



The Health and Social Care Alliance Scotland (the ALLIANCE)



A Human Rights Bill for Scotland

5 October 2023

Introduction

The Health and Social Care Alliance Scotland (the ALLIANCE) welcome the Scottish Government's ambition to incorporate international human rights into domestic law and the opportunity to respond to the consultation on a Human Rights Bill for Scotland (the Bill).¹

We have long called for incorporation, and our response is informed by our engagement over several years with a wide range of stakeholders, including our members, rights holders, public bodies – including Scottish Government – academia, National Human Rights Institutions (NHRIs), third sector and independent sector organisations.

The ALLIANCE recognises that incorporation is a challenging and complex endeavour. However, it is imperative that the legislation gives the maximum possible effect to people's human rights. This means ensuring that the Bill includes a duty to comply with as many of the rights as possible – including substantive rights in CEDAW, CERD and CRPD – as well as robust measures on access to justice, participation, implementation, scrutiny and accountability.

The consultation timescale has been challenging; although it ran for 16 weeks, half of this took place during the 2023 summer holidays. As such, the ALLIANCE and several of our members and partners have had to work on our responses at pace with limited capacity. We also note that less detail was provided on some proposals as different options are being considered. Nevertheless, we understand that Scottish Government will be carrying out further consultation prior to the Bill being introduced, and the ALLIANCE looks forward to actively engaging in this work as well as providing a connecting bridge to our members.

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?

The ALLIANCE welcomes and supports the proposal. Dignity is a fundamental human rights principle, and research by Professor Elaine Webster demonstrates that engaging with dignity language can “support a transformed and sustainable human rights culture”.² The ALLIANCE recommend that Professor Webster – who provided expertise to the National Taskforce for Human Rights Leadership (National Taskforce)³ – is consulted on developing the Bill’s provisions related to dignity.

The consultation document notes that Scottish Government “are also 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.” The National Taskforce recommended including a purpose clause that would state “the intent of the legislation is to give maximum possible effect to human rights and recognise that human dignity is the value which underpins all human rights.”⁴ The ALLIANCE supports this recommendation, and the call from the Human Rights Consortium Scotland (HRCS)⁵, so that the Bill would include a purpose clause that (a) sets out the intention is to give the maximum possible effect to human rights; (b) recognises dignity as a fundamental principle that underpins human rights; and (c) explicitly names and explains key human rights principles and participation. Naming and explaining principles like universality, indivisibility, interdependence and interrelatedness will ensure a shared and consistent understanding and interpretation of rights in the law, help raise public awareness and build a culture of human rights.

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

The ALLIANCE believes that dignity should be a required key threshold for defining the content of Minimum Core Obligations (MCOs). We believe that public bodies should be required to demonstrate how they have both

actively considered (the procedural duty) and complied with the human rights principle of dignity. As the case study about Dignispace⁶ in our research, ‘The Opportunity Is Now’,⁷ demonstrates, dignity is ‘teachable’ to professionals. We recommend that Scottish Government work with rights holders, experts like Professor Elaine Webster, and others to develop guidance on what dignity looks like in practice, so that public bodies and those carrying out devolved public functions are well informed about how to carry out their duties.

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

The ALLIANCE welcomes Scottish Government recognition that interpretative information, materials and mechanisms already exist in relation to international human rights standards and principles. One example is the recognition in ICESCR General Comment 14 that the right to health facilities, goods and services includes “the provision of equal and timely access to basic preventive, curative, rehabilitative health services”.⁸

We regularly encourage public bodies to consider the wealth of international jurisprudence when developing their policy and practice, and therefore support proposals that the Bill will include provisions for duty bearers, scrutiny bodies, courts and tribunals to use this data. It will help duty bearers better understand how to implement rights in practice, meet their human rights obligations and demonstrate compliance with the duties in the Bill. It will help regulatory and scrutiny bodies better understand and carry out their functions. It will also help courts and tribunals ensure that domestic law is being interpreted in line with expert international opinion.

A relevant provision in the UNCRC (Incorporation)(Scotland) Bill (UNCRC Incorporation Bill)⁹ sets out which treaty-based “things” should be considered, including – but not limited to – treaty preambles, General Comments, Concluding Observations, and recommendations following days of general discussion. For consistency, the Scottish Human Rights Bill

should follow a similar route, however the ALLIANCE also recommends that consideration is given to relevant materials from UN Special Procedures,¹⁰ and to interpretations derived from the reports and other findings of independent UK mechanisms like the Scottish Human Rights Commission (SHRC) and the Equality and Human Rights Commission (EHRC).

The ALLIANCE recognises that a flexible approach may be needed if different treaty bodies have interpreted issues engaging the same rights in different ways. We believe the Bill could include provisions to direct that – in situations of conflicting interpretation – Scottish bodies should engage the principle of progressive realisation and aim to achieve the best possible outcomes for rights holders and the strongest possible accountability for duty bearers. This aligns with the purpose stating that the intent is to give maximum possible effect to human rights (see our answer to Q1).

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

The ALLIANCE supports some – but not all – of the elements of the proposed model of incorporation.

We agree that the text from the four treaties – ICESCR, CEDAW, CERD, and CRPD – should be reproduced in the Bill, removing any areas that are reserved to the UK Parliament. Where there are rights that include both devolved and reserved elements (e.g. Article 6 ICESCR, on the right to work) the Scottish Government should adopt a maximalist approach. We also believe that the right to a healthy environment should be included in the Bill.

The ALLIANCE believes that the aim of the Bill is to achieve the best possible outcomes for rights holders and most robust compliance and accountability possible by duty bearers. We understand that the SHRC are proposing an alternative incorporation model – supported by expert legal opinion – and recommend that Scottish Government give serious

consideration to this alternative approach if it is a better way to achieve the Bill's aims.

The ALLIANCE supports calls from our member, Together (Alliance for Children's Rights), HRCS and others for a legislative audit at an early stage. The purpose of this would be to (a) identify which Acts of the Scottish and UK Parliaments – that fall within devolved competence – fall short of human rights standards; and (b) enable amendments to be passed before the Bill takes effect. We support the three-step approach recommended by Together.¹¹

We agree that public authorities – and as far as possible other bodies carrying out devolved public functions – should have both a procedural duty and a duty to comply in relation to the ICESCR rights and the right to a healthy environment. The procedural duty should also apply in relation to the rights in CEDAW, CERD, and CRPD.

The procedural duty should be a duty to have 'due regard', which is well-understood – if inconsistently applied – for example through the provisions of the 2010 Equality Act¹². Together note the risks of a weaker duty like 'have regard' or 'take steps', and how the 'due regard' duty has "played a significant role in embedding children's human rights" in Wales.¹³

We believe that the duty to have due regard should not be phased out and should continue to exist alongside the duty to comply. Furthermore, we believe that without clear and precise information about when the different duties apply there could be confusion leading to a risk of non-compliance. Therefore, the Bill should explicitly state that the duty to have due regard starts from the date of the Act receiving Royal Assent, and the duty to comply will start two years after the Act receives Royal Assent.

We agree that the duty to comply should include a requirement to deliver MCOs and progressive realisation. It should be explicit that progressive realisation includes the use of maximum available resources and non-

regression. Explicit reference should also be made to human rights budgeting (see our answer to Q21).

The ALLIANCE agrees that there should be an equality provision in the Bill to ensure equal access for everyone to the rights therein. LGBTI people and older people should be named on the face of the Bill (see our answers to Q14-Q18).

The ALLIANCE agrees that there should be a clear explanation of what the rights in the Bill are and what they mean. The Scottish Government should work with rights holders, third sector organisations, human rights experts from the SHRC, EHRC, legal/academic experts, and public bodies to develop such guidance (see our answers to Q42 and Q43).

We agree that the provisions of CEDAW, CERD and CRPD should be considered when ICESCR rights and the right to a healthy environment are being interpreted and implemented for relevant population groups. The ALLIANCE believes there should be interpretative provision in the Bill that ensures all the rights are required to be interpreted in light of international human rights standards and the concept of human dignity (see our answer to Q3).

The ALLIANCE does not support the proposal to only apply a procedural duty/duty to have due regard to CEDAW, CERD and CRPD. We strongly believe that fully realising the substantive rights in these treaties requires a duty to comply, otherwise the Scottish Human Rights Bill will not deliver the significant change that is needed.

We understand that numerous respondents to this consultation are expressing a similar view, including many ALLIANCE members and partners. For example, Together note that, “Children and young people called for a duty to comply during the passage of the UNCRC Bill”;¹⁴ HRCS note that, “As the consultation itself notes, a stronger duty of compliance is needed ‘for transformative impact’. The decision to not place a ‘duty to comply’ on the special protection treaties is a significant departure from full

incorporation of these treaties”;¹⁵ and the Scottish Commission for People with Learning Disabilities (SCLD) note that, “[the CRPD] should be given as much power as possible in to order to ensure that the rights of people with disabilities, including people with learning disabilities, are protected as much as possible.”¹⁶

The ALLIANCE is very concerned about the prospect of a two-tiered and hierarchical approach to the rights and duties in the Bill. We strongly urge that further consideration is given to applying the duty to comply to the substantive rights in CEDAW, CERD and CRPD. Without this, the Bill risks falling short on the Scottish Government commitment to implement the National Taskforce’s recommendations and take a maximalist approach to incorporation.

To support transparent and participatory decision-making on the incorporation model, the ALLIANCE recommend that Scottish Government publish more detailed information explaining the rationale for its proposal, and welcome further opportunities to engage on the issue.

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.

Like other respondents we are aware of, the ALLIANCE believes calling CEDAW, CERD and CRPD “equalities treaties” is unhelpful and we support alternative terms like “special protection treaties” instead.

If Scotland is to be considered a world leader in human rights, an ambitious, progressive and maximalist approach to incorporation is required. The ALLIANCE believes that the starting point should be an assumption that all rights being incorporated come with a duty to comply, and the question should be which rights in CERD, CEDAW and CRPD should *not* have this duty. As Together note, “This is a technical, legal question which should be explored by Scottish Government lawyers. It is crucial that this analysis is transparent and allows for public scrutiny of

what has been omitted. Similar considerations for the UNCRC Bill involved in-depth discussion between Scottish Government, civil society and the Children and Young People's Commissioner Scotland."¹⁷ The Scottish Government should take a similar approach to the Scottish Human Rights Bill, including meaningful input from civil society, the SHRC, EHRC, Children and Young People's Commissioner for Scotland (CYPCS), and legal/academic experts.

The ALLIANCE believes that there are substantive rights in the CRPD that should have a duty to comply as well as a duty to have due regard. These are:

- Article 5, Equality and non-discrimination, including the requirement to make "reasonable accommodation".
- Article 7(3), Participation of disabled children.
- Article 9, The right to accessibility of the physical environment, transportation, information and communication, and services open to the public.
- Article 11, Situations of risk.
- Article 12, Equal recognition before the law.
- Article 13, Access to justice.
- Article 14, Liberty and security of the person.
- Article 16, Freedom from exploitation.
- Article 17, The right to respect for physical and mental integrity.
- Article 19, The right to live independently and be included in the community.
- Article 20, Personal mobility.
- Article 24, Inclusive education.
- Article 26, Habilitation and rehabilitation.

One of the stated aims of the Bill is to "deliver stronger public services and improve the lives of those who are most marginalised and disadvantaged in our society."¹⁸ There is a wealth of evidence that disabled people are amongst the most excluded and discriminated against groups in Scottish

society;¹⁹ the implication is that existing legal protections are not working. The CRPD is of fundamental importance for disabled people in Scotland. It contains tangible, substantive rights that are within the competence of Scottish Parliament and should be realised in full.

On CERD and CEDAW, we would refer the Scottish Government to the consultation responses by ALLIANCE members CEMVO Scotland and Engender. We understand that both organisations – and others in the equality sector with extensive expertise and experience – propose an alternative approach whereby the duty to comply could apply to specific rights within these treaties.

If the Scottish Government proceeds with its proposed approach, the ALLIANCE recommends that it transparently demonstrate that only placing a due regard duty on the special protection treaties goes as far as possible within the limits of devolution. We understand that the Scottish Government may receive conflicting opinions; we recommend that a guiding principle should be to choose the option that will achieve the maximum possible effect for human rights. We also recommend that experts such as Professor Nicole Busby and Professor Kasey McCall-Smith – who both provided expertise to the National Taskforce²⁰ – are consulted on CEDAW, CERD and CRPD incorporation.

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

The ALLIANCE agree with the definition of the environment proposed in this bill, using the Aarhus definition. This definition makes specific reference to ecosystems and the biosphere. We agree with the recommendation by ALLIANCE member, Environmental Rights Centre for Scotland's (ERCS),²¹ to draw attention to the Aarhus Convention's Preamble, Article 1, and Article 2, and would want these to be reflected in the Bill.²²

By including these additional elements of the Aarhus Convention, the definition proposed by the Scottish Government will be more fully explained and robustly protected within the Bill.

Question 7: If you disagree please explain why.

N/A

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

We agree with the response set out by ERCS, that the formulation of substantive aspects of the right to a health environment include clean air, safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems. These rights should be identified and recognised as six interdependent rights, each of which need standalone protections.²³

The ALLIANCE disagrees with two exclusions set out in the Scottish Government's proposal, those being the right to adequate sanitation under safe and sufficient water and the right to healthy and sustainably produced food. We believe that these are core features of the right to a healthy environment. These are detailed more clearly in our responses to Q9 and Q10.

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.

This Bill proposes to incorporate the right to food under Article 11 of ICESCR. Article 11 guarantees the right to adequate, culturally appropriate, accessible, and available food. The proposal therefore excludes the right to healthy food as a substantive feature of the right to a healthy environment

on the basis that it can be better respected, protected and fulfilled through ICESCR.

The ALLIANCE disagrees with this approach. We agree with ERCS²⁴ that while the ICESCR definition considers both health and sustainability, there has been a tendency – given the current trends in food insecurity – to look only at availability and access when thinking about Article 11.

The ALLIANCE therefore recommends incorporating the right to food as a standalone feature as part of the right to a healthy environment, in agreement with ERCS. While the right to food is recognised under ICESCR, it is also a substantive part of the right to a healthy environment.

Furthermore, we believe it is important to provide a distinction between the economic/social right to food, and the right to healthy and sustainably produced food as a part of a broader right to a healthy environment. By incorporating the right to food as part of the right to a healthy environment, the discrepancies between these two aspects of the right to food will not be furthered.

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.

The Scottish Government are proposing within this Bill to recognise ‘safe and sufficient water’ as a substantive feature of the right to a healthy environment, but to distinguish between the right to water for human consumption, and safe and sufficient water as a component of a right to a healthy environment.

The ALLIANCE agree that there should be a right to safe and sufficient water within this Bill. We also agree with ERCS²⁵ that this must include the right to adequate sanitation. ‘Safe and sufficient’ should be interpreted broadly and include restoring the ecosystem health of Scotland’s inland waterways, rivers, and lochs, as proposed by ERCS.

The ALLIANCE also agrees with the justification proposed by the Scottish Government for including the right to safe and sufficient water as distinct from its conception as a social right under ICESCR. We believe that there are similar reasons for including the right to healthy and sustainably produced food as part of the right to a healthy environment.

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

The ALLIANCE agree with the ERCS response to this question, outlining that there should be dedicated reforms with clear timelines to make the right to a healthy environment fully enforceable.²⁶

ERCS believe that the substantive elements including the six features, which are interdependent and require standalone protections. These substantive elements should be defined according to expert guidance and international best practice, and adhere to the highest standards, with appropriate enforcement mechanisms to ensure compliance.

ERCS advocate for embedding the five environmental principles when establishing the definition and highest standards of the substantive rights, to ensure policy coherence and coordination across all sectors. These principles can be found in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

Finally, ERCS argue, and the ALLIANCE agree, that for the procedural element to be fulfilled, rights must be enforceable in a court of law, with appropriate mechanisms in place to effectively hold duty bearers to account.

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?

As the consultation document notes, the National Taskforce recommended that the framework, “Re-state the rights protected by the Human Rights Act which gives domestic effect to the European Convention on Human Rights.”²⁷ The ALLIANCE believes that the National Taskforce’s intention was to bolster against attempts to regress on these rights as well as have all rights restated in one place.

While we understand the Scottish Government’s reluctance to include this provision in case it puts the Bill at risk of challenge, we note that some people in Scotland do not fully enjoy their rights in the Human Rights Act 1998 or broader civil and political rights. As one example – and as noted in SNAP 2 – disabled people, people with learning disabilities and autistic people experience disproportionate infringements of their right to private and family life.²⁸

Research has found that human rights – including the provisions of the Human Rights Act 1998 – are still not fully understood and mainstreamed across the public sector,²⁹ and the SHRC notes that work is required to build the public’s understanding and awareness of human rights.³⁰

To address the ongoing lack of understanding and awareness of civil, political, economic, social cultural and environmental rights by both duty bearers and rights holders, the ALLIANCE believes that a purpose clause should be included in the Bill that explicitly names and explains fundamental human rights principles like indivisibility, interrelatedness and interdependence (see our answer to Q1). We also recommend that Scottish Government fully include the Human Rights Act 1998 rights and duties in its implementation of the Scottish Human Rights Bill through guidance, public body training and capacity building, public information sharing and awareness raising (see our answers to Q42 and Q43).

We note the Scottish Government position that, “Given it is already strongly accounted for within the constitutional settlement and other legislative provision, we are not therefore minded to pursue incorporation of UNCAT within this framework legislation.” However, some people in Scotland do not fully enjoy their right to be free from cruel, inhumane and degrading treatment. For example, ALLIANCE member SCLD notes that, “People with learning disabilities in Scotland often experience practices which would meet the criteria for torture, cruel, degrading and inhumane treatment. The most common being the use of physical restraint, seclusion and the use of antipsychotic medication.”³¹ The ALLIANCE supports calls by HRCS that the Scottish Government should be required to deliver services aimed at rehabilitation from torture, and that effective remedy under this Bill should include fair and appropriate levels of compensation.³²

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

The ALLIANCE notes, and supports, the National Taskforce recommendation that, “Further consideration be given to including an explicit right to participation, drawn from the principles of international human rights law, within the legislation.” As a fundamental human rights principle, participation in decisions that affect our rights and lives should be free, meaningful, active and effective. It is indivisible, interdependent and interrelated with all other rights and essential for the Bill’s effective implementation.

We believe that recognising participation as a human right would reinforce the Bill. As the former UN High Commissioner for Human Rights, Michelle Bachelet, noted, “Protecting and respecting the right to participation is a legal obligation for every Member State. But it is also a major asset to governments, even if not always recognized as such.”³³

Participation applies to the Bill development process itself, as well as its implementation, monitoring and accountability. It should therefore be embedded throughout the Bill text, and clearly defined so that all public

bodies – including Scottish Government – and rights holders fully understand their obligations and entitlements, respectively.

People in Scotland have already been directly involvement in the development of rights-based charters, for example the Charter of Rights for People with Dementia and their Carers in Scotland,³⁴ and the current work to develop a Charter of Rights for co-designed between people affected by problem substance use, service providers and government.³⁵ There are many different forms of participation, ranging from consultation, through to engagement, and into co-production and co-design.³⁶ To be effective, at a minimum, good participation should be accessible to everyone – including the most marginalised – take an inclusive communication approach,³⁷ and include access to accurate, comprehensive and accessible information. Resources (e.g. time, money) should be planned for and available to ensure that those whose rights are most at risk are equally included, and that accessible information is available simultaneously with original formats. Good participation also means that public bodies listen well, embed what rights holders say into their decision making, and provide feedback loops on action taken (or not).

The ALLIANCE believes that, as well as recognising participation as a substantive right, participation should be explicitly referenced at various points in the Bill, starting with its recognition as a core human rights principle in the purpose clause (see our answer to Q1). Rights holders should be fully involved in defining the groups to be protected by the equality provision (see our answer to Q15), developing the MCOs (see our answer to Q39), as well as statutory and non-statutory guidance (see our answer to Q42). Public bodies should be required to engage rights holders in carrying out their duties (see our answers to Q20 and Q21) and developing their reports (see our answers to Q22 and Q23). The Human Rights Scheme should include a requirement that Scottish Government report on the extent to which rights holder participation informs Bill implementation (see our answer to Q26). Adding human rights to the remit of Scottish scrutiny bodies should include reference to participation (see our answer to Q30). The SHRC's expanded mandate should include a

requirement for participation by rights holders in both their general work and their scrutiny role (see our answers to Q31 and Q32). Additionally, we would echo the view of Who Cares? Scotland that independent advocacy provision is a way of embedding the right to participation in the Bill.

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?

The ALLIANCE agree that there should be an equality provision in the Bill to ensure equal access for everyone to the rights therein. We believe a similar approach can be taken to the wording in Article 2 ICESCR and Article 14 ECHR, indicating that the rights in the Bill are to be “secured by everyone without discrimination on any ground”. The grounds can then be set out, including “other status”.

We recognise that the equality provision will have to operate within the limits of devolved competence. The ALLIANCE recommends further consultation with experts who provided evidence to the National Taskforce on this issue and others, including EHRC, civil society organisations with equality expertise, and legal/academic experts.

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

The ALLIANCE notes and supports the National Taskforce recommendation to, “Include an equality clause which aligns with the Equality Act 2010 and provides equal access to everyone to the rights contained within the Bill.” We understand this to mean that the equality provision should include, as a minimum, the following grounds: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation. If the proposal is to take a similar approach to ICESCR and the ECHR, then the grounds would also include: colour; language; political or other opinion; national or social origin; property; birth; association with a national minority.

It may not be practical for the equality provision to list every ground upon which people are discriminated, therefore there could be a need to include the wording “other status”. The work of the SNAP Leadership Panel³⁸ – whose members represents a cross-section of rights holders, public sector and civil society organisations, as well as Scottish Government, SHRC and EHRC – also provides a potential approach to defining the groups to be protected by the equality provision.

During its work to review, revise and finalise SNAP 2, the Leadership Panel spent considerable time discussing how to best define the rights holders subject to specific human rights infringements that would benefit from targeted actions. Panel members were conscious that – due to inequality and discrimination related to their characteristics or how their characteristics intersect – some people experience disproportionate infringements of different rights. In SNAP 2, these rights holders are called “people whose rights are most at risk.”³⁹ Their direction to action delivery stakeholders throughout is that “people whose rights are most at risk should be identified and prioritised on an action-by-action basis, before activity begins.”

People whose rights are most at risk – and who would be protected by the equality provision – can vary, according to the situation and which rights are being engaged. They can include the protected characteristic groups defined by the Equality Act 2010, as well as rights holder groups protected by CEDAW, CERD and CRPD, including women, people subject to racial discrimination, and disabled people. However, a non-exhaustive list of other groups that the ALLIANCE believes could also be considered as those whose rights are most at risk includes: care experienced people; unpaid carers; people with lived experience of homelessness; people with lived experience of substance and/or alcohol use; people with long term conditions; people with mental health conditions; people living in rural or remote areas; families of accused persons and people in custody; people on remand; migrants, refugees and people seeking asylum; people with

sensory impairments; people with learning disabilities; autistic people; people living in poverty.

The ALLIANCE believes that Scottish Ministers should be required to publish guidance on the interpretation of “other status”. This will include evidence and criteria that public bodies should apply in considering the rights holders and groups that should be protected. We strongly recommend that rights holders, National Human Rights Institutions (NHRIs), civil society and legal/academic experts are involved in the development of this guidance.

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?

The ALLIANCE disagrees that “other status” in the equality provision will sufficiently protect the rights of LGBTI and older people.

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

The ALLIANCE believes that LGBTI and older people should be specifically named in the equality provision. This demonstrates a progressive, internationalist and maximalist approach. It supports the National Taskforce recommendation to, “Include an equality clause which aligns with the Equality Act 2010 and provides equal access to everyone to the rights contained within the Bill.” It also reflects both the National Taskforce recommendations that call for “A right for older people to be included in the statutory framework”, and “An equality clause that protects and promotes the full and equal enjoyment of rights of LGBTI people.”⁴⁰

In Scotland, older people and LGBTI people face many human rights problems.⁴¹ Although neither group is currently subject to a special protection treaty at the UN level, there is work underway to create a new UN Convention on the Rights of Older Persons.⁴² Therefore, naming older

people in the Bill will help to future-proof it in line with international developments.

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

The ALLIANCE believes that the starting point should be an assumption that everyone should have equal access to all the rights in the Bill. This means that duty bearers should deliver ICESCR, CEDAW, CERD and CRPD rights, and the right to a healthy environment, ensuring equal access to all, including LGBTI and older people.

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

The ALLIANCE agrees that the duties in the Bill should apply as widely as possible to bodies carrying out devolved public functions. In addition to public bodies, this should include private and third sector organisations contracted to deliver devolved public functions when carrying out those functions. Public functions should be interpreted to include digital interactions and services, as well as non-digital.

ALLIANCE engagement has consistently highlighted the potential for the rights-based duties to create a culture change, but that there is a need for adequate and sustainable resources, education, training and support for the workforce to enable this.⁴³ Examples of human rights in action in different areas and services were felt to be important to this, to show what good practice looks like.

Some public functions – for example social care – are primarily delivered by third and private sector organisations. Therefore, consideration should be given to how any additional duties are created and implemented. For example, to enable third sector organisations to comply with the duties there must be a respectful and equal relationship between the commissioner and the commissionee, supported by adequate and

sustainable funding and good communication. In order to carry out their duties under the Bill, like their public sector counterparts, third sector organisations may require additional support, training and capacity building.

We would echo the concerns raised by our member Together of the potential of a two-tier system being created because some key public services are delivered by organisations who are neither contracted nor funded by the Scottish Government or public bodies, like private schools or private care homes.⁴⁴ The ALLIANCE recommends the Scottish Government consider how a two-tier system can be avoided in practice, and the duties in the Bill can be extended as widely as possible to these organisations.

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

The ALLIANCE agrees that there should be an initial procedural duty on duty bearers as soon as the Act receives Royal Assent. We echo the recommendation by other respondents, including ALLIANCE members, that this should be a duty to have due regard, as detailed in our answer to Q4.⁴⁵

We believe that the duty to have due regard should continue to exist alongside the duty to comply. Furthermore, we believe that there would be confusion and a risk of non-compliance unless there is clear and precise information about when the duties apply. Therefore, the Bill should explicitly state that the duty to have due regard starts from the date of the Act receiving Royal Assent, and the duty to comply starts two years after the Act receives Royal Assent.

The duty to have due regard should be clearly explained in the Bill and supporting guidance. As detailed in our response to Q19, it is important that this is backed up with adequate and sustainable resources, training, capacity building, and support so that all duty bearers understand their obligations and how to comply with them. Guidance should include specific measures to ensure robust disaggregated equality and human rights data-

gathering and analysis. This would help better identify gaps and where improvements are needed to (progressively) realise rights.

In further support of both the duty to have due regard and the duty to comply, the ALLIANCE recommends placing an explicit requirement on duty bearers to use a human rights budgeting approach. Although the consultation document implies that the duty “could apply to...budgetary processes”, it should not be assumed that this would be an automatic consequence of the Bill. The ALLIANCE have long advocated for public bodies to adopt a human rights budgeting approach,⁴⁶ and we would draw Scottish Government attention to the consultation response submitted by the Human Rights Budget Working Group, of which we are a member.

Consideration should be given to implementation of the duty to have due regard and how best ensure public bodies’ accountability. The ALLIANCE’s understanding from members and partners with experience and expertise of the Public Sector Equality Duty (PSED) and Fairer Scotland Duty (FSD) is that improvement is needed in terms of compliance and monitoring of the duties therein, and, therefore, achieving the best outcomes for people. The Scottish Human Rights Bill should learn from this and avoid replicating legislative and procedural issues that fall short of its purpose to give maximum effect to human rights.

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

The ALLIANCE agrees that public bodies and other bodies carrying out devolved public functions should have a duty to comply with the rights in the Bill. This is an essential element in giving enforceability to people’s human rights and driving the practical implementation of the Bill.

The duty to comply should include a requirement to deliver MCOs and progressive realisation, and should also include the duty to have due regard (see our response to Q4). The Bill should explicitly state that progressive realisation includes the use of maximum available resources and non-regression.

The ALLIANCE also believes the duty to comply should be extended to the substantive rights in CEDAW, CERD and CRPD, as well as ICESCR and the right to a healthy environment. As detailed in our responses to Q4 and Q5, we strongly recommend that further consideration is given to applying the duty to comply to the special protection treaties.

We are very concerned at the prospect of a two-tiered approach to the rights and duties in the Bill. We believe that the starting point should be a presumption that the duty to comply applies to all the rights in the Bill and the question should be which rights in CEDAW, CERD and CRPD do *not* have a duty to comply. By creating a hierarchy of duties – and therefore rights – the Bill risks falling short on the Scottish Government commitment to implement the National Taskforce’s recommendations and take a maximalist approach to incorporation.

The ALLIANCE believes that there are substantive rights in the CRPD that should have a duty to comply as well as a duty to have due regard. These are:

- Article 5, Equality and non-discrimination, including the requirement to make “reasonable accommodation”.
- Article 7(3), Participation of disabled children.
- Article 9, The right to accessibility of the physical environment, transportation, information and communication, and services open to the public.
- Article 11, Situations of risk.
- Article 12, Equal recognition before the law.
- Article 13, Access to justice.
- Article 14, Liberty and security of the person.
- Article 16, Freedom from exploitation.
- Article 17, The right to respect for physical and mental integrity.
- Article 19, The right to live independently and be included in the community.

- Article 20, Personal mobility.
- Article 24, Inclusive education.
- Article 26, Habilitation and rehabilitation.

One of the stated aims of the Bill is to “deliver stronger public services and improve the lives of those who are most marginalised and disadvantaged in our society.”⁴⁷ There is a wealth of evidence that disabled people are amongst the most excluded and discriminated against groups in Scottish society;⁴⁸ the implication is that existing legal protections are not working. The CRPD is of fundamental importance for disabled people in Scotland. It contains tangible, substantive rights that are within the competence of Scottish Parliament and need to be realised in full.

On CERD and CEDAW, we would refer the Scottish Government to the consultation responses by ALLIANCE members CEMVO Scotland and Engender. We understand that both organisations – and others in the equality sector with extensive expertise and experience – propose an alternative approach whereby the duty to comply could apply to specific rights within these treaties.

If the Scottish Government proceeds with its proposed approach, the ALLIANCE recommends that it transparently demonstrate that only placing a due regard duty on the special protection treaties goes as far as possible within the limits of devolution. We understand that the Scottish Government may receive conflicting opinions; we recommend that a guiding principle should be to choose the option that will achieve the maximum possible effect for human rights. We also recommend that experts such as Professor Nicole Busby and Professor Kasey McCall-Smith – who both provided expertise to the National Taskforce on Human Rights Leadership (National Taskforce)⁴⁹ – are consulted on CEDAW, CERD and CRPD incorporation.

In order to demonstrate how they are using maximum available resources to meet MCOs and progressively realise rights, the Scottish Government

and public bodies will be using a process similar to human rights budgeting. However, as our answer to Q19 indicates, this cannot be assumed. Therefore, the ALLIANCE strongly recommends that an explicit requirement is placed on duty bearers to use a human rights budgeting approach.

As detailed in our response to Q19, it is important that the duty to comply is backed up with adequate and sustainable resources, training, capacity building and support so that duty bearers fully understand their obligations and how to comply with them.

Consideration should be given to implementation of the duty to comply and how best ensure public bodies' accountability. Research by the ALLIANCE and others on other legislation that places duties on public bodies – for example the Social Care (Self-directed Support) Scotland Act 2013⁵⁰ – has found that improvement is needed in terms of compliance and monitoring, and, therefore, achieving the best outcomes for people. The Scottish Human Rights Bill should learn from this and ensure it gives maximum effect to human rights. The duty should be clearly explained in the Bill and supporting guidance, including accessible explanations of what principles like progressive realisation, maximum available resources and non-regression mean and look like in practice. Guidance should also include specific measures to ensure robust disaggregated equality and human rights data-gathering and analysis. This will help better identify gaps and where improvements are needed to (progressively) realise rights.

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?

The ALLIANCE believe that there should be a public bodies' reporting requirement. This reporting duty is a key part of ensuring that the Bill has 'teeth'. The Human Rights Bill Lived Experience Boards⁵¹ highlighted the importance of government and public bodies not being able to 'mark their own homework' when it comes to rights. It was felt that for this Bill to be

impactful, there must be clear accountability mechanisms in place. The ALLIANCE supports the HRCS proposal that public bodies be required to submit their reports to the SHRC for monitoring.

Public authorities should be required to identify how they have – or will in the future – maximised their available resources to meet their duties. As well as identifying actions, reports should identify gaps in rights realisation and measures taken to address these; reporting on challenge as well as success is essential to support transparency, accountability, and a mature human rights culture. Requiring public authorities to consult with people – including those whose rights are most at risk – as part of their reporting process will yield vital information about whether their actions have achieved positive human rights outcomes.

Comprehensive and consistent reporting across public authorities is required. This will help avoid a siloed approach so that findings can be compared across sectors and a systematic – as well as tailored – approach is taken to learning and improvement. It will also support monitoring and accountability for progressive realisation over time. To enable comprehensive and consistent reporting, duty bearers will require clear guidance, support, training and ongoing capacity building. If the reporting duty either directly applies to other bodies carrying out devolved public functions – or is passed onto them by public bodies – then third sector organisations will similarly require guidance, training and support, including adequate and sustainable resources to carry out this additional task.

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

As outlined in our answer to Q22, the reporting duty is extremely important in ensuring that duty bearers are accountable for the duties set out in the Bill. There are several valid options on how these reporting obligations may be set out, including similar provisions in the UNCRC Incorporation Bill. As suggested by other respondents that we are aware of, the ALLIANCE firmly believes that reporting obligations in the Scottish Human Rights Bill should

not be a 'tick box' exercise. It should be transparent, meaningful and lead to the progressive realisation of people's rights across the country.

The UNCRC Incorporation Bill sets out that public bodies must publish a report every three years both on what they have done and plan to do to implement children's rights and send this to Scottish Ministers. The reporting duty should specify a non-exhaustive list of topics that public bodies should report on. Public bodies must publish a child-friendly version of the report. Finally, Scottish Ministers must develop guidance for public bodies about this reporting duty, after consulting with children and young people, the CYPSC, the SHRC, and anyone else they think is appropriate. They need to then issue and publish this guidance, and review and revise this guidance from time to time. This is one model of reporting which could be included within this Bill.

The Human Rights Lived Experience Boards⁵² had a lot of discussion around embedding lived experience and voices into public body reporting. The ALLIANCE feel strongly that these views should be considered, and any reporting obligations should be created in consultation with rights holders.

The Human Rights Lived Experience Boards also emphasised three main things when discussing reporting obligations. Public bodies should not just report on the activities they have done or will do, but about the lived experience of rights and where there are implementation gaps. Therefore, it is essential that rights holders, including people whose rights are most at risk, are freely, meaningfully and actively involved in report development. Any reports created from these obligations should be accessible, and understandable to everyone, published in a range of formats and mediums, using an inclusive communications approach. Finally, the Boards felt that public bodies and the Scottish Government should not be able to 'mark their own homework' when it comes to these rights' implementation reports.

The ALLIANCE would also draw Scottish Government attention to the responses by our members with experience and expertise of existing

reporting obligations under the PSED and FSD, including CEMVO Scotland and Engender.

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?

The ALLIANCE strongly supports a requirement to clearly, comprehensively, and consistently demonstrate compliance with the rights in the Bill via MCOs and progressive realisation. These are essential elements in ensuring the Bill has 'teeth' and will lead to the realisation of people's human rights in practice.

We recommend that the MCOs are co-produced with rights holders, in particular people whose rights are most at risk. We recommend this is done prior to secondary legislation.

During the development of SNAP 2, it was recognised that the Bill "will necessitate setting minimum core obligations for all the economic, social and cultural rights that will be incorporated. If not, duty bearers will not understand the minimum that they are responsible for, and the rights will not be justiciable in law. Rights holders must be supported to participate freely, meaningfully and actively in setting the minimum obligations, alongside duty bearers."⁵³

SNAP 2 includes the following actions, which are of direct relevance to agreeing MCOs:⁵⁴

- Facilitate rights holder participation (tenants in private and public housing) to develop minimum core standards of the right to housing in Scotland.
- Scottish Government and Scottish Parliament to develop and deliver a rights-based participatory process, including with people whose

rights are most at risk, to define the minimum core obligations of incorporated economic, social, cultural and environmental rights.

The ALLIANCE believes that the MCOs produced for Scotland should build upon the current international legal standards. MCOs are the floor below which no country can go and – although they should not be subject to resources – they should be actively considered as part of the annual budgeting process. We agree with the SHRC that once the MCOs have been agreed and set, they should be defined in secondary legislation, which should be reviewed every 10 years, “to ensure that those essential levels are a reflection of the technological, societal, financial and environmental realities of Scotland”.⁵⁵

Along with our partners in the Right to Rehab Coalition, the ALLIANCE believes the right to access rehab as part of ICESCR Article 12 should be explicit in the MCOs. The Right to Rehab is intrinsically linked to the right to health. It is not possible to obtain the highest attainable standard of health without access to rehab. This is recognised in existing interpretation of UN treaties – the right to health includes the provision of appropriate healthcare services, including rehab services (UN General Comment 14 on ICESCR Article 12).⁵⁶ Services such as rehab should be available to all, accessible to all, acceptable (i.e. appropriate), and of high quality.

The ALLIANCE also believes that consideration should be given to explicitly identifying MCOs that relate to social care. Social care is not a right in itself; however, it is an area of public service that affects thousands of rights holders’ lives and engages multiple human rights.

As well as the MCOs, agreement and clarity will also be required on what constitutes progress, in terms of progressively realising rights. There are numerous examples of actions in SNAP 2 that are intended to progressively realise economic, social, cultural and environmental rights. Progressive realisation requires using maximum available resources to take concrete steps, a human rights budgeting approach, and robust monitoring and evaluation.

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

The ALLIANCE agree that there should be the same duties for the right to a healthy environment as for economic, social and cultural rights.

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

The ALLIANCE agrees with the proposed duty to publish a Human Rights Scheme. Scottish Ministers should have to consult with rights holders, in particular those whose rights are most at risk, when developing the Scheme and reporting against it, and report against it annually. Recommendations for what should be included within the Human Rights Scheme are detailed in our response to Q40.

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?

Independent advocacy is crucial in helping people navigating barriers to realising their rights and accessing justice. Independent advocates have a critical role as human rights defenders. The role of independent advocacy should be strengthened through the Bill, with the independent advocacy sector adequately resourced and supported to enable them to fulfil this vital role.

Additionally, early involvement of independent advocacy contributes to prevention and has a potential role in contributing to early intervention and preventative spend. Much of the current provision of independent advocacy is directed by funders towards statutory interventions, such as mental health tribunals, adults with incapacity meetings, and adult support and protection case conferences, which are all reacting after an incident has occurred. As a result, much of the population does not get access to

advocacy. The Bill and Human Rights Scheme could act as a catalyst for greater provision of independent advocacy that is preventative, promotes people's human rights and saves public money due to being directed at preventative spend.

Independent advice and other forms of independent support are also important, though are distinct from independent advocacy and should not be confused or conflated with the role of independent advocacy.

There is clear evidence of the provision of independent advocacy leading to better outcomes for people. The ALLIANCE previously delivered a one-year pilot advocacy service, the Welfare Advocacy Support Project, targeted at people going through assessment for Personal Independence Payment (PIP) and Employment and Support Allowance (ESA) in four pilot areas in Scotland.⁵⁷ The project demonstrated and responded to unmet need, providing support to over 600 people during the pilot period. This project was influential in the Social Security (Scotland) Act 2018 providing for a right to advocacy for people accessing the devolved social security system.

Additionally, the Scottish Independent Advocacy Alliance's (SIAA) response to the consultation includes a range of examples of how independent advocacy contributes towards realising people's rights to education, health, housing and to take part in cultural life, and how it has benefited people who have received independent advocacy. As part of research conducted by the ALLIANCE and Self Directed Support Scotland on people's experiences of Self-directed Support (SDS), respondents highlighted the value of independent advocacy.⁵⁸ When good relationships were established, collaboration led to effective support planning and implementation of SDS options. One interviewee described the positive outcome of a meeting between their social worker, the interviewee, and an independent advocate, despite initial apprehension from the social worker:

"But I still felt that they were ticking boxes along the line of, "well for my job I've got to cover this, this, this and this." Which [...] that's what she's

employed to do as such, but it does come over as a different kind of experience. But we did have a meeting here with social work and [...] advocacy when we were getting more into the detail of things. So, [the social worker] was open and she did come to that and [...] it was a good meeting. I think she was apprehensive when she arrived but at the end she actually did say, 'this has turned out to be a really good meeting', because it gave her a better idea of what we wanted."⁵⁹

This positive account of the involvement of independent advocates in the development of support plans is an excellent example of all parties benefiting from their involvement, with productive outcomes for the person in need of support and social work professionals alike.

The ALLIANCE believes the Bill should guarantee access to independent advocacy for all rights holders particularly those whose rights are most at risk. This provision should be included in the Human Rights Scheme.

It is essential that the Scottish Human Rights Bill does not replicate problems that have occurred with the implementation of other laws that provide for independent advocacy. For example, the SIAA 'Advocacy Map: Sustainability of Independent Advocacy in Scotland' report highlights that the demand for independent advocacy has significantly increased and is outstripping resource, resulting in a position that is not sustainable for the future. Additionally, 71% of respondents identified groups with an unmet need for independent advocacy.⁶⁰

For the proper implementation of this provision in the Scottish Human Rights Bill, adequate and sustainable resources for the independent advocacy sector must be guaranteed, otherwise there is a real risk that rights holders will not have access to independent advocacy and independent advocacy organisations will not be able to provide their essential services and expertise. For this reason, the ALLIANCE supports SIAA's proposed roadmap to increasing access to independent advocacy in implementing the Bill, as detailed in their response to the consultation:⁶¹

- Ensure that those with current rights to independent advocacy in Scots law can access it.
- Utilize different models of independent advocacy including collective advocacy to support groups to address systemic human rights issues.
- Provide individual independent advocacy and citizen advocacy first to those who experience the greatest barriers to having their rights realised.
- Progressive realisation of rights should be supported by sustainably increasing access to independent advocacy so that eventually it can be accessed by anyone with a human rights issue. This should be done in consultation with existing grassroots and local independent advocacy organisations and groups.

Public bodies should be given training and information about independent advocacy and advice services, so they can routinely refer people to these resources, and recognise the value these independent services can bring to their own work.

In relation to the broader issue of access to justice, the ALLIANCE notes the issues raised by the Lived Experience Boards and supports the submission by the HRCS. Significant improvement will be needed to Scotland's human rights justice system to ensure a right to remedy that is effective, affordable, accessible, timely, and person-centred.

Our members have also reported issues with access to Legal Aid for people whose first language is British Sign Language (BSL). Although interpretation for BSL or other languages is paid for if Legal Aid has been granted, it is not paid for initial pre-claim discussions which creates additional barriers to justice.

For Legal Aid (as well as more widely) information should be accessible and inclusive communication processes should be considered at the outset. As a starting point, information should be made publicly available in plain English and free from jargon. Accessible information should follow the

Six Principles of Inclusive Communication, and should be publicly available in multiple inclusive formats, including Community Languages, British Sign Language (BSL), Braille, Moon, Easy Read, clear and large print, and paper formats. The ALLIANCE recommends involving relevant experts – including BSL and language interpreters – at the earliest opportunity to ensure communications and information provision is inclusive for all.⁶²

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

Although the ALLIANCE agrees that updated model complaints handling processes would be useful, we believe that more substantial changes are needed to improve complaints handling by public bodies. In particular, research from the ALLIANCE and others has shown significant issues in the handling of social care complaints, which have acted as barriers to the realisation of human rights of people who access social care.⁶³

The Scottish Human Rights Bill should ensure that there is a robust complaints system in place to enable rights holders to effectively challenge decisions that infringe their human rights.

Based on research by the ALLIANCE and others⁶⁴, we propose the following in relation to complaints handling by public bodies in relation to the Scottish Human Rights Bill:

- Everyone should have access to an easy to access, transparent, and fair complaints system.
- Any complaints system should follow human rights-based approaches, and be co-produced with rights holders.
- Complaints handling processes should not just consider the procedural aspects of a decision, but also whether fundamental rights were protected and that there was due regard to the rights holders' dignity throughout.
- Public bodies (and staff) should pro-actively and regularly inform people who use their services about how they can challenge decision

and access complaints procedures and independent oversight, and that they can do so without fear of adverse consequences.

- Public bodies (and staff) should proactively signpost people to independent advocacy and advice services, highlight the benefits independent advocates offer, as well as providing reassurance regarding their independence.
- People should always have access to independent advocacy, advice and support, including interpreters and translators, for complaints and associated meetings, if they desire.
- Public bodies should maintain regular communication during the informal stage of challenging a decision and provide support (e.g. resources) for individuals asked to discuss formal challenges.
- Sources of mental health support should be made available to those pursuing challenges.
- Formal complaints processes should be timely and quick wherever possible.
- Processes should use plain, jargon-free, English.
- All information should be readily accessible in a range of accessible formats, e.g. BSL, Easy Read, Moon, etc.
- There should be clarity and transparency about the process and what it includes, including an indication of the general time frame to expect informal and formal complaints to take.
- Robust, disaggregated equality and human rights data should be gathered and used to monitor and analyse complaints, measure public bodies' accountability, and contribute towards progressive realisation of rights.

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

The ALLIANCE agrees that there is scope to increase the powers of the Scottish Public Services Ombudsman (SPSO) as part of the Bill. However, given the significant issues with complaints and feedback, as detailed in our response to Q28, they should not be seen as the only solution. In

addition, we do have some reservations around the specific proposals in the consultation.

We agree that SPSO should be allowed to consider the duties in the Bill as part of any complaint without an applicant having to make specific reference to them. We also agree that SPSO should be able to take oral complaints.

However, we note concerns raised by the HRCS around the proposed investigatory powers for the SPSO conflicting with the investigatory powers of the SHRC and CYPSCS. Any changes to SPSO's remit in this area should take care not to impede the functions of the specific human rights commissioners, who will be best placed to consider human rights issues.

Whilst we note the rationale in the consultation document for keeping SPSO's recommendations non-binding, in some cases it may be appropriate for a public body to be required to comply with them. Consideration should be given to allowing SPSO to make binding recommendations, in addition to non-binding recommendations.

The ALLIANCE also echoes the recommendation of HRCS that people should not have to raise a complaint with SPSO before taking a human rights case to court.⁶⁵

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

The ALLIANCE broadly welcomes the proposals in relation to scrutiny bodies. We agree that scrutiny bodies can play an important role in holding devolved public services to account in relation to human rights and helping to drive culture change in service delivery.

The proposals to require scrutiny bodies to assess public bodies through a human rights lens; to enable closer joint working and information sharing on human rights matters; and require them to report any systemic human

rights issues they come across, all have the potential to contribute to a human rights culture and embedding human rights in public services. Measures should be taken – and, if required, adequate and sustainable resources allocated – to ensure that scrutiny bodies have the necessary human rights knowledge, skills and expertise to carry out their functions.

The ALLIANCE recommends that the proposals in the Bill are taken forward in a joined-up way with parallel processes including the Independent Review of Inspection, Scrutiny and Regulation, the Independent Review of Adult Social Care, the Scottish Mental Health Law Review and the development of the National Care Service. These collectively offer an opportunity to embed citizen involvement, human rights and co-production in designing and improving services for people in Scotland.

The ALLIANCE echo our recommendations in our response to the Independent Review of Inspection, Scrutiny and Regulation, that Scotland's system of inspection, scrutiny and regulation should include a commitment to co-produce systems with people with lived experience, where people accessing health and social care services are part of planning and decision-making at all levels.⁶⁶

Co-production activity should be fully accessible, with appropriate resources and support provided to ensure people can participate in the process. Similarly, strategic evaluation of the process of inspection, scrutiny and regulation should explicitly draw on data collection and intersectional analysis of people's experiences, to ensure evidence-based responses that target groups of people whose rights are most at risk.⁶⁷

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

The ALLIANCE recognises that the powers of the SHRC are more limited than other comparable NHRIs, and its budget relatively smaller.⁶⁸ This can create misunderstandings over what the SHRC is empowered to do, which

has led to the SHRC being unable to fulfil certain roles due to lack of capacity or legal mandate.

Additionally, as described throughout this response, the ALLIANCE views this Bill as an opportunity to strengthen people's human rights in law and in practice, helping to bring about a change of culture and greater human rights awareness in Scotland. As one of our NHRIs, the SHRC has a key role to play in this.

Consequently, the ALLIANCE believes that the SHRC should be given additional powers in the Bill. This should include powers to intervene in civil proceedings under the Bill, and an investigatory power, as proposed in the consultation document. It could also include being able to provide advice to individuals and groups (e.g., disabled people) and a role to monitor and scrutinise public body reports on implementation of the rights in the Bill. The SHRC should also be able to issue binding guidance, compel public bodies to provide information necessary for inquiries or investigations, and require them to implement its recommendations. In order to carry out these additional powers, the SHRC will have to be adequately and sustainably funded.

We also note the proposals for new Commissioners covering a range of groups of people, or equalities and human rights issues. The ALLIANCE supports the creation of an Older People's Commissioner for Scotland,⁶⁹ a Disability Commissioner,⁷⁰ and the Patient Safety Commissioner.⁷¹ Each of these would provide a visible champion for groups of people whose rights are most at risk, as the CYPSC currently does for children and young people.

We are also mindful however, of the large number of separate proposals for Commissioners being made by different bodies, with the risk of duplication, overlapping mandates and without a strategic direction to what should or should not have its own Commissioner. We note that the SHRC has proposed that some of these functions might be added to its current

mandate, potentially by adding specific Commissioners or ‘rapporteurs’ within the SHRC.⁷²

The ALLIANCE recommends that an Older People’s Commissioner, a Disability Commissioner and a Patient Safety Commissioner are created. Consideration should be given to whether these (and other possible Commissioners) might be included within the SHRC’s remit. In doing so, it is important that the role is a visible champion for the rights of the group in question and has sufficient power and resource to promote and defend their rights.

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

The ALLIANCE agrees that the CYPSC should be given the same powers as those extended to the SHRC under the Bill. As with our answer to Q31, the CYPSC should be provided with adequate and sustainable funding to carry out its powers.

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

The ALLIANCE agrees that the rules on ‘standing’ should be the same as for civil law cases in Scotland, so bodies with ‘sufficient interest’ have the right to take a judicial review. This would enable organisations to bring collective and test cases in defence of people’s human rights.

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

N/A

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

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?

The ALLIANCE welcomes proposals to consider extending judicial remedies. We believe that, in line with the recommendations of the National Taskforce,⁷³ the range of remedies in Scots law should be extended. At present, remedies do not address all human infringements, or take account of systemic or structural issues. Remedies should reflect whether and how the full range of an individual's rights have not been respected, protected and fulfilled, as well as the human rights principles set out in the Bill's overall purpose clause. We recommend further advice is sought from those who provided expertise to the National Taskforce.

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?

The ALLIANCE recommends that courts should be able to make declarations of incompatibility or 'strike down' legislation which is found to be incompatible with the rights in the Bill, as far as possible within devolution.

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

There needs to be clear and robust timelines for full implementation of this Bill within the text of the law itself. As stated in our answers to Q4, Q20 and Q21, there should be an initial procedural duty (a duty to have due regard) on duty bearers as soon as the Act receives Royal Assent. The Bill should

state that the duty to comply starts two years after the Act receives Royal Assent.

The international human rights being incorporated are already in place, therefore the ALLIANCE believes that implementation can and should begin now. As detailed in our answers to Q19 and Q20, implementation must be backed up with training, support, capacity building and adequate and sustainable resources so that duty bearers can understand their obligations and how to comply with them.

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

As previously outlined in our answer to Q24, the ALLIANCE strongly supports proposals to establish MCOs through a participatory process. We recommend that the MCOs are co-produced with rights holders, in particular people whose rights are most at risk. We recommend that this is done prior to secondary legislation. Participation should also include other stakeholders with relevant experience and expertise, including civil society, legal and human rights experts.

As set out in our response to Q13, for this participatory process to be effective, it should be accessible to everyone – including the most marginalised – take an inclusive communication approach, and include access to accurate, comprehensive, and accessible information. This includes ensuring that resources are available so that those whose rights are most at risk are equally included, and that information should be available in accessible formats at the same time as the originals. Good participation also means that public bodies listen well, embed what rights holders say into their decision making, provide feedback loops on action taken (or not).

More information is needed on what this participatory process would look like in order to judge its effectiveness. The ALLIANCE recommends that serious consideration should be given to who conducts this participatory

process, and the potential value of the process being conducted independently. We agree with the HRCS that MCO development should not be left until after the Bill has passed. The Scottish Government should provide details of UN guidance on MCOs and examples of MCOs in Scotland before this Bill is introduced to Parliament.⁷⁴ We also recommend that the Bill includes timescales for defining MCOs and passing relevant regulations; this should be in line with the timescale for the duty to comply (we recommend no more than two years after the Bill has passed).

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

The ALLIANCE agree that there should be a Human Rights Scheme, which is a key accountability tool on the commitment of the Scottish Government to human rights. This accountability is not served unless reports show clearly what the Scottish Government is doing and plans to do to enable a strong and effective human rights framework, and to address systematic human rights issues. These reports should be accessible and enable rights holders to use them to hold Government to account. As set out in our answer to Q26, there should be a duty to consult with rights holders, including people whose rights are most at risk, when developing the Scheme and reporting against it, and report against it annually.

This reporting should not just be on activity and policy but should include the outcomes or rights made real in people's lives. For this to work properly, Government will need to review what data and evidence it collects. Specific measures should be put in place to ensure robust disaggregated equality and human rights data-gathering and analysis. This would help better identify gaps and where improvements are needed to (progressively) realise rights.

The consultation includes a large list of things that the scheme could include, one of which is an update on Scotland's National Action Plan on Human Rights (SNAP 2). We support this list, with one exception. While the ALLIANCE welcomes this inclusion of SNAP 2 within the Bill, we would

urge caution on it becoming a Scottish Government responsibility to report. This would make SNAP 2 a Scottish Government action plan, rather than a collaborative plan as it was intended.

In addition to the proposed requirements listed in the Bill, the Scheme should also include a number of other provisions. As mentioned in our response to Q27, there should be a provision within the Human Rights Scheme guaranteeing access to independent advocacy for all who need it. This should be provided alongside provision of rights advice and inclusive communication to make sure that everyone is able to access their rights equally. The ALLIANCE supports other provisions for the Scheme that have been highlighted by our members and partners, including: improved data collection and reporting; provision of – and equitable access to – advice on human rights; a requirement for inclusive communication; Scottish Minister’s engagement with UK Ministers on human rights; the provision of rehabilitation from torture services; a requirement to report on the extent to which rights holders, including people whose rights are most at risk, are informing the Bill’s implementation; emerging case law and interpretation of rights; timescales and plans to develop/review the MCOs; plans or proposals to ensure access to justice is accessible, effective, timely, affordable and supportive; and Human Rights Impact Assessments.

The consultation indicates that the Human Rights Scheme provides an opportunity for Scottish Government reporting on activities to further embed human rights in budget processes. The ALLIANCE believes the Scottish Human Rights Bill is an opportunity to mainstream and embed human rights budgeting in Scotland. Not least, it is a useful tool by which Scottish Government and other public bodies can demonstrate compliance with the MCOs and progressive realisation. As such, we recommend a requirement for human rights budgeting in the Scheme, and draw Scottish Government attention to the consultation response by the Human Rights Budget Working Group, of which we are a member.

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?

The ALLIANCE agrees with the Scottish Government's proposal to enhance the assessment and scrutiny of legislation introduced to the Scottish parliament, considering the rights established in this proposed Bill.

We agree with the HRCS that statements of compatibility should include a requirement to demonstrate that consultation with rights holders, including people whose rights are at risk, has been undertaken in order to assess a Bill's compatibility with human rights. Timely production of robust, comprehensive and accessible Human Rights Impact Assessments should become a regularised part of the development of all legislation, and form part of the scrutiny process.

We agree with the SHRC, that like with the UNCRC Incorporation Bill, Ministers should be obliged to conduct Human Rights Impact Assessments for any Bill or Statutory Instrument (SI) presented to the Scottish Parliament. These assessments will provide a tool for evaluating how proposed legislation may influence human rights. This proposal will ensure that the potential human rights implications of proposed laws should be carefully considered.

These proposed measures will mean that legislation brought to the Scottish Parliament can be more vigorously assessed against a broad spectrum of human rights, including civil, political, economic, social, cultural, and environmental rights. This comprehensive approach contributes to the creation of a more effective and robust framework for safeguarding and advancing human rights in Scotland.

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?

Building capacity across the public sector – and in bodies carrying out devolved public functions – is essential for the Bill’s implementation. The ALLIANCE agrees with Scottish Government proposals to include statutory and non-statutory guidance developed in consultation with stakeholders and to develop a plan for capacity building of government and public bodies.

Statutory and non-statutory guidance is essential to ensuring that this Bill has ‘teeth’. This guidance should be developed with the participation of human rights experts from civil society, NHRIs, and academia, as well as rights holders, including people whose rights are most at risk. It should be written and published in a way that is accessible to rights holders as well as duty bearers.

As stated in our answers to Q12, Q20, Q21, Q22, Q27 and Q38, public bodies – and bodies carrying out devolved public functions – may require substantial training, capacity building and ongoing support to fulfil their human rights obligations. As the National Taskforce notes, this will require “the provision of adequate resources”. The ALLIANCE strongly recommends that concrete measures are taken to ensure that third sector organisations are adequately and sustainably resourced to carry out additional tasks required by the Bill. We also recommend that building capacity within the public sector does not need to wait for the Bill to be passed. These international human rights obligations are in place now, so duty bearer capacity should be built now.

We would draw Scottish Government attention to the proposal in the submission by the Human Rights Budget Working Group that capacity could be built through the creation of a well-resourced Independent Centre of Expertise on Economic, Social, Cultural and Environmental Rights to build knowledge and skills among public authority officials.

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

Providing effective information and raising awareness of the rights for rights holders is an essential element of the Bill's implementation. As our answer to Q12 notes, more work is needed to build the public's awareness and understanding of human rights.

The ALLIANCE notes that this is a somewhat underdeveloped part of the consultation and would welcome further detail on the Scottish Government plans. We support the proposal that this work will be done with stakeholders and recommend that it is co-produced with rights holders as well as human rights and communications experts. We support the HRCS proposal for the creation of an adequately and sustainably resourced National Network for Humans Rights Information, Education, Legal Services, and Advice.

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

Monitoring of and reporting on the steps planned or taken by public authorities to progressively realise rights is essential for accountability and to ensure effective implementation of the Bill.

The Human Rights Bill Lived Experience Boards had significant discussions around monitoring and reporting. One aspect emphasised was the importance of government and public bodies not being able to 'mark their own homework' when it comes to rights. Board members said that it is key that the new duties have teeth, there must be a strong accountability mechanism and clear consequences for a failure to comply with rights.

For this Bill to work effectively, the ALLIANCE believes there must be robust monitoring and reporting of the duties set out by an independent body. There are many options in which an independent organisation could

take on this monitoring role. This could fall within the remit of the SHRC, or within other scrutiny bodies, for example, the Care Inspectorate. The ALLIANCE strongly recommends that this independent body is adequately and sustainably funded and properly supported to fulfil this role.

As outlined in our answer to Q22, as well as identifying actions, reports should identify gaps in rights realisation and measures taken to address these; reporting on challenge as well as success is essential to support transparency, accountability, and a mature human rights culture. Requiring public authorities to consult with people – including those whose rights are most at risk – as part of their reporting process will yield vital information about whether their actions have achieved positive human rights outcomes.

Comprehensive and consistent monitoring as well as reporting across public authorities is also required. This will help avoid a siloed approach so that findings can be compared across sectors and a systematic – as well as tailored – approach is taken to learning and improvement. It will also support monitoring and accountability for progressive realisation over time. To enable comprehensive and consistent reporting, duty bearers will require clear guidance, support, training and ongoing capacity building. If the reporting duty either directly applies to other bodies carrying out devolved public functions – or is passed onto them by public bodies – then third sector organisations will similarly require guidance, training and support, including adequate and sustainable resources to carry out this additional task.

About the ALLIANCE

The Health and Social Care Alliance Scotland (the ALLIANCE) is the national third sector intermediary for health and social care, bringing together a diverse range of people and organisations who share our vision, which is a Scotland where everyone has a strong voice and enjoys their right to live well with dignity and respect.

We are a strategic partner of the Scottish Government and have close working relationships with many NHS Boards, academic institutions and key organisations spanning health, social care, housing and digital technology.

Our purpose is to improve the wellbeing of people and communities across Scotland. We bring together the expertise of people with lived experience, the third sector, and organisations across health and social care to inform policy, practice and service delivery. Together our voice is stronger and we use it to make meaningful change at the local and national level.

The ALLIANCE has a strong and diverse membership of over 3,300 organisations and individuals. Our broad range of programmes and activities deliver support, research and policy development, digital innovation and knowledge sharing. We manage funding and spotlight innovative projects; working with our members and partners to ensure lived experience and third sector expertise is listened to and acted upon by informing national policy and campaigns and putting people at the centre of designing support and services.

We aim to:

- Ensure disabled people, people with long term conditions and unpaid carers voices, expertise and rights drive policy and sit at the heart of design, delivery and improvement of support and services.

- Support transformational change that works with individual and community assets, helping people to live well, supporting human rights, self management, co-production and independent living.
- Champion and support the third sector as a vital strategic and delivery partner, and foster cross-sector understanding and partnership.

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