to provide a process which takes into account the rights of the individual.

The duty to comply can focus minds, incentivise and drive change in how a public body performs. However, there is a need to improve how this operates.

Where the duty is not fulfilled, court judgments have the potential to address individual cases as well as systemic human rights problems. Accordingly, within a public body the duty to comply can unhelpfully lead to human rights being regarded as more a matter for lawyers. In fact, it is also the responsibility of policy makers and those who make daily decisions – whether they be head teachers, health and social care managers, local authority chief executives, or inspectors and regulators.

The cost of legal proceedings can be prohibitive and the delay frustrating. Costs should be reduced and access to legal aid improved. “Test cases” or systemic issues need to be identified early on and fast-tracked through the judicial system.

While access to a court is a necessary “last resort”, the public body duty-bearers should be regarded as the “first resort”. Building their capacity is key to the practical implementation of rights, to everyday accountability and to the improvement of people’s lives.

To refer back to the quote of Eleanor Roosevelt – “*where, after all, do universal human rights begin? In small places, close to home.....*”

The challenge today then in Scotland is to find a way to bring out the best of the “*due regard*” duty and the “*duty to comply*” while recognising that the right to an effective remedy for a rights-holder is indispensable and is an international obligation.³⁶

The right to an effective remedy is enshrined in international human rights law by various international and regional treaties. International law establishes different forms of reparation to remedy violations of human rights, such as; restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.³⁷

These findings and analysis have helped inform the view of the Advisory Group in shaping its recommendations.

The Advisory Group makes key recommendations in relation to structure, process and outcome, as well as in relation to the different potential post-Brexit scenarios of current devolution, further devolution and independence.

“Recommendations 1-5 are designed for the current devolution settlement. Recommendation 6 sets out the immediate first steps to implement these recommendations. Recommendation 7 relates to possible future constitutional settlements of further devolution or independence.”

CHAPTER 5

Key Recommendations of the Advisory Group

The Advisory Group makes key recommendations in relation to structure, process and outcome, as well as in relation to the different potential

post-Brexit scenarios of current devolution, further devolution and independence. the current devolution settlement.

Current Devolution	<div>Recommendation 1: An Act of the Scottish Parliament which provides human rights leadership</div> <div>Recommendation 2: A public participatory process to be developed as a vital part of preparation of the Act and its implementation</div> <div>Recommendation 3: Capacity-building to enable effective implementation of the Act so as to improve people's lives</div> <div>Recommendation 4: A Scottish Government National Mechanism for Monitoring, Reporting and Implementation of Human Rights</div> <div>Recommendation 5: Development of human rights-based indicators for Scotland's National Performance Framework (NPF)</div> <div>Recommendation 6: Process for Implementation of Recommendations 1-5</div>
If Further Devolution or Independence	<div>Recommendation 7: Integration of any further devolved powers into the framework as proposed in Recommendation 1 and, if independence, a written constitution including a Bill of Rights for Scotland.</div>

Recommendations 1 to 5 are designed for the current devolution settlement.

Recommendation 7 relates to possible future constitutional settlements of further devolution or independence.

Recommendation 6 sets out the immediate first steps to implement these recommendations.

IN RELATION TO STRUCTURE

Recommendation 1: An Act of the Scottish Parliament which provides human rights leadership.

This Act will establish a new framework of human rights to improve people's lives.

It will set out for the first time and in the one place the rights belonging to everyone in Scotland. It will recognise that human dignity underpins all these rights and is the bedrock of society.

The development of the Act and the new framework of rights should follow a participatory process in which the public can lay claim to, take ownership of their rights and influence what needs to be done to ensure their practical implementation.

The Act could be legislated at the commencement of the next term of the Scottish Parliament in 2021.

The Act will restate those rights already provided under the Human Rights Act 1998. Those rights will continue to be subject to the regime of the Human Rights Act. They are included in the proposed new Act so that rights holders can see all of their rights listed in one place. This is vital to enable people to know and exercise their rights.

The Act will provide further rights drawn from UN human rights treaties ratified by the UK but not yet incorporated, including economic, social and cultural, as well as environmental rights.³⁸

So as to enable full and equal enjoyment of these rights, the Act will also provide specific rights to children, women, persons with disability and on race. These will be drawn from UN human rights treaties ratified by the UK but not yet incorporated into Scottish law.³⁹

As part of demonstrating leadership and reflecting international best practice, although not yet explicitly part of a UN treaty, the Act will additionally provide rights for older persons, LGBTI communities as well as for protection against poverty and social exclusion.⁴⁰

All of these further rights would apply and be exercised only within those areas that fall within the responsibility of the Scottish Parliament.

Other rights in UN treaties, such as work rights, are reserved to the UK Parliament and therefore cannot be included within the recommended Act of the Scottish Parliament.

Following this Act, the Scottish Parliament would give further effect to these rights through subsequent primary legislation.

Rights to be included in the Act:

Part 1: Civil and Political Rights and Freedoms (restated, in abbreviated form, from the Human Rights Act)

- right to life
- freedom from torture and from inhuman or degrading treatment or punishment
- freedom from slavery or servitude or being required to perform forced or compulsory labour
- right to liberty and security of person
- right to a fair trial
- freedom from punishment without law
- right to respect for private and family life, home and correspondence
- right to freedom of thought, conscience and religion
- right to freedom of expression
- right to freedom of peaceful assembly and to freedom of association, including the right to form and join trade unions
- right to marry
- right to protection of property
- right to education
- right to free elections
- right to non-discrimination in the exercise of all of these rights

Part 2: Economic, social and cultural rights

- right to an adequate standard of living, including:
 - right to adequate housing
 - right to adequate food
 - right to protection against poverty and social exclusion

- right to the enjoyment of the highest attainable standard of physical and mental health
- right to education
- right to social security and social protection
- right to take part in cultural life

The content of these rights and the corresponding duties will be outlined in schedules contained within the Act. The schedules will be developed having regard to relevant international standards. As well as outlining the content of rights, the schedules will also outline the duty to “progressively realise” such rights using the “maximum of available resources”.

Part 3: Environmental right

- right to a healthy environment

This overall right will include the right of everyone to benefit from healthy ecosystems which sustain human well-being as well the rights of access to information, participation in decision-making and access to justice. The content of this right will be provided within a schedule in the Act with reference to international standards such as the Framework Principles on Human Rights and Environment developed by the UN Special Rapporteur on Human Rights and the Environment, and the Aarhus Convention.⁴¹

Part 4: Further specific rights

- rights belonging to children, women, persons with disabilities, on race and rights for older persons and for LGBTI communities

Essential Features of the Act:

In order to create an effective new framework for rights, the Act must have certain essential features.

1. The Preamble of the Act should make clear that its purpose is to give further effect to human rights and that human dignity underpins all rights.
2. The Act should recognise that the further human rights apply only within devolved competence.
3. The Act must list all human rights belonging to everyone in Scotland in one place.⁴²
4. There must be an obligation on courts and tribunals when interpreting the rights to have regard to international law (including the UN treaties, treaty body decisions, General Comments and recommendations). It should also state that they may have regard to comparative law.
5. There must be an obligation that courts and tribunals, in so far as it is possible to do so, read and give effect to primary and subordinate legislation of the Scottish Parliament in a way which is compatible with the rights given effect by the Act.
6. Duties – There must be an initial duty to “pay due regard” to the rights provided for under the Act. This duty will apply to all public bodies, including the Scottish Government. A schedule within the Act will outline the duty’s requirements.

There must be a “duty to comply” with the rights after a specified period. A “sunrise clause” within the Act would trigger this further duty. It should be within the lifetime of the next Parliament.

The interim period (between the due regard duty and the duty to comply coming into force) will enable public bodies to make any necessary preparations for the commencement of the compliance duty.

Businesses carrying out public functions already have duties of compliance under the Human Rights Act as do public bodies regulating such activities. Such organisations will have the same duties as public bodies under this Act.

7. Limitations – the Act needs to make provision for limitations to the rights. Rights may be balanced with other legitimate considerations, especially the general welfare in a democratic society.
8. Remedies – the Act needs to make provision for remedies. These may be varied but there is a requirement to meet international obligations of providing an effective remedy.⁴³

A necessary remedy is a “declaration of incompatibility” in respect of legislation judged to be incompatible with the Act. This type of remedy is provided under the Human Rights Act. A declaration of incompatibility may not meet the requirement to provide an effective remedy unless such declarations are consistently given effect to by the Scottish Parliament ensuring the law is brought into line with the court’s judgment. Statutory guidance may be produced to ensure Parliament develops the practice of giving effect to judgments.

A power similar to section 102 of the Scotland Act 1998 should be introduced to allow the Scottish Government and Parliament time to consider how best to bring the incompatible law into line with the Act.

A “strike down” power, as provided under the Scotland Act 1998 could provide an effective remedy.⁴⁴ This would mean that the court can rule that the legislation is not law because it is not compatible with the Act. Further consideration would need to be given to whether such a provision is within the legislative competence of the Scottish Parliament. Such a provision may be deemed to be a modification of the Scotland Act 1998 and therefore beyond the legislative competence of the Scottish Parliament.

The Act should provide for damages as a remedy for breach of the rights under the Act.

In addition, the broad range of remedies already within our legal system should be available to be applied as appropriate. Additional specific remedies could be developed as needs be in subsequent primary legislation in relation to particular rights or sectors.

Notwithstanding these remedies, there is a need to consider further developing the range of available remedies in the Scottish legal system. There is a need to develop remedies which provide for an outcome to be achieved, rather than simply providing for a process to be followed. For example, this could usefully include a “structural interdict” whereby a court may make a judgment of a human rights breach, suspend the effect of the judgment and provide the public body with sufficient and a specified period of time to implement the remedy the court says is required in the situation. This may be particularly appropriate in instances of a systemic problem identified by the court in, for example, such policy areas as housing, health or social security and where there may be multiple rights-holders and multiple duty-bearers.

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9. The Act must provide a power to bring proceedings under it and state that the rights and duties contained within it can be relied upon in other proceedings.
 10. Standing to take proceedings – there must be a provision that states who is entitled to take proceedings in respect of the Act.

Clearly, as is the case under the Human Rights Act, a rights-holder whose right has been infringed must be able to bring proceedings.

But there must also be a broader test of “sufficient interest” to enable appropriate bodies such as non-governmental organisations or charities to bring proceedings. This is of particular importance in “test cases”, class actions and where there may be systemic issues involved. This would be an expeditious, efficient and cost-effective provision for access to justice and for the functioning of the legal system as a whole. In the environmental context under the Aarhus Convention, there is a presumption that NGOs have standing. That is a presumption that should be adopted and can be extended to other contexts, along with the development of a broader “sufficient interest” test.

Positive steps are already being taken in this general direction. The Court of Session has developed procedures to identify and manage test cases or class actions. More will however need to be done to achieve effective access to justice. In addition, it would be advisable to extend these types of procedure to the Sheriff Courts and the tribunal system.

11. Pre-legislative scrutiny

The Act should make provision for an enhanced pre-legislative scrutiny.

Review of legislation before it is passed can help ensure the realisation of all human rights, including civil, political, economic, social, cultural and environmental rights.

Pre-legislative scrutiny of human rights already takes place in the Scottish Parliament in accordance with the Scotland Act 1998.⁴⁵ This needs to be enhanced.

Pre-legislative scrutiny currently occurs through non-disclosed assessments by the Scottish Government and the Presiding Officer of the Scottish Parliament before legislation is passed. The relevant Minister and the Presiding Officer must make a statement of compatibility in relation to each Bill being considered. These reviews are limited to compatibility with the ECHR and do not take into account the full body of international human rights law. This means, for example, that economic, social and cultural rights as well as environmental rights are not regularly reviewed as part of the pre-legislative process.

There is scope then to broaden the current pre-legislative scrutiny arrangements in order to ensure that all human rights are being taken into consideration by the Parliament as a whole. This should be done by the Scottish Government, the Presiding Officer and the Parliament's Equality and Human Rights Committee (EHRC) and by the Parliament's other committees. Effective human rights scrutiny by committees is a particularly important aspect of accountability in the parliament because there is no second chamber of review.

EHRC could coordinate pre-legislative scrutiny of Bills to ensure compliance with civil, political, economic, social, cultural and environmental rights. There is good practice from other jurisdictions such as the Finnish Constitutional Law Committee.

The Committee should be supported with the appropriate legal expertise and resources to carry out this function. It could regularly call on the independent expertise of constitutional and human rights experts to assist. The expert evidence and decisions of the Committee should be published to ensure transparency.

The decisions of the EHRC, though not necessarily binding on Parliament, should carry weight and could be referred to by the judiciary should legislation be challenged as being incompatible with human rights.

In addition, the Scottish Parliament (including through the EHRC) can initiate dialogue with the Scottish Government to ensure steps are being taken to continuously progress human rights, including giving further effect to the rights contained within the Act as well as responding to UN recommendations related to devolved areas.

Further features of the Act which deserve consideration include the following:

1. A statement of principles applicable to all human rights. This would include the principles of universality, indivisibility and interdependence as well as non-discrimination and could assist in interpretation of the rights.
2. A declaration of intent by the Scottish Parliament to “respect, protect and fulfil” the rights contained within the Act.
3. A provision for entrenchment – that future legislation of the Scottish Parliament shall not be taken to repeal any part of this Act unless expressly stated.
4. A provision authorising the making by Scottish Ministers of Codes of Practice and non-statutory guidance.

Nothing in the recommendation for this Act should supersede, undermine or otherwise negatively impact any more comprehensive proposals for the protection of human rights by the Scottish Government.

NEXT STEPS

A public participation process needs to be developed and carried out.

It needs to include, as part of the preparation of the Act, public engagement and awareness-raising to enable the public to take ownership of the rights to be included within the Act.

It also must include public participation to help determine what is needed to make sure the Act is practically and effectively implemented and achieves its purpose of improving the lives of people.

This is further developed in Recommendations 2, 3, 4 and 5.

Recommendation 1

Act of the Scottish Parliament

An Act of the Scottish Parliament (ASP) providing in the one place the human rights belonging to everyone, based upon the recognition of human dignity. Building upon HRA/SA and including a new commitment to give further effect to economic, social, cultural and environmental rights as well as other specified rights sourced from UN human rights treaties.

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graph TD; A[Act of the Scottish Parliament] --> B[Scottish Parliament]; A --> C[Public Administration]; A --> D[Judiciary];
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Scottish Parliament

- Give effect to rights within ASP through subsequent pieces of legislation
- Declaration/duty to respect, protect, fulfil ASP
- Enhanced role of human rights committee

Public Administration

- Give effect to ASP and implement subsequent legislation through policies, decisions, regulation, inspection, monitoring and adjudication
- Initial duty to pay due regard to rights within ASP
- Sunrise clause to trigger within a specified time a subsequent duty to comply with the rights within ASP

Judiciary

- Give effect to ASP
- As a last resort, on structural and systemic issues
- Variety of existing remedies applicable according to specific nature of rights, powers or duties at issue

Outcome

Results measured with reference to ASP commitments and National Performance Framework indicators.

IN RELATION TO PROCESS

Recommendation 2: A public participatory process to be developed as a vital part of preparation of the Act and its implementation.

In order for the Act to achieve its purpose and full potential in improving people's lives, it is essential that there is a public participatory process in the preparation of the Act.

This will enable the public to lay claim to and take ownership of the rights to be provided within the Act.

It will also enable the public to influence how best the Act can be practically implemented and the rights made real in everyday life.

The design, development and execution of this process should draw upon international best practice, including consideration of "citizens' assemblies" or "citizens' juries".

Scotland's National Action Plan (SNAP 2) should act as a vehicle to help carry out such a public participation process as part of the preparation of the Act.

NEXT STEP

The Scottish Government should engage within SNAP 2 to explore how this recommendation may best be carried out.

This is further elaborated within Recommendation 6.

Recommendation 3: Capacity-building to enable effective implementation of the Act so as to improve people's lives.

There needs to be a process of targeted capacity-building to enable the practical and effective implementation of the Act.

People need to know their rights if they are to be able to fully enjoy them. This is widely recognised and is an obligation on all states outlined in the UN Declaration on Human Rights Education and Training.

Human rights education, awareness-raising, training of professionals and dissemination of information are all necessary components of observing and implementing international human rights law.

The United Nations Declaration for Human Rights Education and Training recognises that there is an obligation on states to ensure that people can access human rights education and training so that they can know, seek and receive information about all human rights.⁴⁶

Human rights education should begin at an early age and is a lifelong process. It needs to form part of the school curriculum. The Advisory Group notes the potential of initiatives like the 'Rights Respecting Schools' initiative facilitated by UNICEF.⁴⁷

Human rights training and awareness-raising should also be embedded across all sectors and all parts of society.

Decision makers, who play key roles in the practical implementation of rights, should be given the necessary training to become human rights leaders in their areas of responsibility whether they be, for example, head teachers, hospital managers or local authority chief executives.

Effective practical implementation of human rights and of the Act also lies within the everyday accountability space where human rights standards should be monitored and upheld by a range of bodies including inspectorates, regulators, complaint handlers and adjudicators.

It is in this everyday accountability space that people need access to justice to be able to exercise their rights when standards have not been met by, for example, providers of public services.

Accordingly, a central part of capacity-building is in improving the availability of independent advocacy and legal representation so as to enable access to justice.⁴⁸

Access to court and a judicial remedy are indispensable safeguards. However, they are a last resort when the everyday accountability space has not worked.

Priority needs to be given to the practical implementation of the Act through policy and practice and to this "*first resort*" of everyday accountability from inspectorates, regulators, complaints handlers and adjudicators.

NEXT STEPS

The specific forms of capacity-building should be determined through the participation of civil society and rights-holders with lived experience of denial of rights. They can input exactly what kind of capacity building is needed to enable people to exercise their rights – for example, this may include access to information and advice, independent advocacy and legal representation.

This participation is essential so that lessons are learned about what has not been working and how it can be improved.

The direct experience and views of all public bodies – including local authorities, those delivering public services, inspectors, regulators, complaints handlers, adjudicators and others – need to inform exactly what has to be done to enable them to carry out their duties under the Act. For example, this may include the provision of different kinds of resource including training, good practice development and guidance on human rights impact assessment and human rights budgeting, as well as financial resources.

It is important to learn from the emerging good practice and to further develop peer exchange and support such as is being currently supported by the Scottish Human Rights Commission.⁴⁹

Private bodies and charities, particularly those procured to provide public services, should also be involved in this participatory process of capacity-building. Businesses carrying out public functions already have duties of compliance under the Human Rights Act as do public bodies in regulating such activity. The same will apply under the new Act.

In terms of international human rights law, public bodies are required to prevent, monitor and remedy human rights failures resulting from business conduct (including in the context of privatisation). Business entities and other private bodies themselves have responsibilities and duties in international human rights law terms.

As part of ensuring human rights leadership in this regard, the Advisory Group understands that early work led by the Scottish Government is underway to develop a national action plan for implementation of the UN Guiding Principles on Business and Human Rights (UNGPs). This could be one means of human rights-related capacity-building in the private sector.⁵⁰

Drawing upon the UNGPs, part of this national action plan should also build capacity of those public bodies charged with regulating the private sector in order to protect the human rights of the public.

Recommendation 4: A Scottish Government National Mechanism for Monitoring, Reporting and Implementation of Human Rights

The Scottish Government should establish a National Mechanism for Monitoring, Reporting and Implementation of Human Rights, aligned with general UN recommended good practice.⁵¹

The UN promotes the value of such a body because it can improve government reporting to and follow up of recommendations from regional and UN human rights systems.

It can also improve coordination across government directorates and so help achieve more consistency and coherence in observing and implementing international obligations.

This would significantly contribute towards achieving the National Performance Outcome that “*we will respect, protect and fulfil human rights and live free from discrimination*”. It will also help align the Scottish Government’s reporting on the Sustainable Development Goals.

The body would contribute to national dialogue on the promotion of best practice including with parliaments, the judiciary, civil society and the general public.

Such a body is different from a national human rights institution (NHRI) although it is complementary with it. The Scottish Human Rights Commission (the NHRI) is independent of government and will continue to hold government to account for meeting its human rights obligations.

Best practice would be for the National Mechanism to be a Scottish Government body with its own separate structure, staffing and budget and accountable to the relevant Scottish Government Minister. At arm's length from central Government, both its public accountability and its ability to hold the government to account would improve.

However, there is not a “*one-size-fits-all*”. Indeed, there is an opportunity to adapt this proposed National Mechanism to the Scottish context.

Post-Brexit there will be a need to monitor and report on developments at the UK Parliament in relation to those rights “returned” from the EU which fall into reserved areas. These would include rights in employment, equality, data protection, consumer standards and other important areas.

There will also be a need to monitor and report on any relevant developments in rights terms within the EU post-Brexit. Consideration could then be given as to whether and how it may be appropriate to adapt progressive rights developments within a devolved context.

Accordingly, the National Mechanism's three core functions would lie in the operationalisation of the three guiding principles (as referred to in the Executive Summary of this Report) of non-regression, keeping pace and taking leadership, as follows:

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1. Coordinating Scottish Government engagement with European and UN human rights systems, including reporting to and implementation of recommendations within the devolved context.
 2. Monitoring the UK Parliament and reporting to the Scottish Government, Scottish Parliament and the public on any developments as regards the continued effect of rights “returned” from the EU to the UK Parliament.
 3. Monitoring the EU and reporting relevant rights developments to the Scottish Government, Scottish Parliament and the public for consideration of adapting any such developments within devolved areas of competence.

In order to ensure that this sits well with other processes already in existence in Scotland, it is recommended that this body is explicitly tasked to proactively engage with Scotland's National Action Plan (SNAP). Together they can identify priorities for action on implementation of recommendations, and for the promotion of best practice.

NEXT STEPS

The Scottish Government should proceed to establish a National Mechanism as outlined above.

IN RELATION TO OUTCOME

Recommendation 5: Development of human rights-based indicators for Scotland's National Performance Framework (NPF).

Human rights-based indicators should be developed for the National Performance Framework (NPF).

The National Outcomes are of critical importance in reflecting the values and aspirations of Scottish society. They have the potential to provide a useful mechanism by which to monitor and analyse commitments, effort and outcomes. They can be used to hold government, parliament and public bodies accountable for progress across a wide range of policy areas in accordance with obligations and commitments, including international human rights treaty obligations and commitments under the Sustainable Development Goal (SDG).

Building on the welcome progress made through the inclusion in the newly revised NPF of a human rights-specific National Outcome and drawing on the extensive work of the Scottish Human Rights Commission in this area, it is recommended that:

1. Improved indicators are developed for the Human Rights Outcome which states: *"We respect, protect and fulfil human rights and live free from discrimination."*

The indicators under the Human Rights Outcome need to better reflect the obligations to respect, protect and fulfil and the principle of non-discrimination. They must also comprise Structure, Process and Outcome indicators as is international best practice. Together these address the essential aspects of human rights implementation, namely: commitment, effort and result.

Outcome indicators look backwards at results. Structure and Process indicators help governments to look forward and make more progress. For example, by removing barriers to better outcomes such as systemic discrimination as a result of law or policy, intended or unintended.

Process indicators (which include a focus on policy and budgetary resources) also strengthen evidence-based policy making by helping governments determine if their interventions are actually leading to improved outcomes or whether they need to be adjusted. The focus on commitment and effort, as opposed to measuring only result outcome, is one of the things which make human rights indicators distinct.

It is also clear from best practice guidance that human rights indicators can address cross-cutting issues, namely: participation, accountability and non-discrimination. These cross-cutting issues are foundational blocks of a human rights-based approach and they help to shift the focus of analysis to the most marginalised and excluded. They support a deeper analysis of political and social power relationships in the public (and private) sectors.

As it currently stands, the indicators under the Human Rights Outcome need to be further developed in order to provide the data required to sufficiently assess progress.

Most importantly, the data needs to be disaggregated to ensure that the experience, needs and rights of different parts of the community are fully understood. For example, in law and policy-making, as well as in a budgetary context, specific consideration needs to be given to those such as children, women, persons with disabilities, minority ethnic communities and those living in islands and rural areas.

The gathering and analysis of such disaggregated data is to ensure that “no one is left behind”. It is this that lies at the heart of the Sustainable Development Goals and the National Performance Framework.

2. The next NPF Outcomes Framework takes a human rights-based approach to its re-development and uses human rights-based indicators for future measurement of *all* National Outcomes.

All of the National Outcomes and many of their indicators are relevant to the realisation of rights in Scotland and is why the NPF has such transformational potential. This potential will not, however, be fully realised in their current iteration.

Connecting the whole NPF explicitly to the international human rights framework will show leadership in terms of how a country can truly embed human rights within the way it measures progress across delivery of all National Outcomes. This approach will enable the indicators to be drawn directly from international obligations, as well as adopting an indicator set that explores structure and process as well as result outcome.

This increased focus on structural and process indicators would support better realisation of all of the NPF Outcomes and the Sustainable Development Goals agenda. It will also enable the monitoring of all of Scotland's international human rights obligations.

Specifically, and in accordance with recommended best practice, the development of budgetary process indicators would help Scotland achieve the above.

NEXT STEP

The overall implementation of both of these recommendations is best achieved by the ongoing Scottish Government led process adopting a human rights-based approach to the further development of NPF indicators.

Recommendation 6: Process of Implementation of Recommendations

In order to take forward all the Advisory Group's recommendations effectively, a National Task Force, led by Scottish Government, should be established. The National Task force should form part of the government's leadership position of Scotland's National Action Plan for Human Rights (SNAP).

In addition, it is recommended that the powers and resources of the Scottish Human Rights Commission are strengthened.

It is acknowledged that there will need to be an investment of resources and an organisational commitment and effort to implement the recommendations, including the public participatory process and necessary capacity-building.

The Scottish Government is the principal duty-bearer and is key to the implementation of these recommendations but it cannot nor should do this on its own.

Rather it is a journey for all to make together. Leadership lies in enabling and supporting this.

National action plans for human rights, as supported and recommended by the UN, provide a means for the implementation of human rights. The development of a national action plan for human rights is part of a country demonstrating its human rights leadership.

Scotland has already had a four-year action plan between 2013-2017.⁵² This won both international and domestic recognition as a collaborative and dynamic process. Work is already underway to develop the next National Action Plan and this is very timely. Public sector bodies and civil society are already committed to contribute to the development and implementation of SNAP.

There is, therefore, significant potential for the delivery of the Advisory Group's recommendations to be given broad and committed support through such a reconfigured National Action Plan.

Given the effort and investment required at many levels to take all this forward, the work of the National Task Force should become a key part of SNAP. This would establish the appropriate ownership and leadership of SNAP by the Scottish Government in line with international best practice. It would enable a collaborative process to coordinate and oversee the practical implementation of the recommendations which are clearly aligned with both the NPF Outcomes and the SNAP Outcomes.

To ensure their delivery, the government led National Task Force would require its own secretariat, executive and Ministerial leadership and would develop a plan for implementation of the recommendations.

It needs to be a multi-stakeholder body drawing upon the expertise and experience of both duty-bearers and rights-holders and their advocates in order to effectively implement the recommendations.

International experience has demonstrated that an independent and effective national human rights institution is critical to capacity-building in a country. The Advisory Group has heard from many actors with whom it has engaged that there is a widely recognised need for the strengthening of the resources and powers of the Scottish Human Rights Commission.

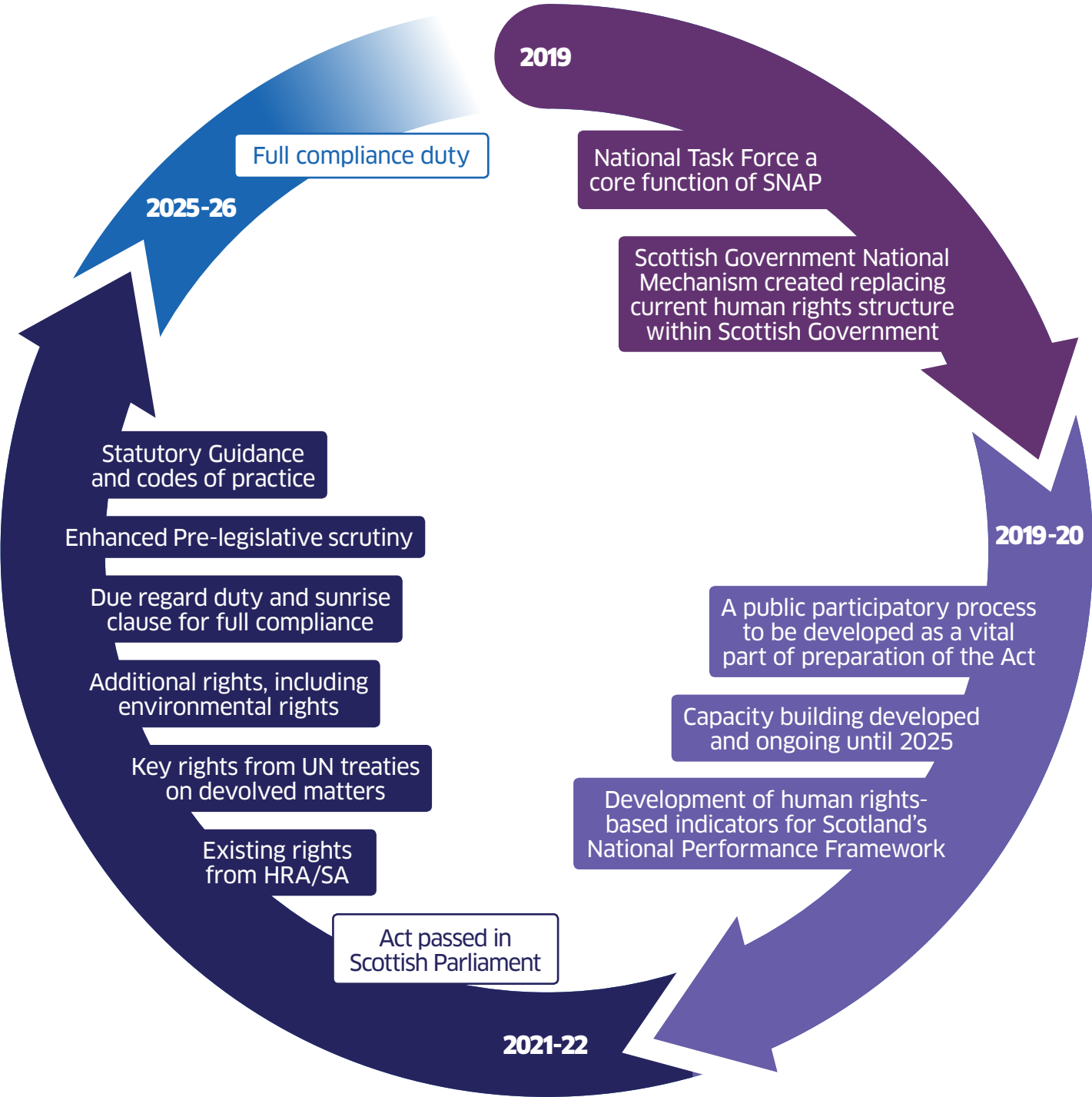
If the recommendations of the Advisory Group are to be effectively implemented, it is anticipated there will be an increased demand from both public bodies and civil society for further support, particularly in capacity-building, from the Scottish Human Rights Commission.

Accordingly, as part of the implementation of these recommendations the Advisory Group specifically recommends an increase in resources and powers of the Scottish Human Rights Commission, while acknowledging that this consideration lies with the Scottish Parliament and not the Scottish Government.

NEXT STEPS

The Scottish Government should set up a National Task Force. The Task Force should be integrated as a key part of SNAP and should develop a plan for implementation of the recommendations.

TIMELINE OF IMPLEMENTATION OF RECOMMENDATIONS



IN RELATION TO FURTHER DEVOLUTION OR AN INDEPENDENT SCOTLAND

Recommendation 7: Integration of any further devolved powers into the framework proposed in Recommendation 1 and, if independence, a written constitution including a Bill of Rights for Scotland.

Any further powers which may come in the future to be devolved to the Scottish Parliament could be integrated into the framework proposed by Recommendation 1.

Employment, equality and immigration were among those further devolved powers which were most often raised with the Advisory Group in the course of its broad engagement as being the most desirable.

So, for example, work rights derived from the International Covenant on Economic, Social and Cultural Rights could be added to the list of rights contained within the Act of the Scottish Parliament were employment to become devolved to the Scottish Parliament.

If Scotland were to become independent the Advisory Group recommends that there should be a written constitution which would include a Bill of Rights.

An independent Scotland would self-evidently not be bound by the limitations of devolution.

Consequently, it could provide constitutional protection to a Bill of Rights. A Bill of Rights in an independent Scotland could extend protection of all human rights across all parts of public life. This is the international norm.

Of course, further preparatory work would need to be done in relation to a Bill of Rights in an independent Scotland. This is beyond the scope of the Terms of Reference of the Advisory Group.

The experience gained from the development of the recommended human rights framework for devolution will stand Scotland in good stead if there are to be any future changes in constitutional arrangements, whether they take the form of further devolution or independence.

Further background information and materials in relation to the Advisory Group process will be available on its website at <http://humanrightsleadership.scot/>.

“A new human rights framework is therefore of clear public benefit.”

CHAPTER 6

Public Benefits of Key Recommendations

The overall public benefit is the improvement of people's daily lives.

This is the purpose of the Scottish Government, Parliament and the public sector.

It is affirmed in Scotland's National Performance Framework throughout all the Outcomes, and most clearly in the Outcome that *"we will respect, protect and fulfil human rights and live free from discrimination"*.

The implementation of the Advisory Group's recommendations will directly contribute to the achievement not only of the Human Rights Outcome but of all of the other Outcomes.

It will do so by contributing to the continuous improvement of law, policy and decision-making as well as to the necessary further development of the indicators to measure all of the Outcomes.

Improving people's lives is, however, not something that is only done *for* people. It works better when it is done *with* and *by* people. This is what a human rights-based approach brings to the table and this is what is promoted by the Advisory Group recommendations.

Reference may usefully be made to two case studies which illustrate the improvement to people's lives brought by this approach and the potential benefit to society if this approach were to be mainstreamed. Both can be clearly linked to National Performance Framework Outcomes of building empowered and resilient communities and of growing up loved, safe and respected so as to achieve full potential.

The Leith housing project involved tenants becoming empowered to improve their housing conditions and community through becoming aware of and exercising their right to adequate housing under the International Covenant on Economic, Social and Cultural Rights.⁵³

The Historic Child Abuse InterAction involved survivors of historical child abuse becoming empowered to gain access to justice through effectively exercising their internationally recognised right to a remedy. It also enabled lessons to be learned as to how to prevent child abuse today.⁵⁴

Another way of assessing the public benefit is to consider any "public disbenefit" of failing to develop a new human rights framework including rights from UN human rights treaties ratified by the UK but not yet incorporated.

For example, had there been such a framework at the UK level it is likely that various austerity measures would either have been identified at the early stage of a pre-legislative scrutiny, or would subsequently have been found by the courts to be unlawful because they were in breach of human rights provided by UN treaties.

A new human rights framework is therefore of clear public benefit.

“Leadership is about bringing people from different places to travel together on a journey that achieves real and sustainable progress.”

CHAPTER 7

Conclusion

Leadership is about bringing people from different places to travel together on a journey that achieves real and sustainable progress.

The journey presented by these recommendations is to achieve the ambition of a new human rights framework to improve people's lives. This framework will be based upon the recognition of human dignity and encompass civil, political, economic, social, cultural and environmental rights. In so doing it will be in keeping with and inspired by the vision of the Universal Declaration of Human Rights.

It is the "sunrise clause" in the recommended Act of the Scottish Parliament which brings people from different places to travel together on this journey. It offers assurance to rights-holders of sustainable progress and offers assurance to duty-bearers of a manageable progress.

In these times of uncertainty, this recommended new framework of human rights will anchor Scotland's values. From there it will then help Scotland navigate its way forward post-Brexit. In doing this Scotland will signal its commitment to an international rules-based order – a better country in a better world.

This is human rights leadership today.

ANNEXES

Annex A

Frequently Asked Questions

In the course of its public engagement, the Advisory Group was frequently asked the following questions amongst others:

1. What would the Act of the Scottish Parliament be called?

This is not a matter for the Advisory Group. It will be a matter for public and political debate and decision.

The Act does have some key features of a Bill of Rights in that the Scottish Parliament, for the first time and in the one piece of legislation, will set out the human rights belonging to everyone and the corresponding duties of all public bodies.

However, certain limitations need to be recognised due to devolution.

Firstly, not all rights can be included, such as employment, equality or immigration, because these areas are reserved to the UK Parliament. Secondly, the Act cannot be constitutionally protected from repeal as the Scottish Parliament is a devolved legislature created by the UK Parliament.

2. How will courts make decisions about economic, social and cultural rights in cases that come before them?

The courts will be able to make use of such recognised principles as “reasonableness”, “proportionality” and “due deference to legislature” to assess how, and to what extent, the duties imposed by the rights apply in the cases before them.

Variants of these principles are already used by courts in Scotland and the UK as well as in very many other countries. Other useful sources of interpretation will also be available from General Comments from UN treaty bodies, treaty body decisions and recommendations, statutory guidance and case law from other jurisdictions.

3. How would individual rights and interests be balanced with public interest? For example, rights of a land owner with public use of land, or rights and interests of developers and a right to healthy environment?

This would be done through the recognised principle of proportionality which is already used by courts in Scotland, the UK, the European Court of Human Rights, as well as in many other countries. Generally speaking, proportionality means the reasonable balance to be struck between the legitimate public interest aim and the means chosen to achieve such aim.

4. What do the government and public bodies need to do to implement economic, social and cultural rights?

In brief, the primary duty is to take steps, using the maximum of available resources, with a view to achieving progressively the full realisation of the rights.

It is then a process of continuous improvement of laws, policies and programmes to realise the rights of people and improve their lives.

At the same time there is a duty to ensure minimum core standards are met. There is a threshold or a floor below which no one should be permitted to fall. Priority should be given to the most disadvantaged in efforts to implement these duties.

The Act would provide a schedule which would outline these duties drawing upon guidance from the UN treaty bodies and the experience of the many other countries which have already accorded legal status to such rights.

In short, it can be understood as enhancing good governance in the public interest.

5. How are economic, social and cultural rights implemented in times of economic recession and austerity?

While in general there should be no retrogression (backward steps) in the realisation of such rights, it is recognised that this may be unavoidable in certain circumstances, for example in a situation of economic recession.

In such circumstances any retrogression should be temporary. Measures taken such as budget cuts should not be discriminatory or impact disproportionately on a vulnerable part of the society. The most disadvantaged should be prioritised. Government should ensure that minimum core standards are maintained.

6. What about the risk that the compliance duty is not triggered?

The recommended “sunrise clause” in the Act would ensure the compliance duty is triggered. The starting date for the duty would be in the Act itself. There would be no need for further legislation and it would not be within Ministerial discretion.

Of course, if for any reason the compliance duty was not triggered, it would become a question of public and political accountability.

7. What about the risk that the due regard duty is not carried out by public bodies?

Statutory guidance could specify transparency and reporting requirements and again it would also become a question of public and political accountability.

Additionally, it would be in the self-interest of public bodies to carry out the “due regard” duty in order to prepare for the compliance duty to become triggered by the “sunrise clause”.

As a last resort, it would be possible to take legal proceedings under the Act for failure to comply with the due regard duty.

8. How do these recommendations relate to SNAP?

It is recommended that a Scottish Government led National Task Force would develop a plan and implement the recommendations as part of SNAP.

9. How do these recommendations relate to the separate process of incorporation of the UNCRC?

This question recognises the separate process underway concerning the incorporation of the UNCRC in Scotland.

The Advisory Group acknowledges and welcomes the commitment in the Programme for Government to incorporate the UNCRC. Consideration of UNCRC incorporation goes back many years. It has received considerable attention from successive governments and has involved significant participation from civil society.⁵⁵

The Advisory Group encourages UNCRC incorporation by the government and parliament. That separate process is complementary to and capable of being aligned with our overall recommendations. The Advisory Group’s recommendations should not cause any delay to UNCRC incorporation.

The Advisory Group also considers that its recommendation for the broader incorporation of rights from across the range of UN human rights treaties will, along with the incorporation of the UNCRC, help build a society in which children and young people are able to enjoy all of their rights and realise their full potential.

10. Why are the rights of older persons and LGBTI included in the Act when they are not explicitly included in UN treaties?

This is in recognition of domestic public opinion, international standards and best practice, and of the current process regarding a potential UN treaty on the rights of older persons. It is about Scotland demonstrating human rights leadership.

11. What might be the timeline for implementation of the recommendations?

It could be as follows:

2019 – beginning of the process of incorporation of rights from UN treaties, establishment of the Scottish Government led National Task Force as part of a reconfigured SNAP and establishment of the National (Scottish Government) Mechanism for Monitoring, Reporting and Implementation;

2019/20 – a public participatory and pre-legislative process of the Act and its implementation, beginning of process of capacity-building along with the development of human rights-based indicators for the National Performance Framework;

2021 – introduction in the Scottish Parliament of a Bill to establish the new framework of human rights;

2022 – the Act passed and commencement of “due regard” duty;

2025/26 – sunrise clause triggers “compliance duty” and process of incorporation completed.

13. Why did you not recommend any of the following?

A provision in the Act which triggers a compliance duty but without a specified date and at the discretion of Ministers? In other words, delayed commencement rather than a “sunrise clause”.

A specifying a start date in the Act itself provides certainty to all. It addresses civil society concerns about potential delay in introducing a compliance duty or it not being done at all. At the same time, it provides confirmation for public bodies of what they need to do and by when.

The recommendation that the specified date is “within the lifetime of the Parliament” ensures that the Act can be fully implemented during the term of office of the current Government. Both the Government and Parliament are therefore able to commit themselves to this and be held accountable.

Finally, this period is considered adequate for preparations for the compliance duty to be able to be carried out by public bodies.

A “due regard duty” by itself without a sunset clause triggering a compliance duty?

As previously outlined in Chapter 4, experience has shown that a “due regard” duty by itself does not lead to sufficient improvement in people's lives.

A compliance duty immediately without a prior “due regard” duty and not waiting until the next parliamentary term of 2021?

This would neither recognise the need for the recommended public participatory process nor the legitimate need of public bodies to prepare for the introduction of a duty to comply.

Instead of introducing a new Act of the Scottish Parliament why not simply amend the Human Rights Act and the Scotland Act to include the recommended rights?

The Scottish Parliament does not have this power and any amendment would need to be made by the UK Parliament.

It is doubtful that there would be sufficient support within the UK Parliament to do this.

There is greater potential for public participation if the Act is legislated for in the Scottish Parliament.

Full incorporation of the whole of the UN treaties by themselves?

Such a “copy and paste” approach would not sufficiently consider the Scottish context.

There is a clear benefit in a public participatory process to both take ownership of the rights and promote their practical and effective implementation.

In some circumstances it may also be preferred to go above and beyond the rights set out in the UN treaties and provide additional protection that better serves the public interest.

However, there should be no circumstances in which a chosen means of incorporation results in the protection of human rights falling below the standards envisaged by the UN treaty.

Annex B

Outline of Act

This Annex sets out the general scheme of the proposed Act. It is not intended to be prescriptive. Rather it is to illustrate the provisions which the Advisory Group considers essential or desirable for the Act to achieve its aim.

PROPOSED ACT OF THE SCOTTISH PARLIAMENT

Preamble

The Preamble should make clear that the purpose of the Act is to give further effect to human rights, and to recognise that human dignity is the value which underpins all human rights.

PART ONE: THE RIGHTS

Section 1

The Act should make clear that it applies only to non-reserved matters. It should make reference to the Human Rights Act 1998, which will continue to govern those rights incorporated into Scots law from the ECHR.

Section 2

This section should make clear that the rights given effect in this Act belong to everyone in Scotland. Thereafter the Act should list all human rights which form part of Scots law (this should be done in Schedules to the Act). The list will include those ECHR rights already incorporated by the Human Rights Act 1998, as well the further rights which are given effect by this Act.

The Act should provide further definition of the rights listed. These outlines should be formulated having regard to relevant international standards and following public participation. They should be included as Schedules to the Act. There should also be schedules to outline important general concepts such as “progressive realisation” and “maximum available resources” as well as to outline the duty of “due regard”.

Section 3

The Act could include statements of principles which apply to all human rights, including universality, indivisibility and interdependence, as well as non-discrimination.

PART TWO: INTERPRETATIVE OBLIGATIONS

Section 4

The Act should provide that when courts or tribunals are interpreting the rights given effect by the Act, regard must be had to international law (including the UN treaties from which rights are drawn, treaty body decisions, General Comments and recommendations) and that they may have regard to comparative law.

Section 5

The Act should provide that courts and tribunals, in so far as it is possible to do so, must read and give effect to primary and subordinate legislation of the Scottish Parliament in a way which is compatible with the rights given effect by the Act.

PART THREE: DUTIES

Section 6

If it is decided that it is within the legislative competence of the Scottish Parliament to introduce a “strike down” power, the Act should provide that the Scottish Parliament has no power to pass legislation which is not compatible with the rights given effect by the Act.

If it is decided that such a provision is not within legislative competence, then the Act could provide a declaration by the Scottish Parliament that it will seek, in so far as possible, to respect, protect and fulfil the rights given effect by the Act.

Section 7

The Act should create a duty to pay due regard to the rights given effect by the Act. That duty should apply to the Scottish Government, public authorities/public bodies and private bodies carrying out public functions. The duty should come into force on commencement of the Act.

Section 8

The Act should specify a date, within the lifetime of the next Scottish Parliament, to bring into force a duty to comply with the rights given effect by the Act. The duty should apply to the same bodies as the due regard duty. This is the “sunrise clause”.

PART FOUR: LIMITATIONS

Section 9

The rights in this Act may be balanced with other legitimate considerations, for example promotion of the general welfare in a democratic society. They may be limited when: provided for in law and carried out according to law; there is no other less restrictive alternative; and the measures are reasonable, non-discriminatory, based on evidence, subject to review, and of limited duration.

PART FIVE: PROCEEDINGS

Section 10

The Act should provide for the power to bring proceedings under it and to rely on the rights and duties provided for by the Act in any other legal proceedings.

Section 11

The Act should provide effective remedies, including:

Power to strike down incompatible legislation (if considered to be within legislative competence).

Declaration of incompatibility.

Damages.

Other remedies already within the powers of the court or tribunal.

The Act could consider introducing further remedies, such as structural interdicts.

Section 12

The Act should provide the court or tribunal with the power to suspend or postpone the effect of its judgment in order that the government or public body may consider what steps are required to remedy the issue.

Section 13

The Act should set out who has standing to bring proceedings. This should include individuals whose rights under the Act are said to have been infringed. It should also include those with “sufficient interest”. The “sufficient interest” test must be wide enough to permit appropriate bodies, which may include non-governmental organisations and charities, to bring proceedings in their own name regardless of the fact that the body is not the “victim” of the alleged rights infringement. The Act should provide that there is a presumption in environmental rights cases that non-governmental organizations have sufficient interest to bring proceedings (in keeping with the Aarhus Convention).

PART SIX: LEGISLATION

Section 14

The Act should require the Parliament’s Equality and Human Rights Committee to certify that any proposed Bill is compatible with the rights given effect under the Act. The Committee should be given the power to obtain independent expert advice. The Act should provide that any certificate of compatibility or incompatibility, and the reasons for it, must be published.

Section 15

The Act could provide that future legislation of the Scottish Parliament shall not be taken to repeal any part of the Act unless it is expressly stated.

Section 16

The Act should give the Scottish Government power to publish Codes of Practice or other non-statutory guidance to further operationalize the realisation of the rights given effect under the Act.

SCHEDULES

List of rights incorporated from the ECHR under the Human Rights Act

List of further rights – economic, social and cultural, and environmental rights

List of further rights – specific rights for women, children, persons with disability, older persons, LGBTI and on race

Content of Rights – further definition of the rights given effect under the Act

Meaning of general concepts such as “progressive realisation”, “maximum available resources” as well as the meaning of the duty of “due regard”, etc.

Annex C

Terms of Reference

CONTEXT

1. The Scottish Government's programme for 2017-18⁵⁶ identifies actions which the Scottish Ministers intend to take to further promote and uphold the values of an open, inclusive, diverse, tolerant and progressive democracy.
2. Ministers are committed, in particular, to respecting, protecting and implementing internationally-recognised human rights, and to embedding equality, dignity and respect in everything they do. Taking concerted action to give practical effect to human rights for all members of society is a core function of Scotland's national government⁵⁷.
3. The Scottish Government is, accordingly, pursuing a programme of activity which places human rights, equality and human dignity at the heart of public policy in Scotland. It is also working to protect human, environmental, employment and other rights from the threats posed by UK withdrawal from the European Union. Together with partners across the public, private and third sectors, and in conjunction with wider civil society and members of the general public, the Scottish Government will continue to pursue its vision of an inclusive, fair, prosperous, innovative country which is ready and willing to embrace the future.

4. In order to support and inform that work, and to encourage both leadership and constructive challenge in the field of human rights, the Programme for Government ("PfG") undertakes to:

- *establish an expert advisory group to lead a participatory process to make recommendations on how Scotland can continue to lead by example in human rights, including economic, social, cultural and environmental rights.*

PURPOSE OF THE GROUP

5. To make recommendations to the First Minister, before the end of December 2018, on how Scotland can continue to lead by example in human rights, including economic, social, cultural and environmental rights.

NAME OF THE GROUP

6. The Group will be known as the *First Minister's Advisory Group on Human Rights Leadership* ("the Group"). The following abbreviations may also be used: "The FM's Human Rights Leadership Group"; the "Human Rights Leadership Group"; "HRLG").

STATUS OF THE GROUP

7. The Group is an independent and time-limited advisory group. It has no executive functions. It will report, through the Chair, to the First Minister.

REPORTING AND LIFETIME OF THE GROUP

8. The Chair will provide updates to the First Minister on the progress of the Group's work, in keeping with a timetable to be agreed by the First Minister.
9. The Chair will present an interim report before the end of August 2018. The format and content of the report will be determined by the Chair following consultation with the First Minister.
10. The full report of the Group, with specific recommendations to the Scottish Government, will be presented to the First Minister by the end of December 2018. The principal findings and recommendations will be available for publication and/or debate (in a form to be agreed by the First Minister) in time for Human Rights Day (10 December) 2018.

PARTICIPATIVE PROCESS

11. The overall work of the group will be informed by a participatory process, which the Group will lead.
12. That process will ensure that the recommendations developed by the Group are underpinned by a participative and deliberative approach which reaches beyond those who already have access to power and influence in Scottish society. Human rights belong to everyone, and it is essential that voices from all walks of life and from every corner of the nation are heard.⁵⁸

REFERENCE GROUP

13. The Group will be further supported in its work by a Reference Group consisting of individuals drawn from across Scottish society and mobilising, in particular, the knowledge and expertise which resides within civil society and the public, private and third sectors.
14. The Reference Group will be convened by the Chair of the First Minister's Advisory Group. The frequency and location of meetings will be determined by the Chair in consultation with members of the Reference Group.

FURTHER GUIDING PRINCIPLES

15. The work of the Group will take appropriate account of topical concerns, including the implications for human rights of UK withdrawal from the European Union. There is a recognised need to consider how best to protect and promote all human rights across the full range of potential post-Brexit scenarios.
16. The First Minister's Standing Council on Europe has articulated three fundamental principles which are likely to inform the work of the Group:
 - There should be "non-regression" from current EU rights.
 - There should be nobody left behind future progressive EU developments in rights.
 - Scotland should "take a lead" in the protection and promotion of all human rights.

-
17. The emphasis on Scotland continuing to “take a lead” directly informs the purpose and remit of the Group and is relevant not just in the context of Brexit but also to the next potential steps in Scotland’s human rights journey.
 18. That includes consideration of the potential effects of incorporating international human rights treaties into domestic law, and the means by which this might in practice be undertaken. Such treaties, which have been ratified by the United Kingdom, are already part of the international legal obligations referred to within the Scotland Act 1998, but the Group will wish to explore how such obligations might be given further effect in law, policy and practice within Scotland. In doing so, the Group will consider related issues, such as the extent to which incorporation might have wider constitutional or other implications, including for the relationship between the courts, the legislature and the executive.

RELATED COMMITMENT ON CHILDREN’S RIGHTS

19. The PfG also commits the Scottish Government to examining how Scotland can go further to embed human rights, including economic, social and cultural rights including the UN Convention on the Rights of the Child (“UNCRC”)⁵⁹. Work relating to the UNCRC will be taken forward as a separate initiative.
20. It will, however, be important for the Group to liaise closely with that work, in particular in relation to matters of mutual interest. The Chair will ensure effective engagement by the Group with this and other relevant activity.

MEMBERSHIP [SEE CHAPTER 1]

21. Members (including the Chair) serve in a personal capacity unless otherwise indicated. Members serve at the invitation of the First Minister.
22. Additional members may be invited to serve on the Group following consultation between the Chair and the First Minister. Any proposal for additional members will be informed by the initial research and deliberation undertaken by the Group, by the requirements of the participation process and by gap analysis of existing work on human rights safeguards and implementation in Scotland.
23. The Chair will give specific consideration to options for including one or more persons with “direct lived experience” of relevant human rights issues as members of the Group.

Scottish Government

November 2017

Annex D

Scope of Engagement

The Advisory Group have held a number of events and discussions including:

- A public engagement processes which was carried out by the Scottish Community Development Centre & Community Health Exchange – events were held in: Inverness, Glasgow and Dundee.
- An online survey to seek rights-holders' views was also developed by SCDC.
- Meetings of the Reference Group which brought together over 50 civil society leaders to advise on the development of the Advisory Group's recommendations.

The Reference Group met on three occasions throughout the year in March, June and October 2018.

The following organisations were invited to participate in the Reference Group discussions:

- ALLIANCE Scotland
- Amnesty International
- ASL Reference Group
- BEMIS Scotland
- C-Change Scotland
- Children and Young People's Commissioner Scotland
- Children in Scotland
- Citizens Advice Scotland
- Community Land Scotland
- Edinburgh Tenants' Federation
- ENABLE Scotland
- Engender
- Equality and Human Rights Commission Scotland
- Equality Network
- Ewart Communications
- Faculty of Advocates – Faculty Human Rights Committee
- Fair Work Convention
- Friends of the Earth Scotland
- Glasgow Disability Alliance
- Global Academy on Agriculture and Food Security
- GMB Brussels Office
- Health and Social Care ALLIANCE
- Human Rights Consortium Scotland
- Just Rights Scotland
- Justice Scotland

-
- Law Society of Scotland
 - Nourish Scotland
 - Office of Scotland's Commissioner for Children & Young People
 - Poverty Alliance
 - Poverty and Inequality Commission
 - Royal Society for the Protection of Birds
 - Scottish Council for Voluntary Organisations
 - Scottish Council on Deafness
 - Scottish Environment Link
 - Scottish Human Rights Commission
 - Scottish Independent Advocacy Alliance
 - Scottish Refugee Council
 - Scottish Trades Union Congress
 - Scottish Wildlife Trust
 - Scottish Women's Aid
 - Scottish Youth Parliament
 - See Me
 - Shelter Scotland
 - Social Work Scotland
 - Together Scotland – Scottish Alliance for Children's Rights
 - Unison
 - Unite
 - University of Edinburgh
 - Victim Support Scotland

Roundtable Events:

- Access to Justice Roundtable event
- Judicial Roundtable event
- Constitutional Roundtable event
- Environmental Roundtable event

The Advisory Group have also held meetings with:

- Cabinet Secretary for Culture, Tourism and External Affairs
- Cabinet Secretary for Environment, Climate Change and Land Reform
- Cabinet Secretary for Government Business and Constitutional Relations
- Cabinet Secretary for Health and Sport
- Cabinet Secretary for Justice
- Cabinet Secretary for Social Security and Older People
- Chief Exec Scottish Council for Development & Industry
- Children and Young People's Commissioner Scotland
- Convention of Scottish Local Authorities (COSLA)
- Deputy First Minister of Scotland and Cabinet Secretary for Education and Skills
- Director of Strategy, NHS Health Scotland
- Equalities and Human Rights Committee (Scottish Parliament)
- Equality and Human Rights Commission
- First Minister of Scotland
- Human Rights Consortium Scotland
- Human Rights Officer, Office of the UN High Commissioner for Human Rights responsible for economic, social and cultural rights
- Law Society of Scotland
- Lord Advocate
- Lord President of the Court of Session
- Lord Wallace of Tankerness
- Minister for Older people and Equalities
- Office of the Parliamentary Counsel, Scottish Parliament
- Permanent Secretary to the Scottish Government

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- Poverty and Inequality Commission (Chair)
 - Royal Society Edinburgh
 - Scottish Community Development Centre & Community Health Exchange
 - Scottish Conservative and Unionist Party
 - Scottish Council for Voluntary Organisations
 - Scottish Government Executive Team
 - Scottish Government Human Rights team
 - Scottish Government Legal Directorate
 - Scottish Government UNCRC team
 - Scottish Green Party
 - Scottish Labour Party
 - Scottish Liberal Democrats
 - Scottish Public Service Ombudsman
 - Scottish Youth Parliament
 - Society of Local Authority Chief Executives and Senior Managers in Scotland (SOLACE)
 - Society of Local Authority Lawyers & Administrators in Scotland (SOLAR)
 - Together – Scottish Alliance for Children's Rights

Members of The Advisory Group
have attended the following:

- Brexit, Human Rights and the Environment – Strathclyde University workshop.
- Civil Society Steering Group
- Engender – How can women's rights be better realised in Scotland?
- Evidence to the Equalities and Human Rights Committee (Scottish Parliament) (Various dates). Provided by Professor Alan Miller, Dr Katie Boyle and Dr Tobias Lock.
- Scotland's Equality Law and Housing Conference
- Scottish Human Rights Commission – Being Human Conference
- University of Strathclyde, Human Rights Innovation in Scotland – Human Rights 20th Anniversary

For more details on the engagement we carried out please see: <http://humanrightsleadership.scot/>

Annex E

Glossary of Terms

We are grateful to the Scottish Human Rights Commission for providing the basis for the glossary of terms.

Accountability

Human rights laws create legal duties on governments and public bodies. If governments and public bodies fail to protect human rights, there should be effective and fair ways for people to challenge this, for example through the courts.

Act

Creates a new law or changes an existing law.

Best practice

A working method or set of working methods that is officially accepted as being the best to use in a particular scenario.

Bill

Is a formal proposal for a new law, or a change in the law, that is put forward by the Government for consideration by Parliament.

Brexit

The withdrawal of the United Kingdom from the European Union.

CEDAW

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is an international human rights treaty adopted in 1979 by the United Nations General Assembly.

CERD

The Convention on the Elimination of Racial Discrimination (CERD) is an international human rights treaty adopted in 1965 by the United Nations General Assembly.

Civil and political rights

Rights which protect our freedoms, such as right to life, right to liberty, freedom of expression, freedom of belief, freedom of association.

Civil Society

Is the “third sector” of society, along with government and business. It comprises civil society organisations and non-governmental organisations.

Comparative law

This is a field of law which looks to compare experiences in different countries or jurisdictions, for various purposes, such as undertaking legal reform.

CRPD

The Convention on the Rights of Persons with Disabilities (CRPD) is an international human rights treaty adopted in 2006 by the United Nations General Assembly.

Declaration of incompatibility

A declaration by a court that a law or part of a law is incompatible with with certain rights, for example the rights contained with the European Convention on Human Rights. The declaration of incompatibility does not in and of itself effect the validity of the law.

Devolved and reserved powers

Devolution is a system of government which allows decisions to be made at a more local level. In the UK there are several examples of devolved government including the Scottish Parliament. The Scottish Parliament has power over some aspects of life in Scotland, but not others. The powers it has are called devolved powers, the powers it doesn't have are called reserved powers.

Due regard

Obliges the duty-bearers to 'have due regard to' a list of considerations, for example human rights, when making decisions or carrying out their functions. They must give the list of considerations the weight which is proportionate in the circumstances.

Duty-bearers

Are those who have a particular obligation or responsibility to respect, promote and fulfil human rights and to abstain from human rights violations, including, Governments, public bodies and other actors.

ECHR

The European Convention on Human Rights (ECHR) is a Council of Europe (not EU) convention that protects civil and political rights of people in countries that belong to the Council of Europe, it came into force in 1953.

Economic, social and cultural rights

Rights which we need to live in dignity, for example rights to health, housing, food, social security, work rights and right to protection against poverty.

EHRC

The Equality and Human Rights Commission (EHRC) are an independent public body which operates across the UK. In relation to human rights in Scotland, the EHRC's remit covers human rights issues arising in reserved areas.

Equalities and Human Rights Committee

Considers and report on matters relating to equalities and human rights and upon the observance of these within the Scottish Parliament.

ESC/ESCR

This is shorthand for Economic, Social and Cultural Rights.

European Union

Is a group of 28 countries that operates as a cohesive economic and political block.

General Comments

These are comments developed by the committees in charge of monitoring the different UN human rights treaties. They tell us how we should understand and interpret human rights.

Human rights

Are the basic rights and freedoms that belong to every person in the world. They can never be taken away, although they can sometimes be restricted.

ICCPR

The International Covenant on Civil and Political Rights (ICCPR) is an international human rights treaty adopted in 1966 by the United Nations General Assembly.

ICESCR

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is an international human rights treaty adopted in 1966 by the United Nations General Assembly.

Incorporation

The idea of including UN treaty rights within our domestic law in Scotland. Although after ratifying a treaty a state has consented to be bound by the treaty, unless the rights are directly incorporated into our law they can be difficult to uphold under our law.

Independent advocacy

Is a way to help people have as much control as possible over their own lives, it is standing alongside people who are marginalised and speaking on behalf of people who are unable to do so for themselves.

Indivisibility

The idea that all human rights are equally important. Economic, social and cultural rights are as important to human dignity as civil and political rights.

Interpretative obligation

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention or other rights.

Judiciary

The judicial authorities of a country; judges collectively.

Legislation

A law or set of laws suggested by a government and made official by a parliament.

Maximum of available resources

The idea that a country spends as much of its budget as it can on making economic, social and cultural rights real.

Non-regression, non-retrogression

The idea that things should get better, not worse; governments should not take decisions which they know will create setbacks in making rights real.

NPF

The National Performance Framework (NPF) is a Scottish Government framework that provides broad measures of national wellbeing covering a range of economic, health, social and environmental indicators and targets.

Progressive realisation

The idea that some rights can be made real over time rather than immediately; the United Nations recognises that in some cases it is not possible for governments to ensure that everyone gets their economic, social and cultural rights straight away. However, governments still have to do all they can.

Ratify/Ratification

An act by which a State signifies an agreement to be legally bound by the terms of a particular treaty. To ratify a treaty, the State first signs it and then fulfils its own national legislative requirements.

Regression

A return to a previous and less advanced or worse state.

Regulatory body

Exercise a regulatory function, including; imposing requirements, restrictions and conditions, setting standards in relation to any activity, and securing compliance, or enforcement. Regulatory bodies are usually established and given powers by an Act.

Reparation

Is a of remedy for human rights violations that is required under international law and includes the following:

- restitution – should, whenever possible, restore the victim to the original situation before their rights were violated;
- compensation – should provide any economic damages;
- satisfaction – can include, finding out the truth, an apology, proper investigation and commemorations and tributes;
- rehabilitation – should include medical and psychological care as well as legal and social services; and
- guarantees non-repetition – steps should be taken so the violation cannot occur again.

Respect, Protect, Fulfil

This is a way of describing the different types of duties which governments have towards people's human rights:

- Respect means that governments must not act in a way that violates people's human rights.
- Protect means that governments must protect people's rights from being violated by the actions of others, for example, big business.
- Fulfil means that governments must take positive steps to ensure that people's rights are real.

Rights-holders

Are individuals and they can ask that their rights are respected. Duty-bearers are responsible for upholding rights, they can be held accountable for not respecting the rights of individuals.

SHRC

The Scottish Human Rights Commission is an independent public body which promotes and protects human rights for everyone in Scotland.

SNAP

Scotland's National Action Plan for Human Rights.

Strike down

A power to declare a law, or proposed law illegal and unenforceable.

Supreme Court

The Supreme Court is the final court of appeal in the UK for civil cases. It hears cases of the greatest public or constitutional importance affecting the whole population.

Sustainability

The idea that things we plan and put in place now will last into the future.

Treaty

A treaty is an international agreement concluded between States in written form and governed by international law.

Treaty body

A committee of independent experts appointed to monitor the implementation by State parties of the core international human rights treaties.

Treaty body decisions

Decisions made by a treaty body relating to individual complaints.

UDHR

The Universal Declaration of Human Rights (UDHR) is a United Nations document drafted by representatives with different legal and cultural backgrounds from countries in all regions of the world, as a common standard of achievements for all peoples and all nations. The UDHR was adopted by the General Assembly of the United Nations in 1948.

UNCRC

The United Nations Convention on the Rights of the Child (UNCRC) is an international human rights treaty adopted in 1989 by the United Nations General Assembly.

United Nations

IS an international organisation founded in 1945. It is currently made up of 193 Member States. The mission and work of the United Nations are guided by the purposes and principles contained in its founding Charter.

Endnotes

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- 57 <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11089&i=101194>
- 58 *ibid*
- 59 *A Nation with Ambition*, Sept 2017, <http://www.gov.scot/Publications/2017/09/8468>: "The actions we will take over the next year will include ... a comprehensive audit on the most effective and practical way to further embed the principles of the UN Convention on the Rights of the Child into policy and legislation, including the option of full incorporation into domestic law"

