

INCORPORATING CEDAW INTO SCOTS LAW

Introduction

Scotland is currently developing a new and ambitious approach to human rights protection. Following a report by the First Minister's Advisory Group on Human Rights Leadership the Scottish Government has established a National Taskforce on Human Rights Leadership to develop recommendations for a new Scottish human rights statutory framework which is due to report in spring 2021.

The Advisory Group's report in 2018 recommended that Scottish Parliament pass an Act to incorporate UN and other key international human rights protections into Scots Law in order to improve people's daily lives. It recommended the Act include not only rights already articulated in the Human Rights Act but broader protection of "civil, political, economic, social and cultural rights and [recognise] environmental rights" in addition to "specific rights for women, children, persons with disability, older persons, LGBTI and on race."¹ A Bill to incorporate the UN Convention on the Rights of the Child (UNCRC) is currently being considered by the Scottish Parliament.²

The women's sector in Scotland has long advocated for the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to be given direct effect in Scots Law. We are clear that increased accountability and recourse to challenge when rights have been denied is a fundamental element of achieving women's equality.

In this briefing we outline the reasons that CEDAW incorporation is not only necessary and achievable within the process Scotland has embarked on and respond to some suggestions that women's rights should wait for a subsequent package of rights to be considered.

¹ First Minister's Advisory Group on Human Rights Leadership (2018) Recommendations for a new human rights framework to improve people's lives: Report to the First Minister. Available at <<https://humanrightsladership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>>

² United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. Available at <<https://beta.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill>>

What is CEDAW?

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a UN Convention which was signed by the United Kingdom in 1981, and ratified in 1986. The treaty has been ratified by 187 of the 194 member nations of the United Nations.

Commonly referred to as the ‘women’s bill of rights’, CEDAW reflects the need for gender equality to underpin human rights so that they can be enjoyed, in full and without discrimination, by all women and girls. It provides an international, common legal framework which ‘legitimises women’s claims for rights and equality’ through its 30 articles³ spanning rights in public and political life, marriage and family life, education, employment and health. Women and girls should be able to enjoy all these rights without discrimination, defined in Article 1 as: “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁴

Efficacy and implementation of the convention at domestic level is monitored by UN’s CEDAW Committee, a body of 23 independent experts who are responsible for holding states to account on their efforts towards protecting and realising women’s human rights. As Professor Nicole Busby, Professor in Human Rights, Equality and Justice at the University of Glasgow, writes, the convention:

“places a positive obligation on states to bring about changes in cultural norms and practices which are ‘based on the idea of the inferiority or the superiority of either of the sexes’. This is a positive duty which requires states to take proactive steps to bring about gender equality.”⁵

Fulfilling this obligation effectively requires that states amend domestic law and take

³ Anuradha Rao and the International Women’s Rights Action Watch (2008) ‘Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women: Potential and Actuality’, p. 13.

⁴ Article 1, CEDAW

⁵ Nicole Busby (2018) CEDAW: How can women’s rights be better realised in Scotland? Engender. Available at <<https://www.engender.org.uk/content/publications/CEDAW-incorporation-paper.pdf>>

any other steps necessary to ensure compliance within its own legal system.⁶ Article 5 of CEDAW explicitly requires that states “pursue by all appropriate means and without delay a policy of eliminating discrimination against women” including embodying the principle of the equality of men and women in their national constitutions, adopting appropriate legislative and other measures and establishing legal protection of the rights of women on an equal basis with men. Despite the UK’s ratification of the Convention, incorporation has not yet been forthcoming within any of its jurisdictions, a fact that the CEDAW Committee highlighted in its 2019 Concluding Observations at the end of its programme of examination of the UK:

“The Committee calls upon the State party to seize this opportunity to reinforce its human rights framework across its territory, including by incorporating the Convention into its national law, and to utilize the Convention as a strategic mechanism for empowering women... At this critical juncture, the Committee stresses that placing women’s rights at the heart of its deliberations and ensuring that women’s rights are strengthened will result in creating a stronger and more resilient society”⁷

While CEDAW already serves an important symbolic function for women and women’s advocacy in Scotland it does not place any requirements on Scottish public bodies to enhance women’s rights, and offers women limited options to address the widespread and systemic inequality that impedes the realisation of their human rights.

Women’s sector and human rights

The women’s sector in Scotland has collectively expressed consistent support and evidence of the need for the incorporation of international human rights standards over a number of years in our advocacy in Scotland and internationally. We have engaged with the United Nations shadow reporting processes for several treaties, particularly CEDAW and the International Covenant on Economic, Social and Cultural Rights (ICESCR), over a number of years, playing active roles in the reporting

⁶ CEDAW Committee general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention.

⁷Committee on the Elimination of Discrimination against Women Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland CEDAW/C/GBR/CO/8. Available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CEDAW/C/GBR/CO/8&Lang=En> paragraph 9

mechanisms to influence the content of concluding observations and recommendations for state action and raise awareness of areas where action is needed.

We have also consistently called on the Scottish Government to incorporate CEDAW and advocated for realisation of the rights it protects through mechanisms such as the Scottish National Action Plan for Human Rights (SNAP).

In the 2018/2019 CEDAW reporting cycle for the UK, Engender undertook a specific stream of work coordinating Scottish NGO engagement with the Committee.⁸ This involved convening a steering group to support the drafting of a shadow report and undertaking a call for evidence from women's organisations and individuals as well as public events to expand public awareness of CEDAW and support the reporting process. We also worked with sister organisations in England, Wales and Northern Ireland to produce a four-nations report on women's equality in the UK.⁹

Why CEDAW must be incorporated

Women in Scotland continue to face significant barriers to equality and the realisation of fundamental human rights. The recently published Gender Equality Index sets a baseline score for women's equality at 73 out of 100 ('full equality') but this also masks deeper inequality experienced by difference groups of women. Disabled women, women from black and minority ethnic (BME) communities, LGBT women, younger and older women, migrant, refugee, asylum seeking and stateless women, low-income women, women with minority faiths, unpaid carers, care experienced girls and women, and women in rural areas all experience gender inequality in particular ways that is not fundamentally taken into consideration by policymakers in Scotland and the UK.

Engender's Scotland Shadow Report submitted to CEDAW in 2018 outlined the impact of the decade of austerity in diminishing women's rights. In 2021 this is clearly exacerbated further by the impacts of the Covid-19 crisis; UN Women estimate that global public health measures including school closures and sector-

⁸ Engender (2018) CEDAW: Eighth periodic report of the government of the United Kingdom on measures taken to give effect to CEDAW. Available at <<https://www.engender.org.uk/content/publications/Engender-CEDAW-report.pdf>>

⁹ Engender et al (2018) CEDAW: Shadow Report from The Four Nations of the United Kingdom. Available at <<https://www.engender.org.uk/content/publications/Eighth-periodic-report-of-the-government-of-the-United-Kingdom-on-measures-taken-to-give-effect-to-CEDAW---four-nations-report.pdf>>

wide service restrictions risk setting women’s equality back 25 years.¹⁰ Covid-19 has further reinforced the limitation of existing duties on Scottish public sectors actors to meaningful address women’s inequality in their actions, such as the failure of impact assessment to meaningfully address concerns.

The rights CEDAW protects have therefore never been more at risk. UK anti-discrimination and equality-enabling regulation – including women’s rights in areas such as equal pay, part-time work and maternity rights - stems from EU law, which is underpinned by the principles of equality and non-discrimination. With Brexit, there is a critical omission in basic protection for women’s rights that Scotland cannot solve alone, but incorporation of CEDAW would mitigate some of the impact and demonstrate strong commitment to equality in devolved areas.

Scotland and incorporation: the process so far

Amid concerns about human rights protection following Brexit and the UK Government’s approach to the Human Rights Act, the Scottish Government has set out its own ambitions to situate Scotland as a world-leader in human rights protection and realisation. The recent report of the Social Renewal Advisory Board provides a recent call for action for incorporation of key human rights instruments into Scots Law, in line with forthcoming recommendations from the National Taskforce on Leadership in Human Rights.¹¹

The report that preceded the establishment of the National Taskforce clearly recommended that CEDAW – and other specific group rights – fall within the proposed Act of Parliament: “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.”¹² The report therefore clearly recognises that CEDAW plays a vital role in ensuring that the full spectrum of human rights can be enjoyed without discrimination by women and girls.

¹⁰ See BBC (2020) ‘Coronavirus and gender: More chores for women set back gains in equality’. Available at <<https://www.bbc.co.uk/news/world-55016842>> citing data from UN Women (2020). Available at <<https://data.unwomen.org/publications/whose-time-care-unpaid-care-and-domestic-work-during-covid-19>>

¹¹ Social Renewal Advisory Board (2021) If Not Now When? Scottish Government. Available at <<https://www.gov.scot/publications/not-now-social-renewal-advisory-board-report-january-2021/>>

¹² First Minister’s Advisory Group on Human Rights Leadership (2018) Recommendations for a new human rights framework to improve people’s lives Report to the First Minister. Available at <<https://humanrightleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>>

The Scottish Government has also made a number of public commitments specifically on CEDAW incorporation. For example, in the response to the recommendation from the National Advisory Council on Women and Girls it said that “The Taskforce will be asked to consider the incorporation of CEDAW as part of this broader incorporation of rights agenda.”¹³ The 2020-2021 Programme for Government restates that the work of the National Taskforce will “include how best to take forward our commitment to incorporate the UN Convention on the Elimination of All Forms of Discrimination against Women into domestic legislation.”¹⁴

Effective CEDAW incorporation as part of a Scottish Human Rights Framework

The women’s sector has found opportunities to engage with the process of developing the National Taskforce’s Recommendations limited. A Women’s Rights Reference Group was established relatively late into the process and the initial discussions with civil society did not focus on women’s equality concerns in any depth.

Throughout this process, we have made clear our opposition to any de-prioritisation of CEDAW in favour of a less expansive Bill solely focussed on social and economic and environmental rights, and do not believe that this would live up to the ambitions outlined in the above statements. It would be deeply troubling for Scotland to expend its current attention to the issue of human rights on an Act that fails to consider the specific rights of women, 52% of the population, let alone those groups who also experience the greatest degrees of discrimination and marginalisation. It would also be radically inconsistent with other progressive and ambitious measures being pursued at national policy level around gender mainstreaming and puts future policy coherence at risk.

¹³ Scottish Government (2019) Response to the National Advisory Council on Women and Girls Year One Report. Available at <<https://www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2019/06/scottish-governments-response-national-advisory-council-women-girls/documents/scottish-governments-response-first-ministers-national-advisory-council-women-girls/scottish-governments-response-first-ministers-national-advisory-council-women-girls/govscot%3Adocument/scottish-governments-response-first-ministers-national-advisory-council-women-girls.pdf>>

¹⁴ Scottish government (2020) Programme For Government: Protecting Scotland, Renewing Scotland. Available at <<https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2020/09/protecting-scotland-renewing-scotland-governments-programme-scotland-2020-2021/documents/protecting-scotland-renewing-scotland/protecting-scotland-renewing-scotland/govscot%3Adocument/protecting-scotland-renewing-scotland.pdf>>

Incorporation of CEDAW may further bolster arguments for the justiciability of social and economic rights and, because of the mutually reinforcing and interdependent nature of human rights, could potentially mitigate some of the anticipated difficulties of judicial interpretation. In particular CEDAW could support the efficacy of UNCRC15 because of the close connection between women’s rights and children’s rights (the UNCRC and CEDAW have sometimes been referred to as ‘sister conventions’).¹⁶

Scotland’s new Human Rights Law must not only be ambitious; it must reach those who have most to gain from greater justiciability and accountability. Failure to address the specific needs of women would be in our view a mistake and risk re-entrenching inequality between women and men in relation to social and economic rights.

Significant work has already been done to set out the rationale and possibilities for incorporation of CEDAW both within and outwith the work of the Taskforce. Research undertaken on behalf of Engender examined the benefits and challenges of CEDAW incorporation under the current devolution settlement and suggests that CEDAW could be incorporated by an Act of the Scottish Parliament which adopted a tripartite approach similar to the Human Rights Act - requiring public authorities not to act incompatibly, courts and public authorities to take account of the Convention’s provision, and the courts given powers to address incompatibility.

This would give CEDAW visibility and greater power as an advocacy and litigation tool, however effective incorporation would also need to be supported by other legal and soft law measures, such as the Scottish Specific Duties for the Public Sector Equality Duty.¹⁷ The ongoing discussion and duration of engagement with CEDAW to-date means that there is no justification for further delay.

¹⁵ Engender (2020) Submission of evidence to the Equality and Human Rights Committee call for evidence on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. Available at <<https://www.engender.org.uk/content/publications/Engender-submission-of-evidence-EHRIC-UNCRC.pdf>>

¹⁶ UNICEF (2018) CRC and CEDAW: Making The Connection Between Women’s And Children’s Rights Facilitator’s Guide. Available at: https://www.unicef.org/gender/files/CRC_and_CEDAW_Facilitators_Guidesmall.pdf.

¹⁷ Nicole Busby (2018) CEDAW: How can women’s rights be better realised in Scotland? Engender. Available at <<https://www.engender.org.uk/content/publications/CEDAW-incorporation-paper.pdf>>

In particular, we foresee three immediate cross-cutting benefits of incorporation of CEDAW:

- The significantly improved visibility of CEDAW and the rights it protects;
- Enhanced accountability for women’s rights including the possibility that any woman can access a remedy for a breach of her rights in her local court;
- Rights could be better delivered without litigation because of requirements for public sector bodies to better embed substantive equality and the detailed jurisprudence spanning the full treaty articles into policy and practice;
- As the overarching aim of incorporation would be to avoid litigation, effective incorporation would require the legislature’s enhanced vigilance regarding compliance.

Our Calls

- That the Act drafted to give effect to the Scottish Government’s ambitions on human rights leadership must include all rights frameworks that have been committed to.
- That CEDAW incorporation is suitably placed within the proposed Act to enable maximum enjoyment of the rights the Convention guarantees.

This briefing is supported by:

- Engender
- Zero Tolerance
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- Close the Gap
- Scottish Women’s Aid

FOR FURTHER INFORMATION

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