



## **Close the Gap submission to the Scottish Government Consultation on a Human Rights Bill for Scotland**

**October 2023**

### **1. Introduction**

Close the Gap is Scotland's policy advocacy organisation working on women's labour market participation. We have been working with policymakers, employers, and employees for over 20 years to influence and enable action that will address the causes of women's labour market inequality.

Much of our work is directed at gendering Scottish Government policy development so that women's experiences are visible and the inequalities they face addressed. We welcome Scottish Government's broadly good intentions on women's rights and gender equality, but there is a lack of gender mainstreaming in policy development which prevents progress on women's equality and human rights. This deficit is also evident in public bodies' responses to the public sector equality duty in Scotland, which has failed to advance equality and tackle discrimination for women.

Alongside the wider women's sector in Scotland, Close the Gap has long advocated for the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of Discrimination Against Women (CEDAW) to be incorporated into Scots Law. Close the Gap therefore welcomes this opportunity to respond to this consultation on a Human Rights Bill for Scotland. We are committed to continued engagement with Scottish Government on the development and implementation of the Bill.

## 2. Women's equality and human rights

Women face significant barriers to accessing their human rights in Scotland, barriers which are rooted in gender inequality. These barriers are greater for particular groups of women who are further marginalised.

Women are more likely to be in poverty, find it harder to escape poverty, and are more likely to experience persistent poverty. Single parents, especially young single mothers, as well as racially-minoritised women and disabled women, disproportionately experience poverty. Women's poverty is also inextricably linked to child poverty, meaning action to tackle women's inequality in the labour market is critical to addressing child poverty and realising children's rights.

The gender pay gap, the headline indicator of women's labour market equality, is a key driver of women's higher levels of poverty. Women are more likely to be in low-paid work, and account for over seven in ten of workers in Scotland earning less than the real living wage.<sup>1</sup> Women are more likely than men to have caring responsibilities and face the additional pressure of finding work that allows them to balance earning with caring. Women are therefore three-quarters of the part-time workforce.<sup>2</sup> This sees women further concentrated into low paid and insecure work, as most part-time work is found in the lowest paid jobs and sectors, often leading to women working below their skill level. Women face gendered barriers to increasing their working hours and earnings such as a lack of high-quality flexible working opportunities, including part-time work. Childcare is the most immediate barrier to women being able to work, study and train.<sup>3</sup>

As a result of gender inequality, women are being disproportionately affected by the cost-of-living crisis, and women who were already struggling are now under enormous financial pressure. This is particularly the case for groups of women who are already more likely to be living in poverty such as disabled women, racially minoritised women, single mothers, and older women.<sup>4</sup>

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<sup>1</sup> Joseph Rowntree Foundation (2023) *Poverty in Scotland 2023*. Available at:

<https://www.jrf.org.uk/report/poverty-scotland-2023>

<sup>2</sup> Close the Gap (2022) *Gender pay gap statistics*. Available at:

<https://www.closesthegap.org.uk/content/resources/Gender-pay-gap-statistics-paper-2022.pdf>

<sup>3</sup> Close the Gap & One Parent Families Scotland (2023) *A childcare system for all: A vision that puts gender equality at the centre of Scotland's childcare strategy*. Available at:

<https://www.closesthegap.org.uk/content/resources/CtG-and-OPFS--A-childcare-system-for-all-FINAL.pdf>

<sup>4</sup> Women's Budget Group (2022) *The gendered impact of the cost-of-living crisis*. Available at:

<https://wbg.org.uk/wp-content/uploads/2022/03/The-gendered-impact-of-the-cost-of-living-crisis.pdf>

In 2023, women in Scotland face a perfect storm of crises rooted in gender inequality, and which prevent them from accessing their human rights. The gendered nature of these crises requires a gendered response. This includes a gendered approach to the development and implementation of a Human Rights Bill for Scotland. Those responsible for delivering human rights must actively place gender at the core of their decisions and actions.

There are a wide range of steps that could be taken in Scotland in doing so, and which are entirely within the scope of devolution. A guarantee of accessible, affordable, and flexible childcare for all would support the realisation of women's equality and rights, and children's rights. Integrating gender budget analysis across Scottish Government and local government would ensure women's specific needs are considered in, and inform, spending decisions. This would lead to better-targeted, and most cost-effective, policy and services that meet their needs. Designing specific employability programmes to enable women to build the skills needed for "green jobs" could remove some of the barriers women face to a free choice of profession, and to earning a decent living.

### **3. Questions**

#### Incorporating the Treaty Rights

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

Close the Gap supports the proposal to allow courts to consider dignity in interpreting the rights in the Bill. However, we agree with Human Rights Consortium Scotland (HRCS) that courts should not just be allowed but should be required to consider dignity when interpreting these rights.

Dignity is a fundamental and universal principle of human rights and asserts that every individual possesses inherent worth and value, and no person should be treated as lesser than another. The principles of equality and non-discrimination and dignity are thus interdependent and indivisible.

Article 1 of the Universal Declaration of Human Rights states that *"All human beings are born free and equal in dignity and rights."* The Preamble of the CEDAW states *"that discrimination against women violates the principles of equality of rights and respect for human dignity."*

**Close the Gap calls for the Bill to recognise the interdependence and indivisibility of human dignity and equality and non-discrimination and, critically, that the experience of dignity is and can be impeded by the structural inequality faced by women and other protected characteristic groups.**

We also support HRCS's recommendation of a purpose clause that explicitly mentions dignity along with other key human rights principles such as universality, participation, non-discrimination, and other relevant principles.

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

We refer to our response to question 1 and stress that the concept of dignity is not gender-neutral, and the same applies to Minimum Core Obligations (MCOs). It is critical that Scottish Government recognise this and commit to developing a gendered set of MCOs, applying an intersectional lens in the development process. The actions necessary to uphold the dignity of women may be different to those necessary to uphold the dignity of men, e.g. access to reproductive healthcare, adequate childcare provision. MCOs that do not meet the needs of women do not deliver dignity as it is understood in the Universal Declaration of Human Rights, nor in CEDAW.

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

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

As set out by Engender, it will be crucial that duty bearers, courts and tribunals are able to consider evolving human rights jurisprudence through evolving case law, in addition to 'soft law' norms and standards. This includes those emanating from General Recommendations and Comments produced by relevant Treaty Bodies, Concluding Observations, and outcomes of inquiries and complaints.

We agree with Engender's view that, with regards to human rights jurisprudence, international and comparative law, this should be relatively straight forward for duty bearers, courts, and tribunals to interpret, via case law and legal precedents.

However, much of the normative value of the human rights framework comes from ‘soft law’ standards and norms, which are more expansive, complex, and regularly evolving. Scottish Government must therefore consider how these can best be utilised to improve human rights decision-making in Scotland and allocate sufficient time and resources to doing so thoroughly.

This is especially important with regard to CEDAW, as there is less decided case law citing the Convention than with some other treaties. This could translate into a lack of legal certainty and create challenges in terms of ensuring consistency in approach.<sup>5</sup> It follows that CEDAW Committee’s General Recommendations and Comments are critical. While not all of its 39 General Recommendations will be within devolved competence, duty bearers will still be required to take into account a substantial body of information in relation to CEDAW. This will require a significant level of gender competence, which will necessitate concomitant resources and support, including detailed guidance.

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

##### The ‘direct treaty text’ approach

Close the Gap supports the incorporation of ICESCR, CEDAW, the Convention on the Rights of People with Disabilities (CRPD), the Convention on the Elimination of Racial Discrimination (CERD) and the right to a healthy environment into Scots law. Ensuring women have access to their human rights is fundamental element to achieving gender equality. The incorporation of ICESCR and CEDAW in particular present the opportunity to create increased accountability and recourse to challenge when women’s rights have been denied.

We are broadly supportive of the proposal that all four treaties should be reproduced in the Bill, removing any text that relates to areas that are reserved to the UK Parliament. However, we agree with Engender’s assessment that CEDAW is likely to be severely redacted under this approach, given reservations around devolved competence and the substantive approach to equality. This renders it unlikely that CEDAW will be on the face of the Bill. We also understand that Scottish Human Rights Commission (SHRC) has argued that a ‘transposition’ approach could potentially provide more flexibility in navigating the equality reservation and could create scope for more of CEDAW’s components to make it onto the face of the proposed Bill,

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<sup>5</sup> Rao, A. & The International Women’s Rights Action Watch (2008) *Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women: Potential and Actuality*

including aspects of the Convention text and selected standards from general recommendations. We recognise the arguments that this approach may help secure a more maximalist approach and could provide more clarity for duty bearers. However, we also acknowledge that there are significant risks in opening up human rights treaties to legislative reinterpretation.

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

**Close the Gap believes the ‘cut and paste’ approach should also incorporate an element of transposition in order to fill the gaps left by redactions of CEDAW and the other special protection treaties.** This mechanism would enable the incorporation of CEDAW rights where possible, while reinterpreting those aspects of rights that cannot, and creating rights that would fulfil the intended purpose of those rights that are lost in redaction. This reinterpretation would focus on what action is possible within the devolved context that could move people closer to the realisation of those rights. We have set out an example below on how a right to childcare could substantively contribute to the delivery of employment rights in article 7 of ICESCR and article 11 of CEDAW, while staying within the bounds of legislative competence. **We therefore call on Scottish Government to consult on this approach as part of ongoing engagement around the development of the Bill.**

#### Gender-competent incorporation

However the treaties are incorporated, delivering human rights for women requires that those rights in the Bill take account of the specific barriers women face to accessing their rights. Gender-neutral incorporation will not achieve this. **We therefore call on Scottish Government to ensure fully gender-competent incorporation of ICESCR.** As set out by Professor Nicole Busby, we are clear that *“[i]ncorporating the social and economic rights provided by ICESCR without specifically gendering those rights risks reproducing and perpetuating existing inequalities which could become further institutionalised as the new rights framework becomes operational.”*<sup>6</sup> This is even more critical in the event that only a due regard duty applies to CEDAW, as we set out below.

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<sup>6</sup> Busby, N. (2020) *The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW*. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby--->

## CEDAW incorporation

The women's sector in Scotland has long advocated for CEDAW to be given direct effect in Scots Law, and the benefits of incorporation are well-rehearsed.<sup>7</sup> CEDAW reflects the need for gender equality to underpin human rights so that they can be enjoyed, in full and without discrimination, by all women and girls. Further, when duty bearers take steps to realise women's rights, this has a ripple effect across other protected characteristic groups. As Professor Nicole Busby sets out, *"if legislative action is targeted specifically at improving women's lives, other protected characteristic group members (e.g. disabled people, older people, BAME communities, etc) benefit directly because approximately half of each category will be comprised of women and also indirectly because of women's disproportionate role as the providers of informal care across other protected groups."*<sup>8</sup> Further, given that women's rights are essential to the realisation of children's rights, the UNCRC's incorporation would be facilitated and strengthened by the full incorporation of CEDAW.<sup>9</sup>

Close the Gap acknowledges that CEDAW's substantive approach to equality will mean that the process of determining which specific rights it is possible to include in the Bill is likely to be complex. **However, we are clear that rights in CEDAW, beyond those that correspond with ICESCR, must be given due consideration for incorporation.** We agree with the wider human rights sector that the consultation lacks definitive detail on what will be redacted in terms of any CEDAW interpretative duty.

**We call on Scottish Government to be as ambitious as possible in its incorporation of CEDAW.** It is critical where part but not all of a right under CEDAW may be incorporated, that this part is incorporated. This is essential in order for women's rights to be fully realised and for substantive equality to be achieved.

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<sup>7</sup> Busby, N. & Robison, M (2018) *CEDAW: How Can Women's Rights be Better Realised in Scotland?* Available at: <https://www.engender.org.uk/content/publications/CEDAW-incorporation-paper.pdf> and Close the Gap & Engender (2022) *Incorporating CEDAW into Scots law*. Available at:

<https://www.closesthegap.org.uk/content/resources/Womens-orgs-CEDAW-incorporation-paper.pdf>

<sup>8</sup> Busby, N. (2020) *The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW*.

Available at:

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

<sup>9</sup> Ibid.

**Further, Scottish Government must consider how it can fill gaps where rights may not be incorporated, in full or in part, due to legislative competence.** For example, as employment law is reserved to Westminster, parts of treaties that relate to employment may be redacted. However, there are steps that could be taken to realise the rights in article 7 of ICESCR and article 11 of CEDAW that sit outside of employment law, and are not precluded by the bounds of devolution. For example, **Scottish Government could include on the face of the Bill a right to accessible, affordable, and flexible childcare for all.**

ICESCR, CEDAW and the UNCRC already recognise the importance of childcare for both parents and children. Incorporating a right to childcare would not fall foul of the equal opportunities reservation, as women and men would share in it equally. It would also tackle one of the biggest drivers of women's economic and labour market inequality, and thus help advance gender equality overall. This in turn would better enable women to realise more of their rights, in addressing a significant barrier to accessing them. It would also help realise children's rights, and tackle women's and children's poverty, while having a positive impact on the realisation of other treaty rights on education (ICESCR 13, CEDAW 10), standard of living (ICESCR 11), political participation (CEDAW 8), health (ICESCR 12), and gendered social norms (CEDAW 5).

Scottish Government has already set out its view of the importance of funded early learning and childcare (ELC) and has rightly identified it as critical to the delivery of its cross-cutting aim of tackling child poverty.<sup>10</sup> The inclusion of right to childcare in this Bill would align with Scottish Government's existing commitment to deliver funded ELC across Scotland. The knock-on effect of such a right would be transformative for the realisation of human rights for all in Scotland. Scottish Government must be bold if this Bill is to deliver tangible change for those who need it most.

We welcome and endorse the work that Professor Nicole Busby has done in analysing the rights conferred by CEDAW and their applicability within the reserved/devolved context.<sup>11</sup> **As part of an ongoing and transparent consultation process, Scottish**

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<sup>10</sup> Scottish Government (2023) *Equality, Opportunity, Community: Our Programme for Government*. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2023/09/programme-government-2023-24/documents/equality-opportunity-community-programme-government/equality-opportunity-community-programme-government/govscot%3Adocument/equality-opportunity-community-programme-government.pdf>

<sup>11</sup> Busby, N. (2020) *The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW*. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby---cedaw/aap-paper-nicole-busby---cedaw/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BNicole%2BBusby%2B-%2BCEDAW%2BFINAL%2B%25281%2529.pdf>



**Government should publish a paper setting out what parts of CEDAW it believes may and may not be incorporated, and the evidence for this, to enable it to demonstrate that it is ensuring a maximalist approach to realising women’s rights.** We also call for a collaborative and consultative approach to be taken in determining how CEDAW is ultimately articulated in the Bill.

### The procedural duty and duty to comply

Close the Gap supports the institution of a procedural duty on all four treaties – not solely on ICESCR as the consultation proposes – and the right to a healthy environment. We also agree with the proposal to place a duty to comply on duty bearers, and that this duty should include the delivery of MCOs and demonstration of progressive realisation of the rights. Progressive realisation should include the use of maximum available resources and non-retrogression.

However, we are concerned that the language of ‘procedural duty’ lacks clarity, particularly on whether this amounts to a ‘due regard’ duty. **We are clear that this procedural duty must be the duty to have due regard, in line with the Equality Act 2010**, as discussed further in our response to question 20. We would be very concerned if this duty amounted to a weaker one, as this would significantly lessen the impact of this Bill and the aims for incorporation CEDAW, CERD and CRPD. Further, it may create barriers to the future integration of human rights and equalities duties, causing confusion for duty bearers and weakening impact.

The consultation notes that a duty to comply is ultimately needed if ‘transformative impact’ is to be secured. **Close the Gap is therefore concerned about the proposal to only place the weaker procedural duty on CEDAW and the other special protection treaties, CERD and CRPD.** This carries the risk of sending a strong signal to duty bearers, and to rights holders, that women’s rights are a secondary consideration to delivering gender-neutral rights under ICESCR. This is particularly concerning when public sector budgets are under significant pressure, coupled with a policy landscape that places multiple overlapping duties on public bodies. We know from experience of Scottish public bodies’ performance of the public sector equality duty (PSED) that this due regard duty has failed to secure meaningful action to tackle gender inequality and discrimination.<sup>12</sup>

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<sup>12</sup> Busby, N. (2020) *The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW*. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby--->

Further, women's rights and equality are frequently deprioritised at times of crisis or financial pressure, exacerbating their pre-existing inequality. Close the Gap has repeatedly highlighted that women's needs were largely invisible in Scottish Government policy responses to the Covid-19 crisis, despite the due regard duty in PSED.<sup>13</sup>

There are significant questions on how CEDAW, CERD and CRPD will be enforceable without a compliance clause. This concern is rooted in our experience of working on public bodies' performance of PSED. This duty already takes the 'procedural duty' approach, through its due regard duty. Implementation of PSED, and SSDs, has been inconsistent at best, and has not resulted in public bodies mainstreaming equality considerations in their decision-making processes. The evidence shows that the duties have failed to deliver advances in equality in Scotland, and if the approach to the new human rights duties is aligned with them, they will be immediately susceptible to the same implementation failings.

It is unclear how the suggested approach for a procedural duty only for the special protection treaties and for compliance for ICESCR rights would work in practice. We are concerned that weaknesses in accountability, combined with complexity and confusion for duty bearers, could be a major impairment to any meaningful operationalisation of CEDAW, CERD and CRPD. Further, consideration should also be given to how the procedural duty as proposed would be applied in recognising the impact of the particular barriers faced by people experiencing intersectional inequalities, e.g. racially-minoritised women and disabled women, in accessing their rights.

As a procedural duty, even if this is due regard, is a softer duty than a duty to comply, it would allow public bodies, provided they had due regard to the CEDAW rights, not to comply with them and to decide that they should be overridden by other considerations. For example, under Article 13 of ICESCR, a public body may provide equal access to technical and vocational secondary education opportunities for all, but at times and locations that are incompatible for women with caring roles who are unable to access childcare. The public body only has to demonstrate that it

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<sup>13</sup> Close the Gap, Engender & Scottish Women's Aid (2023) *Joint response to the Finance and Public Administration Committee Inquiry into Effective Scottish Government decision-making*. Available at: <https://www.closethegap.org.uk/content/resources/Joint-response-to-the-FPA-Committee-Inquiry-into-Effective-SG-DecisionMaking.pdf>

recognises this, but cannot afford to do anything about it, to meet the due regard duty. The women are therefore unable to claim this right.

**As a duty to comply is the duty that enables individuals to name and claim their rights it is critical that women are able to draw on this to be able to access their rights to the same extent as men.** A human rights system that enables sanctions on duty bearers for failing to deliver on one set of rights, but not for the other, makes it likely that the process of giving due regard will be influenced by this consideration from the outset. The lack of a compliance duty for CEDAW, CERD and CRPD could also further dilute protections for rights holders and weaken routes to justice.

We believe only placing a procedural duty on CEDAW, CERD and CRPD is a significant departure from what was envisioned and articulated in work produced by and for the Taskforce.<sup>14</sup> We accept that there are complex interactions with the equal opportunities reservation. However, Close the Gap is not persuaded that, under a maximalist approach, only a due regard duty is possible for CEDAW and its sister special protection treaties. **We urge Scottish Government to introduce a duty to comply with CEDAW as far as possible with a due regard duty alongside this only for rights where this is not possible.**

We support the calls by the human rights sector that the duty to comply should not *replace* a duty to have due regard but should be in addition to this.

#### CRPD incorporation

We also support HRCS calls on the need to ensure the Scottish Human Rights Bill brings significant improvements to the protection and realisation of disabled people's rights. The proposed model of incorporation treats all three special protection treaties as the same, but CRPD contains significant, substantive rights for disabled people that are not found with ICESCR, and which are vital to the dignity of disabled

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<sup>14</sup> Busby, N. (2020) *The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW*. Available at:

<https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby---cedaw/aap-paper-nicole-busby---cedaw/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BNicole%2BBusby%2B-%2BCEDAW%2BFINAL%2B%25281%2529.pdf> and Scottish Government (2021) National Taskforce for Human Rights Leadership Report. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2021/03/national-taskforce-human-rights-leadership-report/documents/national-taskforce-human-rights-leadership-report/national-taskforce-human-rights-leadership-report/govscot%3Adocument/national-taskforce-human-rights-leadership-report.pdf>

people. If these standalone rights are to be fully realised for disabled people, public bodies must have the stronger duty to comply.

### Equality provision

Close the Gap supports the inclusion of an equality provision in the Bill to ensure everyone has equal access to rights, and a non-discrimination clause. We agree that special protection treaties should also be considered when interpreting and delivering ICESCR rights and the right to a healthy environment to ensure a coherent and effective framework. We also support the inclusion of an interpretative provision that aligns rights with international standards, mirroring those listed in the UNCRC Incorporation Bill.

We support the call for an audit of wider legislation that impacts rights in the Bill, mirroring the audit being considered for UNCRC incorporation. This should be planned for alongside wider Bill implementation.

**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.**

It is difficult to respond to this question in the absence of any detail on how Scottish Government intends to approach the incorporation of CEDAW. We would welcome more clarity on how CEDAW will be considered and what is proposed to be incorporated and redacted. Along with the wider women's sector, we are clear that there must be transparency, consultation, and collaboration in this process from Scottish Government. This also echoes the position of the wider human rights sector. In particular, we are keen to understand how Scottish Government considers that CEDAW rights will interact with the Equality Act 2010, regarding decision-making on redaction, and on the compatibility of any new CEDAW duties with the existing PSED and SSDs.

### Incorporating Further Rights and Embedding Equality

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

We agree with HRCS's response to this question in the consultation. For clear understanding and full implementation, and to ensure that the whole of Scotland's human rights framework works well together, the Human Rights Act 1998 (HRA), civil and political rights, and the UNCRC must fully embedded into capacity building and awareness-raising plans related to this Bill.

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

We agree that participation should be embedded within the framework of the Bill.

In our work on public bodies' performance of PSED we found only minimal evidence of effective participation work. As part of their work on PSED, Engender worked with Nicole Busby, Professor of Human Rights, Equality and Justice to develop a set of draft regulations for the SSDs<sup>15</sup>. Their proposals included a recommendation for public bodies' PSED reports to include a statement detailing how protected groups and experts in equality policy were involved in meeting the duties and specifying the impact(s) of their involvement on that implementation. We believe this approach should be applied to the equalities provision and to the procedural duty being applied to CEDAW.

Women face specific barriers to participation, e.g. meetings must be at times and locations that are compatible with their caring responsibilities, childcare must be available, and approaches must be culturally sensitive to meet the needs of Muslim women, Sikh women, and other marginalised groups. Scottish Government must provide guidance and resources for public bodies on effective participation methods to ensure women, especially marginalised women, are included in decision-making processes. It is essential this is supported by sufficient and sustainable resources and capacity for women's groups and grassroots organisations, who are a vital support to women's participation.

Further, participation cannot be tokenistic: duty bearers must be required to provide evidence in their reporting on how participation has influenced its work on delivering human rights.

**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?**

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<sup>15</sup> Engender (2022) *Draft Regulations for the Scottish Specific Duties of the Public Sector Equality Act*. Available at: <https://www.engender.org.uk/content/publications/engender-draft-regulations-table-of-changes.pdf>

Close the Gap agrees with the proposal to include an equality clause in the Scottish Human Rights Bill. We note the advice of Professor Nicole Busby, “*Explicit articulation of the extent of the duties in the equality clause and/or the accompanying guidance would improve rights holders’ awareness of their rights and inform their expectations of what a human rights-based approach can achieve. This has the potential to improve equality outcomes and to enhance access to justice in the broadest sense.*”<sup>16</sup>

Further, we know that commitment to considering equality in a broad sense does not work. Despite the clear requirement within PSED and the SSDs to consider the needs of the nine different protected characteristic groups, public bodies have taken an increasing homogenised approach to equalities.<sup>17</sup> When protected groups are treated in an undifferentiated way this means results in a failure to advance human rights and equality and tackle discrimination for any group.

**The barriers that prevent women from accessing their human rights are gendered. Therefore, in order for women to access their human rights on an equal basis with men, duty bearers must ensure they apply a gender lens to the steps they take to deliver human rights to all.** There must be clarity for duty bearers that they are required to consider the specific inequalities and barriers faced by each protected characteristic group in accessing their human rights. Critically, the equality provision, and the Bill as a whole, must not lead to confusion for duty bearers when considering the equality provision as well as their existing duties under the PSED and SSDs in regard to women and the other protected characteristic groups.

There must be clear language and definitions in the drafting of the Bill, as well as in statutory and non-statutory guidance that explicitly links to existing equalities duties and explains how any new rights protections under the Bill will complement and interconnect.

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

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<sup>16</sup> Busby, N. (2020) *The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW*. Available at:

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

<sup>17</sup> Close the Gap (2022) *Close the Gap submission to the Scottish Government Consultation on the Review of the operation of the Public Sector Equality Duty in Scotland*. Available at: <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-submission-to-the-SG-consultation-on-the-review-of-the-operation-of-the-PSED-in-Scotland.pdf>

Close the Gap agrees with HRCS that LGBTI people, older people and Care-Experienced people should be specifically named within the non-discrimination aspect of the equality provision.

Consideration should also be given to how the equality provision may be applied in recognising the impact of the particular barriers faced by people experiencing intersectional inequalities, e.g. racially minoritised women and disabled women, in accessing their rights.

**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?**

Disagree.

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

In line with our response to question 15, we believe that the use of “other status” in the equality provision would not sufficiently protect the rights of LGBTI, older and Care-Experienced people.

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

As set out in our response to question 15, we agree that there should be an equality provision, and that LGBTI, older and Care-Experienced people should be specifically named and visible in the Bill.

The duties

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

**Close the Gap calls for the new human rights duties to apply to as many public bodies as possible within devolved competence, as women’s lives in Scotland interact with all types of support and services across Scotland.** Progress towards gender equality is heavily dependent on the actions and decision-making of public services, as we know that women are disproportionately reliant on their services and employed within these organisations.

We note that HRCS’s response to this consultation highlights that it is often challenging for individuals to discern whether the public body they are interacting with is a Scottish or UK public authority, and that consideration should be given to ensuring clarity for rights-holders around duty bearers under this Bill.

We also agree that the duties should apply to all private bodies when carrying out public functions, as they too play a significant role in upholding human rights. We agree that this should mirror the approach taken by the UNCRC Incorporation Bill.

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

Close the Gap supports the inclusion of an initial procedural duty in the Bill, as a means of embedding human rights considerations into decision-making processes.

This procedural duty is critical in addressing the barriers faced by specific groups in accessing their rights, e.g. the use of gender budgeting to ensure the diverse realities of women's lives are considered in budgeting processes, such that funds are targeted where needed most and services meet their particular needs.

As set out in our response to question 4, we are clear that this procedural duty must be the duty to have due regard, as this is the strongest, clearest, and best-understood procedural duty. It is also already an established principle in PSED and in the Fairer Scotland Duty (FSD). Due regard is well understood and has been clearly interpreted by courts regarding PSED. As HRCS notes in its response to this consultation, courts said:

*"[T]he duty [to have due regard] must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of "ticking boxes".<sup>18</sup>*

Close the Gap agrees with HRCS that the duty to have due regard (the procedural duty) should continue to apply after the full duty to comply is in effect, in order to ensure that human rights considerations remain an integral part of decision-making for public bodies.

As set out in our response to question 4, while we support the introduction of a due regard duty, we note at the same time such a duty's limitations, as evidenced by successive assessments of public bodies performance of PSED.<sup>19</sup> **Close the Gap calls on Scottish Government to ensure the procedural duty is clearly aligned with an**

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<sup>18</sup> R (Brown) v Secretary of State for Work and Pensions [2008] EWCA 3158 (Admin), para 92. As quoted in [DueRegardJune2015.pdf \(equallyours.org.uk\)](https://www.equalityhumanrights.com/wp-content/uploads/2015/06/Due-Regard-June-2015.pdf)

<sup>19</sup> Close the Gap (2022) *Close the Gap submission to the Scottish Government Consultation on the Review of the operation of the Public Sector Equality Duty in Scotland*. Available at: <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-submission-to-the-SG-consultation-on-the-review-of-the-operation-of-the-PSED-in-Scotland.pdf>



**improved PSED and FSD.** The new integrated framework should be accompanied by specific guidance targeted at a range of duty bearers with good practice examples and improved processes for monitoring and measuring related to government-produced benchmarks. This will make it easier for duty bearers to implement and improve the chances of success.

There is also an urgent need for a substantial programme of competence building, and reliable ongoing support, on the function and application of a due regard duty, human rights, the specific barriers faced by women and other protected groups in accessing them, and what positive steps can be taken to tackle these. It follows that this will require substantial investment, and we call on Scottish Government to ensure that adequate resources are allocated.

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

Close the Gap supports placing a duty to comply with the rights in the Bill on all duty bearers. A duty to comply is essential to ensure rights are enforceable. Our experience of work on the PSED and SSDs strongly indicates that these lack meaningful enforceability, and compliance action from the regulator has been limited. This has resulted in public bodies' work on these duties being superficial and failing to deliver advances in equality for women and other protected characteristic groups. More often than not, equality is treated as secondary to, not integral to, the work of public bodies, and the same can be said of human rights. The failure of national and local government to consider gender inequality in their responses to the COVID-19 is evidence of this.<sup>20</sup>

Rights must be justiciable in order that individuals may name and claim them, and to motivate duty bearers to take steps to deliver human rights outcomes for all. The same must be said for women's rights, and the rights of other groups that face barriers to accessing their rights. As set out in our response to question 4, we are not persuaded that a duty to take account of CEDAW goes far enough, nor that a duty to comply with CEDAW is not possible. **We urge Scottish Government to introduce a duty to comply with CEDAW as far as possible, alongside applying a duty to pay due regard to all CEDAW's provisions, whether they are legally enforceable or not.** This creates a mechanism to ensure that duty bearers take necessary action in a

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<sup>20</sup> Close the Gap, Engender & Scottish Women's Aid (2023) *Joint response to the Finance and Public Administration Committee Inquiry into Effective Scottish Government decision-making*. Available at: <https://www.closesthegap.org.uk/content/resources/Joint-response-to-the-FPA-Committee-Inquiry-into-Effective-SG-DecisionMaking.pdf>

responsive way as and when needed, thus avoiding litigation. This is essential if women's rights are to be fully realised and substantive equality achieved.

Close the Gap agrees with HRCS that the duty to comply should comprise two critical components: the delivery of MCOs; and the progressive realisation of rights, by taking concrete steps towards realising these rights by utilising maximum available resources, while ensuring non-retrogression. Duty bearers will require significant guidance and support to demonstrate each of these components. It is critical that this is included in Scottish Government's programme of capacity building and adequate resources allocated for this.

However, interpretation of MCOs of ICESCR and the Right to a Healthy Environment must be gender-sensitive and standards designed in partnership with gender equality experts and women across Scotland. This is essential in order that MCOs are accessible to women through the court system, as set out in our answers to questions 1 and 2. We also need to see further detail from Scottish Government on how courts would understand the equality provision when assessing the obligations of duty bearers to meet MCOs. This is unclear from the consultation document.

The Scottish Government is currently developing an equality and human rights mainstreaming strategy. This will be a core tool for duty bearers in delivering human rights, and in particular enabling them to give due regard to CEDAW, CERD and CRPD in their delivery of ICESCR. It is critical that the development of this strategy considers carefully how the intersecting lenses of equality and human rights will be applied in practice, and how the risk of a diluted focus on women and other protected groups, and on human rights, will be avoided.

Further, Scottish Government must give consideration to how a reformed set of SSDs, and the PSED generally, will interact with the Bill and its associated duties. The equality clause must make this inter-relationship abundantly clear. In 2018, Scottish Government committed to reform the SSDs in response to calls from civil society and mounting evidence of their shortcomings. This work was delayed by the pandemic, but a three-stage process was initiated in early 2021, culminating in a public consultation in November 2021.

Recent correspondence from Scottish Government sets out the next steps for PSED reform. The proposals set out are disappointing, and a long way off from the substantive reforms long called for by organisations working on equality. The absence of action to tackle the dearth of equality mainstreaming in the public sector is deeply

concerning, particularly as the same public bodies subject to PSED will become duty bearers under the Bill. These public bodies will soon be required to apply a mainstreaming approach and undertake human rights impact assessments to ensure they are delivering human rights. Successive assessments by a number of equalities organisations, including the EHRC, have generated a substantial evidence base to show that PSED has not motivated public bodies to substantively consider equality and non-discrimination in decision-making.<sup>21</sup> Given that over ten years has passed since PSED was introduced, without improvement in public bodies' practice, this should be of urgent concern to Scottish Government in its plans for the development of this Bill. Close the Gap acknowledges the commitment to deliver improvements to PSED as part of a phased approach. **We urge Scottish Government to ensure the PSED reform process is prioritised and not allowed to further stall.**

**It is of fundamental importance that the new human rights duties, and Human Rights Scheme, align with a new and gender-competent set of SSDs.** The PSED and SSDs are both tools that can undoubtedly assist public bodies in realising human rights for women and other protected characteristic groups. **We urge Scottish Government to include full and meaningful consultation on this as part of its ongoing engagement on the development of the Bill.** Close the Gap welcomes the opportunity to support work to deliver meaningful reform of the duties.

Moreover, the reform process provides myriad opportunities for learning from the failure of the SSDs to secure meaningful action from public bodies on equality and non-discrimination. This must be taken advantage of in the process of developing a procedural duty on human rights.

We also support HRCS's recommendation that the duty to comply be implemented within a specified period of no more than two years from the Bill's commencement, and that this should be stated in the Bill. While we recognise the significant capacity deficit in public bodies, this is no justification for a long implementation timescale. Two years is more than enough time for public bodies to build capacity, adapt their policy and practices, identify concrete steps for progressive realisation of rights, and deliver on MCOs.

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<sup>21</sup> Close the Gap (2022) *Close the Gap submission to the Scottish Government Consultation on the Review of the operation of the Public Sector Equality Duty in Scotland*. Available at: <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-submission-to-the-SG-consultation-on-the-review-of-the-operation-of-the-PSED-in-Scotland.pdf>

**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 duties set out in the Bill?**

Yes. All duty bearers, as far as possible and appropriate to their function, should be required to report on what actions they are planning to take, and what actions they have taken, to meet duties set out in the Bill.

In reporting, duty bearers must be required to evidence how they have given due regard to the relevant rights and protected groups in how they have delivered on ICESCR. Making this a requirement of reporting will encourage a human rights culture by obliging public bodies to routinely record information and evidence of how CEDAW, CERD and CRPD been considered in and shaped their decision-making. It will also make it easier for policy advocacy organisations to scrutinise the work of public bodies on human rights and enhance accountability across the board.

It is necessary that Scottish Government mandate this by placing specific duties on the Scottish Ministers to provide a suitable framework, with periodic review so that the Government is accountable to the Scottish Parliament and to the public for monitoring the performance of the duties.

As reporting is a key scrutiny measure, it is critical that recent learning from public bodies' PSED reporting is used to develop a reporting scheme that is fit for purpose and elicits the information and evidence needed to hold duty bearers to account and make rights visible.

Assessments of public bodies' performance of the PSED have repeatedly highlighted the poor standard of reporting.<sup>22</sup> There has been a widespread failure by public bodies to provide evidence of substantive work carried out to meet their duties under PSED. A significant proportion of reports are characterised by vague statements, assurances of action, or commitment to principles, rather than evidence of work undertaken or planned. This cannot be repeated with reporting under the Bill.

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<sup>22</sup> Close the Gap (2022) *Close the Gap submission to the Scottish Government Consultation on the Review of the operation of the Public Sector Equality Duty in Scotland*. Available at: <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-submission-to-the-SG-consultation-on-the-review-of-the-operation-of-the-PSED-in-Scotland.pdf>

The Bill must be clear on who is required to report and what must be reported on if duty bearers' reports are to enable meaningful scrutiny, drive accountability, and make women's rights visible.

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

As duty bearers under the HRB are likely to be listed public authorities or other bodies covered by the PSED and FSD it is preferable that reporting on all sets of duties is aligned. At present, listed public authorities are required to report on work to meet PSED every two years. In our response to the 2021 Scottish Government consultation on PSED reform we called for a biennial reporting timetable to be retained, setting out our concerns that a longer reporting schedule is insufficient.<sup>23</sup>

The purpose of reporting is to facilitate scrutiny, support accountability, and make rights visible. It stands that the reporting schedule should support this by ensuring duty bearers maintain focus on their work to realise human rights in Scotland.

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

Close the Gap agrees with the proposed duty to require Scottish Ministers to publish a Human Rights Scheme. This scheme must clearly set out the requirements related to the implementation of rights outlined in the Bill and require Scottish Ministers to report on their actions and progress concerning these requirements.

**However, the women's sector is calling for a specific 'Women's Rights Scheme' in addition or in complement to a wider Human Rights Scheme, which would place a duty on Scottish Ministers to comply with CEDAW.** This would mirror the approach of the UNCRC Bill, which will create a 'Children's Rights Scheme', specific to children's rights.

We do not believe that a Women's Rights Scheme conflicts intrinsically with the equal opportunities reservation. The protected characteristic of age is afforded symmetrical protection in the Equality Act 2010, in the same way as sex. Therefore, if the UNCRC

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<sup>23</sup> Close the Gap (2022) *Close the Gap submission to the Scottish Government Consultation on the Review of the operation of the Public Sector Equality Duty in Scotland*. Available at: <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-submission-to-the-SG-consultation-on-the-review-of-the-operation-of-the-PSED-in-Scotland.pdf>

Bill is able to include a Children’s Rights Scheme, it should be possible to introduce a Women’s Rights Scheme as part of a Human Rights Bill for Scotland.

Placing obligations on Scottish Ministers through a Women’s Rights Scheme framework would necessitate specific guidance on how CEDAW rights would be monitored and assessed for progress. This is critical to making any progress on gender equality visible within monitoring of the Human Rights Bill implementation. We believe there should be a duty on Scottish Ministers to produce such a framework and to ensure the intersectional inequalities affecting marginalised and minoritised groups of women are reflected within it.

Aligning with the four key areas covered by the UNCRC implementation programme, Close the Gap calls for Ministerial reporting to cover the following key areas:

1. Scottish Government leadership on women’s rights.
2. Empowering rights holders to claim their rights.
3. Embedding women’s human rights in public services.
4. Women’s rights resolution.

Further detail on the Women’s Rights Scheme can be found in our response to question 40. Specific consideration should be given by the Scottish Ministers to the actions necessary to realise women’s human rights under the Scottish National Action Plan for Human Rights (SNAP 2).<sup>24</sup>

### Ensuring Access to Justice for Rights-Holders

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

Close the Gap agrees with Engender that significantly more consultation is needed on the types of access to justice women would require to realise their rights under the Bill. This is particularly important as we do not yet know which CEDAW rights will be included or redacted in the Bill, which could impact the type of support women would need and be able to access.

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<sup>24</sup> Scottish Government (2023) *SNAP 2: Scotland’s second national human rights action plan (2023-2030)*. Available at: <https://www.snaprights.info/wp-content/uploads/2023/03/SNAP-2-March-2023-FINAL-PDF.pdf>

In order to realise their rights, women need access to specialist organisations, tailored to women's needs, who understand how to support women experiencing gendered rights violations, and are adequately funded. This must include an intersectional approach, which understands the specific inequalities experienced by different groups of women.

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

We agree with the wider women's sector that any regulator being afforded new responsibilities in the Bill must be required to have substantive gender competence. In order to meet this standard this would require significant capacity building work to ensure their services are gender-sensitive and can meet the needs of women. Currently, we are not confident the Scottish Public Services Ombudsman (SPSO) would have the ability to analyse systemic inequality for women and marginalised people in the delivery of public bodies' duties under the Bill.

We would need to see a concrete commitment to a strategy and resources invested for the SPSO to be able to deliver for women, especially in scrutinising CEDAW rights, which requires gender expertise.

Close the Gap shares HRCS's concern regarding the lack of consideration in the consultation of people's experience of taking a complaint to the SPSO. It is critical that the Scottish Government identify and implement any necessary changes to ensure that this is an affordable, accessible, timely, effective, and supportive route to human rights remedy and justice.

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

In principle we support the proposal to require Scotland's scrutiny bodies to consider human rights in their work. This has the potential to enhance accountability through an additional layer of compliance assessment.

However, our concerns regarding the ability of the SPSO to competently and robustly scrutinise women's rights also apply to scrutiny bodies, who will require significant capacity building to ensure they are able to perform such a role effectively. Close the Gap's assessments of scrutiny performance of PSED revealed very little evidence of their consideration of equality and non-discrimination, particularly the specific experiences of women and other protected groups, in their work. Where we have

seen evidence of the inclusion of equalities in the reports of scrutiny bodies, this has often been minimal and of poor quality.

Further, Close the Gap included a small number of regulatory bodies within our assessment of public bodies' performance of the duties. We found their reports to be of poor quality with little substantive action planned to meet the duties, a lack of mainstreaming and protected characteristics treated in an undifferentiated way. We are concerned that this demonstrates a lack of understanding of both the duties and of inequality and discrimination.

If scrutiny bodies are to be required to make recommendations on human rights to those public bodies within their remit, they will require significant capacity building in order to do so. **Scrutiny bodies must have an advanced level of gender competence to ensure they are able to assess the due regard duty as it relates to CEDAW.**

Without this, the involvement of scrutiny bodies risks enabling or sustaining poor practice by duty bearers, by failing to identify areas of concern and being unable to provide the necessary support to improve.

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

We join the HRCS call for increased powers and concomitant resourcing for the SHRC. The SHRC is Scotland's National Human Rights Institution (NHRI) and must be able to provide individuals the same routes for access to justice, and advice and services, that are available through the Equality and Human Rights Commission (EHRC) in England and Wales, and the NIHRC in Northern Ireland.

We agree that additional SHRC powers should include:

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



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

We are concerned that the consultation does not make clear Scottish Government's thinking on which regulatory body will oversee compliance of the procedural duty of the special protection treaties. At present, the SHRC does not undertake substantive work on equality and non-discrimination, while the EHRC is the regulator for the Equality Act 2010 and has no jurisdiction on human rights in Scotland. It is unclear how or if it is envisaged that the SHRC and EHRC will work together to oversee implementation, particularly as it relates to matters of equality, including CEDAW, the proposed procedural duty, and the equality provision.

There is a need for further clarity on what SHRC will be responsible for in relation to the special protection treaties and what new powers and resourcing will be given.

**Without effective gender-competent enforcement the procedural duty, and women's rights, could fall between the cracks between SHRC and EHRC.**

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

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

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

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

Close the Gap disagrees that existing judicial remedies are sufficient in delivering effective remedy for rights-holders.

**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?**

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

Structural remedies are urgently needed to avoid the barriers to effecting systemic change caused by the current individualisation of rights and remedies. As Dr Katie Boyle sets out, *“The structural interdict can operate as a response to a systemic problem identified in either an individual case that identifies a wider systemic problem or in response to multi-party group proceedings where several litigants are facing the same systemic issue. Comparative best practice suggests that facilitating group proceedings is a helpful way of addressing economic, social, cultural and environmental rights (ESCER) violations because such violations are often collective in nature.”*<sup>25</sup> **Structural interdicts are therefore a necessary tool in ensuring the judiciary is able to respond appropriately in instances where gender or other protected characteristics are a causal factor in rights violations.**

Implementing the New Scottish Human Rights Act

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

Close the Gap supports the position of HRCS, that the primary driver for bringing the legislation into force should be addressing the serious violations of rights that people are experiencing right now. Given that these international human rights are already established, the implementation by public bodies should commence immediately.

Further, the timescales for bringing the legislation into force must be specified within the Bill itself. We agree that a reasonable timeline would involve commencement within six months after receiving Royal Assent and the additional duty to comply no more than two years later. This provides ample time for the development of

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<sup>25</sup> Boyle, K. (2020) *Academic Advisory Panel Briefing Paper: Access to Remedy – Systemic Issues and Structural Orders*. Available at: <https://dspace.stir.ac.uk/retrieve/83ce5341-cc71-43dd-98ad-72be806d9a10/BOYLE%20Systemic%20Issues%20and%20Structural%20Orders%20Briefing%20Paper.pdf>

guidance, the building of public sector capacity, and the establishment of MCOs, ensuring an efficient transition to full implementation.

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

Close the Gap agrees that MCOs must be established through a participatory process. We refer to our comments on women's participation in our response to question 13. We also refer to our comments on the need for MCOs to be meaningfully gendered in our response to questions 1 and 2. Given that significant gender competence will be necessary for this work to be effective, organisations with specific gender expertise, including policy advocacy, service delivery, and grassroots organisations, must be included in the participation process.

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

As set out in our response to question 26, Close the Gap agrees with the proposed duty to require Scottish Ministers to publish a Human Rights Scheme. This scheme must clearly set out the requirements related to the implementation of rights outlined in the Bill and require Scottish Ministers to report on their actions and progress concerning these requirements.

As previously discussed, **the women's sector is calling for a specific 'Women's Rights Scheme' in addition or in complement to a wider Human Rights Scheme, which would place a duty on Scottish Ministers to comply with CEDAW.** This would mirror the approach of the UNCRC Bill, which will create a 'Children's Rights Scheme', specific to children's rights.

We do not believe that a Women's Rights Scheme conflicts intrinsically with the equal opportunities reservation. The protected characteristic of age is afforded symmetrical protection in the Equality Act 2010, in the same way as sex. Therefore, if the UNCRC Bill is able to include a Children's Rights Scheme, it should be possible to introduce a Women's Rights Scheme.

Placing obligations on Scottish Ministers through a Women's Rights Scheme framework would necessitate specific guidance on how CEDAW rights would be monitored and assessed for progress. This is critical to making any progress on gender equality visible within monitoring of the Human Rights Bill implementation. We believe there should be a duty on Scottish Ministers to produce such a framework

and to ensure the intersectional inequalities affecting marginalised and minoritised groups of women are reflected within it.

Aligning with the four key areas covered by the UNCRC implementation programme, Close the Gap calls for Ministerial reporting to cover the following key areas:

1. Scottish Government leadership on women's rights.
2. Empowering rights holders to claim their rights.
3. Embedding women's human rights in public services.
4. Women's rights resolution.

We support Engender's recommendations that the following actions form explicit requirements under the duties linked to a Women's Rights Scheme:

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

There is an urgent need for adequate gender-competent guidance for all duty bearers. This should make any progress on gender equality visible within the wider monitoring mechanisms put in place for implementation of the Bill. There should be a duty on Scottish Ministers to produce such a framework, including ensuring any guidance adequately details how intersectional experiences of marginalised and minoritised groups of women are made visible as part of monitoring and reporting under the Scheme.

*2. Reporting requirements by duty bearers on actions to secure and advance women's rights.*

The Scheme should also require the Scottish Government and other duty bearers to report periodically on action they are taking to actively progress women's rights. A requirement to report on the progression of women's human rights should be stated explicitly. This should also link to existing commitments to implement an Equalities and Human Rights Mainstreaming Strategy, and with existing duties to report under PSED.

*3. Creation of specific monitoring and evaluation tools*

The Scottish Government should produce gender-competent evaluation and monitoring tools for duty bearers so that progress can be measured regularly against the procedural duties imposed on them. This must include a system for reviewing the mechanisms to ensure that they remain fit for purpose.

*4. Ministerial reporting directly to Scottish Parliament*

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

### *5. Other actions*

Specific consideration should be given by the Scottish Ministers to the actions necessary to realise women's human rights under the Scottish National Action Plan for Human Rights (SNAP 2).<sup>26</sup>

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

**A gendered approach must be mainstreamed into reporting, monitoring, and scrutiny of Ministerial requirements under the Bill.** Reporting should be not only on actions and policy, but on the outcomes of rights in people's lives. Further, any Rights Schemes placing obligations on Ministers would need to complement other reporting required on the progression of Equality and Human Rights Mainstreaming and the implementation of PSED in Scotland.

### **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?**

Scottish Parliament urgently requires improved equality and human rights assessment mechanisms for all new legislation. We welcome the aim of ensuring that Parliament is satisfied that legislation is rights-compliant and rights-fulfilling, as well as contributing to the advancement of the rights in the Bill.

Scottish Parliament should be required to include a statement of compliance with human rights legislation as part of the pre-introduction stage for new legislation. This would ensure that the impact on the human rights of the specified groups would have to be considered at the earliest stage.

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<sup>26</sup> Scottish Government (2023) *SNAP 2: Scotland's second national human rights action plan (2023-2030)*. Available at: <https://www.snaprights.info/wp-content/uploads/2023/03/SNAP-2-March-2023-FINAL-PDF.pdf>

Parliament must also act to maximise opportunities for organisations with expertise on the inequalities experienced by different specified groups, and those with lived experience, to participate in the legislative process. This should encompass all stages of the legislative process, e.g. at committee stage, and in public debates. Parliament should take a co-production approach where possible. The participation process must be properly resourced and include adequate time for feedback to meaningfully inform the development of draft legislation.

**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?**

**A gender-competent implementation environment is critical if women are to be able to access and realise their rights in Scotland.** Duty bearers must understand the wide range of gendered barriers that inhibit women’s equal enjoyment of human rights, and understand how to apply this understanding through a due regard duty in the delivery of all rights contained within the Bill. From our experience of monitoring and assessing public bodies’ performance of the PSED, we know that this level of gender competence is largely absent across the public sector.

PSED in Scotland has shown the significant limitations of a due regard duty, in this case in relation to the delivery of action that is well within the competence of the Scottish Parliament. The SSDs are intended to support public bodies to respond to the general duty and to place the use of evidence at the heart of policymaking and equality outcome-setting. However, successive assessments by Close the Gap and other civil society organisations, and the EHRC, have highlighted that this has not been achieved.<sup>27</sup> While PSED has created a framework for action on inequalities, including women’s inequality in employment, public bodies have consistently failed to take effective action or deliver change.

It is reasonable to expect that public bodies’ competence and performance of the duties would improve over time, however assessments consistently show a decline in performance. It is over 20 years since the first equality duty was brought in. This is ample time for public bodies to have built capacity and embedded equality in their work. That this has not happened cannot be justified.

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<sup>27</sup> Close the Gap (2022) *Close the Gap submission to the Scottish Government Consultation on the Review of the operation of the Public Sector Equality Duty in Scotland*. Available at: <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-submission-to-the-SG-consultation-on-the-review-of-the-operation-of-the-PSED-in-Scotland.pdf>

Close the Gap acknowledges that equality and human rights are deeply connected. It is a positive aspiration for public bodies to integrate both equality and human rights into their functions. However, we are concerned that many public bodies do not have sufficient gender, equality, or human rights competence to successfully do this.

As with our submission to the Scottish Government consultation on PSED reform<sup>28</sup>, we are cautious about the potential for confusion in layering different types of analysis and approaches on top of one another. Public bodies have taken a homogenised approach to the duties, treating protected characteristics in an undifferentiated way, and neglecting the specific disadvantage and discrimination faced by different protected groups. Close the Gap is concerned that without adequate leadership, capacity building and resourcing, and a clear understanding of the links between the equality and human rights frameworks, there is a risk that public bodies' engagement with both will be ineffective.

Scottish Government must consider how to ensure that public bodies have the necessary resources and capacity to meaningfully comply with the multiple duties they hold and are supported to manage situations where different duties may conflict. Failure to do so may result in a situation where particular rights and equality actions that could and should be mainstreamed into decision-making are not given meaningful attention, as duty bearers prioritise matters falling under the duty to comply.

Further, the principle of indivisibility means that the fulfilment and enjoyment of one right is dependent on the protection and fulfilment of another e.g. the right to life is dependent on the right to adequate health care, the right to an adequate standard of living and the right to adequate housing. In view of this, Scottish Government must consider how it will ensure duty bearers are able to consider and apply rights together to enable this as part of the development of a guidance and capacity building programme.

As highlighted by Professor Nicole Busby, care will have to be taken to avoid confusion between the proposed due regard duty and the pre-existing duties under the PSED and FSD. By failing to provide effective guidance, the commitment and/or ability to comply of duty bearers may be undermined.<sup>29</sup>

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<sup>28</sup> Ibid.

<sup>29</sup> Busby, N. (2020) *The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW*. Available at:

<https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-nicole-busby--->

**It is critical that Scottish Government put in place a resourced programme of action to build capacity in duty bearers.** This programme should include the development and delivery of a suite of resources and training on:

- the rights and duties within the Bill;
- the concept of due regard and how it must be applied in practice to rights in the Bill; and
- the inequalities and barriers to accessing human rights affecting each protected group, including content on intersecting inequalities.

Specific resources and training should be prioritised for roles with decision-making responsibility, including executive and non-executive officers, and other senior leaders, and scrutiny bodies.

We would welcome the opportunity to work with Scottish Government to support the development of capacity-building work in this area.

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

We refer to our response to question 27.

**We join with the wider women's sector in highlighting that the realisation of women's rights will only be possible with the support and advocacy of specialist organisations, tailored to women's needs and who understand how to support women experiencing gendered rights violations.** Women will only be able to access the support and advocacy they need if significant funding and resourcing is made available to grassroots and community organisations that specialise in supporting women and specific groups of women, as well as investment in the wider women's sector in Scotland.

The provision of adequate and sustainable funding for women's and other third sector organisations is also critical, in order that they can work to ensure public bodies understand their duties and are held accountable in the case of consistent rights failings or a lack of progress of rights for women protected in the Bill.

We note that 2023 research from the Centre for Regional Economic and Social Research found that show that the women's sector is 'undervalued, under resourced

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[cedaw/aap-paper-nicole-busby--cedaw/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BNicole%2BBusby%2B-%2BCEDAW%2BFINAL%2B%25281%2529.pdf](https://www.cedaw.gov.scot/3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BNicole%2BBusby%2B-%2BCEDAW%2BFINAL%2B%25281%2529.pdf)



and ultimately unsustainable.<sup>30</sup> We urge Scottish Government to recognise the central role played by women's sector organisations in its plans for work on information and awareness raising.

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

Monitoring and reporting are critical to ensure transparency, facilitate scrutiny, support accountability, and make rights visible. **In reporting, duty bearers must be required to evidence the actions they have taken to deliver rights and make equality considerations for women and other protected characteristic groups central to this work.** This must include the data used and an accompanying analysis, along with evidence of human rights budgeting. This will encourage a human rights culture by obliging public bodies to routinely record information and evidence of how CEDAW, CERD and CRPD been considered in and shaped their decision-making.

We highlight our response to question 22 and reiterate that it is vital to ensure that recent learning from public bodies' PSED reporting is used to develop a reporting scheme that is fit for purpose and elicits the information and evidence needed to hold duty bearers to account and make rights visible.

As set out in our response to question 40, a gendered approach must be mainstreamed into reporting, monitoring, and scrutiny of Ministerial requirements under the Bill. Reporting should be not only on actions and policy, but on the outcomes of rights in people's lives. Further, any Rights Schemes placing obligations on Ministers would need to complement other reporting required on the progression of Equality and Human Rights Mainstreaming and the implementation of PSED in Scotland.

The SHRC should have a central role in monitoring and scrutinising duty bearers' reports. As set out in our response to question 31, they should be able to issue binding guidance, and make binding recommendations to public authorities.

**Finally, we call on Scottish Government to recognise the essential role of women's sector organisations in an effective monitoring and reporting system, in scrutinising duty bearers progress in delivering women's rights, and acting as an early warning system on rights violations or stagnation.**

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<sup>30</sup> The Centre for Regional, Economic and Social Research (2023) *Mapping the UK Women and Girls Sector and its Funding: Where Does the Money Go?* Available at: <https://rosauk.org/wp-content/uploads/2023/04/Women-and-Girls-Sector-Research-Mapping-Report-Amended.pdf>