Incorporation of the CERD and CRPD and Equivalent Rights Provision for LGBTI Communities and Older Persons

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1. Executive Summary

- This briefing paper starts with an introduction which sets out its scope and purpose and specifies that the current paper is intended as a supplement to the existing AAP Briefing Paper on the Essential Features of an Equality Clause and the Potential Incorporation of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), (hereinafter ‘Equality Clause Paper’).
- The relevant recommendations of the First Ministers Advisory Group on Human Rights Leadership (FMAG) are restated.
- The aims of this paper are: (1) to consider the scope and purpose of the potential incorporation of the UN Convention on the Elimination of Racial Discrimination (CERD) and the UN Convention on the Rights of Persons with Disabilities (CRPD), and; (2) to consider how best to ensure that rights protections equivalent to those provided by the specific treaties are extended to LGBTI communities and older persons as part of the current process.
- The focus on CERD includes an overview of its provisions and their contextualisation within the EU and domestic legal frameworks which draws attention to the different yet overlapping definitions applied to race. The fact that CERD refers to the right to freedom of thought, conscience and religion is contrasted with the EU and GB equality frameworks which define

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‘religion and belief’ as a separate identity category with some overlapping protection for those religions whose members are classified as ethnic groups. Scotland’s policy landscape including the Race Equality Framework and Action Plan is considered and its current shortcomings identified in the context of the continued inequality of outcomes related to race and ethnicity evidenced in the EHRC’s 2018 review ‘Is Scotland Fairer?’. The need to collect accurate and updated disaggregated data in order to develop effective policies to combat racial discrimination and to monitor the impact of measures taken as noted by the CERD Committee is highlighted.

- The focus on the CRPD includes an overview of its provisions and their contextualisation within the EU and domestic legal frameworks which draws attention to the different models applied to disability by the CRPD and those frameworks, with the former favouring a social model and the latter a medical model. The CRPD Committee’s recognition of the limitations of the domestic framework in giving full effect to the interpretation of the CRPD is noted as is its observation concerning the inadequate representation of disabled people in the impact assessment process. The Scottish policy landscape is considered and its shortcomings are highlighted including a general incoherence relating to the needs of people with disabilities across the framework; a lack of disabilities-specific language and a general lack of awareness of some of the barriers experienced by disabled people in Scotland.

- The rationale for full incorporation of CERD and CRPD alongside CEDAW is articulated with emphasis placed on their potential to provide opportunities for joined-up policy making and impetus for further development in areas of devolved competence including health and social care, education, housing, civil and criminal justice and policing.

- The method of incorporation that is recommended is a restatement of the full text of the Conventions in an Act or Acts of the Scottish Parliament which would adopt the maximalist approach using the respect, protect and fulfil model by adopting some of the features of the UNCRC (Incorporation) (Scotland) Bill with some alternative – and strengthened – features based largely on the approach recommended by the FMAG.

- The second part of the Briefing Paper consists of a consideration of how best to ensure that rights protections equivalent to those provided by the specific treaties are extended to LGBTI communities and older persons as part of the current process. Overviews of the international human rights, EU and domestic legal frameworks are provided and specific issues pertaining to each group are identified. It is recommended that, in order to safeguard against any diminution of rights and to prevent the development of a hierarchy of protected characteristics, the same approach as that applicable to the rights arising from CEDAW, CERD and CRPD should be adopted as far as is possible in respect of LGBTI communities and older people.
2. Introduction and Background

2.1 Scope and Purpose of this Briefing Paper

This briefing paper is intended to supplement the previous paper produced by the Academic Advisory Panel which outlined the features of an equality clause and provided guidance on the potential incorporation of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹ That paper provided a brief analysis of the potential for incorporation of key UN treaties and the benefits which would flow from such incorporation. Although the paper made reference to CEDAW and her sister treaties the UN Convention on the Elimination of Racial Discrimination (CERD) and the UN Convention on the Rights of Persons with Disabilities (CRPD), the analysis took CEDAW as its focus.²

Much of the analysis presented in that paper applies equally to the CERD and the CRPD. However, the areas covered by the specific treaties obviously differ in important respects giving rise to substantive issues and some divergence in suggested approaches making it necessary to give separate consideration to each. Before doing that, it is helpful to restate the underlying rationale for the inclusion of an equality clause in the proposed Act of the Scottish Parliament as recommended by the FMAG.

Recommendation 1 of the FMAG was that the Scottish Parliament should bring forward an Act which ‘will set out for the first time and in the one place the rights belonging to everyone in Scotland’. In addition to restating those rights which people in Scotland already enjoy, the ASP ‘will provide further rights drawn from UN human rights treaties ratified by the UK but not yet incorporated, including economic, social and cultural, as well as environmental rights.’³

To enable full and equal enjoyment of these rights, the ASP ‘will also provide specific rights to children, women, persons with disability and on race’ which will be drawn from UN human rights treaties ratified by the UK but not yet incorporated into Scottish law. In addition, the Act will provide rights for older people and LGBTI communities which are not yet explicitly provided for by a UN treaty. It will also provide protection against poverty and exclusion. (FMAG Report, p. 31).

The substantive provisions of the proposed ASP will be drawn from the civil and political rights and freedoms provided by the Human Rights Act 1998 supplemented by specific articulation of the economic, social, cultural and environmental rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) through a process of direct incorporation. Whether to directly incorporate the UN Conventions which deal with specific rights holders (i.e.

² CEDAW, CERD and CRPD will hereinafter be collectively referred to as ‘the specific treaties’.

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women, black and minority ethnic populations and people with disabilities) as part of the current process is currently under consideration by the Taskforce.

To ensure equal access to the general economic, social, cultural and environmental rights and to provide the ‘specific rights’ referred to above which are based on group membership on grounds of specified identity characteristics will require recognition and realisation of the principles of equality and non-discrimination. For reasons of legal certainty, it is imperative that the new rights framework is aligned, as closely as possible, with the pre-existing equality law framework. However, the introduction of new substantive rights or any extension of existing equality rights related to sex, disability, race, sexual orientation, gender reassignment and in relation to older persons poses certain challenges under current devolution arrangement as ‘equal opportunities’ is a reserved policy area (Scotland Act 1998 (SA 1998), Schedule 5).

The Equality Act 2010 (EA) is an Act of the Westminster Parliament which covers GB, Northern Ireland having its own equality law regime, which operates by prohibiting discrimination against certain specified groups with shared identity characteristics known as ‘protected characteristics’. Under the current devolution arrangements, the proposed ASP could not expand or extend the provisions of the EA. This limitation was recognised by the FMAG (FMAG Report, p. 52, response to FAQ1).

In considering how best to protect Scotland’s rights framework against the threats posed by the UK’s withdrawal from the EU, with particular regard to the guiding principles of non-regression and keeping pace with future EU rights developments, the FMAG sought to develop the most robust and extensive approach to rights protection possible within the current constraints imposed by the devolution arrangements. Such an approach would provide, as far as is possible, ‘future proofing’ against the threat of diminution of protection at the domestic level, including through the paring back of equality and human rights protections by the Westminster Parliament.

Whilst full incorporation of ICESCR will undoubtedly impact positively on the inequality experienced by those protected characteristic group members specifically provided for under the EA, it cannot cover the full range of protections currently provided by domestic law and underpinned by EU law. The removal of the guarantees of equality and non-discrimination currently provided by EU law poses a threat to the maintenance of current standards and future development as there is no guarantee of equality within the UK’s constitution.

In implementing the recommendations of the FMAG it is thus necessary to make specific provision for the principles of equality and non-discrimination in the proposed Act. The inclusion of an ‘equality clause’ would, thus, provide a guarantee of equality in respect of the Act’s provisions. Detailed consideration regarding the nature and content of this proposed clause is set out in the Equality Clause Paper which recognises that, under current devolution arrangements, such a provision would not amount to a constitutional guarantee (see Equality Clause Paper, 3.5). For further consideration of the impact of the devolution arrangements on
the Scottish Parliament’s ability to act in the areas under review in this paper, see Equality Clause Paper, 3.1.

Notwithstanding the reservation of equal opportunities to the Westminster Parliament, human rights is a subject devolved to Scotland by the Scotland Act 1998. Thus, although international relations is a reserved policy matter, observing and implementing international human rights obligations relating to devolved matters is the responsibility of the Scottish Parliament and Scottish Government Ministers.

The first part of this paper focuses on the CERD and CRPD and provides an overview of each of the Conventions and their current alignment with the respective Scottish policy frameworks. This section concludes with a discussion of their potential incorporation into Scots Law as part of the Scottish Government’s commitment to take forward the recommendations of the FMAG.

As stated above, the FMAG recognised that there were two key groups of rights holders which are not yet explicitly provided for by way of a UN treaty - LGBTI communities and older people - and recommended that the rights of these groups should also be incorporated (FMAG Report, p.31). The second part of this paper will consider how best to ensure that rights protections equivalent to those provided by the specific treaties are extended to LGBTI communities and older persons as part of the current process.

3. The Potential Incorporation of the CERD and the CRPD

As with the analysis applied in the case of CEDAW (Equality Clause Paper, at 5), this paper will focus on how incorporation could be undertaken. The intention is not to make out a case for doing so in relation to the specific characteristics and populations covered by CERD and CRPD – detailed analysis of why incorporation should be undertaken has been provided by experts working in the relevant sectors.3 The justification for incorporation of these treaties alongside the Convention on the Rights of the Child,4 is the same for that relating to CEDAW (see Equality Clause Paper, 5.3) and will be outlined briefly below.

Notwithstanding the limitations imposed by the reservation of equal opportunities, the specific treaties offer manifold opportunities for interaction with existing Scottish policy across a range of devolved areas. This has been acknowledged by the relevant UN bodies which have

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4 UNCRC (Incorporation) (Scotland) Bill.
increasingly recognised the value of specific concluding observations and recommendations for
the Scottish Government as a way of ensuring that law, policy and practice in Scotland is fully
compliant with all international human rights law and policy.

As explained in the Equality Clause Paper, the beneficial outcomes of incorporation would include
better accountability and increased awareness through compliance. This would enable enhanced
mainstreaming of the relevant protected characteristics covered by the Equality Act (sex, race,
disability) in policy-making, including through mandatory equality impact assessments, and
improved implementation of the Public Sector Equality Duty (PSED) (Section 149) and Fairer
Scotland Duty (FSD) (Part 1, Equality Act 2010; The Equality Act 2010 (Scotland) Regulations
2018)) at organisational, sectoral and governmental levels.

Before setting out the common issues and suggested approach to achieving incorporation of
CERD and CRPD, the respective legal and policy frameworks and specific issues related to each
will be considered separately.

3.1. The International Convention on the Elimination of All Forms of Racial Discrimination

CERD, adopted in 1965, was the first international human rights treaty. The UK ratified CERD in
1969. Article 1 defines racial discrimination as ‘...any distinction, exclusion, restriction or
preference based on race, colour, descent, or national or ethnic origin which has the purpose or
effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of
human rights and fundamental freedoms in the political, economic, social, cultural or any other
field of public life.’

In contrast to the EU and domestic frameworks in which religion is a protected identity category
(see below at 3.1.1. and 3.1.2.), there is no specific UN treaty which deals with discrimination on
religious grounds. Although it does not cover religion or belief explicitly as an identity
characteristic, Article 5 specifies that the prohibition and elimination of racial discrimination in
all its forms applies, ‘...notably in the enjoyment of the following rights: [...] (vii) The right to
freedom of thought, conscience and religion’.

In its ratification, the UK agrees to take action to eliminate racial discrimination in all its forms,
including eradicating racial hatred and incitement to hatred, taking action to combat prejudices
which lead to racial discrimination and guaranteeing the enjoyment of civil, political, economic,
social and cultural rights without discrimination on grounds of race, colour, or national or ethnic
origin.

The obligation of non-discrimination under CERD imposes both negative obligations not to
discriminate, and positive duties: Article 2 requires positive steps to be taken in both legislation
and policy to eliminate racial discrimination by public authorities (Article 2.1 (a) and (c)), and in
the private sphere (Article 2.1 (b) and (d)).
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The Convention imposes specific duties to prevent, prohibit and eradicate segregation and apartheid (Article 3), to condemn racist propaganda and to adopt positive measures to eradicate the promotion or incitement of racial hatred and discrimination (Article 4). It provides for access to justice through the assurance of equality before the law (Article 5) and access to remedies (Article 6) and for the promotion of tolerance through education (Article 7).

Although the scope and nature of CERD’s provisions overlap with the protection provided by EU and domestic laws, the Convention is more comprehensive than either as it imposes a set of principles and clear aims that cut across all areas of state policy. It differs in this respect from most anti-discrimination law at the EU and domestic levels which is narrowly focused on commercial activities or those which carry clear resource implications.

3.1.1. The EU Anti-Discrimination Framework: Race

In the EU Race Directive 2000/43/EC prohibits discrimination on the grounds of racial or ethnic origin in employment (including recruitment), the provision of goods and services, housing, education and social protection.

Discrimination on the grounds of religion and belief in the employment context is prohibited by the EU Framework Directive 2000/78/EC (which also covers sexual orientation, disability and age).

The EU Charter of Fundamental Rights lays out the principle of non-discrimination in EU law (Title III, Equality) which includes the prohibition of ‘…any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation’ (Article 21) and respect for ‘cultural, religious and linguistic diversity’ (Article 22).

In September 2020 the European Commission announced its intention to carry out a comprehensive review of the existing legal framework on race discrimination, ‘..to determine how to improve implementation, whether it remains fit for purpose, and whether there are gaps to be filled’.5

3.1.2. Domestic Anti-Discrimination Law

The Equality Act 2010, which applies to Great Britain, prohibits discrimination on the ground of race which includes colour, nationality, ethnic or national origins (section 9). Religion or belief forms a separate protected characteristic under the Act (section 10), although those religions whose members enjoy a long-shared history and cultural tradition, such as Judaism and Sikhism,

are also protected by the race provisions (see *Mandla v Dowell Lee* [1983] 1 All ER 1062, HL]. The areas covered by the Act are employment, the provision of goods and services, the exercise of public functions, housing and education.

The Equality Act is a reserved Act but, as outlined in the Equality Clause Paper (at 3.2.1), the PSED imposes general and Scottish specific proactive, anticipatory duties on public authorities in Scotland to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities and the FSD places a legal duty on public authorities in Scotland to pay due regard to how they can reduce inequalities of outcome caused by socioeconomic disadvantage, when making strategic decisions (Equality Clause Paper, 3.2.2).

### 3.1.3. Scotland

As a nation of the United Kingdom, Scotland acquires the state’s obligation to respect, protect and fulfil all international human rights treaties ratified by the UK. Incorporation has the potential to strengthen this commitment by making CERD’s provisions justiciable which would have a direct effect on a range of devolved policy areas including health, housing, education and training, civil and criminal justice. Increased emphasis would be placed on the protection and fulfilment of the rights of racial groups and ethnic minority communities in these areas. If strengthened by CERD’s incorporation, Scotland’s race framework could provide the necessary policy infrastructure for an enhanced approach to racial equality.

### Scotland’s Race Equality Framework and Action Plan

The Race Equality Framework for Scotland is intended to advance race equality, tackle racism and address the barriers that prevent people from minority ethnic communities from realising their potential. It does so by taking ‘a long-term, partnership-based approach, working with all sections of society including the Scottish Parliament, public sector bodies and agencies, established networks and forums, voluntary sector equality bodies and communities’ (Race Equality Framework for Scotland, 4) over a 15 year period (2016-2030). The Framework is accompanied by an Action Plan, the current version of which sets out the key actions for Scottish Government between 2017-2021. Although the Framework and Action Plan set out a clear commitment for tackling the inequalities experienced by black and minority ethnic (BME) communities in Scotland across a range of policy areas, their lack of attachment to a specific legislative framework results in a compliance gap which could be filled by CERD’s incorporation.

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Issues of Specific Concern for Scotland

The CERD Committee last examined the UK’s implementation of CERD in 2016.\(^8\) Its general recommendations (based on data drawn from across the UK) included actions in a number of areas policy devolved to Scotland including tackling racist hate crime, the disproportionate detention and restraint of BME populations, issues connected to access to justice for BME populations and problems of racial bias in the criminal justice system. The lack of racial and ethnic diversity in Scotland’s police force was a subject of specific focus.\(^9\)

The Committee noted ‘the importance of collecting accurate and updated disaggregated data to develop effective policies to combat racial discrimination and to monitor the impact of measures taken’ and recommended that the devolved nations ‘systematically collect and publish disaggregated data on the enjoyment of rights by members of ethnic minorities in all fields of life, and...include such information in the next periodic report.’\(^10\)

The strategic importance of such data in the formulation and prioritisation of all government policy and its use in ensuring the effective operation of the PSED and FSD through Equality Impact Assessments is clear.

Although Scotland’s National Performance Framework\(^11\) has, as one of its aims, ‘to reduce inequalities’ and identifies Human Rights as one of the national outcomes, the data on which the analysis of race and ethnicity impacts is based is patchy and largely reliant on secondary sources.

In its review of the state of equality and human rights in Scotland which reported in 2018,\(^12\) the EHRC highlighted the lack of reliable equalities data. The review found an array of unequal outcomes related to race and ethnicity including: an ethnicity pay gap; lower levels of attainment in higher education and graduate employment rates for those in ethnic minority groups who were more likely to live in poverty than other racial groups, reported lower levels of trust and belonging in their local neighbourhood and were underrepresented in all areas of public life.

3.1.4. What would CERD’s incorporation add to Scotland’s current legal framework?

Accountability is a crucial element of any law and policy framework and its importance can be clearly seen in the context of race. The realisation of the right to non-discrimination and equality through litigation and access to a remedy are essential forms of accountability but the benefits of incorporation would go beyond litigation by bringing cohesion and dynamism to the existing

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9 Ibid, para 28.
10 Ibid, paras 13 and 14.
11 [https://nationalperformance.gov.scot/](https://nationalperformance.gov.scot/)
framework thereby increasing its effectiveness. For example, in the context of the existing equality duties, the provision of direct access to the rights protected by CERD would provide a renewed focus on the PSED and FSD by encouraging duty bearers to take the proactive and anticipatory actions required. The incorporation of CERD would show a commitment to the rights and obligations contained in the Treaty which would send an important message to Scotland’s population and beyond. This would be more than symbolic: heightened awareness of inequalities can herald the necessary shifts in public perception and invoke deeper understanding of the underlying causes of racial discrimination.

The need to ensure that CERD’s incorporation is achieved in the most appropriate and effective way emphasises the importance of wide consultation and the need for a participative process involving representatives from civil society’s race sector and other organisations representing those with relevant lived experience.

3.2. The Convention on the Rights of Persons with Disabilities

The CRPD, along with its Optional Protocol, was adopted in December 2006 and entered into force in May 2008. It was ratified by the UK in 2009.

The CRPD provides a comprehensive combination of civil and political rights in addition to economic, social and cultural rights. The Convention places both negative and positive obligations on states to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all ‘persons with disabilities’ defined as including those ‘who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’ (Article 1).

Negative obligations are those that require the state to refrain from interfering with the exercise of a person’s rights. For example, the CRPD requires that states do not interfere with a disabled person’s right to education and therefore a disabled person cannot be excluded from the general education system on the basis of his or her disability (Article 24(2)(a)). Positive obligations demand that the state ensures that each individual is able to fulfil their rights by, for example, requiring reasonable accommodations to be made to meet the individual’s right to education (Article 24(2)(c)).

Article 3 sets out the general principles that underpin the rights: (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; (b) Non-discrimination; (c) Full and effective participation and inclusion in society; (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) Equality of opportunity; (f) Accessibility; (g) Equality between men and women; (h)
Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

These general principles reinforce the social model of disability which moves the location of the disability away from the person and into social structures by recognising that perceptions, attitudes, institutions, and policies all contribute to the creation of disability so that it is framed as a social construct rather than an individual impairment. From this perspective, disability is ‘a socially produced injustice which it is possible to challenge and eliminate through radical social change.’ The social model provides a contrast with the medical model more commonly found in disability discrimination law including in the EU and domestic contexts.

3.2.1. The EU Anti-Discrimination Framework: Disability

Discrimination on the grounds of disability in the context of employment and occupation is prohibited by the EU Framework Directive 2000/78/EC (which also covers sexual orientation, religion and belief, and age). The Directive requires Member States to take measures to prohibit direct and indirect discrimination and harassment on the ground of disability with regards to employment (including recruitment), occupation and vocational training.

The Directive does not define disability, but case law suggests that the legislation depends on a medical rather than social model. In the leading case the Court of Justice of the EU held that the Directive required that a person have a ‘limitation’ which results in particular from a ‘physical, mental or psychological impairment’ and which 'hinders' over ‘a long period of time' the participation of the person concerned in professional life (see Case C-13/05 Chacón Navas v Eurest Colectividades SA [2006] IRLR 706, ECJ).

The EU Charter of Fundamental Rights lays out the principle of non-discrimination in EU law (Title III, Equality) which includes the prohibition of discrimination based on disability (Article 21).

3.2.2. Domestic Anti-Discrimination Law

Disability is one of the protected characteristics under the Equality Act 2010 (section 6). As well as prohibiting direct and indirect discrimination and harassment and victimisation, the Act provides two additional protections: the duty to make reasonable adjustments, which is unique to this protected characteristic (section 20), and the additional prohibition of discrimination arising from disability (section 15).

To be defined as disabled within the meaning of the Act, a person must have a ‘physical or mental impairment’ that has a ‘substantial’ and ‘long-term’ negative effect on his or her ability to do normal daily activities.

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The focus on ‘impairment’ within the EU and domestic frameworks emphasises the medical model which suggests that the disability is caused by the said impairment rather than by the social structures which prevent the full participation of persons with disabilities in a range of activities. This reinforces an ‘ablest’ model based on an unimpaired normative standard. As well as perpetuating the stigma associated with disability, the medical model lacks the proactive nature of the social model.

The limitations of the domestic framework in giving full effect to the interpretations of rights under CRPD has been recognised by the CRPD Committee. In 2016 the Committee determined that impact assessments conducted in fulfilment of the PSED prior to the implementation of several welfare reforms by the UK government expressly anticipated an adverse impact on disabled people and these measures have in fact had a disproportionate and adverse effect on disabled people. The Committee also found that there was inadequate representation of disabled people in the impact assessment process itself. The Committee’s commentary makes clear that reviewing discrimination claims solely on the basis of the Equality Act’s provision fails to recognise the interrelated nature of disabled people’s rights protected under the CRPD framework, for example, in relation to the intersectional effects of two or more protected characteristics.

3.2.3. Issues for Scotland

The EHRC’s review of the state of equality and human rights in Scotland ‘Is Scotland Fairer?’ (see footnote 11) which reported in 2018 found, among other inequalities, that that disabled people are twice as likely to be without work than those without disabilities and more likely to live in poverty and that disabled pupils are almost twice as likely to be excluded from school. A lack of full access to services, including transport, continued to negatively impact the lives of those with disabilities.

Scotland’s disability rights framework consists of a range of existing laws and policies and a CRPD delivery plan. The plan’s five aims are focused on: support services that meet people's needs and promote independent living; decent incomes and fairer working lives; places that are accessible to everyone; protected rights; active participation. The approach adopted could provide the policy infrastructure necessary to support the incorporation of CRPD but would

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require some fundamental amendment in terms of its substantive content and implementation methods.

While its aims are written in the language and terminology of the CRPD, there are gaps between the policy and its delivery. Disabled people in Scotland frequently report the lack of clear information about disability services and limited success in having their views heard or influencing decision-makers. In measuring the implementation of disabled people’s rights, the strategy merely pulls together various streams of work that were already in progress and/or anticipated in Scotland.

Across the range of relevant policy, in common with the provisions on racial discrimination, there is a lack of cohesion. Some existing laws display a lack of disabilities-specific language and there is a general lack of awareness of some of the barriers experienced by disabled people in Scotland. Altogether the status quo in Scotland fails to recognise that disabled people are often unable to engage with or exercise their most basic civil and political rights. The holistic approach offered by the CRPD requires a more participative process in policy formulation which would provide a deeper understanding of how individuals can be enabled to utilise their existing rights based on a social model of disability. A consolidated action plan that entrenches a coherent measurement system for delivering the strategy is needed if disabled people’s rights are to be fully realised.

The FMAG’s Recommendations provided that any new Act of Scottish Parliament should ‘include[ ] a duty on the government to take steps, including as part of budgetary processes and decision-making, to use the maximum of its available resources to achieve progressively the full realisation of the economic, social and cultural rights of everyone.’ (FMAG Report, p. 7) Importantly, the FMAG further outlined that any new legislation should include specific rights for disabled people and be accompanied by a system for ensuring accountability (see Recommendation 1). Incorporation of the CRPD would provide a stronger basis for the development of Scots law and related policy in respect of disability by utilising the social model wherever possible and bringing cohesion to the law and policy framework.

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4. Rationale for the Full Incorporation of the CERD and the CRPD

There is a need to ensure that human rights incorporation in Scotland benefits everyone equally. As stated in relation to CEDAW in the Equality Clause Paper (at p.18), the incorporation of ICESCR on its own is not enough to ensure that those specific identity groups whose protection against discrimination is currently underpinned by EU law will enjoy the full benefits of Scotland’s new human rights framework. Without incorporation of the specific Conventions, there is a danger that the resulting framework will simply replicate and further entrench existing inequalities.

The EHRC’s review ‘Is Scotland Fairer’ concluded (at p. 114),

The available evidence shows that women, disabled people, LGBT people, people from ethnic minority groups, and younger and older people experience the starkest inequalities, and that these cut across many areas of life. Poverty drives or compounds inequality, and many of the worst outcomes are for people living in the most deprived areas.

The potential interplay between ICESCR and the CRC, CEDAW, CRPD and CERD is critical for full realisation of economic, social and cultural rights for all including where discrimination arises as a result of the intersection of two or more characteristics.

Compliance with the specific treaties requires deeper consideration of structural and institutional inequalities and their causes than the current approach adopted by the Equality Act generally allows (see Equality Clause Paper, 4.5).

Even where current domestic provision is focused on proactive and anticipatory approaches, the accountability gap makes it difficult for the PSED and the FSD to be fully effective because of their reliance on a due regard, rather than full compliance, duty. A duty to comply with international standards through full incorporation would help to improve the effectiveness of the existing equality duties and aid their integration in achieving the required outcomes. For example, compliance with the specific treaties would require that the lack of up-to-date, accurate and disaggregated data would have to be addressed. This would assist with the operationalisation of equality impact assessments and the implementation of their findings. In the race discrimination context, this would help to ensure the achievement of substantive equality outcomes relating to social cohesion and community relations as required by the PSED.

Incorporation would underscore and operationalise the need to include those with appropriate lived experience in the formulation of policy. As previously stated in relation to CEDAW, the Conventions provide a holistic approach by providing frameworks which link the various aspects of law and policy relevant to the lived experience of the targeted population based on shared identity, rather than on the siloed areas of government policy.
The current domestic framework provided by the Equality Act 2010 offers insufficient protection in relation to both racial discrimination and disability discrimination. In the Scottish context, notwithstanding the reservation of equal opportunities, there is ample scope for the Scottish Parliament to act across a range of devolved policy areas in order to close the gaps between current provision and the standards required by international law. Because of the reliance on a range of duty bearers, the current deficiencies will only be remedied by a full compliance model.

Incorporation would provide opportunities for joined-up policy making and impetus for further development in areas of devolved competence including health and social care, education, housing, civil and criminal justice and policing all of which would benefit from the direct effect of the specific treaties.

Full incorporation would accommodate and encourage a cohesive and coordinated system of accountability by providing a clear framework. This is currently lacking in the somewhat piecemeal provision of rights which has developed incrementally over time across different policy areas. Accountability in this context means monitoring how people’s rights are affected by changing social and economic environments as well as the provision of remedies when things go wrong.

5. How Should Incorporation be Achieved?

Consideration was paid to the constitutional barriers to full implementation of the provisions of the specific treaties in the Equality Clause Paper. However, navigation of those barriers need not and should not prevent incorporation of the Conventions into Scots law. As explained, in that analysis, the necessary shift from a formal to a substantive approach to equality which is required in order to achieve full compliance with the international human rights framework is an ongoing and incremental process.

Care should be taken to align, as far as is possible, the Convention rights with the pre-existing provisions of the Equality Act 2010, with particular attention paid to how the resulting new human rights framework can contribute to the effective operationalisation of the PSED, including the Scottish-specific duties, and the FSD.

In setting out the rationale for incorporation of the specific treaties, this briefing paper has referred to ‘full incorporation’. What is meant by this?

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19 It is outside the scope of this Briefing Paper to provide a full analysis of the process of incorporation. For an expansive consideration including the different options in the specific Scottish context, see Katie Boyle, ‘Economic and Social Rights Law Incorporation, Justiciability and Principles of Adjudication’ (Routledge, 2020), Chapter 6.
20 For more information and resources on incorporation, see ‘Incorporating Human Rights in Scotland’, at: https://www.law.ed.ac.uk/research/research-projects/incorporating-human-rights-in-scotland
The preferred approach to the incorporation of CERD and CRPD, as for CEDAW, is the restatement of the full text of each Convention in one framework (or separate) Act(s) of the Scottish Parliament (ASP) accompanied by a limitation clause which recognises the restrictions imposed on the Scottish Parliament by the current devolution arrangements. Such a clause would acknowledge that realisation of the rights contained in the Convention(s) and transposed into Scots law by the ASP are subject to the provisions of the Human Rights Act 1998, the Equality Act 2010 and current devolution arrangements.

The ‘full text’ approach is favoured because, as explained elsewhere in this briefing, the Conventions are drafted as holistic documents by which their provisions serve as aspirational yet achievable standards in accordance with the concept of progressive realisation. Put simply, to pick and choose from their provisions risks weakening the intended overarching and cohesive frameworks provided by the Conventions’ full text.

Although it does not take this exact path, the UNCRC (Incorporation) (Scotland) Bill (hereinafter ‘UNCRC Bill’) nonetheless provides a helpful model of the maximalist approach which reinforces that adopted by the Human Rights Act 1998 by way of the following steps:

- Identify all relevant rights-holders under Scots law in line with the specific Convention; make it ‘unlawful for a public authority to act in a way which is incompatible with the Convention’s requirements’ (see s. 6 UNCRC Bill).

- Place (i) a proactive/positive obligation on Scottish Ministers to develop a scheme detailing the arrangements they are putting into place to ensure they comply with their specified duties (see s. 11 UNCRC Bill); (ii) a proactive/positive duty to keep these schemes and progress on entrenching rights under review (see s. 13 UNCRC Bill).

- Place a due regard duty and, at a specified date, a duty to comply on all those who carry out public functions (FMAG Report, p. 58); ensure justiciability by enabling ‘a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by this Act [to] (a) bring proceedings against the authority under this Act in any civil court or tribunal...or (2) rely on the Conventions requirements concerned in any legal proceedings.’ (see s. 7(1) UNCRC Bill); Ensure access to justice and a right to an effective remedy for those affected by non-compliance by making a range of appropriate remedies available; Ensure that courts can take account of international items relevant to the interpretation of the Convention (see s. 4 UNCRC Bill); give courts ‘strike down’ powers (see s. 20 UNCRC Bill).

**Full Compliance**

A duty to comply would be an essential requirement for the framework ASP (or each Act, if separate). The duty of due regard alone has proven untenable in the pursuit of progressing and
activating people’s rights. This is why, in its report, the FMAG (at p. 58) recommended that an ASP intended to incorporate international human rights into Scots law should ‘create a duty to pay due regard to the rights given effect by the Act’ which would be ‘accompanied by a specified date, within the lifetime of the next Scottish Parliament, on which a duty to comply with the rights given effect by the Act would be brought into force.’ This is the preferred process by which the specific treaties should be incorporated.

The duty of due regard and the duty to comply should apply to the ‘Scottish Government, public authorities/public bodies and private bodies carrying out public functions.’ (FMAG, p. 58). The definition adopted for ‘public authorities’ and others to whom the duty would apply should be fully comprehensive so as to ensure the widest scope possible and to take account of the privatisation of public services. The suggested approach would be that adopted by the Equality Act 2010 which applies the prohibition of discrimination to anyone ‘concerned with the provision of a service to the public or a section of the public’ (section 29).

Full and effective incorporation would require a significant amount of compliance checking of pre-existing law and policy. The strongest justiciability option would include a strike-down power for an incompatible Act of the Scottish Parliament which pre-dates the incorporation Act. This is an important means of bringing cohesion and consistency to the law and policy landscape and is the approach taken in the proposed UNCRC Bill (see s. 20).

Section 21 of the UNCRC enables courts to deliver a ‘declarator of incompatibility’ for proposed legislation that breaches the Convention. The retroactive nature of this approach alone would not be in accordance with the achievement of full compliance. As the FMAG made clear in its report (at p. 36 and p. 60), an enhanced and transparent process of pre-legislative scrutiny would require to be provided by the proposed ASP.

**A Participative and Inclusive Process**

International incorporation experience confirms that the opportunity to develop and discuss the features of an incorporation bill through a participative, inclusive process can also encourage culture change and ensure that the voices of rights holders are heard and that duty bearers are given ‘buy-in’. This engagement should occur at the start of the process and continue as a means of supporting full implementation, for example through participative processes to develop statutory and non-statutory guidance for duty bearers and rights holders.

**Interpretation and Justiciability**

In order to establish its intention and to aid in its interpretation, the proposed ASP should contain an interpretative clause or preamble which sets out the key concepts (e.g. ‘progressive realisation’) applicable to international human rights law and articulates its underlying principles, e.g. dignity, non-discrimination.
The importance of interpretive tools and the need to keep the range of such tools as broad as possible cannot be overstated. The relevant provision in this context should aid and encourage the development of jurisprudence joining all Convention rights and their underlying principles for coherence and to aid in dealing with intersectional claims. Without explicit provision in this respect, the take up in invocation of the rights themselves and their broad interpretation is unlikely to occur.

A strong interpretive feature would require public authorities (broadly defined), Scottish Ministers and courts to take account of the interpretive materials produced by the Convention Committees in their jurisprudence in order to define the basic level of protection or minimum core required to deliver different Convention rights. This means expressly outlining that interpretive materials over and above the text and preamble of the specific Convention may be relied upon in determining breaches of rights. This also means including target populations in the interpretation processes in a way that supports their right to active and informed participation in public life and decision-making.

Existing frameworks would require amendment, for example the removal of current restrictions in standing and other barriers which apply in judicial review proceedings to enable civil society organisations to participate more easily in public interest litigation.21

**Statutory Guidance**

Statutory guidance is crucial and must be developed in collaboration with relevant civil society sectors and other community representatives to take account of lived experience as well as with duty bearers.

**Remedies**

Full realisation of the rights provided by the international human rights framework would require a full and comprehensive enforcement regime underpinned by the principles of access to justice and the right to an effective remedy which should be explicitly provided for under the ASP (see Article 8 Universal Declaration of Human Rights and Article 13 ECHR). The cultural and systemic change necessary to ensure full compliance would make it necessary to go beyond those remedies currently available in the civil justice context via party-party litigation and judicial review proceedings. The overarching aim should be to move away from the standard litigation

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model of one claimant/victim and a compensatory remedy by, for example, the availability of class actions and structural remedies wherever possible.22

6. Ensuring Rights Protections for Older People and LGBTI Communities

In giving its recommendations the FMAG recognised that there were two key groups of rights holders who are not yet explicitly provided for by way of a specific Convention - LGBTI communities and older people - and recommended that the rights of these groups should also be incorporated (FMAG Report, p. 31). This paper will now consider how best to ensure that rights protections equivalent to those provided by the specific treaties are extended to these groups as part of the current process.

6.1. Older People

Both the Equality Act 2010 and the EU anti-discrimination framework treat ‘age’ as a protected characteristic but do not identify ‘older people’ as a distinct category of rights holders. This is in recognition that age discrimination in the various contexts covered by the legal frameworks can occur at any age dependent on social and economic factors.

6.1.2. The EU Anti-Discrimination Framework: Age

Discrimination on the grounds of age in the context of employment and occupation is prohibited by the EU Framework Directive 2000/78/EC (which also covers disability, sexual orientation, religion and belief). The Directive requires Member States to take measures to prohibit direct and indirect discrimination and harassment on the ground of age with regards to employment (including recruitment), occupation and vocational training.

The EU Charter of Fundamental Rights lays out the principle of non-discrimination in EU law (Title III, Equality) which includes the prohibition of discrimination based on age (Article 21).

6.1.3. Domestic Anti-Discrimination Law

Under the Equality Act people of all ages and age groups are protected against discrimination – direct, indirect, harassment and victimisation - on the grounds of age (section 5). This protection extends to all areas covered by the Act – work, education and the provision of goods, facilities and services subject to certain specified exceptions.

One major difference between direct discrimination on the grounds of age and the other protected characteristics is that direct age discrimination can be justified if it can be found to amount to a proportionate means of achieving a legitimate aim.

22 For a detailed consideration of justiciability and remedies in the context of economic and social rights, see Boyle, fn 19, chapter 2.
6.1.4. The International Human Rights Framework

There is no specific Convention relating to the characteristic of age although the UN Convention on the Rights of the Child, which was adopted in 1989, provides for the rights of those below the age of 18.

Despite the lack of a specific Convention providing for the rights of older people, the UN has increasingly engaged with the need to consider the rights of this group over the last 30 years. The common themes arising from participatory and consultative considerations of older persons as rights holders have demonstrated the need for a new human rights framework that could consider the inclusion of certain specified rights, including in areas such as housing, social security, health and social care and protection from abuse.

The Open-Ended Working Group (OEWG) on Ageing was established by the UN General Assembly by Resolution 65/182 in December 2010. The OEWG will consider the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures. The Chair of the OEWG has issued a series of calls inviting stakeholders to contribute ideas and proposals on the possible elements of a new international instrument across a range of substantive policy areas and relevant standards.

In the international and domestic settings, the need to act on the articulation and implementation of the rights of older people has been highlighted by the COVID-19 pandemic. Against this backdrop, a series of proposals have been produced by those working in the sector within the UK which call for a focus on non-discrimination, autonomy, care, support and independent living, freedom from violence and abuse, the right to health and social security.

6.1.5. Issues for Scotland

The EHRC’s review of the state of equality and human rights in Scotland ‘Is Scotland Fairer?’ which reported in 2018 highlighted older people as one of the groups which ‘experience the starkest inequalities, and that these cut across many areas of life’.

Any action taken to protect the rights of older people in Scotland should engage with the ongoing UN process to formulate a specific Convention in this area and track the likely substantive content of the proposed Convention.

23 For a comprehensive literature review of the international rights landscape and the UN’s engagement with older persons’ rights, see Charmaine Gittens (2020) The Incorporation of International Human Rights Law into Domestic Systems pertaining to the Rights of Older Persons, University of Strathclyde.

6.2. LGBTI Communities

6.2.1. The EU Anti-Discrimination Framework: LGBTI

Discrimination on the grounds of sexual orientation in the context of employment and occupation is prohibited by the EU Framework Directive 2000/78/EC (which also covers age, disability, religion and belief). The Directive requires Member States to take measures to prohibit direct and indirect discrimination and harassment on the ground of sexual orientation with regards to employment (including recruitment), occupation and vocational training.

Although EU primary legislation does not contain any explicit references to gender identity, gender expression or sex characteristics, EU secondary law does make one important reference to gender reassignment. The Recast Directive 2006/54/EC (Recital 3) provides that the Directive also applies to discrimination arising from ‘gender reassignment’. This is a codification of the Court of Justice of the EU’s jurisprudence in Case C-13/94 P v S and Cornwall County Council [1996] ICR 795.

The EU Charter of Fundamental Rights lays out the principle of non-discrimination in EU law (Title III, Equality) which includes the prohibition of discrimination based on sexual orientation (Article 21). The Court of Justice of the EU may interpret the provision in an inclusive manner, either by an extensive interpretation of ‘sex’ or by expanding on the list which has been drafted in a non-exhaustive manner.25

6.2.2. Domestic Anti-Discrimination Law

Under the Equality Act 2010 gender reassignment (section 7) and sexual orientation (section 12) are protected characteristics. This protection extends to all areas covered by the Act: work, education and the provision of goods, facilities and services, subject to certain specified exceptions, and covers direct and indirect discrimination, harassment and victimisation.

6.2.3. The International Human Rights Framework

Despite the lack of a specific UN Convention in the area of LGBTI rights, the UN Human Rights Council has, in recent years through various resolutions, ‘strongly deplor[ed] acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation or gender identity’.26

In 2011 and 2015 the UN High Commissioner for Human Rights issued reports on human rights violations against individuals based on their sexual orientation and gender identity, the latest of

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which called, among other things, for states to ‘Enact effective anti-discrimination laws that protect LGBT and intersex persons from discrimination, and work to end negative stereotypes, including through public education campaigns’.  

In 2016, the Council appointed an Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity (SOGI) who is mandated to ‘explore ways to better protect persons who suffer from violence and discrimination on the basis of their sexual orientation or gender identity’. 

Although there is no specific Convention planned in this respect, there is still plenty of scope for action. The EHRC’s 2018 ‘Is Scotland Fairer?’ report highlighted LGBTI people as one of the groups which ‘experience the starkest inequalities, and that these cut across many areas of life’.

More specifically, the review found (at p. 115) that,

LGBT people continued to face prejudice, with many experiencing prejudice from school onwards and with a potential impact on their mental health and wellbeing. Hate crime charges related to sexual orientation and transgender identity continued to increase, but most people who experienced a hate crime or incident did not report it. Evidence continues to be relatively limited on the experiences of transgender people, although available evidence relating to work, financial services and healthcare show transphobia is something many transgender people face.

An ASP which directly incorporates ICESCR should make specific provision for the drawing down of all relevant economic, social and cultural rights and their application to LGBTI populations and individuals. This provision should be as comprehensive as possible.

6.3. How Can Equivalent Rights Protections be Guaranteed for Older People and LGBTI Communities?

The proposed incorporation of ICESCR will bring rights to all and LGBTI communities and older people would benefit from the full incorporation of CEDAW, CERD, CRPD, CRC but further action is required if the incorporation process is to benefit all equally.

In accordance with the recommendation of the FMAG (p. 31), the economic, social and cultural rights of LGBTI communities and older people must be explicitly included within an Act of the Scottish Parliament that incorporates international human rights into Scots law.

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29 For a comprehensive overview of the area, see Stephanie Fernandez (2020) ‘Unpacking a Legal Basis for LGBTI Rights in Scotland’ University of Edinburgh.
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It is imperative to ensure that those rights which are drawn down from ICESCR and the wider international human rights framework are applied in accordance with the principles of equality and non-discrimination under international law. The provisions of the Human Rights Act 1998 and the Equality Act 2010 should be explicitly referenced in the equality clause as a means of ensuring that all human rights incorporated in the Act apply equally to LGBTI people and older people.

As well as explicit reference in the equality clause, LGBTI communities and older people also require specific rights provision. This is important as a means of safeguarding against any potential diminution in current rights protection which is underpinned by EU law.

In the case of older people, consideration should be given as to whether protection should be applied in respect of the category of ‘older people’ to coordinate with developments at UN level or in respect of the characteristic of ‘age’ in line with the existing statutory protection at GB and EU levels.

Without a specific guarantee that current domestic standards will be maintained regression in rights could occur over time following the end of the Brexit transition period on 31st December 2020. In other areas where specific treaties exist, direct incorporation of international human rights law will provide some guarantee of non-regression leaving those areas without such protection particularly exposed.

6.3.1. The Need for a Common Framework

In order to guard against the development of a hierarchy of rights, the same approach as that outlined above in relation to the incorporation of the rights provided by CEDAW, CERD and CRPD should apply as far as is possible to the rights of older people and LGBTI communities.

This would include: the need for parallel inclusive and participative processes; a full compliance model; the importance of broad interpretive tools\(^{30}\) and strong justiciability; clear and comprehensive statutory and non-statutory guidance; full use made of existing duties under the Equality Act (PSED and FSD).

The specific rights relating to LGBTI communities and those relating to older people which are already part of the Scottish legislative framework should be restated alongside the guaranteed application of international standards to provide legal certainty and clarity for rights holders and duty bearers.

\(^{30}\) Which could be drawn from beyond the Treaty bodies to include the reports produced under the thematic mandates within the UN system, for example in the case of older people the Independent Expert on the enjoyment of all human rights by older persons, and in the case of LGBTI populations, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.
In parallel with those areas covered by the specific treaties (CEDAW, CERD, CRPD), the use of a wide range of interpretive tools should be specified as applying to the interpretation of the rights of LGBTI communities and older people. In the absence of specific treaties in these areas, it is particularly important to ensure strong justiciability of new and existing rights. Provision should thus be made to apply international jurisprudence in litigation and to place obligations on courts to have regard to international law when interpreting rights (including the UN treaties, treaty body decisions, General Comments, and recommendations) and to comparative law. (See FMAG Report, p. 33, Essential Features of the Act)

Duty bearers should be required to have due regard to the human rights of these groups when fulfilling their obligations under the Act(s). Statutory guidance will be required to ensure that duty bearers are aware of how to discharge their consequent duties.