



CEDAW

How can women's rights be better realised in Scotland?

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. UN Conventions are signed by member states (known as States Parties) only, and therefore Scotland is not a signatory to CEDAW, although many of the women's rights protected by CEDAW fall under legislation which is devolved to Scotland.

Engender commissioned Professor Nicole Busby and Professor Muriel Robison to compile this report to examine the following questions:



Could CEDAW be incorporated into Scots Law? What would the impact of this be?



What other legal mechanisms or duties could Scotland create to enable better realization of CEDAW?

Section 1 provides an introduction to and overview of CEDAW, section 2 considers the available compliance mechanisms, section 3 provides a brief consideration of CEDAW's application in UK Law. The remainder of the report considers the questions highlighted by Engender in turn (sections 4-10) with a summary of conclusions provided in section 11.

CEDAW: Introduction and overview

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international human rights treaty which requires states to protect and promote the rights of women and girls. CEDAW was adopted by the UN General Assembly in 1979 and has been ratified by 187 of the 194 member nations of the United Nations, including the UK.¹

1.2. CEDAW's effectiveness relies on implementation at domestic level and the state's obligation to implement the Convention forms one of CEDAW's key principles with states entering into this obligation through the legal process of ratification.² Under international law, once ratified a treaty creates duties and obligations on the state to amend domestic law and to take any other steps necessary to ensure compliance with its principles. These obligations are extensive and indivisible and are bolstered by recognition of the rule of law at the national and international levels.

1.3. In order for the state to discharge its obligations to respect, to protect and to fulfil human rights effectively, the nature and extent of appropriate actions should be broadly defined to include, for example, auditing, monitoring and human rights education encompassing training and continuing professional development for relevant staff.

1.4. The protections contained in CEDAW are wide-ranging and include rights in public and political life, rights in marriage and family life, and rights to education, employment and health. CEDAW states that women and girls should be able to enjoy all of these rights without discrimination which is defined 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.³

1.5. This is a broad definition which includes anything which has either the purpose or the effect of treating women differently. As well as requiring states not to discriminate themselves, CEDAW also places obligations on states to take measures to prevent others from discriminating against women.

1.6. CEDAW 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’.⁴ This is a positive duty which requires states to take proactive steps to bring about gender equality. Thus, the Convention provides a positive legal framework which ‘legitimises women’s claims for rights and equality’.⁵ It can be used ‘to define norms for constitutional guarantees of women’s human rights, to interpret laws, to mandate proactive, pro-women policies and to dismantle discrimination’.⁶

Positive obligation

Positive obligations are active steps that a State Party has to take to comply with CEDAW. It means the State Party must act to ensure women enjoy the fulfilment of their rights under international law. For example, a positive obligation could include producing a strategy for increasing women’s participation in political life or funding initiatives to eliminate sexism in schools.

On the other hand, negative obligations require States Parties not to interfere in the exercise of women’s rights. It is essentially an obligation by States Parties to abstain from human rights violations.

2. Compliance mechanisms

2.1. Signatory states can be held accountable for compliance with CEDAW in three ways, all of which are administered by the CEDAW Committee.⁷ These consist of: the reporting mechanism; the complaints procedure; the inquiry procedure.⁸

2.2. Under the reporting mechanism all states which are parties to CEDAW must report to the Committee every four years detailing compliance measures and their effectiveness. NGOs also participate in this process by the submission of shadow reports. After considering all the relevant information, the Committee provides 'concluding observations' which contain comments and recommendations for the state.

2.2. Under the complaints procedure CEDAW's Optional Protocol⁹ provides a mechanism for certain participating states (including the UK) by which individuals are able to submit complaints directly to the Committee about violations of their rights. Following consideration of such complaints, the Committee produces its 'decisions/views' in the form of a report which provides conclusions and recommendations.¹⁰

2.3. The concluding observations and decisions/views are not legally binding. They are intended to exert pressure on member states by highlighting certain aspects of public policy and practice which are deemed to be non-compliant with CEDAW. The lack of effectiveness of this 'soft' approach can be illustrated by the fact that, despite the Committee's concerns regarding the criminalisation of abortion in Northern Ireland in its 2013 concluding observations,¹¹ there has been no change to date to the relevant legislation which permits lawful abortions only in very limited circumstances.¹²

2.4. Under the inquiry procedure, Article 8 of the Optional Protocol empowers the Committee to initiate confidential inquiries upon receipt of 'reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention.' The state is invited to cooperate in the inquiry and to submit observations regarding the information concerned. Once the inquiry is concluded, the Committee submits a report containing observations and recommendations to the state concerned which has six months to provide a written response. Article 10

Compliance mechanisms

States Parties are required to comply with CEDAW provisions, and compliance mechanisms are a method used to hold States Parties accountable for meeting the objectives of CEDAW. A compliance mechanism could be, for example, reporting to the UN CEDAW Committee on your progress towards meeting CEDAW.

of the Optional Protocol provides a potential opt out of the inquiry procedure which has not been utilised by the UK.

2.5. In December 2010, the Family Planning Association, the Northern Ireland Women's European Platform and Alliance for Choice made a joint request to the CEDAW committee for an inquiry into access to abortion in Northern Ireland.¹³

2.6. The symbolic value of CEDAW's approach and provisions is undeniable – the existence of a proactive and positive legal framework of rights for women which, rather than adopting a neutral stance, requires states to take positive actions to promote and protect women's rights legitimises claims for rights and promotes women's agency – but it does not automatically convey rights on women. In order to realise its potential as an instrument of real change, CEDAW requires to be formally adopted into domestic law so that its symbolic value can be transformed into substantive provision.

2.7. Under the principle of state obligation, a state submits itself to scrutiny on the basis of the standards set forth in the Convention by ratification. However, even if the important principle of state obligation is honoured, there are no direct powers of enforcement which weakens the actual effect of CEDAW unless further action is taken to operationalise it within the domestic system. Although CEDAW can and should be used as an interpretive tool by courts, there is little **jurisprudence** at the international level citing CEDAW.¹⁴ This is because awareness of CEDAW and its provisions is low among potential stakeholders including government, the judiciary, NGOs and civil society in general. Writing in 2010, Sandra Fredman noted,

Jurisprudence

Jurisprudence refers to the study of law and the principles on which a legal system is based.

*'The most salient aspect of the Convention in the UK is its lack of visibility. The provisions of the Convention and the views of the Committee are virtually unknown among the general public and possibly too across branches of Government. The result is that they are not utilised by women or operationalised by Government.'*¹⁵

2.8. This is a hurdle to CEDAW's effective implementation as enforcement of the Convention is highly dependent on political will which in turn depends on public awareness, advocacy and invocation. Increasing CEDAW's visibility and giving effect to its provisions in domestic law are important aims. One potential course of action in this respect is incorporation of the Convention into domestic law.

3. CEDAW's application in UK law

3.1. Under the UK's **dualist system** of international law, ratification of an international treaty such as CEDAW places an obligation on the UK to other states to comply with it. However, there is no direct obligation owed to individuals within the UK unless the treaty provisions are incorporated into domestic law through specific enabling legislation. Successive UK governments have resisted calls to incorporate CEDAW, most pertinently from the CEDAW Committee which has recommended that the UK fully incorporate CEDAW in 1999¹⁶, 2008¹⁷ and 2013.¹⁸

Dualist system

In a dualist system, international law is not directly applicable unless that law has been translated – or implemented – into national (domestic) law.

3.2. The Equality Act 2010 provided an opportunity for CEDAW's incorporation which was rejected by the then Labour government on the grounds that '...such an approach would create a separate, parallel regime within the Equality Bill that incorporates all the elements of CEDAW that are, to the extent that the UK is obliged to comply with them, already covered by or present in other areas of UK law.'¹⁹

3.3. Although unincorporated treaties do not have *direct* effect in domestic law, they do have *indirect* effect, for example, by way of the common law and the general rules of interpretation. Furthermore, section 2(1) of the Human Rights Act requires national courts to take account of the judgments of the European Court of Human Rights (ECtHR) which makes frequent references to international treaties.

3.4. However, this requirement for CEDAW to be taken into account is weakened due to its reliance on the Convention's invocation before the ECtHR and it does not give rise to any right of enforcement before a court or tribunal. Thus, CEDAW's status as an unincorporated treaty under the dualist system poses a specific legal problem which is that the resulting lack of **justiciability** means that there is no effective remedy for breaches of its provisions.²⁰

Justiciability

Justiciability refers to the types of matters that courts can adjudicate. There are certain legal issues that fall outside the purview of courts, which are referred to as "nonjusticiable". One example of a "nonjusticiable" case: women in the UK cannot currently take a case to court on the grounds that it violates their rights under CEDAW.

3.5. This apparent lack of compliance has attracted attention in relation to other international treaties. Referring to the lack of incorporation of the International Covenant of Economic, Social and Cultural Rights, the ICESCR Committee has stated that,

...the need to ensure justiciability is relevant when determining the best way to give domestic legal effect to the Covenant rights...While the Covenant does not formally oblige states to incorporate its provisions in domestic law, such an approach is desirable...Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts.²¹

4. CEDAW's incorporation into Scots law

4.1. Incorporation would give CEDAW direct effect in domestic law. Such an act would certainly be supported by the Scottish Ministerial Code,²² which cites Scotland's international obligations in its reference (in para 1.2) to 'the overarching duty on Ministers to comply with the law, including international law and treaty obligations.' Whilst the code does not have the force of law, it nonetheless expresses important principles which Scottish Ministers are expected to observe.

4.2. Current political circumstances may provide an opportunity for the Scottish Parliament to act to incorporate CEDAW into Scots law.²³ The combination of possible constitutional change under the UK's devolution settlement, the current UK Conservative Government's intransigence regarding human rights and equality more generally and the opportunities offered by Brexit provide potential for traction in this respect, making this a possibility worthy of further consideration.

4.3. The EU has been the primary instigator of progress in gender equality law in the UK in recent decades. The 'leave' result in the UK's referendum on EU membership in June 2016 places equality law in the UK under serious threat and poses challenges for the preservation and progression of a robust framework capable of guaranteeing human rights after Brexit.²⁴

4.4. Despite the political assurances given that all current protections arising from EU law will be preserved at the date of the UK's withdrawal from the EU,²⁵ clause 5(4) of the European Withdrawal Bill provides that 'The Charter of Fundamental Rights is not part of domestic law on or after exit day'. This is of concern because the Charter contains rights which go beyond those of the ECHR, and includes important protections in evolving areas concerning social and workers' rights.²⁶

4.5. As well as the potential for a diminution in existing rights, the loss of the Charter will contribute to the uncertainty regarding the future protection of equality and human rights standards in the UK and their interpretation by the courts, particularly given recent discussions about a British Bill of Rights and the removal of European jurisprudential influence on British legal institutions.

4.6. The maintenance of current levels of protection and further progress will depend on specific action and CEDAW's incorporation has much to offer in this respect. The Scottish Parliament's ability to act so as to preserve and protect existing rights in Scotland post Brexit and to adopt the proactive and positive equality framework envisaged by CEDAW is discussed further below.

4.7. The Scottish National Action Plan for Human Rights 2013-2017 (SNAP),²⁷ described as 'a roadmap for the realisation of all internationally recognised human rights', was produced through a partnership between the Scottish Government, the Scottish Human Rights Commission and other organisations and individuals. This initiative could provide impetus for CEDAW's incorporation into Scots law.

4.8. Although SNAP does not currently give specific attention to CEDAW, the possibility of incorporation of international instruments is referred to in a number of key places. For example, under Outcome 1 (Better Culture), priority 3 (Accountability) refers to the 'benefits of further incorporation of human rights law' as an issue that the innovation forums established under SNAP could explore. Under Outcome 3 (Better World) priority 7 (Implement international human rights obligations), priority 8 (Respect, protect and fulfil human rights in our international action) and priority 9 (Engage constructively with the international human rights system) could all be used to argue for CEDAW's incorporation. Indeed the accompanying text states, 'There is increasing support for the UK to accept additional human rights commitments internationally, and to explore incorporation of other treaties at domestically'²⁸ and specifies that 'SNAP will ensure increased consideration of the benefits of further incorporation of human rights treaties into our domestic laws'.²⁹

4.9. As well as its specific provision, the open nature of SNAP and its imminent renewal may provide an opportunity to ensure that greater prominence is given to the consideration of CEDAW's incorporation in any future iteration. The current framework provides that 'SNAP does not belong to one organisation'³⁰ and, as the current cycle nears its end, 'An independent evaluation of the process and outcomes of SNAP will be commissioned to inform the development of a second National Action Plan in 2017,'³¹ thus providing an opportunity to influence its specific provision and future direction. In his lecture for International Human Rights Day in 2014, James Wolffe QC explicitly highlighted SNAP's potential as an engine of change in the realisation of Scotland's international human rights obligations (see 10.3. below).³²

4.10. Notwithstanding the potential that exists under the Scottish Government's human rights framework, the process of incorporation would be wholly reliant on political will and this presents a number of potential challenges. The most oft cited ground for the denial of incorporation of international human rights treaties into domestic law is the distinction between civil and political rights and social and economic rights, with the latter seen as non-justiciable due to their reliance on resource allocation which is the domain of parliamentary prerogative rather than judicial decision-making.³³

4.11. The rights contained in CEDAW are wide-ranging and many of those capable of constituting effective change in the context of Scots law's current provision would certainly be categorised as social and economic.³⁴ However, judges themselves do not necessarily agree with the view that such rights are non-justiciable and, in fact, courts already make decisions concerning resources in many contexts.³⁵

4.12. A counter argument to the non-justiciability of social and economic rights is that the principle of the indivisibility of the rights provided by international law confers equal status on all applicable rights regardless of whether they are categorised as civil and political or social and economic.³⁶

4.13. Speaking in 2014, James Wolffe argued that whether such rights are justiciable is not a conceptual point but rather a constitutional one which is dependent on the distribution of power within a society. Using the South African Constitutional Court as an example, he posits that '...a court, alive to the respective roles of legislature and executive on the one hand, and court on the other, can responsibly adjudicate on social and economic rights'.³⁷

4.14. The supporting arguments for the justiciability of social and economic rights are strong and bolster calls for CEDAW's incorporation which, if achieved through specific and carefully drafted legislation, could actually overcome some of the anticipated difficulties of judicial interpretation. However, what is difficult to determine is what substantive effect incorporation would have on women's rights in Scotland.

5. CEDAW's incorporation: international examples

5.1. There are several international examples of CEDAW's incorporation into domestic law, although the means by which this has been accomplished vary and the overall impact of incorporation on women's rights appears to be mixed.

5.2. South Africa incorporated CEDAW's principles when its new constitution was established in 1996. However, as documents relating to the CEDAW Committee's subsequent monitoring of South African law post-incorporation illustrate, this step

towards CEDAW's constitutionalisation should be viewed as the beginning of a lengthy process, rather than the end.³⁸

5.3. Colombia, Uganda and Brazil incorporated CEDAW when redrafting their constitutions.³⁹ In the case of Colombia, there is clear evidence that CEDAW's incorporation in 1991 has had a positive impact on reform of abortion law as, in a landmark ruling in 2006, the Constitutional Court was careful to ensure that it interpreted the Constitution in line with its obligations under the Convention and referred to its provisions directly in its judgment.⁴⁰

5.4. Few countries have enacted specific enabling legislation, although precedents in incorporation of CEDAW have been set through test cases.⁴¹ The international examples cited above provide a stark contrast with Scotland as their incorporation of CEDAW has been achieved at the constitutional level either during a process of reinvention (South Africa) or in the absence of a system of comprehensive domestic legislation (Colombia). The UK's current devolution settlement rules out the option of CEDAW's constitutionalisation in Scotland where there is arguably already a comprehensive framework of primary and secondary equality legislation in place.

5.5. The incorporation of an international treaty such as CEDAW cannot be viewed as a panacea for all shortcomings within the current legal framework although there are obvious benefits that could flow from such action. In order to provide a balanced view, it is worth briefly considering the benefits and challenges of incorporation.

6. Benefits of incorporation

6.1. The most obvious benefit of incorporation is that CEDAW would be made visible and the rights under it claimed. Referring to the benefits of the incorporation of social and economic rights provided by international treaties, Wolffe has stated,

Courts only act if litigants bring cases before them. Incorporation gives power to people – it enables them to advance their interests through the courts, to an enforceable judgment, and not merely through the political process. It is... about access to justice.⁴²

6.2. CEDAW's incorporation would bring enhanced accountability and individual empowerment as citizens would be able to bring claims invoking their rights to gender equality under the Convention.⁴³ An example of the effectiveness of incorporation is provided by the Human Rights Act's (HRA) incorporation of the ECHR⁴⁴ which has taken place through the combined contributions of the courts, policy development and decision-making by public authorities, and has had a 'profound effect on litigation in the Scottish Courts'⁴⁵ (see below at 8.1).

6.3. As the overarching aim of incorporation would be to avoid litigation, effective incorporation would require the legislature's enhanced vigilance regarding compliance with human rights generally including the budget implications of meeting relevant standards. This would have potentially wide-reaching social and economic benefits.

7. Challenges of incorporation

7.1. Even if specific legislation is enacted, effective incorporation would rely heavily on **judicialisation** and this will not inevitably flow without **test cases**. There is little decided **case law**⁴⁶ citing CEDAW which could be used to ensure consistency in approach and this lack of jurisprudence is a serious hurdle. In achieving the ECHR's incorporation, the courts have had the extensive jurisprudence of the ECtHR at their disposal and this has provided a high degree of legal certainty which would not be replicated in the case of CEDAW.

Judicialisation

The process of integrating CEDAW into the judicial system in Scotland to bring it under the remit of law.

7.2. Enhanced education and awareness-raising of CEDAW's principles would still be required. This would necessitate grass roots activism and mass mobilisation to gain public support which might be difficult to achieve.

Case law and test cases

Case law refers to the precedent set by previous court rulings. Case law is derived from judgments given by higher (appellate) courts when these courts interpret existing laws. Called precedents, these higher court judgments are binding on all courts (within the same country) and are followed as the law in future cases coming before the courts. Over time, these precedents are recognised and enforced by subsequent court decisions.

In case law, a test case is a legal action that has been brought before a court with the purpose of setting a precedent. Test cases are brought forward as a means of getting a clearer definition of laws which either have a disputed meaning or an unclear intent.

7.3. Political will might prove an insurmountable hurdle as, if it were fully realised in domestic law, some of the Convention's provisions would obviate a complete change in approach - from formal to substantive equality – which could prove difficult to achieve without substantial dilution. In this regard, CEDAW's incorporation could be a red herring which detracts from other, more immediately effective, actions.

7.4. Furthermore, CEDAW's approach and provision, which is the result of negotiation

involving many states with diverse legal systems, might not necessarily be transplantable into national law.⁴⁷ In a jurisdiction which already has a comprehensive equality and human rights framework, incorporation might bring confusion and obfuscation by making domestic law more complex – especially given the pre-existing complexities of the devolution settlement and the effects of Brexit. This could detract from rather than enhance legal certainty and legitimate expectation by making rights less accessible.

7.5. In considering whether incorporation of CEDAW is a viable option for Scotland, it would be necessary to identify specific gaps in Scotland's existing equality laws which incorporation could potentially close. Consideration should also be given to the use of test cases as a means of promoting CEDAW's use among the legal community in order to assist in its judicialisation. This would involve the identification of specific test cases in areas capable of achieving substantive equality as well as of effective enforcement mechanisms.

8. Means of CEDAW's incorporation into Scots law

8.1. As full constitutionalisation is not an option under the current devolution settlement, incorporation would require an Act of the Scottish Parliament. This could follow the same model as that used to incorporate the ECHR into UK law by way of the HRA which uses a tripartite approach: (1) an obligation is placed on public authorities not to act incompatibly with the Convention; (2) an interpretive obligation is placed on courts and public authorities to take account of the Convention's provision; (3) the courts are given the necessary powers to make declarations of incompatibility of Acts of Parliament which can be struck down or amended.

8.2. The impact on Scots law of the adoption of this model for CEDAW's incorporation is difficult to gauge: on the one hand there is the possible danger of added complexity and, on the other, there is the potential for individual citizens' direct access to the rights themselves (i.e. the right to claim rights).

9. Alternative Scottish legal mechanisms or duties to enable better realization of CEDAW

9.1. There are several alternative legal mechanisms or duties that could be used to ensure better realisation of CEDAW. The most obvious of these might appear to be to ensure that Scots law adequately reflects CEDAW's provisions and those of complimentary human rights treaties such as the UN Convention on the Rights of the Child (CRC). However, although it would not require wholesale incorporation, this approach is severely limited as, in the main, equality law remains reserved.

9.2. One alternative, possible under the current devolution settlement, would be to amend existing Scottish legislation in such a way as to ensure that CEDAW is taken account of. There is a precedent for this in Scots Law in the form of the relationship between the CRC and the Children and Young People's (Scotland) Act 2014 (CYPSCA). Under s. 1(1) of CYPSCA, Ministers 'must keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements'.

9.3. A similar provision referencing CEDAW might be easier to achieve in political terms than incorporation. However, this provision has been criticised as being weak - the duty is for Ministers to report only on how they have fulfilled their obligation, they need not say what steps they considered and rejected, and why – and as lacking any mechanism for individuals to access an effective remedy.⁴⁸ An arguably stronger provision in relation to the CRC is to be found in the Rights of Children and Young Persons (Wales) Measure 2011, under which Welsh Ministers are required to pay 'due regard' to the substantive rights and obligations within the CRC and its optional protocol. This is a more robust test of judicial review which '..should, in principle, empower the Court to decide whether or not the Ministers have had the appropriate level of regard'.⁴⁹

9.4. In the case of CEDAW, one option that could have far-reaching effects would be for the insertion of a 'due regard' duty in all relevant Scottish legislation. The obvious practical difficulty with this approach would be in identifying relevant legislation.

9.5. Another possibility is to use the Public Sector Equality Duty (PSED) which could be enhanced by inserting specific reference to CEDAW so that its provisions would be specifically incorporated into the duty itself. Echoing the Welsh Assembly's approach to the CRC (and in line with the wording of the PSED), this could require 'due regard' to be paid to CEDAW.

9.6. The effectiveness of the PSED in this respect might be questionable, particularly as it is very difficult to evidence the overall impact of the duty to date. The introduction of an enhanced specific gender duty which referenced CEDAW would focus the obligation and make the Convention more visible. However, the issues of political will and added complexity outlined elsewhere in this paper might make this unlikely and undesirable.

9.7. The socio-economic duty provided by s.1 of the Equality Act 2010 has never been implemented by any nation of the UK. The Scottish Government has recently announced plans to do so and has launched a consultation exercise.⁵⁰ The duty places an obligation on public authorities to have due regard to how to reduce the inequalities of outcome which result from socio-economic disadvantage when

making decisions of a strategic nature. The Scottish socio-economic duty could make specific reference to the social and economic rights provided by CEDAW. This proposal, although limited in nature, might be politically well-timed.

9.8. In identifying how best to take account of CEDAW, it would be necessary to consider how existing Scottish legislation should be amended and/or what form a specific reference to CEDAW in the PSED and/or the proposed socio-economic duty should take.

10. Alternative Scottish legal mechanisms to enable the justiciability of CEDAW

10.1. The most obvious alternative to incorporation or the use of existing legislation and/or legal duties would be constitutionalisation of CEDAW's provisions by way of a Scottish Bill of Rights or similar document. However, the potential for such a document to have meaningful legal status is limited by the current devolution settlement. An alternative approach could be based on that which applies in respect of the EHRC whereby, under the Scotland Act 1998, a provision of an Act of the Scottish Parliament is not law insofar as it is incompatible with the EHRC.

10.2. As has already been suggested in this paper, better awareness of CEDAW as an interpretive instrument could result in its judicialisation in Scotland. This would require enhanced legal education and improved attempts at awareness-raising aimed at encouraging its use before the courts as an interpretive source for existing legislation or, as Fredman has suggested, the ECHR.⁵¹ However, increasing CEDAW's visibility has already been identified as a hurdle to its realisation and, furthermore, such an approach relies on retroactive and piecemeal 'case by case' litigation.

10.3. Turning to 'soft law' options, SNAP (see section 4 above) might have greater potential than has yet been realised. Referring to the UK's international obligations, Wolffe posits,

The Scottish National Action Plan model – of auditing and monitoring of the implementation of fundamental rights – might well be a more effective approach for securing systemic change than waiting for individual cases to arise.⁵²

10.4. In order to achieve realisation of CEDAW's provisions, it would be necessary to consider how SNAP could be used most effectively and/or extended and whether there are other alternative legal mechanisms that could be introduced to enable CEDAW's justiciability in Scotland.

11. Conclusions

11.1. This report has considered the potential for incorporation and/or better realisation of CEDAW in Scots law. Although CEDAW undoubtedly has the potential to enhance the current gender equality framework provided by Scots law, there are barriers to its current use and to its incorporation.

11.2. CEDAW's current enforcement mechanisms are weak and are reliant on political will, public awareness, advocacy and invocation. Awareness of CEDAW and its potential use as an advocacy and litigation tool is low and so increasing its visibility and giving effect to its provisions in domestic law are important aims. One potential course of action in this respect is incorporation of the Convention into domestic law.

11.3. Successive UK governments have failed to act despite repeated recommendations for CEDAW's full incorporation into UK law by the CEDAW Committee. Combined current circumstances including the possibility of a renewed devolution settlement following the Brexit referendum results and the Westminster government's intransigence regarding human rights and equality more generally might provide a 'political moment' for CEDAW's incorporation into Scots law.

11.4. Further traction for CEDAW's incorporation in Scotland could be provided by its express provision in the renewed Scottish National Action Plan on Human Rights (SNAP) which is due to be drafted in 2018.

11.5. Notwithstanding, the potential that exists under Scotland's human rights framework, the process of incorporation would be wholly reliant on political will and the current devolution settlement would prevent full constitutionalisation which could only be achieved by an Act of the Scottish Parliament. Without further devolution of some currently reserved policy areas, such as equalities and employment, it is difficult to see how incorporation would impact directly on the lives of individuals in Scotland.

11.6. Aside from full incorporation, there are several alternative legal mechanisms or duties available in Scotland that could be used to ensure better realisation of CEDAW. These include the imposition of Ministerial reporting requirements and/or a 'due regard' duty to be inserted into relevant legislation or through enhancement of the Public Sector Equality Duty and/or Scotland's proposed Socio-Economic Duty provided for under the Equality Act 2010. Soft law options including CEDAW's express inclusion in a Scottish Bill of Rights which, although lacking in terms of direct enforcement, could greatly assist in awareness raising among legal advisors and others which in turn could help to operationalise CEDAW through judicialisation.

End notes

¹ The seven UN member states that have not ratified CEDAW are the United States, the Pacific island nations of Tonga and Palau; Iran, Somalia, South Sudan and Sudan.

² Article 26 of the Vienna Convention on the Law of Treaties (1969), which sets the parameters of international treaty law, states: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

³ Article 1, CEDAW.

⁴ Article 5 (a) CEDAW.

⁵ 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.

⁶ Ibid.

⁷ Which is comprised of 23 independent experts on women's rights issues.

⁸ For a detailed explanation of the complaints and inquiry procedures and the remedies available under each, see International Women's Rights Action Watch Asia Pacific (2008) 'Our Rights are not Optional', available: http://www.karat.org/wp-content/uploads/2012/01/Our_Rights_Guide.pdf

⁹ The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, available: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx>. For detailed analysis of the Protocol's potential, see Equality and Human Rights Commission (2010) 'A Lever for Change: Using the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women', available:

https://www.equalityhumanrights.com/sites/default/files/a_lever_for_change.pdf

¹⁰ To date, the UK has been the subject of only two complaints, NSF v UK 10/2005 and Salgado v UK 11/2006, both of which were declared inadmissible. The committee has only been asked to consider 10 complaints in total since 2004.

¹¹ <http://www.scottishhumanrights.com/news/cedaw-committees-concluding-observations-to-the-uk/>

¹² See RightsNI: <http://rightsni.org/2013/07/grasping-the-nettle-human-rights-and-access-to-abortion-in-northern-ireland>

¹³ For the full submissions and related evidence and an update on what has happened as a result of the request, see Transitional Justice Institute, University of Ulster (2016) Research Paper No. 15-01 'Submission of Evidence to the CEDAW Committee Optional Protocol: Inquiry Procedure': <file:///C:/Users/wrb12116/Downloads/SSRN-id2563665.pdf>

¹⁴ For examples of CEDAW's use by domestic courts around the world, see:

<http://www.globaljusticecenter.net/documents/InfoSheet.CEDAWDomestic.2007.pdf>

¹⁵ Sandra Fredman (2010) 'CEDAW in the UK', available: <http://www.edf.org.uk/report-cedaw-in-the-uk/>

¹⁶ CEDAW Committee's Concluding Observations in 1999, A/54/38/Rev.1, part two, paras. 278–318.

¹⁷ CEDAW Committee's Concluding Observations *Fifth and Sixth Periodic Reports*, A/63/38 para 248 ff.

¹⁸ CEDAW Committee's Concluding Observations in 2013, C/GBR/CO/7, at para C 13.

¹⁹ Government Equality Office Response to Select Recommendations of the UN CEDAW Committee following the Examination of the UK and NI's 5th and 6th Periodic Reports on July 10 2008 (July 2009), para 5.

²⁰ Notwithstanding the complaints process under the Optional Protocol which cannot be said to provide an effective remedy due to the lack of enforcement measures.

²¹ UN Economic and Social Council (1998) General Comment 9, para B.8.

²² <https://beta.gov.scot/publications/scottish-ministerial-code-2016-edition/pages/2/>

²³ The Scotland Act 1998, Schedule 5, Part 1, para 7 (2) gives the Scottish Parliament the power to do this by specifically providing that the implementation of international obligations is not reserved.

²⁴ See Muriel Robison (2017) Equality and Non-Discrimination and Brexit; Tobias Lock (2017) Human Rights and Brexit; Nicole Busby (2017) the Charter of Fundamental Rights and Brexit. All SULNE position papers available: <https://sulne.ac.uk/position-papers/>

²⁵ See the White Paper (Cm 9446, March 2017) 'Legislating for the United Kingdom's withdrawal from the European Union' (at 1.24) which states that the Bill proposes (1) to repeal only the European Communities Act 1972; (2) to convert EU law 'as it stands at the moment of exit'; and (3) to create powers for Government to make secondary legislation which will 'enable corrections to be made to the laws that would otherwise no longer operate'.

²⁶ The Charter's exclusion is further qualified by clause 5(5), which states that rights accrued independent of the Charter will still be protected by the incorporation of EU law into domestic law under clauses 5(1)-(3). The effect of this provision is restricted by schedule 1, paragraph (3) of which states that a failure to comply with the general principles of EU law in domestic law will not give rise to a cause of action post-Brexit and that incompatibility with the general principles cannot be used to disapply or quash 'any enactment or other rule of law' thus protecting future administrative or legislative action.

²⁷ Available: <http://www.snaprights.info/wp-content/uploads/2016/01/SNAPpdfWeb.pdf>.

²⁸ At p. 14.

²⁹ At p. 19.

³⁰ At p. 21.

³¹ At p. 25.

³² James Wolffe QC, 'Economic and Social Rights in Scotland: Lessons from the Past; Options for the Future', Lecture for International Human Rights Day 2014, available: <http://www.scottishhumanrights.com/media/1469/wolffe2014lecture.pdf>, p. 5.

³³ See Jeff King, 'Judging Social Rights' (2010, CUP) and, in the current context, Douglas Ross (2015) Incorporating Human Rights Treaties: What Can be Done? What Should be Done?, available: <https://www.humanrights.scot/wp-content/uploads/2016/01/Douglas-Ross-Incorporating-Human-Rights-Treaties-Talk.pdf>

³⁴ See in particular Part III CEDAW.

³⁵ For examples, see Shelagh McCall QC (2015) 'What can Scotland do?':

<https://www.humanrights.scot/wp-content/uploads/2016/01/Shelagh-McCall-QC-Innovation-Fourm.pdf>, p. 8.

³⁶ See Mary Robinson's quote cited in McCall (note 35), p.2.

³⁷ Wolffe (note 31), p. 12.

³⁸ For a summary of the outstanding areas of concern in 2011 (15 years after CEDAW's incorporation), see the South African Shadow Report on the Implementation of CEDAW submitted to the CEDAW Committee by the Centre for the Study of Violence and Reconciliation, People Opposing Women Abuse, and the Western Cape Network on Violence Against Women, available: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_NGO_ZAF_48_10362_E.pdf. For details of the Committee's 45 specific recommendations as at 2011, see the CEDAW Committee's Concluding Observations on the Combined Second, Third and Fourth Periodic Reports of South Africa, available: file:///C:/Users/wrb12116/Downloads/G1141878.pdf

³⁹ Rao (note 5), p. 18.

⁴⁰ R. J. Cook (2007) 'Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia', Reproductive Health Matters 15(29): 160–62.

⁴¹ Rao (note 5), p. 18.

⁴² Wolffe (note 31), p.12.

⁴³ Assuming that those rights were not already provided for under domestic legislation.

⁴⁴ Human Rights Act 1998, section 2.

⁴⁵ Ross (note 33), para 12.

⁴⁶ Rao (note 5).

⁴⁷ See Ross (note 33), para 29.

⁴⁸ See McCall (note 35), p.6. Wolffe (note 31), at p. 7 argues that 'the scope for judicial scrutiny of the way that the Government fulfils its obligations under section 1 of the Act, though perhaps not entirely absent, is – presumably deliberately – limited'.

⁴⁹ Wolffe (note 31), p. 7.

⁵⁰ <http://www.gov.scot/Publications/2017/07/8131>

⁵¹ Particularly in respect of the non-discrimination provision in Article 14 ECHR – see Fredman (note 15).

⁵² Wolffe (note 31), p. 5.



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