

Engender response to the Scottish Government consultation on A Human Rights Bill for Scotland

October 2023

INTRODUCTION

Engender is Scotland's feminist policy and advocacy organisation, working to secure women's political, economic and social equality with men. Our aspiration is for a Scotland where women and men have equal access to and enjoyment of rights, resources, decision-making and safety. We were formed with the purpose of ensuring that the detail of women's lives is visible, counted, and understood in policymaking.

We welcome the opportunity to respond to the Scottish Government's consultation on a Human Rights Bill for Scotland. We have long called for the incorporation of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹ We also recognise the centrality of the incorporation of the International Covenant on Economic Social and Cultural Rights (ICESCR) to the greater realisation of women's rights and equality in Scotland², and the importance of incorporating the Convention on the Rights of Persons with Disabilities (CRPD) and Convention on the Elimination of all forms of Racial Discrimination (CERD) to ensure greater protections and enjoyment of rights for disabled and racialised women.

We support the ambition of this Bill to incorporate, to the extent possible under devolution, the rights set out in these treaties. This ambition is in keeping with the Universal Declaration of Human Rights direction that human rights are indivisible, interdependent, and interrelated.

The Human Rights Bill represents a significant opportunity to prioritise women's rights and achieve substantive equality in Scotland. We commend the Scottish Government for its commitment to building an improved human rights culture and we are broadly supportive of the overall approach set out in the consultation. Nevertheless, our response outlines areas where we believe further clarification and

¹ Engender (2018) CEDAW: How can women's rights be better realised in Scotland? Available at:

<https://www.engender.org.uk/content/publications/CEDAW-incorporation-paper.pdf>

² Engender et al. (2022) United Nations International Covenant on Economic, Social and Cultural Rights: Shadow

Report. Available at: <https://www.engender.org.uk/content/publications/Engender-ICESCR-pre-sessional-shadow-report.pdf>

transparency is needed and where we think there is scope to go further to strengthen the Bill and its intentions.

We understand that in bringing forward this legislation, the Scottish Government is seeking to navigate a highly complex legal context that includes international law and standards, constitutional and UK equalities law. We also appreciate that the scope of the Bill necessitates early consideration of a wide range of potential implementation measures. However, the result of this has been production of a consultation that is significantly sweeping in scope. This has made it extremely difficult, particularly for smaller organisations, to respond meaningfully to the breadth of questions posed.

Equally, many of the issues covered and proposals made by the consultation are highly technical and complex in nature. However, the consultation document does not provide significant detail in many areas. Whilst we appreciate this approach may have been taken in the interest of brevity, the result has been a document that covers expansive ground, but in minimal detail. As such, **it will be critical for further detailed and meaningful consultation to be undertaken on many of the implications of this Bill and we would urge the Scottish Government to see this specific consultation as the beginning, rather than the end or entirety of its consultation process.**

Critically, the proposals lack critical detail concerning the areas that the Scottish Government has deemed to be outside the competencies of the Scottish Parliament under the Scotland Act 1998. Such determinations will have particular implications for the incorporation of CEDAW, along with the other 'equality treaties', and their enforcement and justiciability through this Bill. **While recognising the complex legal context, we are calling on the Scottish Government to incorporate CEDAW to the fullest possible extent, whilst being transparent in its decision-making regarding constitutional limitations.**

In addition, to ensure this Bill delivers greater access to human rights and protections for women, particularly the most marginalised women, it is vital that the treaties included in the Bill are incorporated and operationalised in ways that are gender competent. Engender's recent Shadow Report demonstrated how the ICESCR rights are gendered in impact.³ Furthermore, interpreting the rights in CEDAW, CERD and CRPD via a proposed equalities clause will require duty-bearers to have significant gender and equalities competence. Achieving this will require dedicated resources and support from the consultation stage through to implementation and operationalisation.

To address these concerns, we are calling on the Scottish Government to commit to further meaningful engagement with women, and other interest groups, as this Bill progresses through the Scottish Parliament. This must be supported by sufficient time

³ Ibid.

and resources to ensure women in Scotland can meaningfully shape this Bill, as well as any supporting guidance or resources for public authorities, duty-bearers and rights-holders.

In order to keep this response manageable and within the limits of our capacity, we have chosen to largely focus on the issue of incorporation of CEDAW. We do touch on a number of other critical areas including the equality clause. We have not unfortunately had the capacity to explore the implications of the incorporation of ICESCR for women's equality to the extent that we would have liked to, despite the fact we believe these will be significant.

Moreover, given the scale and timeframe for the consultation, we have been unable to explore the gendered implications for the right to a healthy environment, or to consider in-depth the intersectional dimensions for disabled or racialised women of incorporation of CRPD and CERD. This is regrettable, and we would urge the Scottish Government to consider whether a consultation of this scope and size is advisable in future.

Nevertheless, we remain broadly supportive of what is proposed, and believe much of what the consultation contains has great potential to advance human rights in Scotland. We will therefore limit our comments to areas where we think greater clarification or consultation is needed, where we want to recommend a specific approach and where we would like to see the Scottish Government go further.

PART 4: INCORPORATING THE TREATY RIGHTS

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

- **Allow**
- **Don't Allow**

Legal certainty and gender/ equalities competence of courts

Engender agrees that dignity should be considered by courts when interpreting the rights in the Bill. We support the Human Rights Consortium for Scotland's (HRCS) call that courts should be required to consider this principle through a purpose clause, not only 'allowed' to.

Whilst we understand that dignity is utilised extensively in the human rights framework, in the context of domestic legislation however, **we would welcome further reassurance around the definition and legal certainty of the concept.** We retain some concern that it could be interpreted subjectively based on the human rights, gender and equalities competence of the courts.

Interdependence and indivisibility of human dignity and equality

Article 1 of the Universal Declaration of Human Rights states that “All human beings are born free and equal in dignity and rights.” The Preamble of the Convention on the Elimination of All Forms of Discrimination against Women states ‘that discrimination against women violates the principles of equality of rights and respect for human dignity.’

Gender and intersecting inequality are the primary root causes of most human rights violations experienced by women. The denial of dignity to women, has been a key mechanism utilised by patriarchal structures to maintain control, and sustain inequality and oppression; the impacts of which are particularly pronounced for women experiencing intersectional discrimination and marginalisation.

In line with the Human Rights framework, the Bill must recognise the interdependence and indivisibility of human dignity and equality and non-discrimination. Specifically, that the experience of dignity can be profoundly impeded by the structural inequality that women and marginalised groups in Scotland face. **In line with this, the Bill should explicitly outline that experiences and violations of dignity are closely connected to equality and non-discrimination.**

From our work and that of women’s sector partners, we know that women are frequently denied dignity due to gender discrimination. For example, a recent report from the Scottish Government’s Women’s Justice Leadership Panel found that victims of gender-based violence explicitly describe a “loss of control and dignity” when going through judicial proceedings, particularly when rape myths and gender stereotypes are used to ‘blame victims and cast doubt on their character.’⁴ This lack of respect for dignity is blocking victim-survivors access to justice; with evidence suggesting that rape myths are prevalent among juries in rape trials but are not systematically challenged which is contributing to fewer convictions.⁵ Indeed, rape and attempted rape have had the lowest conviction rate of all crimes for a decade, despite reported cases of sexual violence being at an all-time high.⁶

Our own research shows that, for many women, reporting sexual violence can lead to investigations and medical procedures that are intrusive, inaccessible and traumatic. This is especially acute for disabled women who may be disinclined to report because

⁴ Scottish Government Women’s Justice Leadership Panel (2023) The Case for Gendered and Intersectional Approaches to Justice. Available at: <https://www.gov.scot/publications/womens-justice-leadership-panel-case-gendered-intersectional-approaches-justice/>

⁵ Vanessa Munro et al., (2020) The provenance of what is proven: exploring (mock) jury deliberation in Scottish rape trials. Available at: <https://onlinelibrary.wiley.com/doi/10.1111/jols.12287>

⁶ Rape Crisis Scotland (2022) Rape Crisis Scotland calls for bold action as conviction rates for rape and attempted rape remain the lowest of all crimes for the last ten years. Available at: <https://www.rapecrisisscotland.org.uk/news/news/rape-crisis-scotland-calls-for-bold-action-as-conviction-rates-for-rape-and-attempted-rape/#:~:text=New%20figures%20released%20by%20the,a%2091%25%20overall%20conviction%20rate>

of discrimination and negative assumptions related to their disability, communication barriers or a lack of equipment and specialist knowledge within services and public bodies required to support their disclosure, all of which ultimately undermines their dignity.⁷

Incorporating the principle of dignity could provide an important legal basis for challenging harmful stereotypes, discrimination and violence that women in Scotland currently face. However, **it is crucial that the Bill ensures that the concept of dignity will be interpreted in a gender competent way.**

Key international human rights principles

The consultation states that the Scottish Government is considering ‘the most appropriate mechanism by which to recognise other key international human rights principles – such as the universality, indivisibility, interdependence and interrelatedness of all rights – within the framework’.

Engender supports the recommendation of the HRCS that the Bill should ‘include a purpose clause that includes dignity, universality, participation and other key human rights principles.’ We would also encourage consideration of the concept of intersectionality.

We agree with the HRCS assessment that this will better ensure a shared and consistent understanding and interpretation of rights in the Bill, that it would be helpful for public awareness and could help build a culture of human rights, guarding against narrow duty compliance.

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

- **Allow**
- Don't Allow

We support the proposal to allow for dignity to be a key threshold for defining the content of MCOs. However, **we would ask that further thought be given to how Minimum Core Obligations (MCOs) can be effectively gendered.** The definition of what would constitute essential levels of protection of economic, social, and cultural rights for women will differ from that of men due to structural gender inequality in Scotland. A minimum standard for fulfilling rights set out in the Bill will need to be tailored to take into account and adapt to the structural inequality that women face. Any such MCOs must also account for the intersectional experiences of women, where women

⁷ Engender (2018) Our Bodies, Our Rights. Available at: <https://www.engender.org.uk/files/our-bodies,-our-rights-identifying-and-removing-barriers-to-disabled-womens-reproductive-rights-in-scotland.pdf>

who face intersecting forms of marginalisation will have different needs, in order for essential levels of protection of rights to be fulfilled in practice.

For example, Article 11 of ICESCR covers rights to housing and from our work on women's invisibility in housing and homelessness policy in Scotland⁸, we know that women's housing situation is generally more precarious than that of men, that they are more likely to face challenges in housing affordability, and that their needs are neither well understood nor appropriately met within existing service provision. Therefore, any MCOs covering housing rights would need to understand the biases and weaknesses within existing systems of support that disadvantage women, and recognise the specific resources and support required to effectively meet the needs of women, particularly those of marginalised women.

We know that certain groups of women are more likely to experience housing instability, poor housing, homelessness or negative treatment by housing services, such as BME; disabled and refugee women; women who have been in the criminal justice system; LGBTI, particularly transgender women; older and younger women; women who sell sex; lone parents and women with other caring responsibilities. For rights which cover housing in the Bill, MCOs must be able to take into account the different intersectional inequalities of populations in Scotland, especially those who are most at risk of having such rights violated in practice.

We echo the point made by the Equality Network in its submission that in order for the concept of dignity to be meaningful in defining MCOs, it must be understood in an intersectional way that considers the ways in which people can experience indignity, for example where services are 'not culturally appropriate, or in which people feel that they need to hide aspects of their identity.'

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

We agree with the proposed approach from the Scottish Government that duty-bearers, courts and tribunals will be able to read, apply and interpret the rights in line with international human rights law, materials, and mechanisms. We welcome the aim of the Scottish Government to ensure this interpretative duty applies to duty-bearers, as well as courts and tribunals.

It will be crucial that duty-bearers, courts and tribunals are able to consider evolving human rights jurisprudence - through evolving case law, as well as 'soft law' norms and standards. This includes those emanating from:

⁸ Engender (2020) A Women's Place: Gender, Housing and Homelessness in Scotland. Available at: <https://www.engender.org.uk/content/publications/A-WOMANS-PLACE---GENDER-HOUSING-AND-HOMELESSNESS-IN-SCOTLAND.pdf>

- General Recommendations and Comments produced by relevant Treaty Bodies that go into more detail on how different rights should be interpreted and implemented
- Concluding Observations that provide comments that are based on the assessment of country reports, dialogues, and information received during the reporting process on the human rights situation of a country in question
- Outcomes of inquiries and complaints – via for example CEDAW’s optional protocol

With regards to human rights jurisprudence, international and comparative law, our view is that this should be relatively straight forward for duty-bearers, courts and tribunals to interpret, via case law and legal precedents. However, much of the normative value of the human rights framework comes from ‘soft’ law standards via the mechanisms we have outlined above. These are by their nature more expansive, complex and regularly evolving. There will therefore need to be careful consideration of how these can best be utilised to improve human rights decision-making in Scotland. A range of actions will be needed to ensure that courts, tribunals and, in particular duty-bearers, are utilising the most up-to-date norms and standards, and are able to competently interpret this evolving body of information.

We are optimistic that this can be a driver for better decision-making and a catalyst for an improved human rights culture in Scotland. However, the potential scale of this task, and the resources needed to ensure it is done well needs to be properly assessed and accounted for as the Bill progresses.

In the specific case of CEDAW, there is less decided case law citing the Convention than with some other treaties - which could translate into a lack of legal certainty, and create challenges in consistency of approach. This makes the need for effective utilisation of the CEDAW Committee’s General Recommendations all the more important.

To date there have been 39 general recommendations handed down by the CEDAW Committee. We appreciate not all of these will be relevant within devolved competence. Nevertheless, the potential body of information to be interpreted by duty-bearers is still substantial and will necessitate significantly improved gender competence across government, the courts and tribunals than is currently the case. Again, we hope that this will create a positive catalyst for this improvement, however **guidance and capacity building will be critical, and we would urge the Scottish Government to ensure that this can be properly resourced.**

The consultation makes mention of instances where ‘different treaty bodies can interpret issues engaging the same rights in different ways.’ Whilst we recognise this can and does happen, we also are of the view that these areas of divergence are often

reconciled over time and this tension is an essential feature of an evolving, normative framework. We would urge the Scottish Government to engage with the Office of the High Commissioner for Human Rights when developing guidance on how to address such issues in the interpretative provision.

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

Engender's view is that whilst we would ultimately want to see *full* incorporation of CEDAW, we understand the scale of the restrictions that the Scottish Government are subject to, on account of the equality reservation under devolution. We also understand the political environment constitutionally and the risk of legal challenge under the Scotland Act 1998. Nevertheless, we would urge the Scottish Government to work to the extent possible to ensure a maximalist approach in this legislation.

The reservation of equal opportunities is complex, and its permitted exceptions are untested in some areas.⁹ The question of where the Scottish Government must draw the line to stay within devolved competence is therefore not clear cut. There is little detail provided in the consultation document to explain why the Scottish Government has chosen to progress in the way it has across several key areas (detailed below). Without this detail, it is difficult to be wholly confident that the Scottish Government has in fact taken a maximalist approach and is fully honouring the recommendations of the National Taskforce.¹⁰

The scope of this question is expansive, so we will summarise our response in sections.

The 'Direct treaty text' approach

Generally, we are supportive of the proposal that all four treaties should be reproduced in the Bill, removing any text that relates to areas that are reserved to the UK Parliament.

However, we expect that much of the CEDAW convention will be 'redacted' using the cut and paste approach proposed, given reservations around its substantive approach to equality, and as such will not make it onto the face of the Bill. We also understand that SHRC has argued that a 'transposition' approach could potentially provide more flexibility in navigating the equality reservation and could create scope for more of

⁹ Professor Nicole Busby (2020) The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby---cedaw/aap-paper-nicole-busby---cedaw/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BNicole%2BBusby%2B-%2BCEDAW%2BFINAL%2B%25281%2529.pdf>

¹⁰ Scottish Government (2021) National Taskforce for Human Rights Leadership Report. Available at: <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/pages/6/>

CEDAW's components to make it onto the face of the proposed Bill, including aspects of the Convention text and selected standards from general recommendations. We can appreciate the arguments that this approach may help secure a more maximalist approach and could be more streamlined for duty-bearers. At the same time however, we fully appreciate that there are significant potential risks in opening up human rights treaties to legislative reinterpretation.

On balance, we support the 'cut and paste' approach proposed. However, we would caveat this by highlighting the lack of detail on this in the consultation, in particular on the Scottish Government's rationale for selecting this approach over others. Engender is concerned that we have not had more opportunity to explore this as an issue that will have such impact on the shape of the Bill in greater detail.

We believe the 'cut and paste' approach should also incorporate an element of transposition in order to fill the gaps left by redactions of CEDAW and the other special protection treaties. This mechanism would enable the incorporation of CEDAW rights where possible, while reinterpreting those aspects of rights that cannot be and creating rights that would fulfil the intended purpose of those that are lost in redaction.

This reinterpretation would focus on what action is possible within the devolved context that could move people closer to the realisation of those rights. We have set out an example below on how a right to childcare could substantively contribute to the delivery of employment rights in article 7 of ICESCR and article 11 of CEDAW, while staying within the bounds of legislative competence. **We therefore call on the Scottish Government to consult on this approach as part of ongoing engagement around the development of the Bill.**

Incorporation of CEDAW

The consultation states that the proposed model is designed to '*ensure duty-bearers are considering all rights in the equality treaties in a holistic way both when delivering ICESCR rights and in their overall decision-making.*' It also acknowledges that there are '*some specific rights in the equality treaties which may be considered to be of standalone significance and where some stakeholders will understandably want to see us go further if possible.*'

In the case of the CEDAW Convention, we understand that its substantive approach to equality will likely mean that the process of determining the rights that can be articulated on the face of the Bill could be relatively complex. We are however, keen to ensure that rights – beyond those that correspond with ICESCR, are given due consideration for incorporation. We agree with the wider human rights sector that the

consultation lacks definitive detail on what will be redacted in terms of any CEDAW interpretative duty.

We welcome and endorse the work that Professor Nicole Busby has done in analysing the rights conferred by the CEDAW Convention and how they could be applied within the reserved/ devolved context.¹¹

As the Scottish Government progresses with Bill drafting, it will be essential that a collaborative and consultative approach is taken in determining how CEDAW is ultimately set out in this Bill, to ensure a maximalist approach. Specifically, we support the suggestion made by Close the Gap (CtG) that the Scottish Government should publish a discussion paper setting out the aspects of CEDAW it believes may and may not be incorporated, and the evidence for this, to facilitate consultation and better demonstrate that it is ensuring a maximalist approach to realising women’s rights.

Where there are rights that include both devolved and reserved elements, there should be careful consideration of how to adopt a maximalist approach. Two examples of CEDAW rights that the Scottish Government may consider for initial modelling are contained in Article 11 of CEDAW in relation to employment and social security. These rights expand across reserved and devolved responsibilities, as well as ICESCR (Art 7) and the ‘equalities treaties’ (CERD Art 5) (CRPD Art 27, 28). In these instances, we believe that there are steps that can be taken to realise aspects of these rights within the bounds of devolution.

For example, we support the suggestion made by CtG that the **Scottish Government could include on the face of the Bill a right to accessible, affordable and flexible childcare for all**. As CtG set out, ICESCR, CEDAW and the UNCRC recognise the importance of childcare. Incorporating a right to childcare would not go beyond the equal opportunities reservation and would help address one of the biggest drivers of women’s economic and labour market inequality, and thus help advance gender equality overall.

Incorporation of CRPD

The consultation groups together CEDAW, CERD, CRPD. However, the treaties are significantly varied in scope. The Scottish Government has not made available its thinking on the specifics or its legal rationale for treating ‘equalities treaties’ as a

¹¹ Professor Nicole Busby (2020) The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW (See Annex A). Available at:

<https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby---cedaw/aap-paper-nicole-busby---cedaw/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BNicole%2BBusby%2B-%2BCEDAW%2BFINAL%2B%25281%2529.pdf>

block. **We support the calls from the broader human rights, and specifically from the disability sector, for substantive rights within CRPD to be articulated on the face of the Bill including the right to independent living.**

Specifically, we point the Scottish Government to the concerns of organisations such as SCLD, who have stressed that they: ‘remain concerned that a failure to place a duty on public bodies and private actors to comply with substantive human rights within the CRPD fails to translate into the promised ‘maximalist’ approach’. SCLD has also warned that ‘If this commitment is not met there is a risk that people with learning disabilities will be left behind on Scotland’s human rights journey by allowing them to remain under the purview of mental health legislation.’¹²

Procedural and Compliance duties

We note that the proposed model places a procedural duty on the ‘equalities treaties’, and initially on ICESCR. The language of ‘procedural duty’ lacks clarity, particularly on whether this amounts to a ‘due regard’ duty.

Our view is that the procedural duty must amount to a duty to have ‘due regard’, in line with the Equality Act 2010. We would be very concerned if this duty amounted to a weaker one than that set out in the Equality Act. Such a situation would significantly lessen the impact of this Bill and the aims for incorporation of the ‘equalities treaties.’

It would also potentially create barriers to the future integration of human rights and equalities duties - creating greater confusion for duty bearers and weakening impact. In this respect we would draw the Scottish Government’s attention to the example of the Welsh Assembly’s approach to the CRC, and how it utilised due regard in line with the Public Sector Equality Duty (PSED).¹³ **As such, we strongly recommend that the ‘procedural duty’ should be articulated and realised as a ‘due regard duty.’**

We agree that there should be a period of time where only the duty to have due regard should apply. This period of time should not be more than two years and be specified in the Bill. After this period the due regard duty should still apply, in addition to a duty to comply.

A duty to comply for ‘Equalities treaties’

The consultation notes that a duty to comply is ultimately needed if ‘transformative impact’ is to be secured. The decision to not place a ‘duty to comply’ on the ‘equalities treaties’ is therefore of significant concern and risks creating a hierarchy of rights

¹² SCLD (2023) The State of Our Rights. Available at: <https://www.sclد.org.uk/wp-content/uploads/2023/08/1-The-State-of-our-rights.pdf>

¹³ Engender (2018) CEDAW How can women’s rights be better realised in Scotland? Available at: <https://www.engender.org.uk/content/publications/CEDAW-incorporation-paper.pdf>

realisation, significant confusion in the delivery of equalities outcomes, and at worst, could compound existing inequalities.

There are significant questions on how CEDAW, CERD and CRPD will be enforceable without a compliance clause. It is unclear how the suggested approach for a 'procedural' duty only for 'equalities' treaties and for compliance for ICESCR rights would work in practice. We are concerned that weaknesses in accountability combined with complexity and confusion for duty-bearers could be a major impairment to any meaningful operationalisation of CEDAW and the Equalities' treaties at ground level. We believe this is a significant departure from what was envisioned and articulated in work produced by and for the Taskforce.¹⁴

A procedural duty, even if it amounts to due regard, is a weaker duty than a duty to comply. We are concerned that this would allow public bodies, provided they had due regard to the CEDAW rights, not to comply with them and to decide that they should be overridden by other considerations.

For example, under Article 13 of ICESCR, a public body may provide equal access to technical and vocational secondary education opportunities for all, but at times and locations that are incompatible for women with caring roles who are unable to access childcare. The public body only has to demonstrate that it recognises this, but cannot afford to do anything about it, to meet the due regard duty. Women are therefore left unable to claim this right.

This approach is of particular concern in the context of resourcing pressures and existing gendered biases in policy and resource decision-making that create structural, entrenched disadvantages for women. **It is of real concern that the proposal being put forward by the Scottish Government could potentially compound these biases in decision-making by reinforcing the perception of a hierarchy of rights.**

Our experience of working on public bodies' delivery of PSED over the last decade is that a due regard duty approach only carries significant weaknesses. In the case of PSED, it has not resulted in public bodies mainstreaming equality considerations in their decision-making processes in a meaningful way. The evidence shows that the PSED duties have failed to deliver advances in equality in Scotland. If the approach

¹⁴ Professor Nicole Busby (2020) The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW. Available at:

<https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby---cedaw/aap-paper-nicole-busby---cedaw/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BNicole%2BBusby%2B-%2BCEDAW%2BFINAL%2B%25281%2529.pdf>

Scottish Government (2021) National Taskforce for Human Rights Leadership Report. Available at: <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/pages/6/>

to the new human rights duties merely replicates these duties, they will be immediately susceptible to the same implementation failings.

There is a substantial body of evidence and learning on the operation of PSED from across the equalities sector. The Scottish Government undertook a review of PSED in 2022 and much of this information was fed into it.¹⁵ However, that critical learning, particularly regarding the weaknesses of a due regard approach does not appear to have been taken into consideration in the design of the Human Rights Bill.

We would urge the Scottish Government to directly engage with the equalities sector and with the wealth of evidence that exists on PSED, to try to ensure that the Human Rights Bill does not replicate the same weaknesses in approach.

We accept that there are complex interactions with the equal opportunities' reservation. However, **we support the call for inclusion of a compliance clause for the 'equalities treaties.'** **The number organisations reiterating this call underlines the need for urgent revisions. We urge the Scottish Government to further reflect on whether their proposed model is maximalist. We also ask for transparent engagement around the advice and rationale for these key decisions.**

Access to justice, justiciability and accountability

We are uncertain as to how 'equalities treaties', including CEDAW, will be justiciable under the current proposed model for incorporation. As outlined in our answer to Q3, we recognise that the interpretative duty will have a key role to play. However, we have concerns about how that will work in practice, particularly in interpreting 'soft law' norms and standards combined with the fact that there is little decided case law citing CEDAW itself, and a lack of gender and equalities competency within courts and tribunals.

We are also concerned that the lack of a compliance duty for duty-bearers could further dilute protections for rights-holders and weaken routes to justice.

It is also unclear, from the consultation, which regulatory body will oversee compliance of the procedural duty of the 'equalities treaties.' Currently the SHRC does not work on 'Equalities'. The EHRC is the regulator for the Equality Act. There is a need for further clarity on what the SHRC and EHRC will be responsible for under this proposed legislation - and what new powers and resourcing will be given. Without this, enforcement could fall between the cracks between the SHRC and EHRC.

The Equality Clause

¹⁵ Engender (2022) Engender response to the Scottish Government's consultation on the operation of the Public Sector Equality Duty in Scotland. Available at: <https://www.engender.org.uk/content/publications/Engender-response-to-PSED-consultation.pdf>

We agree that there should be an equality clause in the Bill which ensures equal access for everyone to their rights. We support naming LGBTI people and older people on the face of the Bill.

Incorporation of ICESCR

The success of human rights incorporation for women in Scotland will be largely determined by the extent to which gender competency is built into the framework. This means recognising and responding to the systemic biases that create barriers to realisation of women's rights. In particular, **it is crucial that the Scottish Government take steps to avoid gender-neutral incorporation of ICESCR.**

The fundamental importance of this has been stressed by Professor Nicole Busby *"[i]ncorporating the social and economic rights provided by ICESCR without specifically gendering those rights risks reproducing and perpetuating existing inequalities which could become further institutionalised as the new rights framework becomes operational."*¹⁶ This is made even more critical by the restrictions on full incorporation of CEDAW.

Engender's latest ICESCR Shadow Report shows clearly how ICESCR rights have a huge bearing on the realisation of women's rights and gender equality.¹⁷ We know there are specific areas of devolved policy covered by ICESCR where equality standards are not being met for women and marginalised groups. For example, numerous gendered health inequalities continue to undermine realisation of the right to health for women and girls in Scotland. Health issues that disproportionately affect women, or affect women differently to men, have historically lacked funding and professional focus, meaning that women's health needs are not equally prioritised and understood.

Women are more likely to: live with long-term health conditions, including dementia, chronic pain and auto-immune diseases; wait longer to receive diagnoses; have physical symptoms wrongly ascribed to mental health problems; have heart disease misdiagnosed; and suffer from illnesses ignored, minimised or denied by the medical

¹⁶ Professor Nicole Busby (2020) The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW. Available at:

<https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby---cedaw/aap-paper-nicole-busby---cedaw/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BNicole%2BBusby%2B-%2BCEDAW%2BFINAL%2B%25281%2529.pdf>

¹⁷ Engender et al. (2022) United Nations International Covenant on Economic, Social and Cultural Rights: Shadow Report. Available at: <https://www.engender.org.uk/content/publications/Engender-ICESCR-pre-sessional-shadow-report.pdf>

profession.¹⁸ Maternal mortality in the UK is four times higher for Black women than for white women,¹⁹ lack of professional competence compromises health outcomes for trans women,²⁰ disabled women are significantly more likely to have unmet health needs than disabled men,²¹ and women in the most deprived areas of Scotland experience good health for 25 years less than those in affluent areas.²² Despite this, the Scottish Government's Gender Equality Index indicates health outcomes for women and men are almost equal (99/100), because it is based on inadequately gendered data.

Effectively interpreting ICESCR rights using CEDAW and broader equality provisions will require public bodies and duty-bearers to have significant gender competence and effective gender mainstreaming mechanisms to be effective in addressing structural gender inequality.

Gender and Equalities Competence and Resourcing

Significant capacity building and competency development will be required around how this new law will function and how public bodies and rights-holders will interact with this Bill. This will also require significant resources directed to those involved in grassroots activism and advocacy to work with and hold duty-bearers to account, and to entrench the Bill's principles.

Gender competence of public bodies, duty-bearers and any regulators involved will be key and this will rely on the Scottish Government seeing through resourcing commitments on mainstreaming, PSED reform, the Fairer Scotland Duty, and other key gender equality policy developments named in the recommendations of the First Minister's National Advisory Council on Women and Girls (NACWG).

As set out in our answer to Question 40, we are also calling for the creation of a specific Women's Human Rights Scheme to ensure duty-bearers can navigate the complexity of the duties, successfully align this with existing duties under the

¹⁸ The Health and Social Care Alliance Scotland (2020) NACWG Satellite Wee Circle: Gender Equality and Mental Health. ALLIANCE, Engender and See Me. Available at: <https://www.alliance-scotland.org.uk/wp-content/uploads/2020/12/NACWG-Satellite-Wee-Circle-Spotlight-on-Mental-Health-Report-181220.pdf>
Engender (2022) Submission to the Health, Social Care and Sport Committee inquiry on health inequalities. Available at: <https://www.engender.org.uk/content/publications/Engender-briefing-on-womens-health-inequalities-for-Health-Social-Care-and-Sport-Committee.pdf>

¹⁹ MBRRACE-UK (2021) Saving Lives, Improving Mothers' Care. Available at: <https://www.npeu.ox.ac.uk/assets/downloads/mbrance-uk/reports/maternal-report-2021/MBRRACE-UK-Maternal-Report-2021-FINAL-WEB-VERSION.pdf>

²⁰ Scottish Trans Alliance (2013) Scottish Trans Health Conference Report. Available at:

<https://www.scottishtrans.org/wp-content/uploads/2013/11/Scottish-Trans-Health-Conference-Report.pdf>

²¹ Sakellariou and Rotarou (2017) Access to healthcare for men and women with disabilities in the UK. Available at: <https://bmjopen.bmj.com/content/7/8/e016614>

²² Scottish Government (2021) Women's Health Plan: A plan for 2021-2024. Available at: <https://www.gov.scot/publications/womens-health-plan/>

Equality Act, support the development of vital competency and the provision of necessary resources.

Question 5: Are there any rights in the equality treaties which you think should be treated differently? If so, please identify these, explain why and how this could be achieved.

- Yes
- No

While we understand the use of the term ‘equality treaties’, we are not convinced that it is the most effective title to apply in this process. We are concerned that it could potentially undermine the full scope and obligations of these treaties, with particular regard to the substantive rights they confer, and cause further confusion and a perception of duplication or conflict with existing equalities law.

CEDAW

As outlined in our answer to question 4, we broadly support the copy and paste approach proposed by the Scottish Government and the decision to leave out parts of CEDAW which conflict with reserved matters and interact with the equal opportunities reservation.

We are keen to ensure that rights – beyond those that correspond with ICESCR, are given due consideration for incorporation, and that a maximalist approach is taken. We agree with the wider human rights sector that the consultation lacks definitive detail on what will be redacted in terms of any CEDAW interpretative duty.

We are also keen to secure more detail on how it is envisaged that CEDAW rights will interact with the Equality Act 2010, both in decision-making on redaction but also compatibility of any new CEDAW duties with existing Public Sector Equality Duty and Scottish Specific Duties set out in law for public bodies.

We welcome and endorse the work that Professor Nicole Busby has done in analysing the rights conferred by the CEDAW Convention and how they could be applied within the reserved/devolved context.²³

As the Scottish Government progresses with the drafting of the Bill, it will be essential that a collaborative and consultative approach is taken in determining how CEDAW is ultimately set out in this Bill, to ensure a maximalist approach. Again, we support the

²³ Professor Nicole Busby (2020) The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW (See Annex A). Available at:

<https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby---cedaw/aap-paper-nicole-busby---cedaw/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BNicole%2BBusby%2B-%2BCEDAW%2BFINAL%2B%25281%2529.pdf>

recommendation made by Close the Gap for the Scottish Government to publish a discussion paper setting out the aspects of CEDAW it believes may and may not be incorporated, and the evidence for this, to facilitate consultation and better demonstrate that it is ensuring a maximalist approach to realising women’s rights.

Where there are rights that include both devolved and reserved elements, there should be careful consideration of how to adopt a maximalist approach. Two examples of CEDAW rights that the Scottish Government may consider for initial modelling are contained in Article 11 of CEDAW in relation to employment and social security. These rights expand across reserved and devolved responsibilities, as well as ICESCR (Art 7) and the ‘equalities treaties’ (CERD Art 5) (CRPD Art 27, 28). In these instances, we believe that there are steps that can be taken to realise aspects of these rights within the bounds of devolution.

For example, we support the suggestion made by Close the Gap that the **Scottish Government could include on the face of the Bill a right to accessible, affordable and flexible childcare for all.** As Close the Gap set out, ICESCR, CEDAW and the UNCRC all recognise the importance of childcare. Again, incorporating a right to childcare would not go beyond the equal opportunities reservation and would help address one of the biggest drivers of women’s economic and labour market inequality, and thus help advance gender equality overall.

CRPD

We support the calls from the broader human rights, and specifically from the disability sector, for substantive rights within CRPD to be articulated on the face of the Bill including the right to independent living. Specifically, we point the Scottish Government to the concerns of organisations such as SCLD, which has stressed that they: ‘remain concerned that a failure to place a duty on public bodies and private actors to comply with substantive human rights within the CRPD fails to translate into the promised ‘maximalist’ approach’. SCLD has also warned that ‘If this commitment is not met there is a risk that people with learning disabilities will be left behind on Scotland’s human rights journey by allowing them to remain under the purview of mental health legislation.’²⁴

PART 5: RECOGNISING THE RIGHT TO A HEALTHY ENVIRONMENT

Question 6: Do you agree or disagree with our proposed basis for defining the environment?

²⁴ SCLD (2023) The State of Our Rights. Available at: <https://www.sclد.org.uk/wp-content/uploads/2023/08/1-The-State-of-our-rights.pdf>

We would like to express our support for the responses given by the Scottish Women's Budget Group for questions 6 to 11 and point the Scottish Government to their response on this section of the consultation.

Question 7: If you disagree please explain why.

Question 8: What are your views on the proposed formulation of the substantive and procedural aspects of the right to a healthy environment?

Question 9: Do you agree or disagree with our proposed approach to the protection of healthy and sustainable food as part of the incorporation of the right to adequate food in ICESCR, rather than inclusion as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.

Question 10: Do you agree or disagree with our proposed approach to including safe and sufficient water as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.

Question 11: Are there any other substantive or procedural elements you think should be understood as aspects of the right?

PART 6: INCORPORATING FURTHER RIGHTS AND EMBEDDING EQUALITY

Question 12: Given that the Human Rights Act 1998 is protected from modification under the Scotland Act 1998, how do you think we can best signal that the Human Rights Act (and civil and political rights) form a core pillar of human rights law in Scotland?

We support the position of the HRCS and agree with the Scottish Government proposals on this, and recognise specifically that they are limited in being able to restate the Human Rights Act 1998 or include the Convention Against Torture in this Bill.

Question 13: How can we best embed participation in the framework of the Bill?

On the consultation

Our view is that further consultation and participation opportunities will be needed to engage diverse groups of women in Scotland as this Bill progresses, and ahead of its implementation. The timeframe for this consultation, combined with the vast scope of issues it explores, limited detail – particularly in areas including the incorporation model, access to justice and implementation, has meant that it has been challenging for small organisations to meaningfully engage stakeholders and respond.

The Scottish Government should commit to conducting further meaningful consultation with women and women’s organisations across Scotland as the Bill takes shape. This will be necessary on issues including the MCOs, access to justice, implementation and accountability measures and connections to existing duties under Equality law.

Embedding participation in the framework of the Bill

We agree that participation should be embedded within the framework of the Bill to support its implementation and monitor its progress. For this participation to be meaningful, it is vital that people whose human rights are most at risk are given the opportunity to engage with public services and bodies.

We support the position of HRCS that any Human Rights Scheme created should include a requirement on Scottish Ministers to consult people whose rights are at risk. In our answer to Question 26 we set out how the women’s sector is calling for a specific ‘Women’s Rights Scheme’. This scheme should place duties on Ministers that ultimately mandate women’s participation as rights-holders to claim their rights, and in the shaping of decision-making.

Despite duties in the Public Sector Equality Duty (PSED) to ‘encourage participation in public life or other activity’, progress towards women’s equal participation is lacking. For instance, women in Scotland remain consistently underrepresented from positions of power and authority meaning they are still not able to participate equally in public life. Indeed, despite making up 52% of the population, women only account for just over a third of identified positions of power in Scotland.²⁵ Furthermore, minoritised groups of women, including women of colour, disabled women and transgender women, are even more poorly represented.

In our response to the Scottish Government’s consultation on PSED, Engender worked with Professor Nicole Busby to develop a set of draft regulations for the Scottish Specific Duties.²⁶ Our proposals included a recommendation that the progress report on mainstreaming the equality duty should **include a statement detailing how people with protected characteristics and experts in equality policy were involved in meeting the duties and specifying the impact(s) of their involvement on that implementation. We believe this approach should be expanded to the equalities clause and procedural and compliance duties in the Human Rights Bill.**

²⁵ Engender (2023) Sex and Power 2023. Available at:

<https://www.engender.org.uk/content/publications/SP2023NEW.pdf>

²⁶ Engender (2022) Draft Regulations for the Scottish Specific Duties of the Public Sector Equality Act

<https://www.engender.org.uk/content/publications/engender-draft-regulations-table-of-changes.pdf>

In addition, the Scottish Government must provide clear best-practice guidance and resources for how public bodies and services can involve women, especially marginalised women, in decision-making processes to ensure equal participation. This should be developed with women and include requirements to capture views and engage women and other groups who are underrepresented in consultation processes.

Such guidance should facilitate gender-sensitive and accessible consultation practices like active outreach to diverse groups of women, flexible meeting times, women-only spaces where required, childcare support, and different participation formats. Furthermore, it must avoid tokenistic approaches that passively assume the participation of groups excluded from existing consultation processes. It is vital this is supported by sufficient and sustainable resources and capacity for women's groups and grassroots organisations.

Question 14: What are your views on the proposed approach to including an equality provision to ensure everyone is able to access rights in the Bill?

We agree with the proposed approach that there should be an equality provision included in the Bill which ensures everyone is able to access their rights. We support the proposal that LGBTI+ and older people should be explicitly named on the face of the Bill.

In particular, we direct the Scottish Government to the Equality Network and wider LGBTI+ sector's response. We support their position that an equalities clause must specifically protect LGBTI+ people to acknowledge the historic and continuing marginalisation and structural inequality they face in Scotland. We agree this is especially vital as LGBTI+ people do not have an explicit international treaty outlining protection that can be incorporated. However, many of the rights covered by ICESCR, CEDAW, CPRD and CERD relate to the specific inequalities that LGBTI+ people experience in Scotland.

Engender frequently highlights evidence of the intersectional experiences of LGBTI+ women who experience marginalisation and violations of their human rights. In our 2022 research paper²⁷ on the endemic nature of sexual and sexist harassment in the workplace for women in Scotland, we highlighted research conducted by the Trade Union Congress in 2019²⁸ that found over 20% of LGBT women reported having experienced sexual assault in the workplace, with one in eight having been seriously sexually assaulted or raped at work. Trans women were even more likely to

²⁷ Engender (2020) Enough is Enough: Tackling workplace sexual harassment in Scotland. Available at: <https://www.engender.org.uk/content/publications/Enough-is-Enough---tackling-workplace-sexual-harassment-policy-in-Scotland.pdf>

²⁸ TUC (2019) Sexual harassment of LGBT people in the workplace. Trades Union Congress. Available at: https://www.tuc.org.uk/sites/default/files/LGBT_Sexual_Harassment_Report_0.pdf

experience sexual assault and rape at work, with 32% reporting sexual assault and 22% having experienced serious sexual assault or rape. More than half of LGBT BME women (54%) had experienced unwanted touching compared to around one third of white women. Many of these incidents appeared to be linked to the sexualisation of LGBT and racialised identities.

VAWG is well documented to have significant economic and social impacts on women and therefore significantly impacts the realisation of ICESCR rights. Such impacts are well recognised in the interpretation of CEDAW and associated jurisprudence, for example CEDAW General Recommendation 19 on violence against women states that equality in employment is seriously impaired by workplace sexual harassment.

In addition, Engender recognises older women face specific barriers to having their rights realised. In our recent Cost of Living Report²⁹, we highlighted that women make up the majority of groups with high energy and transport needs in Scotland such as older people as well as disabled people, unpaid carers, and those looking after children. Soaring energy bills in the past year, continued uncertainty around fuel prices and higher transport costs are currently having an enormous impact on older women and affecting the realisation of their human rights.

Older women also already experience significant financial inequality with men, with the UK Women's Budget group estimating that by the time people reach their late 60s in the UK, the median man has £100,000 more wealth than the median woman.³⁰ Older women have also faced a six per cent rise in pension poverty over the last decade, with 20 per cent of women of pensionable age now "living below the breadline."³¹ This figure is even more acute for BME women, one in three of whom experiences pension poverty.

The ways in which LGBTI+ women experience sexual harassment in the workplace and the examples presented of financial inequality and precarity that older women face shows clearly that we cannot treat women as a homogenous group when interpreting ICESCR and CEDAW rights. This is why we want to see implementation of an equalities clause alongside a maximalist approach to articulating 'equalities treaties' and in incorporation of ICESCR rights and the Right to a Healthy Environment.

²⁹ Engender (2022) Women and the Cost of Living: A Crisis of Deepening Inequality. Available at:

<https://www.engender.org.uk/content/publications/Women-and-the-cost-of-living---updated-copy.pdf>

³⁰ UK Women's Budget Group (2018) Housing and gender: Briefing from the UK Women's Budget Group on the gender impact of changes in housing policy since 2010. Available at: <https://wbg.org.uk/wp-content/uploads/2018/10/Housing-October-2018-w-cover-1.pdf>

³¹ Age UK (2021) New Age UK analysis finds one in five UK women pensioners now living in poverty. Available at: <https://www.ageuk.org.uk/latest-press/articles/2021/new-age-ukanalysis-finds-one-in-five-uk-women-pensioners-now-living-in-poverty/>

However, bringing together the implementation of the four treaties, alongside an equalities clause which ensures equal access to rights, will require duty-bearers to understand how to practice non-discrimination in the delivery of their functions. Key to this will be the Scottish Government laying out explicitly how the Bill will avoid confusion for duty-bearers in implementing an 'equalities provision' with existing duties under the Public Sector Equality Duty and Scottish Specific Duties, under the Equality Act 2010 in regards to women and related protected characteristics.

For this to happen in practice, we need clear language and definitions from the Scottish Government in the drafting of the Bill but also in statutory and non-statutory guidance, which explicitly links to existing equalities duties and explains how any new rights protections under the Bill will complement and inter-link.

We are also concerned about the ability of an 'equalities clause' to deliver systemic change in practice for those whose rights are most at risk. There has been a lack of progress with the promised review of the Scottish Specific Duties in delivering the PSED, as consulted on by the Scottish Government in April 2022. We are also still awaiting a Scottish Government Equalities and Human Rights Mainstreaming Strategy, most recently re-committed to in the Scottish Government's Programme for Government 2022/23.

In our answer to Question 4 we underlined how evidence that the PSED duties have so far failed to deliver advances in equality in Scotland. If the approach to the new human rights duties does not take us beyond these existing duties, they will be immediately susceptible to the same implementation failings. Duty-bearers in the Bill need significant resources, guidance, support and upskilling to be able to depart from the current status quo of policy design and implementation.

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

We welcome the additional protections to ensure equal access to rights in the Bill outlined under the equality provision. The suggestion of modelling the equality provision based on Article 2 of ICESCR or Article 14 of the ECHR is welcome, as they provide wide definitions of a variety of groups who experience identity-based discrimination and significant structural inequality in Scotland.

We support the HRCS' recommendation for Scottish Ministers to publish guidance about the interpretation of "other status". Within this guidance, Ministers should specify evidence and criteria that public bodies should apply when considering other groups whose rights are at risk, such as care experienced people. For example, there is clear evidence that care experienced people face particular barriers to having their

human rights realised, and stark inequalities in areas including health, socio-economic deprivation, education and housing.³²

There are also other groups not currently named on the face of the Bill, that experience stigmatisation or discrimination, and may require or benefit from particular protections to be articulated in further development of this new legislation, such as people who use drugs.

The use of the equalities clause and the definition of groups within the clause needs further consideration and consultation by the Scottish Government, to ensure any such provision is relevant to populations who face particular inequalities in the Scottish context.

We outline our views on the need to explicitly recognise LGBTI+ and older age as protected by the equalities clause on the face of the Bill in our answers to Questions 16 and 17.

Question 16: Do you agree or disagree that the use of ‘other status’ in the equality provision would sufficiently protect the rights of LGBTI and older people? If you disagree, please provide comments to support your answer.

- Agree
- **Disagree**

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

Answer:

We are concerned that the use of ‘other status’ to cover protection of LGBTI+ and older people is not sufficient. Instead, LGBTI+ and older people should be specifically listed, in recognition of the Scottish context where there is a strong evidence base of the structural discrimination faced by LGBTI+ people and older people.

We would direct the Scottish Government to the Equality Network response for more detail but agree with their position that to use ‘other status’ would depart from the Human Rights Taskforce recommendations and the First Minister’s Advisory Group’s report. Specifically naming LGBTI+ people and older people in the equality provision would mitigate the risk of these populations’ rights being overlooked in the implementation of ICESCR and the right to a healthy environment, alongside CEDAW, CRPD and CERD treaty rights.

³² Who Cares? Scotland (2023) A Human Rights Bill for Scotland: response to the Scottish Government’s public consultation. Available at: <https://www.whocarescotland.org/wp-content/uploads/2023/09/WCS-Scottish-Human-Rights-Bill-consultation-response-Oct-2023-Final.pdf>

We believe naming both of these groups within the equalities clause on the face of the Bill will also provide needed clarity for these populations for how the Bill will protect their rights.

As stated in answer to Questions 14, there is no international treaty for the rights of LGBTI+ people and older people. By specifically naming these groups, we believe this Bill can make visible the need to address the specific barriers these groups face to accessing their rights while also reflecting the significant evidence that these groups often experience structural discrimination in Scotland.

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

- **Yes**
- No

We point the Scottish Government to the Equality Network's response for further detail in answer to this question. We support their position that in addition to specifically naming LGBTI+ and older people in the equalities clause, the Bill must also be explicit about including material from international law and treaty bodies that contributes to the evolving and progressive realisation of LGBTI+ rights and older people.

For example, including the Yogyakarta Principles as material that the court system and duty bearers can utilise when interpreting human rights of LGBTI+ people. Such supporting material will provide further strengthening of the Bill's ability to protect LGBTI+ and older people's rights in practice, and contribute important detail in the absence of a UN treaty stating the explicit rights of LGBTI+ and older people.

PART 7: THE DUTIES

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

Engender considers that the duties in the Human Rights Bill should apply to as many public bodies and organisations as possible, including private actors carrying out public functions.

Progress towards gender equality and realisation of women's rights is strongly influenced by actions and decisions taken by public bodies. Women make up the majority of workers in the public sector and are also more likely to rely on public services and social security due to persistent structural inequalities. For example, women are more likely to rely on social security payments as part of their incomes than men. Latest statistics from the Scottish Government show that, as of February 2023, 69% of Carer's Allowance recipients in Scotland were women, which highlights

the increased likelihood that women will require financial support to fulfil caring roles.³³

Public bodies such as Social Security Scotland, the NHS, as well as public and private bodies across education, early learning and childcare, and social housing hold huge influence in the realisation of women's rights and equality. Therefore, it is vital these duties apply to as wide a range of bodies and organisations as possible, within the powers of devolution.

In addition, these duties must complement the outcome of the Scottish Government's PSED Review and improvements to the SSDs and their implementation. In our consultation response to this review in 2022³⁴, we endorsed the National Advisory Council for Women and Girls' (NACWAG) recommendation to **mandate all Scottish regulators, ombudspersons and oversight bodies to advance equality and rights through the PSED and SSDs. Any additional duties introduced through the Human Rights Bill must build on the Scottish Government's commitments to improving the implementation of PSED.**

These duties must also avoid the shortcomings and limitations of PSED. At present, the SSDs are failing to embed equality in public sector work, support public bodies to fulfil their obligations and ultimately enable equality and fulfilment of rights for women and other marginalised groups. Indeed, the limitations of the PSED and SSDs approach have led to widespread calls for reform from across Scotland's equalities sector. In our response to the PSED review consultation³⁵, we detailed our concerns regarding the operation of PSED in Scotland.

In drafting the Human Rights Bill, the Scottish Government must learn from these weaknesses and implementation gaps in PSED, ensure that the new duties do not replicate these failures, and instead move us further on than the status quo.

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

We agree that public bodies and duty-bearers need time to prepare and embed Human Rights considerations into decision-making. However, this must not be an open-ended process, otherwise it may be de-prioritised and there could be a lack of

³³ Scottish Government (2023) Carer Support Payment: Equality Impact Assessment. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/impact-assessment/2023/09/carers-support-payment-equality-impact-assessment/documents/carers-support-payment-equality-impact-assessment/carers-support-payment-equality-impact-assessment/govscot%3Adocument/carers-support-payment-equality-impact-assessment.pdf>

³⁴ Engender (2022) Engender response to the Scottish Government's consultation on the operation of the Public Sector Equality Duty in Scotland. Available at: <https://www.engender.org.uk/content/publications/Engender-response-to-PSED-consultation.pdf>

³⁵ Ibid.

momentum and accountability. **The timeframe for the procedural duty should not be more than two years and should be set out in the Bill.**

As outlined in our answer to Question 4, the language of ‘procedural duty’ lacks clarity, particularly on whether this amounts to a ‘due regard’ duty. **Our view is that the procedural duty must amount to a duty to have ‘due regard’, in line with the Equality Act 2010.** We would be very concerned if this duty amounted to a weaker one than that set out in the Equality Act. Such a situation would significantly lessen the impact of this Bill and the aims for incorporation of the ‘equalities treaties.’ It would also potentially create barriers to the future integration of human rights and equalities duties, which would create greater confusion for duty-bearers and weaken its impact. In this respect we would draw the Scottish Government’s attention to the example of the Welsh Assembly’s approach to the UNCRC, and how it utilised due regard in line with PSED.³⁶ **As such, we strongly recommend that the ‘procedural duty’ should be articulated and realised as a ‘due regard duty’.**

We agree that there should be a period of time where only the procedural duty/due regard should apply. This period of time should not be more than two years and be specified in the Bill. After this period, the due regard duty should still apply, in addition to a duty to comply.

It is vital that any new positive duties, including a ‘due regard’ approach, align with an improved gender-competent PSED for Scotland and Fairer Scotland Duty. See our answer to Question 19 for detail on the need to align any new duties with existing equalities duties and reform efforts in Scotland.

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

Compliance for ICESCR and Healthy Environment rights

Engender agrees that all duty-bearers, within the limits of devolution, should have a duty to comply with the ICESCR rights and the Right to a Healthy Environment in the Bill, as proposed. However, to effectively deliver equality, the interpretation of Minimum Core Obligations of ICESCR and the Right to a Healthy Environment must be gender-sensitive and supported by standards designed with women across Scotland to ensure MCOs are accessible to them through the court system. For more detail on this, please see our answers to Questions 1 and 2.

As previously mentioned, Engender’s ICESCR Shadow Report demonstrated the gendered nature of these rights in Scotland. This report also highlights that we are at a critical moment for women’s rights in Scotland following successive crises such as austerity, the COVID-19 pandemic, and the continued cost of living crisis.

³⁶ Engender (2018) CEDAW How can women’s rights be better realised in Scotland? Available at: <https://www.engender.org.uk/content/publications/CEDAW-incorporation-paper.pdf>

Consequently, our report found that while gender inequality continues to deepen, the principles of progressive realisation of ICESCR are being undermined by government policy and women and girls are experiencing retrogression in protection of their ESC rights.³⁷

For compliance duties in the Bill to create better outcomes for women, we need statutory and non-statutory guidance that clearly states how interpretation of ICESCR and the Right to a Healthy Environment interact with CEDAW rights in the equality provision. We would also welcome further clarity on how courts will understand the equalities provision when assessing the obligations of duty-bearers to meet MCOs of ICESCR and the Right to a Healthy Environment.

A duty to comply for 'Equalities treaties'

As outlined in our answer to Question 4, the consultation notes that a duty to comply is ultimately needed if 'transformative impact' is to be secured. The decision to not place a 'duty to comply' on the 'equalities treaties' is therefore of significant concern and risks creating a hierarchy of rights realisation, significant confusion in the delivery of equalities outcomes, and at worst, could compound existing inequalities.

There are significant questions on how CEDAW, CERD and CRPD will be enforceable without a compliance clause. It's unclear how the suggested approach for a 'procedural' duty only for 'equalities treaties' and a compliance clause for ICESCR rights would work in practice. We are concerned that weaknesses in accountability combined with complexity and confusion for duty-bearers could be a major impairment to any meaningful operationalisation of CEDAW and 'equalities treaties' at ground level. We believe this is a significant departure from what was envisioned and articulated in work produced by and for the Taskforce.³⁸

A procedural duty, even if it amounts to due regard, is a weaker duty than a duty to comply. We are concerned that this would allow public bodies, provided they had due regard to the CEDAW rights, not to comply with them and to decide that they should be overridden by other considerations. For example, under Article 13 of ICESCR, a public body may provide equal access to technical and vocational secondary

³⁷ Engender et al. (2022) United Nations International Covenant on Economic, Social and Cultural Rights: Shadow Report. Available at: <https://www.engender.org.uk/content/publications/Engender-ICESCR-pre-sessional-shadow-report.pdf>

³⁸ Professor Nicole Busby (2020) The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby---cedaw/aap-paper-nicole-busby---cedaw/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BNicole%2BBusby%2B-%2BCEDAW%2BFINAL%2B%25281%2529.pdf> and Scottish Government (2021) National Taskforce for Human Rights Leadership Report. Available at: <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/pages/6/>

education opportunities for all, but at times and locations that are incompatible for women with caring roles who are unable to access childcare. The public body only has to demonstrate that it recognises this, but cannot afford to do anything about it, to meet the due regard duty. Women are therefore left unable to claim this right.

This approach is of particular concern in the context of resourcing pressures and existing gendered biases in policy and resource decision-making that create structural, entrenched disadvantages for women. **It is of real concern that the proposal being put forward by the Scottish Government could potentially compound these biases in decision making, by reinforcing the perception of a hierarchy of rights.**

Our experience of working on public bodies' delivery of PSED over the last decade is that a due regard duty approach only carries significant weaknesses. In the case of PSED it has not resulted in public bodies mainstreaming equality considerations in their decision-making processes in a meaningful way. The evidence shows that the PSED duties have failed to deliver advances in equality in Scotland. If the approach to the new human rights duties merely replicates these duties, they will be immediately susceptible to the same implementation failings.

There is a substantial body of evidence and learning on the operation of PSED from across the equalities sector. The Scottish Government undertook a review of PSED in 2022 and much of this information was fed into it.³⁹ However, that critical learning, particularly regarding the weaknesses of a due regard approach does not appear to have been taken into consideration in the design of the Human Rights Bill.

Recent correspondence from the Scottish Government has set out the next steps for PSED reform. We agree with sector partners that the proposals it details are disappointing, and a long way off from the substantive reforms long called for by organisations working on equality. The absence of action to tackle the dearth of equality mainstreaming in the public sector is deeply concerning, particularly as the same public bodies subject to PSED will become duty bearers under the Bill. Given that over ten years has passed since PSED was introduced, without improvement in public bodies' practice, this should be of urgent concern to the Scottish Government in its plans for the development of this Bill. **We urge the Scottish Government to ensure the PSED reform process is prioritised and not allowed to further stall.**

We would urge the Scottish Government to directly engage with the equalities sector and with the wealth of evidence that exists on PSED, to try to ensure that the Human Rights Bill does not replicate the same weaknesses in approach.

³⁹ Engender (2022) Engender response to the Scottish Government's consultation on the operation of the Public Sector Equality Duty in Scotland. Available at: <https://www.engender.org.uk/content/publications/Engender-response-to-PSED-consultation.pdf>

We accept that there are complex interactions with the equal opportunities' reservation. **However, we support the call for inclusion of a compliance clause for the 'equalities treaties.'** The number of organisations reiterating this call underlines the need for urgent revisions.

We urge the Scottish Government to further reflect on whether their proposed model is maximalist. We also ask for transparent engagement around the advice and rationale for these key decisions.

Question 22: Do you think certain public authorities should be required to report on what actions they are planning to take, and what actions they have taken, to meet the duties set out in the Bill?

As set out in our answer to Question 19, our view is that as many organisations and public bodies as possible, within the limits of devolution, should be covered by the Human Rights Bill. Progress on gender equality is heavily dependent on the actions and decision-making of public services, as we know that women are disproportionately reliant on services delivered by public bodies due to structural gender inequality.

As stated previously, the Scottish Government has already endorsed the recommendation of the National Advisory Council for Women and Girls to mandate all Scottish regulators, ombudspersons, and oversight bodies to advance equality and rights through the PSED and SSDs. Any such additional duties through the Human Rights Bill must build on this commitment and enhance existing duties and requirements of duty-bearers.

Question 23: How could the proposed duty to report best align with existing reporting obligations on public authorities?

As previously outlined, we would welcome further clarity on how the new duties for public authorities to report on ICESCR and CEDAW rights will interact with existing PSED and SSD requirements. Throughout this consultation we have stressed the need for these to be enhanced and link up in a practical way for application by public bodies. This is vital for any new reporting requirements to be meaningful in practice and not overly complex. This is especially important due to existing commitments to review the Scottish approach to PSED and the creation of a Human Rights and Equalities Mainstreaming Strategy across the Scottish Government.

We have provided detail in answers to Questions 19 to 22 on how PSED currently operates and how current reporting obligations under PSED have not amounted to meaningful self-scrutiny. There are important lessons to learn from how reporting duties have translated, in many instances, into tokenistic gestures under PSED.

Engender detailed our concerns with the operation of the Public Sector Equality Duty in Scotland in our response to Scottish Government consultation in 2022.⁴⁰ As previously stated, the SSDs are failing to embed equality in public sector work, support public bodies to fulfil their obligations and ultimately enable equality and fulfilment of rights for women and other marginalised groups. Indeed, the limitations of the PSED and SSDs approach have led to widespread calls for reform from across Scotland's equalities sector.

We know that high quality reporting in relation to gender equality must include:

- Gender-disaggregated data collection
- Gender analysis of service delivery/performance from public bodies
- Inclusion of gender/equalities organisations and expertise
- Inclusion of lived experience from women, especially those most marginalised
- Tailored recommendations in reporting which recognise and address gendered outcomes

We would urge the Scottish Government to directly engage with the equalities sector and with the wealth of evidence that exists on PSED, try to ensure that the Human Rights Bill does not replicate the same weaknesses in approach, and that an effective system of reporting is developed for the Human Rights Bill.

Question 24: What are your views on the need to demonstrate compliance with economic, social and cultural rights, as well as the right to a healthy environment, via MCOs and progressive realisation?

We support this proposal and would reiterate our view that **it is crucial that the Scottish Government takes steps to avoid gender-neutral incorporation of ICESCR.** The fundamental importance of this has been stressed by Professor Nicole Busby *"[i]ncorporating the social and economic rights provided by ICESCR without specifically gendering those rights risks reproducing and perpetuating existing inequalities which could become further institutionalised as the new rights framework becomes operational."*⁴¹ This is made even more critical by the restrictions on full incorporation of CEDAW.

⁴⁰ Engender (2022) Engender response to the Scottish Government's consultation on the operation of the Public Sector Equality Duty in Scotland. Available at: <https://www.engender.org.uk/content/publications/Engender-response-to-PSED-consultation.pdf>

⁴¹ Professor Nicole Busby (2020) The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby---cedaw/aap-paper-nicole-busby---cedaw/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BNicole%2BBusby%2B-%2BCEDAW%2BFINAL%2B%25281%2529.pdf>

Further thought is also need on how Minimum Core Obligations (MCOs) can be effectively gendered. The definition of what would constitute essential levels of protection of economic, social, and cultural rights for women will differ from that of men due to structural gender inequality in Scotland. A minimum standard for fulfilling rights set out in the Bill will need to be tailored to take into account and adapt to the structural inequality that women face. Any such MCOs must also account for the intersectional experiences of women, where women who face intersecting forms of marginalisation will have different needs, in order for essential levels of protection of rights to be fulfilled in practice. **The development of MCOs must be undertaken through a participatory process, involving gender experts and diverse groups of women.**

Effectively interpreting ICESCR rights using CEDAW and broader equality provisions will require public bodies and duty bearers to have significant gender competence and effective gender mainstreaming mechanisms to be effective in addressing structural gender inequality.

Question 25: What are your views on the right to a healthy environment falling under the same duties as economic, social and cultural rights?

Question 26: What is your view on the proposed duty to publish a Human Rights Scheme?

We support the duty to publish a Human Rights Scheme. However, throughout this response we have demonstrated how gender-neutral systems and implementation of law and policy routinely fail women and entrench inequality. We are therefore not convinced that a single Human Rights Scheme would adequately meet the needs of all groups, particularly those, including women, that are subject to special protection treaties.

Utilising a single Human Rights Scheme also limits consideration of intersecting equalities issues. This is an area that is inadequately dealt with by existing equality law, and we would urge the Scottish Government to use the opportunity of the Human Rights Bill to move us forward in how intersectionality is addressed in policy and decision-making in Scotland.

We have outlined the need for gender-sensitive implementation of ICESCR rights, including in the setting of Minimum Core Obligations and in the interpretation of 'dignity' and wider human rights principles in answer to Questions 1 to 4. We have also set out why it is crucial that implementation frameworks for the Human Rights Bill do not replicate the weaknesses of PSED, and that duty-bearers are effectively guided in how to implement the Human Rights Bill proposals, alongside PSED and the Fairer Scotland Duty.

The UNCRC Bill will introduce a separate Children’s Rights Scheme, in recognition of the need for specific accountability mechanisms to protect the rights of children in Scotland as a distinct group that have particular barriers to having their rights realised and protected.

The women’s sector is calling for a specific ‘Women’s Rights Scheme’ in addition to, or in complement to a wider Human Rights Scheme. This Scheme should place enhanced duties on Scottish Ministers to set out the arrangements they will put in place to fulfil women’s rights in Scotland. This would also help ensure that the rights under ICESCR are made specific to women and adequately gendered.

A Women’s Rights Scheme would ensure Ministers articulate how work underway to improve the operation of the Public Sector Equality Duty in Scotland, the Fairer Scotland Duty and any new Human Rights Bill duties inter-lock and work together to realise women’s human rights in Scotland.

We would recommend that Ministerial reporting under a Women’s Rights Scheme provides evidence, action and outcomes in the following areas:

- Scottish Government leadership on progressing women’s rights
- Women’s participation as rights holders to claim their rights and shape decision-making.
- Embedding women’s human rights in public services
- Women’s rights resolutions

We recommend that the following actions form explicit requirements under the duties linked to a Women’s Rights Scheme:

1. Specific guidance on how CEDAW rights would be monitored and assessed for progress.

Human rights, equality duties and the need for compliance with ICESCR should be integrated and aligned with adequate gender competent guidance for all duty-bearers, which will require gender competence at all levels of government. This should make any progress on gender equality visible within the wider monitoring mechanisms put in place for implementation of the Human Rights Bill. We believe there should be a duty on Scottish Ministers to produce such a framework – including ensuring any guidance adequately details how intersectional experiences of marginalised and minoritized groups of women are made visible as part of monitoring and reporting under the Scheme.

2. Reporting requirements by duty-bearers on actions to secure and further women’s rights.

The Scheme should also require the Scottish Government and listed authorities to report periodically on action they are taking to ensure compatibility with the rights and obligations arising under CEDAW to further realise women’s rights. Reporting on

the progression of women's human rights should be stated explicitly and link to existing commitments to implement an Equalities and Human Rights Mainstreaming Strategy, and with existing duties to report under PSED.

3. Creation of specific monitoring and evaluative tools

The Scottish Government should produce gender-competent evaluative and monitoring tools under the Scheme for public authorities so that progress can be measured regularly against the positive (procedural) duties imposed on them. This could take the form of benchmarks or targets for example, as well as a system for reviewing the mechanisms to ensure that they remain fit for purpose.

4. Ministerial reporting directly to the Scottish Parliament

The Scheme should also specify duties on Ministers to report to the Scottish Parliament periodically on the actions they have taken to uphold women's human rights. Reporting on women's rights via the Scheme would ensure that the Scottish Government is accountable to the Parliament, stakeholders and the public.

5. Other actions

Specific consideration under the Scheme should be given by Scottish Ministers on the actions necessary to realise women's human rights under the Scottish National Action Plan for Human Rights (SNAP 2).

Gender budgeting should be part of the requirement placed on Scottish Ministers under the Scheme and we point the Scottish Government to the responses of Close the Gap and the Scottish Women's Budget Group for further detail.

PART 8: ENSURING ACCESS TO JUSTICE FOR RIGHTS HOLDERS

Question 27: What are your views on the most effective ways of supporting advocacy and/or advice services to help rights-holders realise their rights under the Bill?

The consultation lacks critical detail on the routes to remedy for rights-holders under the Bill. Specifically, we are unclear how, or if women will be able to access justice or remedies for violations of their rights protected under CEDAW. As we outlined in our answer to Question 13, the **Scottish Government should commit to conducting further meaningful consultation with women and women's organisations across Scotland on issues including access to justice.**

This should include consideration of the types of access to justice women require to realise their rights under the Human Rights Bill. This is especially important as we do not yet know which CEDAW rights will be redacted in the Bill and this could impact the type of support women would be able to access.

We also support concerns raised by the HRCS and others on the broader lack of detail on ‘access to justice’ as a whole in the consultation. This vital area requires further consideration and thought, as realising access to justice will ultimately determine how the Bill will or will not work for people in practice at an everyday level.

Women have historically struggled to secure redress for human rights violations in Scotland. For example, Engender’s work on sexist and sexual harassment in the workplace, demonstrates how women’s voices are routinely ignored on issues of violence and rights infringements in the workplace.⁴² For decades, individual women have borne the risk for challenging sexual harassment, and we found there is an urgent need to change and improve systems of reporting, investigation, remedies and accountability to redistribute the risk away from victim-survivors and onto perpetrators and employers. This is further impacted by experiences of other forms of marginalisation.

The lack of accountability for rights infringements via sexist and sexual harassment for women in the workplace illustrates the need for access to justice to be based on rebalancing the risk and responsibility away from women to elsewhere in the system.

Women will only have their rights realised if specialist organisations, tailored to women’s needs and who understand how to support women experiencing gendered rights violations, are adequately funded to ensure CEDAW and related ICESCR rights are accessible. This must include an intersectional approach, which understands the different types of services that different groups of women require; for example, potential language and culture barriers, or difficulties due to geographical access.

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

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

Any regulator being afforded new responsibilities in the Bill must be required to have gender competence and undertake resourced capacity building to ensure their services are gender-sensitive and can meet the needs of women.

Currently, we are not confident that the SPSO would have the ability to analyse systemic inequality for women and marginalised people in the delivery of public bodies’ duties under the Bill. We would need to see greater detail on how this would be operationalised within the SPSO, specifically what strategy, resources and

⁴² Engender (2020) Enough is Enough: Tackling workplace sexual harassment in Scotland. Available at: <https://www.engender.org.uk/content/publications/Enough-is-Enough---tackling-workplace-sexual-harassment-policy-in-Scotland.pdf>

accountability mechanisms would be applied to the SPSO to ensure it delivers for women.

We also support the HRCS position that more consideration is needed to ensure that seeking remedies through the SPSO is accessible, effective, affordable, timely and supportive.

Question 30: What are your views on our proposals in relation to scrutiny bodies?

We are concerned there is a lack of gender competency and capacity across current scrutiny bodies named in the proposals, such as the SHRC and SPSO. For more detail see our answer to Question 29.

It is also unclear in the consultation, which regulatory body will oversee compliance of the procedural duty of the 'equalities treaties.' Currently the SHRC does not work on 'Equalities'. The EHRC is the regulator for the Equality Act.

There is a need for further clarity on what the SHRC and EHRC will be responsible for under this proposed legislation – as well as what new powers and resourcing will be given. Without this, enforcement could fall between the cracks between the SHRC and EHRC.

Question 31: What are your views on additional powers for the Scottish Human Rights Commission?

We support the HRCS' call for increased powers and resourcing for the SHRC. We agree that additional powers for the SHRC should include:

1. Providing advice to individuals
2. Conducting investigations into specific human rights issues
3. Holding inquiries into the practices of individual public bodies
4. Monitoring and scrutinising public body reports on the implementation of rights outlined in the Bill and requiring public bodies to implement its recommendations
5. Compelling public bodies to provide necessary information for inquiries or investigations
6. Issuing binding guidance

Given that that the SHRC does not currently have the resources to fulfil such a role, it is crucial that any new powers granted to the SHRC are accompanied by sufficient resources to enable them to utilise these powers effectively. It is right that the SHRC should be able to hold the Scottish Government and public bodies to account on delivering and progressing rights under this Bill. In order to do so their resource needs to be significantly increased.

It is unclear from the consultation **which regulatory body will oversee compliance of the procedural duty of the 'equality' treaties.** As previously stated, the SHRC doesn't currently work on 'Equalities' and the EHRC is the regulator for the Equality Act. It is unclear how the EHRC and SHRC will work together to oversee implementation, particularly as it relates to equalities issues including rights under CEDAW. **We would urge further clarity and consultation on what the SHRC will be responsible for in relation to the 'equalities treaties'- and what new powers and resourcing will be given to ensure their meaningful operationalisation.**

Question 32: What are your views on potentially mirroring these powers for the Children and Young People's Commissioner Scotland where needed?

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

Engender supports the proposed approach to 'standing' as set out in the consultation. Allowing civil society organisations to demonstrate 'sufficient interest' may expand routes for access to justice, including by taking strategic litigation.

We also support the HRCS' proposal that the Scottish Government and other stakeholders should consider amendments to court rules to clearly define the criteria for 'sufficient interest' so that there is clarity for both the courts and NGOs considering taking human rights cases.

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

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

- Agree
- **Disagree**

Question 36: If you do not agree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders, what additional remedies would help to do this?

We do not agree that existing judicial remedies will be sufficient to deliver effective remedy for women whose rights have been violated. Women continue to struggle to access their existing rights and legal protections through the Scottish judicial system.

In order to remedy systemic issues that enable rights violations or prevent women and other protected groups from accessing their rights, the judiciary must have the ability to use structural interdicts as a remedy. This is in line with international best practice. The Scottish legal system is well-placed to include such a remedy.

Structural remedies are urgently needed to address the barriers to effecting systemic change caused by the current individualisation of rights and remedies. As Dr Katie Boyle sets out, “The structural interdict can operate as a response to a systemic problem identified in either an individual case that identifies a wider systemic problem or in response to multi-party group proceedings where several litigants are facing the same systemic issue. Comparative best practice suggests that facilitating group proceedings is a helpful way of addressing economic, social, cultural and environmental rights (ESCER) violations because such violations are often collective in nature.”⁴³ Structural interdicts are therefore a necessary tool in ensuring the judiciary is able to respond appropriately in instances where gender or other protected characteristics are a causal factor in rights violations.

Question 37: What are your views on the most appropriate remedy in the event a court finds legislation is incompatible with the rights in the Bill?

PART 9: IMPLEMENTING THE NEW SCOTTISH HUMAN RIGHTS ACT

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

We support the HRCS’ position that the legislation must be brought into force as quickly as is reasonably possible. We ask that specific timescales are specified, and that commencement is no more than six months after Royal Assent, with the ‘duty to comply’ added no more than two years later.

This will ensure the new legislation does not drift and that rights-holders have a clear understanding of when new rights protections will come into force.

Question 39: What are your views on our proposals to establish MCOs through a participatory process?

We support this proposal.

The development of MCOs must be undertaken through a participatory process, involving gender experts and diverse groups of women, specifically those that are most at risk of rights violations. In addition to evidence on lived experience, robust structural gender analysis will be required, as well as gender competence among those who will be shaping the final MCOs.

Further thought is also needed on how Minimum Core Obligations (MCOs) can be effectively gendered. The definition of what would constitute essential levels of protection of economic, social, and cultural rights for women will differ from that of

⁴³ Dr Katie Boyle (2020) Academic Advisory Panel Briefing Paper Access to Remedy – Systemic Issues and Structural Orders. Available at: <https://dspace.stir.ac.uk/retrieve/83ce5341-cc71-43dd-98ad-72be806d9a10/BOYLE%20Systemic%20Issues%20and%20Structural%20Orders%20Briefing%20Paper.pdf>

men due to structural gender inequality in Scotland. A minimum standard for fulfilling rights set out in the Bill will need to be tailored to take into account and adapt to the structural inequality that women face.

There is a lack of detail within the consultation as to whether this process will be led by Scottish Government or by the Scottish Human Rights Commission. **If it is to be led by the SHRC, then the Scottish Government must ensure that they are properly resourced, and have the appropriate competencies, specifically in the areas of gender and equalities, to carry out this function.**

Currently the SHRC does not work on 'Equalities'; the EHRC is the regulator for the Equality Act. There is a need for further clarity on what the SHRC and EHRC will be responsible for under this proposed legislation - and what new powers, competencies and resourcing will be required.

We support the HRCS recommendation that a review of MCOs should take place every 10 years. Our answer to Question 13, sets out the key components of a participatory process in more detail.

Question 40: What are your views on our proposals for a Human Rights Scheme?

Please see our answer to Question 26.

We support the duty to publish a Human Rights Scheme. However, throughout this response we have demonstrated how gender-neutral systems and implementation of law and policy routinely fail women and entrench inequality. We are therefore not convinced that a single Human Rights Scheme would adequately meet the needs of all groups, particularly those, including women, that are subject to special protection treaties.

Utilising a single Human Rights Scheme also limits consideration of intersecting equalities issues. This is an area that is inadequately dealt with by existing equality law, and we would urge Scottish Government to use the opportunity of the Human Rights Bill to move us forward in how intersectionality is addressed in policy and decision-making in Scotland.

We have outlined the need for gender-sensitive implementation of ICESCR rights, including in the setting of Minimum Core Obligations and in the interpretation of 'dignity' and wider human rights principles throughout this response. We have also set out why it is crucial that implementation frameworks for the Human Rights Bill do not replicate the weaknesses of PSED, and that duty-bearers are effectively guided in how to implement the Human Rights Bill proposals, alongside PSED and the Fairer Scotland Duty.

The UNCRC Bill will introduce a separate Children’s Rights Scheme, in recognition of the need for specific accountability mechanisms to protect the rights of children in Scotland as a distinct group that have particular barriers to having their rights realised and protected.

The women’s sector is calling for a specific ‘Women’s Rights Scheme’ in addition to, or in complement to a wider Human Rights Scheme. The Scheme should place enhanced duties on Scottish Ministers to set out the arrangements they will put in place to fulfil women’s rights in Scotland. This would also help ensure that the rights under ICESCR are made specific to women and adequately gendered.

A Women’s Rights Scheme would ensure Ministers articulate how work underway to improve the operation of the Public Sector Equality Duty in Scotland, the Fairer Scotland Duty and any new Human Rights Bill duties inter-lock and work together to realise women’s human rights in Scotland.

We would recommend that Ministerial reporting under a Women’s Rights Scheme delivers evidence, action and outcomes in the following areas:

- Scottish Government leadership on progressing women’s rights
- Women’s participation as rights-holders to claim their rights and shape decision-making
- Embedding women’s human rights in public services
- Women’s rights resolutions

We recommend that the following actions form explicit requirements under the duties linked to a Women’s Rights Scheme:

1. Specific guidance on how CEDAW rights would be monitored and assessed for progress.

Human Rights and Equality duties and the need for compliance with ICESCR should be integrated and aligned with adequate gender competent guidance for all duty bearers, which will require gender competence at all levels of government. This should make any progress on gender equality visible within the wider monitoring mechanisms put in place for implementation of the Human Rights Bill. We believe there should be a duty on Scottish Ministers to produce such a framework, including ensuring any guidance adequately details how intersectional experiences of marginalised and minoritized groups of women are made visible as part of monitoring and reporting under the Scheme.

2. Reporting requirements by duty-bearers on actions to secure and further women’s rights.

The Scheme should also require the Scottish Government and listed authorities to report periodically on action they are taking to ensure compatibility with the rights and obligations arising under CEDAW to further realise women’s rights. Reporting on

the progression of women's human rights should be stated explicitly and link to existing commitments to implement an Equalities and Human Rights Mainstreaming Strategy, and with existing duties to report under PSED.

3. Creation of specific monitoring and evaluative tools

The Scottish Government should produce gender-competent evaluative and monitoring tools under the Scheme for public authorities so that progress can be measured regularly against the positive (procedural) duties imposed on them. This could take the form of benchmarks or targets, for example, as well as a system for reviewing the mechanisms to ensure that they remain fit for purpose.

4. Ministerial reporting directly to the Scottish Parliament

The Scheme should also specify duties on Ministers to report to the Scottish Parliament periodically on the actions they have taken to uphold women's human rights. Reporting on women's rights via the Scheme would ensure that the Scottish Government is accountable to the Parliament, stakeholders and the public.

5. Other actions

Specific consideration under the Scheme should be given by the Scottish Ministers on the actions necessary to realise women's human rights under the Scottish National Action Plan for Human Rights (SNAP 2).

Gender budgeting should be part of the requirement placed on Scottish Ministers under the Scheme and we point the Scottish Government to the responses of Close the Gap and the Scottish Women's Budget Group for further detail.

Question 41: What are your views on enhancing the assessment and scrutiny of legislation introduced to the Scottish Parliament in relation to the rights in the Human Rights Bill?

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

Our answer to question 40, specifically our proposal for a Women's Human Rights Scheme, sets out detail on how capacity can be effectively built across the public sector to ensure the rights in the Bill are delivered, specifically for women. Critically, it would provide vital accountability mechanisms to ensure that sufficient resources are provided for capacity building and that it is delivered.

When exploring how to build effective capacity across the public sector, we ask that the Scottish Government and partners learn from the application of PSED duties in Scotland. There is a substantial body of evidence and learning on the operation of PSED from across the equalities sector. The Scottish Government undertook a review

of PSED in 2022 and much of this information was fed into it.⁴⁴ However, that critical learning, particularly regarding the weaknesses of a due regard approach does not appear to have been taken into consideration in the design of the Human Rights Bill.

The absence of action to tackle the dearth of equality mainstreaming in the public sector is deeply concerning, particularly as the same public bodies subject to PSED will become duty-bearers under the Bill. Given that over ten years has passed since PSED was introduced, without improvement in public bodies' practice, this should be of urgent concern to the Scottish Government in its plans for the development of this Bill.

We would urge the Scottish Government to directly engage with the equalities sector and with the wealth of evidence that exists on PSED, to try to ensure that the Human Rights Bill does not replicate the same weaknesses in approach, and specifically around capacity building.

The forthcoming Human Rights and Equalities Mainstreaming Strategy and any reforms to the Scottish approach to PSED are crucial in supporting capacity building across the public sector to deliver on the Bill requirements for women and wider equalities groups.

We would add that significant funding and resourcing will need to be made available to grassroots and community organisations that specialise in supporting women and specific groups of women, as well as investment in the wider women's and equalities sector in Scotland. Adequately funding civil society organisations is a key component of capacity building in the public sector.

We agree with the HRCS' position that statutory and non-statutory guidance in building capacity is essential. This should be developed with gender experts and with participation of women whose rights are most at risk. Any such guidance should be written and published in a way that is accessible to rights-holders as well as ensuring duty-bearers understand and can fulfil their responsibilities.

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

We have addressed the resources required for women to be able to access their rights in our answer to Question 27.

We would add that significant funding and resourcing would need to be made available to grassroots and community organisations that specialise in supporting women and specific groups of women, as well as investment in the wider women's

⁴⁴ Engender (2022) Engender response to the Scottish Government's consultation on the operation of the Public Sector Equality Duty in Scotland. Available at: <https://www.engender.org.uk/content/publications/Engender-response-to-PSED-consultation.pdf>

and equalities sector in Scotland. Adequately funding civil society organisations is a key component to ensuring women receiving support or engaging with these organisations are aware of their rights.

This is even more vital in the context of historic underinvestment in women's organisations. Research published in 2023 by the Centre for Regional Economic and Social Research⁴⁵ found that less than 2% of all grants recorded in 2021 in the UK went to women's and girls' organisations, and 50% of all grants to this sector are for £10,000 or less. The average grant value for women and girls' organisations is significantly lower than for all other organisations. Compounded by the ongoing impact of COVID and wider cost of living crisis, the findings show that the women's sector is 'undervalued, under resourced and ultimately unsustainable.'

Question 44: What are your views on monitoring and reporting?

We are restating points already made in answer to Questions 23, 26 and 40 on what good gender-competent monitoring and reporting needs to look like in implementation of the Bill.

We are calling for a 'Women's Rights Scheme' in addition to, or in complement to a wider Human Rights Scheme, to ensure the impact of the Bill on women's lives is made visible in any monitoring and reporting mechanisms.

In our answer to Question 40 we identified and recommended the following actions under the duties linked to a potential Women's Rights Scheme:

1. Specific guidance on how CEDAW rights would be monitored and assessed for progress.
2. Reporting requirements by duty-bearers on actions to secure and further women's rights.
3. Creation of specific monitoring and evaluative tools
4. Ministerial reporting directly to the Scottish Parliament
5. Other actions
 - Specific consideration under the Scheme should be given by the Scottish Ministers on the actions necessary to realise women's human rights under the Scottish National Action Plan for Human Rights (SNAP 2).
 - Gender budgeting should be part of the requirement placed on Scottish Ministers under the Scheme and we point the Scottish Government to the

⁴⁵ Centre for Regional, Economic and Social Research (2023) Mapping the UK Women and Girls Sector and its Funding. Available at: <https://esmeefairbairn.org.uk/latest-news/funding-uk-women-and-girls-sector-where-does-money-go/>

responses of Close the Gap and the Scottish Women's Budget Group for further detail.

In reporting, duty-bearers must provide evidence of actions taken to deliver rights for women and other protected characteristic groups. This must include the data used and an accompanying gendered analysis, along with evidence of gender and human rights budgeting. This will encourage a human rights culture by mandating public bodies to record information and evidence of how CEDAW, CERD and CRPD have been considered and shaped their decision-making in regard to women's lives.

A key concern is that any reporting by duty-bearers, such as public authorities, must be integrated and streamlined to ensure meaningful measurements of progress, that can be implemented in practice.

We echo responses from across the sector, such as Close the Gap, that point to the need for lessons to be learned from the issues with PSED reporting by public bodies. PSED reporting has been deemed not fit for purpose and in need of major reform; much of this learning can be utilised to create meaningful and practical mechanisms for duty-bearers to monitor and report under the Bill.

We want to see monitoring and reporting happen thematically on gender, to ensure progression or regression of women's rights across the different treaty rights is made visible by duty-bearers. In order to achieve this, the Scottish Government needs to work with duty bearers to improve gender-disaggregated data collection and build approaches to data analysis which pull out key rights issues for equalities groups.

We also ask the Scottish Government to recognise the role of the women's sector in Scotland as an essential part of how duty-bearers can be scrutinised as part of monitoring and reporting under the Bill. Women's organisations have first-hand experience and gender competence that can be utilised to provide essential evidence on how women's rights are being upheld.

FOR FURTHER INFORMATION

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ABOUT US

Engender is Scotland's feminist policy and advocacy organisation, working to increase women's power and influence and to make visible the impact of sexism on women, men and society. We provide support to individuals, organisations and institutions who seek to achieve gender equality and justice.