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The First Minister's Advisory Group on Human Rights Leadership:

A New Path Forward on Incorporation of Economic, Social Cultural and Environmental Rights

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Abstract

In January 2018 the First Minister of Scotland, Nicola Sturgeon, established an advisory group to consider the way in which Scotland could exhibit leadership in the protection of human rights.¹ The First Minister's Advisory Group (FMAG) on Human Rights Leadership was formed. The remit of the group was guided by three overarching principles: (1) how to ensure non-regression from those rights currently guaranteed; (2) how to keep pace with future rights developments; (3) and how to continue to demonstrate leadership in human rights as part of Scotland's future. The FMAG issued its recommendations to the First Minister on 10 December 2018. The recommendations included a new contemporary framework to ensure practical implementation and accountability for an array of international human rights, including economic, social, cultural and environmental rights (ESCER). This paper explains the approach taken and the measures proposed to achieve this change in the context of Scotland's multifaceted human rights journey.

Introduction

Scotland is on the precipice of significant constitutional change in relation to human rights reform. In December 2018 the First Minister's Advisory Group recommended a new Act of the Scottish Parliament that incorporates economic, social, cultural and environmental rights (ESCER) into the devolved governance of Scotland. This Act is to be predicated with a participative, inclusive, and informed deliberative process that seeks to better understand how best to embed human rights compliance in a way that benefits the everyday lives of the people living in Scotland. Inspired by the words of Eleanor Roosevelt the recommendations propose that rights must begin in small places, close to home, to be enjoyed in the everyday lives of people. At the same time the recommendations identify that whilst rights must be something that are lived, in order to do so they must take on some form of legal standing so that the rights can be invoked when a violation occurs. This means addressing the 'every day accountability deficit' and deconstructing barriers in access to justice. The recommendations propose that the new framework must have dignity as its core value. This is, in essence, an approach that seeks to improve people's lives by empowering rights holders to claim their rights within a framework that both acknowledges and upholds the full spectrum of civil, political, economic, social, cultural and environmental rights (CPESCER).

This occurs in tandem with other progressive human rights reform measures, including a new Scottish Social Security Act that declares the right to social security as a human right essential to the realisation of other human rights², the incorporation of the UN Convention on the Rights of the Child³, and commitments to address areas such as gender justice⁴, climate justice⁵ and a national performance framework that explicitly integrates the sustainable development goals and international human rights.⁶ It also comes at a time when human rights are experiencing periods of regression globally. Alan Miller, the Chair of the Advisory Group, notes that there is an urgent need of human rights leadership in today's world and that the international rules-based order must be re-affirmed.⁷ The guiding principles of the group's remit (non-regression, keeping pace, and progressively embodying leadership) lead to a framework that can anchor Scotland to an international rules-based order to navigate a way forward in times of human rights uncertainty. It is a direct response the loss of rights posed by Brexit but should be understood as a step in a much longer participative process that

has called for the better protection of rights across areas of devolved governance over the course of the devolution process. Devolved areas such as housing, health, education, social care, the environment and social security directly align with economic, social, cultural and environmental rights not currently protected in our domestic framework. The recommendations seek to close that accountability gap.

The Devolved Legal Framework – an opportunity for a new approach to human rights

The devolved nations are constituted within a framework in which compliance with human rights is a legal necessity.⁸ Law passed in the devolved jurisdictions must comply with the ECHR and EU law or it is *ultra vires*: beyond competence and void. The ECHR and EU law largely protect civil and political rights, with a limited degree of both implicit and explicit socio-economic rights protection. Scotland, Wales and Northern Ireland have each in their own way sought to progress on this model by exploring the means through which legal human rights frameworks can enhance devolved areas of governance beyond the limited scope of the ECHR and EU human rights regime.⁹ Health, housing, education, and even social security are being reconceptualised as policy frameworks where international human rights law can play a role in enhancing both procedural and substantive aspects of legal entitlements.¹⁰ The First Minister's Advisory Group's recommendations sit at the forefront of this devolved trajectory, building on years of work by civil society and successive devolved legislatures and governments who have paved the way on progressive reform.

Why incorporate economic, social, cultural and environmental rights?

The political rhetoric in Scotland often reflects progressive principles with a commitment to building an 'inclusive, fair, prosperous, innovative country, ready and willing to embrace the future'¹¹, where Scotland is a 'leader in human rights, including economic, social and environmental rights'.¹² The FMAG recommendations argue for greater consistency in law and policy in order to achieve the practical implementation of this commitment.¹³

In terms of the principles of non-regression, keeping pace and progressive reform, the FMAG recommendations suggest Scotland seeks to retain EU derived rights in devolved areas, ensure it is in a position to keep pace with developments as they emerge in the future, and finally, that it should go beyond the existing framework to embrace broader international rights law. In many respects this is an exercise in keeping pace, as other countries have already incorporated stronger constitutional recognition of ESCER rights.¹⁴ The recommendations propose to do this in a constitutionally appropriate way for a devolved Scotland whilst leaving further constitutionalisation open should Scotland's status change to an independent country in the future (through a written constitution).

Incorporating rights into the domestic framework is considered best practice at the international level. The United Nations human rights monitoring bodies have advised that the fulfilment of human rights requires states to take action at the domestic level in order to create the necessary legal structures, processes and substantive outcomes for human rights protection. Several UN Committees have recommended that the UK both incorporates international human rights law as well ensure effective justiciable remedies are made available for non-compliance.¹⁵

The Committee on the Rights of the Child suggests that fulfilment of international obligations should be secured through incorporation of international obligations¹⁶ and by ensuring effective remedies, including justiciable remedies are made available domestically.¹⁷ This position is echoed by the UN Committee on Economic, Social and Cultural Rights that has called for incorporation and justiciable remedies for violations of economic, social and cultural rights.¹⁸

The adoption of international human rights norms at the devolved level is considered a component of good governance.¹⁹ The UN Committee on the Rights of the Child suggests that any process of devolution must ensure that devolved authorities have the necessary financial, human and other

resources effectively to discharge responsibilities for the implementation of international human rights law.²⁰ The UN Special Rapporteur on Adequate Housing has called for increased engagement in complying with ESC rights at the devolved level and highlighted that the effective application of rights at the local and subnational levels is critical for enhanced accountability.²¹ Compliance with international human rights law at the subnational level is considered best practice.²²

Devolved competence to incorporate

The Scottish courts when faced with implementing international obligations through the common law do not consider ratified treaties binding unless the legislature has already incorporated the treaty into domestic legislation.²³ While the courts may have regard to international treaties and reports of international organisations as an interpretative source of law they are not deemed to form part of the domestic legal system and are not binding on the court unless otherwise instructed by the legislature.²⁴

As with devolution in Northern Ireland and Wales, the Scottish constitutional framework is restricted in terms of legal competence along a reserved v devolved division of power.²⁵ Reserved matters remain the sole authority of Westminster legislation and devolved matters primarily fall within the remit of the devolved legislature and executive (Westminster retains power to legislate in devolved matters but by convention does not do so without seeking permission).²⁶

Observing and implementing international obligations falls within the devolved competence of the Scottish Parliament.²⁷ The Scottish Parliament can introduce legislation that implements international obligations, including incorporating international human rights standards into the devolved framework of governance. As Lord Brodie has observed,

*'Section 29(2)(b) [of the Scotland Act 1998] provides that a provision is outside the competence of the Scottish Parliament so far as it relates to the matters which are reserved to the United Kingdom Parliament. Schedule 5, which is given effect by section 30, defines reserved matters. Paragraph 7 has the result of including among reserved matters, "international relations", but excludes from "international relations", observing and implementing international obligations. The Scottish Parliament therefore has the power to legislate with the object of observing and implementing international obligations.'*²⁸

Scotland is already on a journey of incorporation in relation to a number of human rights. For example, it is following in the footsteps of other jurisdictions including Norway, Belgium, Spain and most recently Sweden²⁹ in its proposals to incorporate the UN Convention of the Rights of the Child.³⁰ The recommendations of the First Minister's Advisory Group on Human Rights Leadership propose a form of incorporation through an Act of the Scottish Parliament as one model through which to achieve the aim of embedding the full array of international norms in devolved areas.³¹

Incorporation of international human rights law in a dualist state can take many different forms.³² It can be understood as means of internalising international law either directly, indirectly or on a sector by sector basis.³³ Regardless of the approach taken the key component that determines the difference between softer mechanisms of 'implementation' and stronger forms of 'incorporation' is that incorporation ought to ensure access to a remedy for a violation. Essentially domestic incorporation of international norms, be that direct, implicit or sectoral, should be both derived from and inspired by the international legal framework and should at all times be coupled with an effective remedy for a violation of a right.³⁴

In the case of Scotland the domestication of international norms must also be balanced against the reserved v devolved divide. Whilst Scotland can observe and implement international human rights law in areas such as housing, health and education it cannot impinge on areas reserved to Westminster, including significant components of social security and employment law for example.³⁵

In other words, it is within the devolved competence of the Scottish Parliament to incorporate international standards into devolved areas of governance but this cannot simply be achieved through wholesale incorporation of treaties that engage with areas of law reserved to the UK Parliament. Likewise, the Scottish Parliament cannot modify protected Acts, including the Human Rights Act 1998 and the Scotland Act 1998.

The model of incorporation proposed by the FMAG is designed to build upon existing incorporation (under the HRA and SA) by internalising other international norms in devolved areas and creating space to go beyond those norms where possible – such as for example in relation to older persons and LGBTI rights, neither of which are fully accounted for in any international treaty. Likewise, the participatory process that predicated the proposed Act is designed to facilitate time and space for the public and stakeholders to elaborate on what the incorporated rights mean in practice in Scotland. This allows for the ownership of the process and substance of the new Act to evolve as part of the pre-legislative process. Drawing on constitutional theory, the proposed Act also seeks to act as a framework that guides the legislature, executive and the courts in a model of incorporation that is multi-institutional.³⁶ This is a key component of facilitating a culture of human rights that embeds good practice across the arms of the state, where each institutional branch holds the other to account in complying with and fulfilling human rights.

A New Framework

As discussed above, the First Minister’s Advisory Group recommended a new Act of the Scottish Parliament that incorporates economic, social, cultural and environmental rights as well as rights of specific groups such as rights belonging to children, women, persons with disabilities, on race and rights for older persons and for LGBTI communities.³⁷

The recommendations also propose that Scotland undergoes a lengthy participative process to deliberate on how best to contextualise the human rights norms derived from international law into areas of devolved governance.³⁸ The Advisory Group recommended incorporation through a domestically conceived framework inspired by and derived from international human rights law.³⁹ In this sense, the proposed framework can go further than international human rights law where possible, for example, through enhancing rights protection for older persons, LGBTI communities as well as for protection against poverty and social exclusion.⁴⁰ As part of the recommendations the Advisory Group set out a skeletal framework⁴¹ for an Act of the Scottish Parliament:

FMAG Proposed Human Rights Act for Scotland⁴²

Preamble	Human dignity underpins all rights
Competence	Act only applies within devolved competence
Human Rights – full framework: civil, political, economic, social, cultural, environmental, further specific rights)	Act lists all rights belonging to everyone in Scotland in one place (including ECHR civil and political rights). Not all rights can be included in the Act as legally enforceable rights because of the limitations of devolved competence (employment rights for example are excluded as reserved matter)
Interpretation	When interpreting rights courts must have regard to international law and may have regard to comparative law
Interpretation	In so far as it is possible to do so primary and subordinate legislation should be read as compatible with human rights in Act.

Duties	There is an initial duty placed on decision makers to have due regard to the rights and a subsequent duty to comply with rights set out in Act. The duty to comply will commence after specified period (sunrise clause).
Limitations	The Act recognises that limitations can be placed on rights where rights may be balanced with other considerations such as the general welfare in a democratic society. Limitations can be imposed when ‘provided for in law and carried out according to law, there is no other less restrictive alternative; and the measures are reasonable, non-discriminatory, based on evidence, subject to review, and of limited duration.’ ⁷⁴³
Remedies	The Act facilitates access to an effective remedy. Options for consideration include declarations of incompatibility (if consistently given effect to); strike down power; delayed remedies; development of structural remedies for systemic cases.
Standing	Expanded definition of standing to facilitate both individual and collective complaints.
Pre-legislative scrutiny	The Act should make provision for enhanced pre-legislative scrutiny including systematic scrutiny of proposed legislation to ensure compliance with CPESCE rights. This should include regularly calling on independent expertise of constitutional and human rights experts to assist. Decisions should be published and carry sufficient weight in legislative process.

Enhanced Legislative Scrutiny

The legislature can play one of the most significant roles in ensuring that ESCER rights are incorporated and enforced, including by designing and delivering legislation which sets out enhanced rights protection as legal standards. Under the FMAG proposed incorporation model the legislature would continue to be responsible for fulfilling rights through subsequent legislation as well as scrutinising compliance with rights as a matter of course in the everyday legislative process (‘pre-legislative scrutiny’). Effective human rights scrutiny by committees is a particularly important aspect of accountability in the Scottish Parliament because the legislature is unicameral. The United Nations Office of the High Commissioner on Human Rights and the Inter-Parliamentary Union has recommended that ‘[h]uman rights should thoroughly permeate parliamentary activity’.⁴⁴

The model of incorporation proposed by the FMAG coincided with a recent report of the Scottish Parliament Equality and Human Rights Committee (EHRiC) who sought to set out a road map⁴⁵ for a renewed human rights culture in the Scottish Parliament. The report recommends, *inter alia*, a role for the Scottish Parliament as guarantor of human rights in both pre and post- legislative scrutiny of Acts engaging with human rights and equality;⁴⁶ engagement with international treaty monitoring mechanisms (UPR +)⁴⁷; and the expansion of human rights scrutiny across the parliamentary remit through deployment of ‘human rights champions’.⁴⁸ The renewed approach proposes to include a ‘pilot systematic human rights scrutiny of Government Bills with a dedicated legal adviser’⁴⁹ and enhanced disclosure of the Presiding Officer’s statement on legislative competence.⁵⁰ The Committee does not explicitly recommend expansion of the remit to ESCE rights, however, the recommendations

engage responding to the work of the FM Advisory Group⁵¹, which, by extension includes further engagement with ESCER.

The proposals set out by the EHRiC goes further and faster than any other human rights committee established under the UK or devolved legislative systems. Historically, pre and post-legislative scrutiny of human rights has been weak under the devolved frameworks. In Scotland, ex ante (pre-legislative) review of human rights occurs to some extent (in accordance with the Scotland Act 1998)⁵² through non-disclosed assessments by the Executive and the Presiding Officer of the Scottish Parliament before legislation is passed. There is a requirement for the relevant Minister and the Presiding Officer to make a statement of compatibility in relation to each Bill being considered. However these limited reviews do not take the full body of international human rights law into consideration meaning that ESR, for example, are not regularly reviewed as part of the pre-legislative process.

The FMAG recommended that the EHRiC should learn from international experience on enhancing the role of the pre-legislative scrutiny such as drawing from the work of the Finish Constitutional Law Committee (FCLC).⁵³ Similar to the Finish experience, ex-ante review could be supported by a panel of human rights and constitutional experts (including expertise on ESCER).⁵⁴ Compatibility decisions of the EHRiC and the expert advice received could be published to ensure transparency. The decisions of the Committee may not necessarily be binding but, similar to the FCLC, should carry sufficient weight in guiding the legislature on human rights compliance. A renewed remit for the EHRiC would therefore require sufficient support and resources to support these aims (something that the parliament's report recommends⁵⁵).

The EHRiC has decided to pilot a model based on the Joint Committee on Human Rights (JCHR) at Westminster for systematic scrutiny of all legislation. This will require a dedicated legal adviser with the necessary human rights expertise to scrutinise policy/human rights memorandums to highlight legislative areas 'where there is a need for further human rights information and where there are human rights matters of significance or opportunities to advance human rights.'⁵⁶ This approach is pro-active in identifying opportunities for human rights as well as potential legislative gaps. Importantly the work of the Committee and any future role in ex-ante scrutiny or ex-post review should carry significant weight. In a unicameral system the Committee is the main source of scrutiny in the legislative process (compared to the UK Parliament's bicameral system).

If the Committee's recommendations are fully implemented it will place the Scottish Parliament as an example of best practice on pre-legislative scrutiny of human rights and within the Scottish context it will facilitate the multi-institutional approach to ESCER envisaged under the theoretical framework proposed by the FMAG.

Enhanced Role for the Executive

ES CER should be streamlined as part of everyday decision making in the same way that the executive is under a duty to comply with civil and political rights.⁵⁷ The new statutory framework creates obligations on those exercising state authority to comply with international ESCER norms.⁵⁸ This includes a duty to have due regard to the rights set out in a framework Act, as well as a duty to comply that will come into force on a specified date after the passing of the Act (creating both procedural and substantive obligations).⁵⁹

This public administrative space also includes an enhanced roll for regulators, meaning devolved inspectorates in housing, health, education and so on would require to assess compliance with

reference to international human rights standards, creating more immediate accountability mechanisms than a court or tribunal.⁶⁰ It is within this regulatory space that the everyday accountability of rights can occur.⁶¹ Barret and others have argued that sector specific enforcement can be greatly enhanced when bodies, such as the Equality and Human Rights Commission occupy more immediate enforcement space than that occupied by the court.⁶² This approach can help facilitate a wider deliberative model where the decision making sphere of public bodies is regulated on a sectoral basis, with the potential for the relevant National Human Rights Institution to take the lead in facilitating this dialogue and ensuring equality and human rights work permeates the role of other regulator in areas such as health, housing and education.⁶³

The recommendations of the FMAG has suggested enhanced roles for the Scottish Government under the proposed human rights framework. This includes a distinct Scottish Government National mechanism for monitoring, reporting and implementation of human rights.⁶⁴ In addition the report suggests that the national performance framework (NPF) includes human rights-based indicators to help the government recognise governance gaps in the enforcement of ESCER as well as enabling the allocation of resources early on the budget process.⁶⁵ Finally, the government is ultimately responsible for the implementation of the recommendations by establishing a National Task Force to take forward the proposed human rights reform.⁶⁶ The National Task Force will be co-chaired by Shirley Anne Somerville, Cabinet Secretary for Social Security and Older People, and Professor Alan Miller, Chair of the First Minister's Advisory Group on Human Rights Leadership.⁶⁷

Enhanced Role For The Court

Access to justice is primary in any renewed framework that seeks to protect ESCE rights. Indeed, the research and practice suggests that the judicial enforcement of ESCE rights, as with any set of rights, 'requires the development of standards and criteria and a new litigation culture and practice, without which any application of abstract legal concepts is impossible.'⁶⁸ That is not to say that these rights are not already justiciable. Indeed, despite deep misunderstandings in UK discourse around the justiciable nature of ESCER, a positive application of the law in the UK, and in Scotland, already renders many ESCER subject to judicial remedy.⁶⁹ The proposed FMAG framework makes the operation of this adjudication occur in an explicit and holistic way in an adjudication space that is more consistent, clear, comprehensive and in executed in accordance with international norms.

Scotland's legal system includes the possibility of seeking judicial review of decisions made by those exercising power on behalf of the state. This includes the well-developed grounds for review (illegality, irrationality and procedural impropriety). Likewise the court deploys varying intensity of review depending on the circumstances (reasonableness, proportionality, procedural fairness, anxious scrutiny, substantive fairness). Adjudication of ESCER can flourish within this framework, however, there is also scope to develop the role of the court in order to enhance both the types of review as well as the remedies offered. Adjudication of ESCER requires the development of both reasonableness and proportionality beyond narrowly confined definitions.⁷⁰ For example, reasonableness review in UK jurisprudence is restricted to irrationality as the primary device through which to assess a particular decision/policy.⁷¹ This approach is much narrower than comparative and international practice in the assessment of human rights compliance.⁷² The UN recommends employing reasonableness review in the context of the International Covenant on Economic, Social and Cultural Rights as follows:

- The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights.
- Whether discretion was exercised in a non-discriminatory and non-arbitrary manner.
- Whether resource allocation is in accordance with international human rights standards.
- Whether the State party adopts the option that least restricts Covenant rights.

- Whether the steps were taken within a reasonable timeframe.
- Whether the precarious situation of disadvantaged and marginalized individuals or groups has been addressed.
- Whether policies have prioritised grave situations or situations of risk.
- Whether decision-making is transparent and participatory⁷³

Likewise, reflecting on existing remedies helps to highlight that the ‘broad range of remedies already within our legal system should be available to be applied as appropriate’ to meet the needs of ESCER adjudication (reduction; declaratory; suspension and interdict; specific performance or specific implement; interim orders; damages).⁷⁴ However there is also scope to develop new and innovative approaches to remedies. The FMAG recommends that the deliberative process and future framework must

“develop remedies which provide for an outcome to be achieved, rather than simply providing for a process to be followed. For example, this could usefully include a “structural interdict” whereby a court may make a judgment of a human rights breach, suspend the effect of the judgment and provide the public body with sufficient and a specified period of time to implement the remedy the court says is required in the situation. This may be particularly appropriate in instances of a systemic problem identified by the court in, for example, such policy areas as housing, health or social security and where there may be multiple rights-holders and multiple duty-bearers.”

There are examples evident in Scottish jurisprudence that support a collective approach to human rights violations such as addressing slopping out in prisons in Scotland (where prisoners did not have access to toilets and required to defecate into buckets).⁷⁵ In this case the court issued damages to the plaintiffs finding that slopping out amounted to inhuman and degrading treatment (a violation of Article 3 ECHR). The *Napier* case dealt with the petition of one prisoner claiming a breach of human rights as a result of slopping out. Several other cases were sisted (suspended) pending the outcome of *Napier*.⁷⁶ Following the *Napier* judgment, and in anticipation of the far reaching implications, the court accepted a motion to determine the standard of proof for future cases.⁷⁷ This is an example of the court dealing with a systemic issue. Nonetheless, the remedy in this approach tends to favour individual compensation rather than a structural injunction to correct the systemic issue. In the *Napier* case Mr Napier received damages for the violation of his rights but there was no structural interdict compelling the relevant authorities to end the practice of slopping out. The change in practice was an inadvertent consequence of the financial remedy - this is a form of moderate review/ moderate remedy materialising into long term symbolic and material change.⁷⁸

In countries where social rights adjudication is more embedded there are a number of different approaches available to facilitate deliberation between institutions when violations of rights occur. For example, in South Africa the *Grootboom* decision of the Constitutional Court found a violation of the right to housing and the court deferred the matter back to the government by requiring the development of a new, and more reasonable national housing policy.⁷⁹ In Colombia the courts are more likely to issue broader structural remedies that instruct different state actors to perform functions in order to remedy a systemic issue. The *tutela* system employed by the Constitutional Court allows the court to group together cases in order to issue a structural remedy.

These type of structural cases tend to:

- (1) affect a large number of people who allege a violation of their rights, either directly or through organisations that litigate the cause;
- (2) implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations; and
- (3) involve structural injunctive remedies, i.e., enforcement orders whereby courts instruct various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants in the case.⁸⁰

There may be more scope to explore the possibilities of viewing alternative remedies as part of a cultural shift in addressing ESCER violations in Scotland. If structural issues arise in relation to ESCER it would not be beyond the reach of the legislature, executive and judiciary to work together to remedy the matter through deliberation.⁸¹ For example, if a systemic problem arises in relation to human rights protection in housing, health, education, social security and so on, there could be a role for the court to supervise whether the legislature and/or executive have taken steps to remedy this through a form of structural injunction. In many respects Scotland is well placed to develop the deliberative dialogue already underway with an executive formally committed to enhancing ESCER⁸², a parliament seeking to scrutinise this commitment⁸³, and a judiciary equipped to review and remedy as directed by any forthcoming reform.⁸⁴ Addressing violations of ESCER through a structural approach to remedies facilitates a form of adjudication that positively impacts on the lives of poorer citizens and prioritises the most vulnerable.⁸⁵

Further consideration is needed for those cases which do not necessarily fall within the existing court procedures. For example, should it become clear that a number of cases are emerging at tribunal level that engage with ESCER then new procedures might be considered to group the cases and 'refer up' to the Court of Session, or for the possibility to confer powers at the Tribunal level to hear systemic issues by using a multi-party approach (for example, where a systemic issue arises in the Housing and Property Chamber of the First Tier Tribunal (for private rental sector)). Likewise, similar consideration must be given to cases arising in the Sheriff Court and what procedures can be used to facilitate multi-party action or grouping of cases when systemic issues arise, such as in relation to complaints on social housing provision currently within the domain of the Sheriff Court.

As discussed above, in Scotland multi-party actions have been addressed on an ad hoc basis by identifying a lead case that can act as a test case and sisting (suspending) other cases while awaiting for the outcome of the lead case.⁸⁶ Following suggested reform recommended in reports of both the Scottish Law Commission (1996)⁸⁷ and the Scottish Civil Courts Review (2009)⁸⁸ the Court of Session rules were amended to facilitate the adoption of new procedures for multi-party cases to be initiated at the direction of the Lord President allowing more flexibility for case management by the nominated judge (Rule 2.2).⁸⁹ Multi-party procedures have been facilitated under Rule 2.2 on a number of occasions to deal with systemic issues, including claims under the Damages (Asbestos-related Conditions) (Scotland) Act 2009⁹⁰ and in response to personal injury actions relating to the use of vaginal tape and mesh.⁹¹ Rule 2.2 may offer a potential route to remedy for multi-party cases as part of a cultural shift in human rights adjudication around systemic human rights violations. Further reform under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 will provide for group litigation in the Court of Session. Further detail on the group procedure for judicial review will be set out in new rules of court to be developed by the Scottish Civil Justice Council.⁹²

The participatory process that predicates the new Act of the Scottish Parliament will require to take the remedies as well as the rights into consideration in terms of how best to give meaning to rights in the everyday lives of the people of Scotland. A collective approach may prove more appropriate than an individual rights based model.

Process for reform

The FMAG recommendations include significant space for participation in a deliberative process around what the constitutional future of Scotland should look like. This approach is not new to Scottish politics, with previous examples of a constitutional convention (prior to devolution) and deliberative referendum processes (in relation to independence and EU withdrawal) paving the way for future deliberative models. Such deliberative models should ensure informed, inclusive, participative deliberation that seeks to ensure consensus in the outcome (engendered through legitimacy in the process).⁹³ The FMAG recommendations propose that Scotland undertakes a participative process around the formation of the Act of the Scottish Parliament where by different epistemic communities (rights holders/ practitioners/ decision makers/ subject experts/ citizens) have the opportunity to help give substance to the rights provided for in the Act. This is not to detract from or dilute the rights as provided for in international human rights law but to address the indeterminacy of what progressive realisation of some of those rights mean in any given context, including the rights to health, education, housing, and so on. This participative process is an important part of building capacity and awareness of rights as well as allowing a sense of ownership to develop as a bottom up model rather than imposing a top down approach *per se*. Whilst the overarching statute will seek to acknowledge the broad array of rights to be protected, a normative elaboration of what those rights mean in practice should be set out in subsequent more detailed legislation (or amendments to existing legislation) and statutory guidance.

The proposed process therefore includes the establishment of a National Task Force in 2019; a participatory process, capacity building and the development of the national performance framework from 2019-2020; and finally the passing of an Act of the Scottish Parliament that provides for the rights (2021-2022). The new Act introduces pre-legislative scrutiny, requires public bodies to have due regard to the rights with a sunrise clause for full compliance, and subsequent legislation and statutory guidance on how to implement the rights (and duties) in practice (2022-2026).

Scotland is on the precipice of significant constitutional change. A renewed human rights framework that embraces the full body of international human rights will require thought, imagination, innovation and courage. It will require actors across disciplines, sectors and institutions to work together and for political leadership to ensure political will materialises into long term systemic change that seeks to improve people's lives.

¹ The group was independent from government, chaired by Alan Miller and supported by a secretariat (Gill Surfleet and Adam Bruton). Membership of the group comprised of the following experts in alphabetical order: Katie Boyle (author of this article), Nicole Busby, Kativa Chetty, Paul Hunt, Tobias Lock, Shelagh McCall, Alan Miller (Chair), Elisa Morgera, Aoife Nolan, Judith Robertson. This article is written independent of the group and, whilst it contains evidence of the group's approach and comments on the framework, all and any

errors remain the author's own. I am extremely grateful to each member of the group for their expertise and collegiate approach to leadership in developing the recommendations during the period of our appointment.

² Social Security (Scotland) Act 2018

³ Scottish Government Consultation on Incorporation of UNCRC, available at <https://consult.gov.scot/children-and-families/uncrc/>

⁴ First Minister's National Advisory Council on Women and Girls, <https://onescotland.org/equality-themes/advisory-council-women-girls/>

⁵ Climate Change (Scotland) Act 2009 and <https://www.gov.scot/policies/climate-change/>

⁶ National Performance Framework <https://nationalperformance.gov.scot/>

⁷ Alan Miller (Chair), First Minister's Advisory Group on Human Rights Leadership, *Recommendations for a new human rights framework to improve people's lives*, Report to the First Minister (December 2018) at 3, available at <http://humanrightsladership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-post-10th-December-update.pdf>

⁸ The Scotland Act 1998 partially incorporates the European Convention of Human Rights (ECHR) and EU law into Scots law, granting such rights constitutional status within the devolved settlement. Section 29(d) of the Scotland Act limits the competence of the Scottish Parliament in so far as any Act passed that is incompatible with Convention rights or EU law is not law (the Courts can declare said Acts void with immediate effect). Section 101 of the Scotland Act compels the reading of Acts of the Scottish Parliament to be read as narrowly as is required to be within devolved competence and any act by the Scottish Ministers is deemed *ultra vires* if it is in breach of Convention rights (section 57). Similar provisions constitute the devolved settlements in Northern Ireland and Wales. See Northern Ireland Act 1998, s.6(1)(c) (legislative competence); s.24(1)(c) (Ministerial competence); s.83 (interpretation of Acts of the Assembly) and See Government of Wales Act s.81(1) (Ministerial competence); s.94(6)(c) (legislative competence); s.154 (interpretation of Acts of the Assembly).

⁹ For example, the Welsh Assembly has enacted the Rights of Children and Young Persons (Wales) Measure 2011, which imposes a duty on Welsh Ministers to have due regard to the UN Convention on the Rights of the Child. In Scotland there are numerous Acts of the Scottish Parliament referencing international treaties. The Land Reform (Scotland) Act 2003 calls for the observance of international human rights, including the International Covenant on Economic, Social and Cultural Rights. The Social Security (Scotland) Act 2018 also draws on ICESCR as a relevant international legal framework and declares the right to social security as a human right "essential to the realisation of other human rights." In Northern Ireland, the Assembly has passed Commissioner for Older People (Northern Ireland) Act 2011. This Act requires the Commissioner for Older People to have regard to the United Nations Principles for Older Persons when performing his/her function. Importantly Northern Ireland underwent a Bill of Rights process that recommended the inclusion of economic, social and cultural rights *inter alia* – this process has been suspended due to lack of political consensus however its continued development is a requirement of the international British-Irish treaty and the 1998 multi-party peace agreement.

¹⁰ Ibid

¹¹ See Programme for Government 2017-2018, <https://news.gov.scot/speeches-and-briefings/2017-18-programme-for-government>

¹² Ibid

¹³ FMAG n 7 at 18

¹⁴ Katie Boyle, Models of Incorporation and Justiciability for Economic, Social and Cultural Rights (Scottish Human Rights Commission, November 2018)

¹⁵ Treaty bodies recommending incorporation: CEDAW/C/UK/CO/6 (CEDAW, 2009) Committee on the Elimination of Discrimination against Women; CAT/C/GBR/CO/5 (CAT, 2013) Committee against Torture; CRC/C/GBR/CO/4 (CRC, 2008) Committee on the Rights of the Child. Treaty bodies recommending justiciable enforcement and effective remedies: CRC/C/GBR/CO/5 (CRC, 2016) Committee on the Rights of the Child; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights; E/C.12/GBR/CO/6 (CESCR, 2016) Committee on Economic, Social and Cultural Rights

¹⁶ *General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the child*, (2003), CRC/GC/2003/5, para 20; *Concluding Observations of the United Nations Committee on the Rights of the Child on the United Kingdom* (2002), CRC/C/15/Add.188, paras 8 and 9 and *Concluding Observations of the United Nations Committee on the Rights of the Child on the United Kingdom* (2008), CRC/C/GBR/CO/4, para 7; CAT/C/GBR/CO/5 (CAT, 2013) Committee against Torture, para.7; CEDAW/C/UK/CO/6 (CEDAW, 2009) Committee on the Elimination of Discrimination against Women; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights para.13

¹⁷ [E/C.12/GBR/CO/6 \(CESCR, 2016\)](#) Committee on Economic, Social and Cultural Rights, para.5; CRC/C/GBR/CO/5 (CRC, 2016) Committee on the Rights of the Child para.7

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- ¹⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para.10; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights para.13
- ¹⁹ Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 *Fordham Law Review* (2008) 411-438 at 417
- ²⁰ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para.41
- ²¹ UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 22 December 2014, A/HRC/28/62, para.43
- ²² *Ibid.* Comparatively speaking it would not be unusual, subnational systems for human rights protection exist in Canada, Argentina and Switzerland for example.
- ²³ Lord Hodge, *Moohan & Anor v The Lord Advocate* [2014] UKSC 67 (17 December 2014), para.30
- ²⁴ International treaties do not form part of the law of Scotland unless they are incorporated into domestic law through legislation – this was confirmed by Lord Brodie in *Whaley & Anor v. Lord Advocate* [2003] ScotCS 178 (20 June 2003) para.44.
- ²⁵ Schedule 5 Scotland Act 1998
- ²⁶ See Sewell Convention, Scotland Act 2016 s 2
- ²⁷ Schedule 5 para.7(1)-(2) Scotland Act 1998 implementation of international obligations is an exception to the reservation of ‘Foreign Affairs’ to Westminster.
- ²⁸ *Whaley & Anor v. Lord Advocate* n 24 para.44
- ²⁹ New legislation passed in Sweden will see the incorporation of UNCRC into Swedish law in January 2020
- ³⁰ Programme for Government 2018-2019, Scottish Government, September 2018, available at <https://beta.gov.scot/programme-for-government/>
- ³¹ FMAG n 7
- ³² Katie Boyle and Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, (2018) *International Journal of Human Rights* Vol 22. 43-69. See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994)
- ³³ Kasey McCall-Smith, *Incorporating International Human Rights in a Devolved Context*, *European Futures*, 17 September 2018 <http://www.europeanfutures.ed.ac.uk/article-7114>
- ³⁴ Katie Boyle, *Models of Incorporation and Justiciability of Economic, Social and Cultural Rights*, *Scottish Human Rights Commission*, (2018) p.14. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19. Para.77-80; UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147. See also UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para.4.
- ³⁵ Schedule 5 Scotland Act 1998 (reserved matters)
- ³⁶ For a discussion on the constitutional theory see Katie Boyle, *The Future of Economic, Social and Cultural Rights in Scotland: Prospects for Meaningful Enforcement* (2019) Vol 23 *Edinburgh Law Review* 110-116
- ³⁷ FMAG n 7 at 7
- ³⁸ FMAG n 7 at 39
- ³⁹ Boyle, *Models of Incorporation* n 14 at 10
- ⁴⁰ FMAG n 7 at 32
- ⁴¹ *Ibid* at 58-59
- ⁴² *Ibid* at 58-59
- ⁴³ *Ibid* at 59
- ⁴⁴ United Nations Office of the High Commissioner. *Inter-Parliamentary Union, Human Rights, Handbook for Parliamentarians* No.26 at 111
- ⁴⁵ Scottish Parliament Equality and Human Rights Committee (SP EHRiC), *Getting Rights Right: Human Rights and the Scottish Parliament*, November 2018, available at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3/EHRiCS052018R6Rev.pdf>
- ⁴⁶ *ibid* SP EHRiC Report Recommendations 19, 22, 31 and 32
- ⁴⁷ *ibid* SP EHRiC Report Recommendation 11 *inter alia*
- ⁴⁸ *ibid* SP EHRiC Report Recommendation 37
- ⁴⁹ *ibid* SP EHRiC Report Recommendation 29
- ⁵⁰ *ibid* SP EHRiC Report Recommendation 23
- ⁵¹ *ibid* SP EHRiC Report Recommendation 17

⁵² See evidence provided by Dr Boyle, Human Rights Inquiry, EHRC, 29 March 2018, available at http://www.parliament.scot/S5_Equal_Opps/Submission_from_Dr_Katie_Boyle.pdf

⁵³ FMAG n 7 at 26

⁵⁴ SP EHRC Report n 45 at 59 citing Draft Principles on Parliaments and Human Rights, Annex 1 to Report of the Office of the United Nations High Commissioner for Human Rights, Contribution of parliaments to the work of the Human Rights Council and its universal periodic review, Composition and Working Methods, Annex I, para 8, A/ HRC/38/25 (17 May 2018)

⁵⁵ SP EHRC Report n 45 at 60

⁵⁶ *ibid*

⁵⁷ Scotland Act 1998 and Human Rights Act 1998.

⁵⁸ FMAG n 7 at 28-29.

⁵⁹ similar to that found in Human Rights Act 1998 s 6

⁶⁰ FMAG Report n 7 at 40-41

⁶¹ *Ibid*

⁶² See David Barrett, 'The Regulatory Space of Equality and Human Rights Law in Britain: The Role of the Equality and Human Rights Commission', Legal Studies (forthcoming volume 2019) published online 25 January 2019.

⁶³ Barrett proposes various models for achieving this aim: neo-institutionalist; deliberative; pragmatic; and genetic approach, *ibid*.

⁶⁴ FMAG n 7 recommendation 4

⁶⁵ FMAG n 7 recommendation 5

⁶⁶ FMAG n 7 recommendation 6

⁶⁷ Scottish Government Announcement, New National Taskforce to lead on human rights in Scotland, 12 June 2019 <https://www.gov.scot/news/new-national-taskforce-to-lead-on-human-rights-in-scotland/>

⁶⁸ Christian Curtis, Argentina, Some Promising Signs in in M. Langford (Ed) *Social Rights Jurisprudence*, Emerging Trends in International and Comparative Law Langford, p.181

⁶⁹ Katie Boyle, Edinburgh Law Review n 36. For example see the following cases engaging directly with ESCER adjudication: R (UNISON) v Lord Chancellor [2017] UKSC 51R (UNISON) v Lord Chancellor [2017] UKSC 5; *ZH Tanzania v SSHD* [2011] UKSC 4; McLaughlin, Re Judicial Review (Northern Ireland) (Rev 1) [2018] UKSC 48 (30 August 2018). See also H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening) [2013] 1 AC 838, Stevens v Secretary of Communities and Local Government [2013] JPL 1383, approved in Collins v Secretary of State for Communities and Local Government [2013] PTSR 1594; Calver, R (On the Application Of) v The Adjudication Panel for Wales (Rev 2) [2012] EWHC 1172 (Admin) (03 May 2012), Mr Justice Beatson at para.41; Heesom v Public Services Ombudsman for Wales [2014] EWHC 1504 (Admin) (15 May 2014)

⁷⁰ For example, *Wednesbury* reasonableness is much more restrictive than the type of review employed comparatively in South African jurisprudence or the approach proposed by the UNCESCR.

⁷¹ Based on *Wednesbury* test

⁷² See above

⁷³ Bruce Porter, Rethinking Progressive Realisation, Social Rights Advocacy Centre, (2015), at 6 and United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant*, UNCESCROR, 38th Sess, UN Doc E/C.12/2007/1, (2007); Malcolm Langford, 'Closing The Gap? – An Introduction To The Optional Protocol To The International Covenant On Economic, Social And Cultural Rights' (2009) 27:1 Nordic Journal of Human Rights 2; General comment No. 3 (1990) on the nature of States parties' obligations, para. 2; UNSR on Housing, Access to Justice Report, UN Special Rapporteur, Access to justice for the right to housing Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context, 15 January 2019, A/HRC/40/61, para.25-27

⁷⁴ FMAG n7 at 35

⁷⁵ *Napier v. The Scottish Ministers* [2005] ScotCS CSIH_16 (10 February 2005) in which the court accepted a motion to determine how future cases might be dealt with as a matter of public interest (setting out the standard of proof on a balance of probabilities) following the potentially wide-reaching decision of Lord Bonomy that slopping out in prison amounted to degrading treatment contrary to Art 3 ECHR in the single case of Robert Napier: Opinion of Lord Bonomy, *Napier (Ap) v. The Scottish Ministers* ScotCS CSOH P739/01 (26 April 2004)

⁷⁶ *Alexander Maley v Scottish Ministers* A3898/03 Glasgow Sheriff Court (31 March 2004). See also the discussion led by the law firm leading the slopping out cases: Taylor & Kelly, Slopping Out in Scottish Prisons <http://www.taylorkelly.co.uk/prison-law/slopping-out/>

⁷⁷ *Napier* (2005) n 313 para.5-7

⁷⁸ César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial, the Impact of Judicial Activism on Socioeconomic Rights in the Global South* (CUP 2015) at 10

⁷⁹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)

⁸⁰ César Rodríguez-Garavito and Diana Rodríguez-Franco n 78 at 1671

⁸¹ Such as the response by the executive and legislature to introduce emergency legislation to deal with the fall out of systemic human rights violations following the Cadder judgment. See *Cadder v Her Majesty's Advocate* (Scotland) [2010] UKSC 43 (26 October 2010) and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

⁸² Scottish Government, New Task Force to lead on Human Rights, 10 December 2018

<https://news.gov.scot/news/enhancing-human-rights>

⁸³ SP EHRiC Report n 45

⁸⁴ FMAG n7 at 35.

⁸⁵ David Landau, The Reality of Social Rights Enforcement, *Harvard Journal* (2012) 53 *Harvard International Law Journal* 189-247. See also Mantouvalou in Conor Gearty & Virginia Mantouvalou, *Debating Social Rights*, (Hart 2011)

⁸⁶ See Rule of Court 22.3(6) available at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap22.pdf?sfvrsn=8>

⁸⁷ Scottish Law Commission, *Report No. 154, Multi-Party Actions* (1996), para.64

⁸⁸ Scottish Civil Court Review (2009), Volume 2, chapter 13, pp.152-155, available at

<https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>

⁸⁹ See Rule of Court 2.2 available at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap02.pdf?sfvrsn=10>

⁹⁰ Court of Session No.2 of 2012, <https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/court-of-session-directions>

⁹¹ Court of Sessions Directions No.2 of 2015 and No.2 of 2016, <https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/court-of-session-directions>

⁹² Policy Memorandum, Civil Litigation (Expenses And Group Proceedings) (Scotland) Bill, para.94

⁹³ In the context of the referendum independence we argued constitutional change required to be predicated by a deliberative, inclusive, participative and informed process, Stephen Tierney and Katie Boyle, 'Yes or No, Scotland's Referendum Carries Significant Constitutional Implications', *Scottish Constitutional Futures Forum*, 4 November 2013,

<https://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/2550/Stephen-Tierney-and-Katie-Boyle-Yes-or-No-Scotlands-Referendum-Carries-Significant-Constitutional-Implications.aspx>