

Human Rights Bill consultation

Summary and Recommendations

This paper provides Convention with an overview of the current Scottish Government consultation on the Human Rights Bill and the final draft of COSLA's proposed response (Appendix I). The Human Rights Bill seeks to incorporate a number of international conventions on human rights into Scots law within the limits of devolved competence and will have significant strategic and operational implications for Local Government through the creation of new duties for public bodies.

This paper invites Convention:

- i. to provide comment on the draft COSLA response to the Human Rights Bill consultation and;
- ii. subject to comments, approve the response for submission to the Scottish Government.

References

No previous reports

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Human Rights Bill consultation

Purpose

1. The purpose of this report is to provide Convention with an overview of the current Scottish Government consultation on the Human Rights Bill and the final draft of COSLA's proposed response (Appendix I). This Bill will have significant strategic and operational implications for Local Government through the creation of new duties for public bodies.

Background

2. In March 2021, the final report from the National Taskforce for Human Rights Leadership, of which COSLA was a member, included a recommendation for the creation of a new statutory framework for human rights for Scotland. COSLA Leaders had agreed the draft recommendations from the report in February 2021.
3. In response to the Taskforce recommendations, the Scottish Government committed to introduce a new Human Rights Bill during the 2021-26 Parliamentary session.
4. To support the Bill development process, Scottish Government established Governance and Engagement Executive and Advisory Boards, both of which COSLA is represented on.
5. An Implementation Working Group has also been recently established, with COSLA as a member, and the group's first meeting was held on 2nd August 2023.
6. The Human Rights Bill seeks to incorporate a number of international conventions on human rights into Scots law within the limits of devolved competence. These conventions are:
 - International Covenant on Economic, Social and Cultural Rights (ICESCR)
 - Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
 - Convention on the Rights of Persons with Disabilities (CRPD)
 - International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)
7. The Bill also seeks to recognise and include the right to a healthy environment and will introduce new duties for public authorities in relation to the rights within the Bill.

8. The Scottish Government published the [Human Rights Bill consultation](#) on 15th June 2023, with a closing date of 5th October. Both the full consultation document and list of questions can be found [here](#).
9. COSLA Leadership Sounding Board (LSB) considered the initial draft response at their August meeting, with comments provided for further development. It was agreed that a revised draft would be taken back to the September LSB meeting, with the final draft response then to be taken to COSLA Convention for final sign off.
10. Whilst we recognise that the Scottish Government has met its self-imposed deadline of within the first half of 2023 to publish the Bill consultation, the consultation document itself does not provide the level of detail that COSLA officers had hoped to see in terms of the practical implications for public authorities.
11. It has therefore been somewhat challenging to provide fully detailed answers to many of the relevant consultation questions. Of particular concern is the lack of detail on Scottish Government proposals to support capacity building within public authorities.
12. Local authorities, via the Scottish Councils Equality Network (SCEN), have raised concerns with COSLA about the lack of capacity within councils to deliver on new duties which arise from the Bill and the implications for staff workload if no additional funding to build capacity is forthcoming from Scottish Government.
13. SOLAR and SOLACE echoed concerns about the lack of practical detail in the consultation document, as well as the need for additional capacity and resources (and associated funding) within councils to understand and implement the new duties, and the lack of a financial impact assessment to accompany the Bill consultation.
14. SPSO provided useful context on the proposed changes to complaints handling mechanisms, as well as raising concerns that Scottish Government has underestimated, or not fully considered, the challenges of implementation of the Bill provisions, as opposed to the technical challenges of legal incorporation.
15. Through engagement across COSLA's policy teams and the Business Gateway National Unit, a number of concerns with the consultation document and the Scottish Government's approach to Bill development have been raised. These include:
 - a. the lack of consideration of the funding and resource implications for local authorities in implementing the provisions of the Bill;
 - b. Local Government workforce implications arising from implementation, such as staffing for frontline complaints handling mechanisms;
 - c. the lack of detail on Scottish Government responsibility for supporting, and funding, capacity building within public authorities such as councils; and
 - d. and the impact of additional monitoring and reporting requirements on councils.

16. Many of the above concerns have previously been raised by COSLA officers and members through the Bill Executive and Advisory Boards, and the Implementation Working Group, as well as during the discussion of the Taskforce recommendations at the February 2021 COSLA Leaders meeting.

Current Position

17. The draft has been informed through engagement with a range of professional bodies including SOLACE, SOLAR, SPSO, ALACHO, and the National Complaint Handlers Network. This has led to the inclusion of stronger language in relation to the need for more information to be provided in order for respondents to be confident in providing fully informed responses.

18. Convention is now asked to approve the final draft COSLA response (Appendix I) to the Scottish Government consultation on the Human Rights Bill; subject to any further comment members may feel is required to be added at this time, in particular, on questions 19, 28, 39, 42, 43, or 44.

Next Steps

19. Subject to comments, the final approved version of COSLA's consultation response will be submitted to the Human Rights Bill Team by the deadline of 5th October.

September 2023

DRAFT COSLA response: Human Rights Bill consultation

Incorporating the Treaty 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?

More detail on how 'dignity' will be defined in law is needed for COSLA to be able to take a more fully formed position on this. One key question is how dignity can be defined sufficiently to be used as a threshold for minimum core obligations? Furthermore, examples of approaches that other countries have taken with MCOs and dignity would be helpful context to enable us to reach a position and to better understand how this approach may work in practice in Scotland.

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

COSLA is of the view that there is much learning to be taken from the experience to date in incorporating the UNCRC, including carefully considering the implications of the Supreme Court judgement on the UNCRC Bill, as well as the outcome of the Reconsideration process, the eventual amendments and the final form the legislation will take.

Within the complex legislative framework that Scottish local authorities operate within (involving an often complex mix of UK and Scottish legislation in the same service/practice area) this could add significant complexity for councils to interpret and apply their duties in practice, and for people and communities to understand their rights. As is the case with UNCRC incorporation, there is a significant risk that the exclusion of reserved areas coupled with the exclusion of functions/powers conferred by UK legislation in devolved areas would mean that rights coverage under the Human Rights Bill would be significantly limited.

Recognising the Right to a Healthy Environment

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

More detail is needed on the proposed basis of definition in order for COSLA to take a firm position and we would welcome, and indeed encourage, further engagement on this. Examples of approaches that other countries have taken on the right to a healthy environment in legislation would be a helpful aid for reaching a position. Furthermore, the lack of detail on the potential practical implications for local authorities within the consultation paper is concerning and highlights the need for direct engagement with local authorities

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

COSLA strongly supports striving towards a healthier environment for all. However, we do not, as yet, have a position on incorporating the right to a healthy environment within Scots law. Nonetheless, given our positions on climate change and biodiversity we welcome the exploration of this issue by the consultation. It is difficult to answer these questions at this time as our answers will depend on how the right may operate in practice. It is, for example, hard to argue that as a result of worsening climate change and biodiversity loss we live in a healthy environment so, it seems likely that, if introduced, the rights of individuals could be breached from day one of the legislation becoming law. If rights are breached at this high level, what would this mean for other elements of a healthy environment which are being discussed above?

The inclusion of sufficient water as a substantive aspect of the right to a healthy environment seems reasonable given the importance of clean drinking water to everyone, but how might this right operate in practice in a warmer Scotland where water scarcity is likely to become a growing issue? How could this right interact with the need to carefully manage water supplies for all, while still trying to maintain a healthy ecosystem? COSLA could support the right to a healthy environment if it positively contributes to the existing framework of environmental law and assists with the delivery of environmental policy. It is for this reason we welcome the debate, but we will need to see more information on how the right may operate in practice at a high and policy specific level before we can offer a more considered position.

Incorporating Further Rights and Embedding Equality

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

Participation needs to be considered in its widest sense, taking into account not only the public sector but also private bodies. Following the announcement of the First Minister's Policy Prospectus in April this year, the New Deal for Business Group was set up to explore how the Government can work more closely with Scottish businesses, to better design policy and its implementation. Given that, it would be helpful to understand where and how the business community will be engaged in the consideration, development and implementation of this legislation. If they are not already involved in the work then it is imperative that this is addressed as quickly as possible in light of the publication of the New Deal for Business Group's report and the endorsement of that report and its recommendations by the First Minister. We need clarity on how this Bill will impact on businesses and what the implications of the duties will be for business as well as identifying unintended consequences.

COSLA welcomes the proposal for alignment with other participation duties, such as that proposed as part of the Public Sector Equality Duty (PSED) review, however more detail would be beneficial to support COSLA to take a more fully

formed position on how this could work in practice and the potential implications for local authorities. For example, the consultation document makes reference to participation requirements within other pieces of legislation but provides no further detail. Examples would be useful to support understanding of what a participation requirement could look like within the context of the Human Rights 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?

COSLA is unable to take a more fully formed position on this proposed duty without this further detail, as well as the likely practical and strategic impacts on local authorities. Examples of approaches that other countries have taken to implementing a similar duty to comply would be helpful context to enable us to reach a position. Furthermore, further detail is needed from Scottish Government to provide reassurance that lessons have been learned from the difficulties with UNCRC incorporation and conflict between devolved and reserved legislative areas.

The Duties

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

COSLA would like to see further detail on what is meant by a private body, as there is little information on how *“private bodies acting under a contract or other arrangements with a public body”* will be defined. Some case law examples, for example from the Human Rights Act 1998, would be beneficial in supporting COSLA to take a more definite position on this. Local Government contracts both the private and third sector in the delivery of services, which underlines the need for clarity. For example, the Business Gateway services in Aberdeen City, Aberdeenshire, Tayside and Lanarkshire are delivered by Elevator, which is a registered social enterprise.

The timescale for implementation is another key factor for consideration, as existing contracts may preclude amendment that would add additional duties to the contractor and these might only be able to be applied when contracts are being renewed. Again, using Business Gateway as an example, the contracts tend to be for a minimum of three years with options for plus one or plus two years. Many of these have recently been retendered and are now live contracts. The above issues highlight the need for further engagement across all sectors to ensure that the wide range of bodies and organisations who will be covered by the Bill duties are aware of the implications and have had opportunities to contribute their views.

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

Consistency, coherence and alignment in our approach will be crucial for enabling public authorities to understand and implement their duties in relation to compliance with human rights obligations. For this to be done, capacity building support and guidance for public bodies must be developed and embedded well in advance of the proposed procedural duty coming into effect. It is imperative that COSLA would greatly welcome more detail on the practicalities and proposed timescales for the proposed initial procedural duty. We are unable to take a more fully formed position on this proposed duty without this further detail, as well as the likely practical and strategic impacts on local authorities.

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

More detail is needed to allow COSLA to take a fully informed position on the proposed duty to comply, in particular the likely practical implications for local authorities from this approach. Examples of approaches that other countries have taken to implementing a similar duty to comply would be helpful context to enable us to reach a position.

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 Bill consultation document states that Scottish Government is considering following the approach taken in section 15 of the UNCRC Bill, however more detail from Scottish Government on how this would work in practice is needed in order for COSLA to take a fully informed position.

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

We welcome the Scottish Government's commitment in the consultation document to continuing to explore how reporting and implementation of the new duties would interact, although we urge this to be included in the discussions with the newly established Implementation Working Group as a matter of priority.

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 are uncertain what minimum core obligations would be for the right to a healthy environment. As discussed previously, it is hard to argue we currently live in a healthy environment. We need to understand how the right to a health environment and its realisation via MCOs would work in practice when set

against the urgent need to, as fairly as possible, decarbonise the economy and society. Would there, for example, be MCOs for tackling climate change? If so, would a MCO need to be in-line with scientific evidence and the advice of the climate change committee? If it were not it would risk setting a lower bar for progress than is required to meet the worsening climate crisis.

Likewise, it is hard to answer the question on whether the right to a healthy environment should fall under the same duties as economic, social and cultural rights. It seems likely that rights under each of these duties will intersect, potentially leading to tensions that will need to be navigated. How this will be achieved by the legislation is an important consideration and one which we will need more detail about in order to provide a fuller response.

Ensuring Access to Justice for Rights Holders

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

COSLA supports the intention to avoid creating separate, additional processes for human rights complaints by building on existing structures. However, we are concerned that no reference has been made to the workforce and spending implications for councils as a result of any need for increased capacity for frontline complaints handling. As part of the development of this consultation response, COSLA engaged with the National Complaints Handlers' Network who expressed shared concerns about the funding and workforce implications for councils, as well as concerns about the lack of detail on the proposals for front-line complaints handling mechanisms and how these would work in practice within local authorities.

In conversations with SPSO as part of the development of this consultation response, we understand that a child-friendly complaints handling procedure has been developed to cover the provisions of the UNCRC Bill, which is currently being piloted. We welcome the offer that SPSO has made to develop something similar for the Human Rights Bill to cover general human rights-based complaints handling. The development of this must, however, be accompanied by an assessment of the resource and workforce implications for local authorities.

Implementing the New Scottish Human Rights Act

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

COSLA welcomes proposals to develop guidance for public authorities, however serious concerns remain about how public authorities, such as councils, will be supported by Scottish Government to build staff capacity and address workforce implications, including with the additional financial burden of such capacity and

workforce development activity. Whilst the consultation document outlines a commitment to support public bodies to “*ensure they have the right infrastructure in place to support implementation and compliance*”, there is no consideration of the funding implications for local authorities and other public bodies to establish and maintain this infrastructure.

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

The approach to establishing Minimum Core Obligations (MCOs) being proposed here does not mirror the anticipated approach under UNCRC incorporation. Whilst the UNCRC (Incorporation) (Scotland) Bill is still subject to reconsideration by the Scottish Parliament, it is understood the current intention is that the UNCRC legislation will not specify MCOs for economic, social and cultural rights, but rather this will be a matter for the courts to decide upon in interpreting the compliance duty.

It is essential that the approach taken in Scotland to incorporating different international human rights materials is consistent, coherent, integrated and aligned. Children and young people will have the rights set out in the UNCRC legislation as well as those within the Human Rights Bill, and economic, social and cultural rights are covered in both (with significant crossover between these). Given this, there is a risk that taking an inconsistent approach to MCOs in these two pieces of legislation could significantly complicate the landscape, making it challenging for public authorities (including frontline practitioners) to interpret and implement their statutory duties in practice, as well as making it difficult for children, young people, and their families and advocates to understand their rights and their practical meaning.

It is crucial that full consideration is given to the possible implications of taking a different approach (both in relation to MCOs, as well as other aspects) to the incorporation of children’s rights and other human rights. This must be approached holistically and efforts made to ensure coherence, integration and alignment in our approach to avoid the risk of significant complexity and challenges with practical implementation.

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

It is important that our approach to the incorporation of international human rights materials in Scotland is strategic, holistic and coherent. Whilst the UNCRC legislation is subject to Reconsideration by Parliament, section 11 of the Bill as passed sets out duties for Scottish Ministers in relation to a Children’s Rights Scheme.

Children's rights as contained in the UNCRC are a sub-set of human rights, and there is a need to approach all human rights in a holistic and strategic way. Given this, the approach taken to a Human Rights Scheme should be as consistent and aligned as possible with the Children's Rights Scheme; there may be merit in considering whether there is a need for two separate Schemes, or whether these could be combined into one document to maximise coherence and alignment.

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?

COSLA is committed to the delivery of sustainable person-centred public services, as set out in the Verity House Agreement, and the principle that the delivery of such public services should contribute to the advancement of human rights. COSLA has been clear throughout our involvement with the National Taskforce, the Bill Executive Board, and the Bill Advisory Board that properly planned and resourced support for local authorities to build the capacity they need for effective implementation is crucial.

Whilst we welcome the establishment of an Implementation Working Group, it is disappointing that the first meeting of this group took place in August 2023, almost 8 months after its establishment was agreed by the Bill Executive Board and after the Bill consultation opened.

There is considerable concern within local authorities about the capacity building needed to ensure effective Bill implementation, namely the lack of staff capacity and specialist knowledge to train, and provide ongoing support to, wider council staff teams on the new duties. Embedding effective Bill implementation and tackling any barriers to implementation that may arise cannot be expected to be undertaken within local authorities without additional funding to cover staffing and training needs.

The consultation itself makes no mention of additional resources or funding to cover the capacity building and workforce needs of public bodies, such as councils, which raises concerns that Scottish Government has underestimated or overlooked the financial and practical challenges of implementation for public bodies. It is greatly concerning that no initial assessment of the potential financial implications for councils and other public bodies has been undertaken. COSLA urges Scottish Government to ensure that financial and resourcing needs arising from the Bill are discussed at the newly established Implementation Working Group as a matter of priority.

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

Local authorities will certainly have a role to play in providing information on, and raising awareness of, the rights for rights-holders under the Human Rights Bill. Councils across Scotland routinely undertake awareness raising and information sharing activity within their local communities and are best placed to engage with rights-holders, in partnership with other organisations from the third, private and wider public sectors.

As a member of the Implementation Working Group, COSLA welcomes the inclusion of information and awareness raising on the group's workplan, however this needs to be part of a wider conversation across the Local Government sector and we look forward to further detail from Scottish Government on how this will be taken forward.

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

Monitoring and reporting requirements under the Human Rights Bill should, to the fullest possible extent, be integrated into existing requirements on local authorities to avoid unnecessary duplication of work and to mitigate the impact on council officers' workload in this area. It is imperative that any approach seeks to be strategic and rationalise reporting. It is worth considering rather than adding additional human rights reporting duties if this could be combined with existing reporting on children's rights.

Further detail is also needed on the Scottish Government's intention for interaction and alignment between reporting duties under the Human Rights Bill and the National Performance Framework. Another key question is whether sufficient data is currently being collected at a national level to provide an understanding of the state of current compliance with human rights in Scotland, as a baseline of compliance will be essential for effective ongoing monitoring. This additional detail is needed for COSLA to take a more fully formed position on the implications of monitoring and reporting requirements from the Bill for local authorities.