

Academic Advisory Panel to the National Taskforce for Human Rights Leadership
Equality Clause and Potential Incorporation of CEDAW

The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW

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1st June 2020

Explanatory Note

This briefing paper is one of a series written by the Academic Advisory Panel to the National Taskforce for Human Rights Leadership, which was established in 2019 in response to the recommendations made in December 2018 by the First Minister's Advisory Group on Human Rights. The aim of the briefing papers is to consider some of the legal complexities involved in translating international human rights treaties into domestic legislation.

For further information, please go to: <https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/>

1. Executive Summary

- This briefing paper considers the essential features of an equality clause and the potential incorporation of CEDAW.
- The paper starts by outlining the background and context relating to the proposed incorporation of international human rights into Scots law based on the recommendations of the First Minister's Advisory Group on Human Rights Leadership (FMAG).
- It considers the interrelationship between Scotland's existing equality law framework and the proposed incorporation. This analysis identifies the need for an equality clause as part of the proposed Act of the Scottish Parliament (ASP) by which such incorporation would take place.
- The equality clause would fulfil an important function by articulating the relationship between the existing equality framework and the proposed new human rights framework.
- The briefing then turns to consider the relevant legal framework including the reservation of equal opportunities under the Scotland Act 1998, the domestic provision of the UK's Equality Act 2010 and associated duties, and the influence of EU law to date. The challenges arising from the pre-existing framework include the need to ensure that the proposed ASP is within the legislative competence of the Scottish Parliament and the formal equality approach adopted by UK and EU law which is in contrast to the more contextual substantive approach of international law.
- The aims and content of the equality clause are then considered.
 - The specific aims are identified as being: to draw down the provisions of the social and economic rights to be directly incorporated; to specify the relationship between the proposed Act and the Equality Act, and to align or delineate the

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- 'Scottish specific' provisions of the latter; to aid in the interpretation of the new rights framework by all relevant parties; to ensure that the guiding principles of the FMAG are respected.
- Subject to a few key items relating to its terms of reference and underpinning principles, the clause's contents will be determined by its legal status and scope. Some discussion of these aspects is provided along with an overview of the potential for added value offered by the equality clause.
 - This leads into an analysis of the possible incorporation of the specific rights provided by the key treaties the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Rights of Persons with Disabilities (CRPD) which takes CEDAW as its focus. This analysis considers how and why CEDAW might be directly incorporated into Scots law and concludes that, although this process would pose some specific challenges, these could be overcome and would be outweighed by the benefits.
 - The briefing concludes by restating the need for a specific analysis of the under-utilised potential of current equality provision and its alignment with international human rights law in order to discern what specific actions the Scottish Parliament could take in the current context.

2. Introduction and Background

The three guiding principles of the FMAG were (1) non-regression from the rights currently guaranteed by membership of the European Union; (2) keeping pace with future rights developments within the European Union; and (3) continuing to demonstrate leadership in human rights (FMAG Report, p. 4).

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.'

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. women, BAME people and disabled people) as part of the current process is 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

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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, trans status and in relation to older persons poses certain challenges under current devolution arrangements 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 recognition of 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. This would not be a constitutional guarantee – see further below at 3.5.

3. Current Legal Framework and Matters to be Addressed

3.1. The Reservation of Equal Opportunities under the Scotland Act 1998

Under current devolution arrangements, the Scottish Parliament cannot legislate in relation to matters reserved to Westminster (SA 1998, section 29 and Schedule 5) and cannot modify protected Acts listed under Schedule 4, including the Human Rights Act 1998 and the SA 1998.

The implementation of international obligations is an exception to the reservation of 'Foreign Affairs' to Westminster so that 'Observing and implementing international obligations' falls within the devolved competence of the Scottish Parliament (SA 1998, Schedule 5, para.7(1)-(2)). The Scottish Parliament can introduce legislation that implements international

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obligations, including incorporating international human rights standards into the devolved framework of governance.

'Equal opportunities', and therefore equality law, is a reserved matter subject to certain limited exceptions (SA 1998, Schedule 5 L2, as amended by section 37 of the Scotland Act 2016). The relevant legislation, the Equality Act 2010 (EA), is an Act of the Westminster Parliament. There is some limited Scottish provision, where there is interplay with Scottish devolved legislation, in particular in education and housing, where legislative consent motions have been required.¹

Schedule 5, section L2 of the SA 1998 includes an exception to the reservation in respect of 'the encouragement (other than by prohibition or regulation) of equal opportunities and in particular the observance of equal opportunity requirements.' Unusually, this means that the scope of the Scottish Parliament's devolved competence is specifically prescribed. Thus, while equal opportunities in general is reserved, the Scottish Parliament can encourage respect for equality, but cannot legislate to achieve equality objectives. In addition, the Scottish Parliament was given the power to impose duties on Scottish public authorities to carry out their functions in a way which acknowledges the need to observe the equal opportunity requirements. The use of this power to provide Scottish specific duties which form part of the Public Sector Equality Duty (see further below) permits the Scottish Parliament to develop a distinct Scottish approach to promoting equality, this is very limited in practice and it is unclear what it is intended to cover beyond the promotion of equality.²

The definition of 'equal opportunities' under the Scotland Act is wide, specifically,

the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.

This means that the reservation of equal opportunities to Westminster is extensive (going even beyond the protected characteristics legislated for in equality legislation), severely limiting the Scottish Parliament's power to legislate. However, the wide definition of equal opportunities has the concomitant effect of a wide devolved power to 'encourage' equal opportunities, albeit that the Parliament cannot prohibit or regulate conduct. This enabled the setting up of the Equal Opportunities Committee of the Scottish Parliament and the Scottish Government's Equality Unit and permitted the Government and the Parliament to take steps to 'encourage' equal opportunities by undertaking initiatives to seek to mainstream equality.

The scope of the Scottish Parliament's powers in respect of equality was considered by the Smith Commission, set up in the aftermath of the Scottish Referendum result in September 2014 to make recommendations on further devolution of powers. While the

¹ See Discrimination Law Title of Stair Memorial Encyclopaedia.

² See further Colm O'Connell, 'The Place of Equal Opportunities in the Devolution Settlement: A Legal Analysis'.

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Equality Act was to remain reserved, the Smith Commission recommended in its report³ (Para 60, clause 24) that,

The powers of the Scottish Parliament will include but not be limited to the introduction of gender quotas in respect of public bodies in Scotland. The Scottish Parliament can legislate in relation to socio-economic rights in devolved areas.

The subsequent Command Paper, 'An Enduring Settlement'⁴, specified (at para 6.1) that the intention was to,

devolve to the Scottish Parliament the power to legislate on equalities in respect of public bodies in Scotland which will include but not be limited to the introduction of gender quotas and the consideration of socio-economic inequality when making strategic decisions. This power will enable the Scottish Parliament, by imposing new requirements on public bodies in Scotland to introduce new protections for employees and customers of those bodies with regards to their devolved functions. However, the Scottish Parliament will not be able to lower the protections found in the Equality Act 2010.

The provisions, which were eventually enacted in the Scotland Act 2016 (SA 2016) and amended Schedule 5, L2, extended the equal opportunities exceptions by adding two further exceptions. The first related to the non-executive board members of Scottish public authorities and the second to the Scottish functions of any Scottish public authority, in a way which does not 'modify' the Equality Act, except to the extent that any provision supplements or adds to its provisions, including requirements to take action not prohibited by that Act. The second exception provides,

4. Equal opportunities in relation to the Scottish functions of any Scottish public authority or cross-border public authority, other than any function that relates to the inclusion of persons in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions. The provision falling within this exception does not include any modifications to the Equality Act 2010, or of any subordinate legislation made under that Act, but does include –
 - a. Provision that supplements or is otherwise additional to provision made by that Act;
 - b. In particular, provision imposing a requirement to take action that that Act does not prohibit;
 - c. Provision that reproduces or applies an enactment contained in that Act, with or without modification, without affecting the enactment as it applies for the purposes of that Act.

The scope of the second exception is currently untested, and it is unclear from its wording what specifically it would enable. Its potential application is referenced later in this report

³ The Report of the Smith Commission.

⁴ Scotland in the United Kingdom: An Enduring Settlement (2015) Cm 8990.

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(at section 5) in relation to the incorporation of CEDAW but it could possibly also be used in other ways.

3.2. UK Equality Law: the Domestic Framework

Equality rights are provided by the Equality Act 2010 (EA) which is an Act of the UK Parliament which applies to Great Britain, with Northern Ireland having its own equality law regime. Section 4 of the EA provides protection against discrimination on the grounds of nine specified 'protected characteristics' (PCs): age; disability; gender reassignment; marriage or civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation. The Equality and Human Rights Commission (EHRC) is the regulatory body responsible for enforcing the EA.

The EA's scope is broad: all protected characteristics are covered in respect of employment (also a reserved matter) and its coverage includes protection in relation to the provision of goods and services, the exercise of public functions, housing and education in relation to the PCs of sex, sexual orientation, religion or belief, age and disability. In addition, women and men are entitled to equal pay for equal work or work of equal value.

The EA prohibits different types of discrimination ('prohibited conduct') by applying a formal equality approach to ensure equal treatment for a person with a specified PC and a person who does not have the PC but is otherwise similarly situated (the 'comparator'). This results in a symmetrical application so that, for example, the right to equal treatment on the ground of sex, requires women and men to be treated in the same 'gender neutral' way. There is limited scope for different or 'special' treatment between PC group members and their comparators even where inequality derives from historical disadvantage, including formerly legally sanctioned differentiated treatment, or where the wider context and/or circumstances relevant to the person with the PC and his or her comparator are not the same.

Positive discrimination is prohibited except in relation to the duty to make reasonable adjustments for those with a disability under section 20 of the Act. Positive action can be used in line with the permitted exceptions under sections 158 and 159 which will apply in certain specified circumstances.

Section 158 allows, but does not require, 'any action' to be taken to support those with a protected characteristic, as long as it is a 'proportionate means of achieving a legitimate aim'. It does not permit 'anything that is prohibited by or under an enactment other than this Act' so that training which enables PC members to prepare themselves to apply for promotion would be allowed but positive discrimination, such as the use of hard quotas, would be prohibited.

Section 159 provides a specific exemption in relation to recruitment and promotion which permits (but does not require) an employer to take a protected characteristic into consideration when deciding whom to recruit or promote in circumstances where people having the protected characteristic are at a disadvantage or are under-represented. In line with EU law,⁵ this positive action can be taken only where the candidates are equally qualified giving rise to a tiebreak situation. The permitted exceptions have not been widely used and so their specific boundaries remain largely untested.

⁵ C-450/93 *Kalanke v Freie Hansestadt Bremen* ECR [1995] I-03051

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3.2.1. The Public Sector Equality Duty

Section 149 of the EA imposes certain duties on public authorities under what is known as the Public Sector Equality Duty (PSED). Under the general duty which is part of reserved equality law, public bodies are required 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.

In addition, Scottish public bodies are also required to pay due regard to the specific duties which are intended to enable better performance of the general duty (EA 2010 (Specific Duties) (Scotland) Regulations 2012). In particular, listed public authorities in Scotland are required to publish a set of equality outcomes and to report on progress every two years. In setting these outcomes, public authorities must consider relevant evidence and take steps to involve people with protected characteristics. The specific duties also require listed public authorities to undertake equality impact assessments of new or revised policies and practices and to consider relevant evidence when making their assessments. The Equality and Human Rights Commission has provided guidance to assist public authorities in meeting their obligations in respect of the specific duties.⁶

Both the general and specific duties apply to all protected characteristics (age, disability, sex, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation). The general duty also applies to marriage and civil partnerships in regard to the elimination of unlawful discrimination in employment.

The broad purpose of the PSED is,

to integrate consideration of equality and good relations into the day-to-day business of public authorities... The general equality duty therefore requires organisations to consider how they could positively contribute to the advancement of equality and good relations. It requires equality considerations to be reflected into the design of policies and the delivery of services, including internal policies, and for these issues to be kept under review.⁷

The PSED, as enacted in Scotland through the general and specific duties, has application in the current context. The specific duties in particular may offer some scope for Scotland to take a distinctive approach in the way in which the proposed new rights framework operates in practice. However, the reservation of equal opportunities and its permitted exceptions are complex and somewhat untested and so the extent of how far the proposed Act could go in this respect will require careful consideration and specialist constitutional law advice. Short of specific legislative provision, the PSED could provide a useful framework for furtherance of the contextual approach required in order to realise substantive outcomes as opposed to a purely formal approach to equality.

3.2.2. The Fairer Scotland Duty

Following the recommendation of the Smith Commission (see above) the socio-economic duty provided for by Part 1 of the Equality Act 2010 came into force in Scotland in April 2018

⁶ EHRC Guidance for Scottish Public Authorities, available: <https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-scottish-public-authorities>

⁷ EHRC website, <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty>

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(The Equality Act 2010 (Scotland) Regulations 2018). Scotland was the first of Great Britain's three nations to implement this provision renaming the duty 'the Fairer Scotland Duty' (FSD). 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.⁸

To discharge their duty under the FSD, public authorities must be able to meet certain key requirement in each relevant circumstance, specifically, 'to actively consider how they could reduce inequalities of outcome in any major strategic decision they make; and to publish a written assessment, showing how they have done this.' (Interim Guidance, p. 5). The FSD applies from 1 April 2018 and cannot be applied retrospectively to decisions made before this date and does not override other considerations 'such as equality or best value' (Interim Guidance, p. 5). As with all aspects of the Equality Act, the EHRC is the regulator for the FSD and will undertake monitoring and the development of best practice during the first three years, specified by the Scottish Government as the 'implementation phase'.

3.2.3. The 'Due Regard' Approach

Like the proposed first step to the incorporation of international human rights standards, the PSED and FSD operate through the imposition of a due regard duty and the relevant duty bearers are likely to be the same listed public authorities. This makes alignment of the duty imposed under the proposed ASP with those pre-existing duties under the Equality Act necessary. Public authorities' experiences of implementing the PSED and its impact can provide valuable insights which should be taken into account in the development of this aspect of the proposed ASP and associated guidance. The EHRC has carried out assessments in respect of compliance with,⁹ and the impact of,¹⁰ the Scottish specific duties.

The FSD is a new addition to Scotland's suite of equality laws and it remains to be seen how it will be used in practice and what impacts it will have on reducing socioeconomic inequalities in Scotland. In the current context the specific linkage between equality and socioeconomic disadvantage could provide an opportunity to align the proposed new human rights framework with the pre-existing equality law framework which would aid in the articulation of the relationship between the two. Furthermore, the focus on outcomes may enable exploration of how the contextual approach required to achieve substantive equality might be achieved in Scotland albeit in line with the restrictions imposed by the reservation of equal opportunities.

⁸ Scottish Government Interim Guidance, available:

<https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2018/03/fairer-scotland-duty-interim-guidance-public-bodies/documents/00533417-pdf/00533417-pdf/govscot%3Adocument/00533417.pdf>

⁹ Measuring Up 7: Public Authorities' performance in meeting the Scottish Specific Equality Duties, 2017 available: <https://www.equalityhumanrights.com/en/publication-download/public-authorities%E2%80%99-performance-meeting-scottish-specific-equality-duties-2017>

¹⁰ Effectiveness of the PSED Specific Duties in Scotland, available:

<https://www.equalityhumanrights.com/en/publication-download/effectiveness-psed-specific-duties-scotland>

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3.3. EU Equality Law

EU law provides an established guarantee of equality in the specified areas of work and the provision of goods and services which is clearly enshrined in its constitutional law¹¹ and legislative provision.¹² The principles of equality and non-discrimination are fundamental principles of EU law whose meanings have been clarified and extended through the progressive interpretation of the Court of Justice of the EU in its case law.¹³

The Charter of Fundamental Rights makes specific reference to the principle of equality (Chapter 3) and non-discrimination: Article 21 provides,

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 shall be prohibited.

Although the EA implements EU equality law in Great Britain, the scope of EU law is narrower than that provided by the Act: sex, race, sexual orientation, disability, age, religion and belief are protected against discrimination in employment, including recruitment, and some enjoy wider protection, such as the right to equal pay on the ground of sex. Sex and race are protected against discrimination in relation to the provision of goods and services and race has additional protections relating to housing, education and social protection. There is a specific rights regime in place for pregnant workers and those who have recently given birth and EU law also provides the right to equal treatment for those who work under non-standard arrangements, for example, part-time workers.

Notwithstanding its important contribution to the UK's equality law framework, it is important to note that EU law applies the same formal equality approach as that advanced by UK law, so that the right to equal treatment is generally exercised through a narrow comparison between the person claiming the right and his or her comparator.

It is outwith the scope of this paper to provide a full account of the relationship between EU equality law and the UK's equality law framework, or to expand on the impact of the loss of EU membership on UK equality law.¹⁴ However, it has been widely accepted, including by the FMAG, that the loss of the underpinning protection of equality provided by EU law poses a threat to human rights protections post-Brexit. As well as its explicit legislative protection, EU law has filled the gap caused by the absence of a constitutional guarantee of equality in the UK legal order by ensuring the application of the principles of equality and non-discrimination across all its areas of competence.

¹¹ See Article 13 (3) Treaty on European Union; the Treaty on the Functioning of the European Union Articles 18 (nationality), 19 (equal treatment), 45 (free movement of workers), 157 (equal pay).

¹² For example, Directives 2006/54/EEC, 2000/43/EC, 2000/78/EC, 92/85/EEC, 2019/1158, 97/81/EC, 1999/70/EC, 2008/104/EC).

¹³ Nicole Busby 'A Right to Care?: Unpaid Care Work in European Employment Law'.

¹⁴ For a useful outline see Muriel Robison 'Equality and Non-Discrimination and Brexit' (2016, Scottish Universities Legal Network on Europe), available: <https://sulne.files.wordpress.com/2016/11/equalities-sulne-roundtable-oct-2016-v2-2-11-16.pdf>. The paper by Tobias Lock in this series provides an assessment of the potential future relationship between Scots law and EU law after Brexit.

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3.4. International Law

All international and regional human rights instruments contain equality guarantees.¹⁵ The public benefits of these rights are axiomatic: they seek to ensure that no-one is discriminated against because of certain specified protected characteristics across a range of different contexts including employment, the provisions of goods and services, the exercise of public functions, housing, education and, in some cases, in the private sphere.

The principle of non-discrimination is thus as 'an important cross-cutting component of international human rights law'¹⁶ and equality is recognised as a fundamental principle in the interpretation of human rights. Some of the core treaties are explicitly focused on the 'elimination' of discrimination in specified contexts, for example CERD and CEDAW. Others provide general non-discrimination and equality rights to specific identity groups, for example the CRC and the CRPD.

In contrast with UK law the protected characteristics of sexual orientation, trans status and age (specifically in relation to older people) are missing from the express provision offered by the treaties.

The application of the principles of equality and non-discrimination in international human rights law,

requires states to take steps to eliminate discrimination in order to achieve substantive equality of outcome and address structural injustices. International law requires that access and delivery of human rights, including ESC rights should not exclude groups, particularly those who are marginalised and possibly 'hidden' from the system.¹⁷

This application goes beyond the formal equality approach of UK and EU equality law as it requires the contextual understanding and focus on outcomes characterised by substantive equality. If unfettered by the limitations imposed by national law, this has the potential to be transformative in the elimination of inequality and disadvantage associated with identity characteristics and socioeconomic status. Full realisation of the rights provided by the international human rights framework would require a full and comprehensive enforcement regime with a range of appropriate remedies at the domestic level.

3.5. Substantive Issues for Scotland

The incorporation of international human rights standards into Scottish law by way of an ASP offers a potential route to the adoption of the contextual approach to achieving substantive equality. This could occur in an incremental way, starting with the imposition of the due regard duty and supported by relevant guidance, moving to full compliance which will depend to some extent on judicial interpretation of the relevant provisions. However, as outlined above, this would be limited in practice due to the reservation of equal opportunities so that, before any progress could be made in this respect, careful consideration would have to be given as to how to stay within the boundaries of the current devolution arrangements. Thus, in bringing forward an Act which incorporates international human rights into Scots law, the

¹⁵ For examples, ECHR, Art 14; ICESCR Arts 2 (2) and 3; ICCPR Art 3.

¹⁶ Katie Boyle 'Models of Incorporation and Justiciability for Economic, Social and Cultural Rights', p. 8.

¹⁷ Boyle Ibid.

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key question for the Scottish Parliament is how far Scotland can deviate from the formal equality approach in order to realise its obligations under international law.

In respect of the social and economic rights protected by ICESCR which operate across the range of devolved policy areas equality of access to the rights and access to justice under the rights can be achieved in the general sense provided that appropriate enforcement mechanisms including effective remedies are available to all. The specific rights protected by CEDAW, CERD and the CRPD pose a greater challenge as there is the potential for a clash with the formal equality approach adopted by the Equality Act and its reservation under the Scotland Act 1998. This has particular relevance in respect of the Act's provisions on employment, which is also a reserved policy area, but would also impact on what actions could be taken in relation to the operation of equality law in the provision of services and education. The general requirement to provide equal (the same) treatment for those with and without the specified PCs covered by the EA severely limits the potential impact of the specific rights covered by CEDAW, CERD and to some extent, CRPD which arguably has more leeway through the reasonable accommodation requirement under section 20 of the EA. The PSED and FSD might provide some potential for expansion of the equality principle in policymaking through their requirement for wider contextual assessments in policy formulation but, as outlined above, their impact is limited in relation to the rights framework.

One possible point of departure from the current approach which would illustrate a more progressive stance whilst staying within the boundaries of the current devolution arrangements would be the inclusion of a guarantee of equality in respect of the new rights framework. There is still a need for caution here: any such provision could not serve as a constitutional guarantee in the same way as those provided under, for example, the South African Constitution or the Canadian Charter of Rights. Although this restriction would severely limit its impact, by giving express recognition to the equality and non-discrimination principles Scotland could provide an important example and lead the way for other devolved nations in this respect and such action would be particularly significant post-Brexit. The suggested form of such a guarantee would be the inclusion of an equality clause as a provision of the proposed ASP.

3.6. Further Issues to be Considered in the Guidance

As stated above, care will have to be taken to avoid confusion between the proposed due regard duty and the pre-existing duties under the PSED and FSD. This is of particular significance for duty bearers who will be required to take an anticipatory and proactive approach in respect of the full range of duties. Failure to provide effective guidance could have the dual effects of overburdening duty holders and weakening their commitment and/or ability to comply. Whilst a fully integrated approach is not suggested, the steps necessary to ensure compliance should be delineated where necessary and aligned as far as is possible without dilution of the specific objectives that are to be achieved. This will require full and detailed guidance which should outline specific actions and examples of good/best practice wherever possible. Careful handling of this first phase with appropriate management and consolidation of expectations will assist in the shift from the 'due regard' duty to full compliance.

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4. Aims and Essential Features of the Equality Clause

4.1. *The Aims of the Equality Clause*

Based on the foregoing discussion, the aims of the clause would be:

- To draw down the specific provisions of the social and economic rights to be directly incorporated so as to ensure their application across the full range of protected characteristic groups specified by the EA.
- To specify the relationship between the proposed ASP and the EA, and to align or delineate the 'Scottish specific' provisions of the latter, i.e. provision and operation of the PSED in Scotland and the FSD.
- To aid in the interpretation of the new rights framework by rights holders, duty bearers, the judiciary, and other relevant parties.
- To ensure that the guiding principles of the FMAG on non-regression and keeping pace with future legal developments within the EU are respected.

4.2. *Content of the Equality Clause*

As well as setting out its status and scope (see further below at 4.3 and 4.4) through a clear articulation of its relationship and interaction with Scotland's existing equality law framework, the equality clause could specify the principles underpinning the framework, including the particular meanings to be adopted in relation to the terms 'equality' and 'non-discrimination', and could also refer to the relevant values drawn from international human rights law including human dignity. The Declaration of Principles on Equality drawn up by the Equal Rights Trust¹⁸ may be a useful reference document. The Declaration provides a statement of principles based on concepts and jurisprudence developed in international, regional and national legal contexts.

In constructing the equality clause there are certain key questions that will need to be addressed:

- What is the legal status of the equality clause?
- What is the scope of the clause?
- What value does an equality clause add to the proposed ASP?

4.3. *The Legal Status of the Equality Clause*

As outlined above, the restrictions imposed by the current devolution arrangements rule out the possibility of an absolute right to equality,¹⁹ (i.e. a constitutionally enshrined, self-standing and legally enforceable right), being introduced into Scots law by the proposed ASP. Full implementation of the international human rights framework would require adoption of the contextual 'substantive' approach and so the limits of what is possible in this respect

¹⁸ Equal Rights Trust 2008, available:

<https://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>

¹⁹ Jurisdictions that have adopted this approach include South Africa (see the articulated values in section 1 of the South African Constitution) and Canada (see the Canadian Charter of Rights and Freedoms, section 15).

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under the EA should be considered including full use of the permitted exceptions under sections 158 and 159 as well as all relevant actions under the PSED and FSD.

An alternative formulation is offered by the approach adopted by Article 14 of the European Convention of Human Rights which provides.

The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 does not provide a free-standing right to non-discrimination and so can only be invoked where a violation of another free-standing Convention right can be claimed. It is not necessary to establish an actual violation of another Convention right; as long as the claim comes within the ambit of such a right then the discrimination claim alone can succeed even if the primary violation has not been established or the state's action has been found to come within one of the permissible exceptions to that right.²⁰

The Article 14 approach provides a potential model for an equality clause to be included in the ASP. Such a clause could take the form of a statement of the principle of non-discrimination to be invoked alongside an alleged breach of a self-standing right. The principle of non-discrimination in this context would appear to be in keeping with the formal equality approach of the UK's existing framework although it would fall somewhat short of a guarantee of equality in any substantive sense. To aid in its interpretation and to ensure legal certainty, it should cross refer to the pre-existing equality duties (PSED and FSD) as a means of providing for their alignment with the proposed human rights framework. This would have a further potential benefit in that it would facilitate the joint exercise of the duties as a means of extending the equality principle where possible to achieve substantive outcomes.

4.4. *The Scope of the Equality Clause*

If the equality clause is to achieve maximum effectiveness in implementation of Scotland's new human rights framework and to provide some future proofing against the diminution of rights protections, its scope will require careful consideration.

The key question to be asked relates to the intended role or function of the equality principle in this context. Is the equality clause intended merely as an interpretative aid and to ensure a 'fair' application of the new rights framework and/or to provide an articulation of the reservation of equal opportunities? These are important considerations which should inform the scope and content of the equality clause.

In drawing comparisons with Article 14 ECHR, relevant factors would include the restriction of the Equality Act's application to the specified 'protected characteristics' in contrast to the application of Article 14 ECHR to a non-exhaustive list of 'any grounds...'

In defining the scope of Article 14, the ECtHR jurisprudence has adopted a proportionality test, by which,

a difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly

²⁰ Belgian Linguistic Case (No 2) [1968] 1 EHRR 252.

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established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.²¹

Would the equality clause in the proposed ASP be subject to the same or an alternative proportionality test?

In the UK, in common with other Convention rights, Article 14 is only actionable against the State and public authorities as defined by the Human Rights Act 1998. What would the ambit of the equality clause be in this context? The intended duty holders specified by the FMAG are public authorities. Would the equality clause extend to private individuals, for example through contracting and procurement arrangements, in certain specified circumstances?

Finally, the definition of equality under the HRA has relied heavily on judicial interpretation of the nature and scope of the non-discrimination principle in a range of specific contexts as the open-textured nature of Convention rights requires 'an injection of values' such as human dignity into decision-making.²² Through such contextual interpretation, equality can be advanced as 'a central democratic principle, relevant in its own right and as part of the proportionality analysis'²³ required under human rights law. In the current context, this process would take place through judicial review of alleged breaches of the 'due regard' duty and, following the move to full compliance, decisions of the courts and tribunals. To ensure consistency in this important process appropriate judicial guidance including a statement of principles should be provided.

4.5. The 'Added Value' of the Equality Clause

Given the complexities and restrictions relating to the proposed equality clause, it is worth reflecting on what value it would add. Specifically, what would it contribute to the new rights framework beyond the provisions of domestic equality law and the Human Rights Act? As already discussed, the current formal approach to equality is largely procedural and adopts a symmetrical application based on comparisons between different individuals on the grounds of group membership.

The contrasting approach, characterised by Article 14 ECHR and the PSED, adopts a substantive and contextual meaning of equality which can have a distributive effect on resource allocation. By way of illustration, the full realisation of a specific right, for example the right to housing, gives rise to three different types of duty on the state:

- i. A primary duty not to interfere with the exercise of the right
- ii. A secondary duty to protect individuals against interference by other individuals
- iii. A tertiary duty to facilitate the exercise of the right, i.e. the duty to provide housing.

The first two of these duties can be discharged by way of the formal approach. The tertiary duty, in contrast, requires the application of a contextual consideration in order to achieve a distributive effect. Where discrimination can be shown to have had a bearing on the breach or violation of the tertiary duty, the achievement of equality will depend, not on consistency

²¹ Belgian Linguistic Case (No.2) (1968) 1 EHRR 252, at [10].

²² Sandra Fredman, *From Deference to Democracy: The Role of Equality under the Human Rights Act 1998*. On dignity as a judicial value, see Elaine Webster's paper in this series.

²³ Fredman, *ibid*.

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of treatment but, rather, on the resulting distribution of resources. In such circumstances, inequality of treatment might be necessary to achieve a fairer allocation.²⁴

Although this formulation will require a nuanced argument based on the wider context relevant to each case in order to succeed, where discrimination has resulted in different outcomes, such context will generally be present. A finding of a violation of a justiciable right in such circumstances may ultimately depend on judicial interpretation which, in turn, will rely on the legal argument presented to the court or tribunal. However, in discharging the proactive anticipatory requirements under the 'due regard' duties of the PSED and FSD and the proposed ASP, duty holders are/will be expected to adopt a contextual approach in their decision-making. Explicit articulation of the extent of the duties in the equality clause and/or the accompanying guidance would improve rights holders' awareness of their rights and inform their expectations of what a human rights-based approach can achieve. This has the potential to improve equality outcomes and to enhance access to justice in the broadest sense.

If we accept that the interplay between a set of duties to pay due regard to international human rights standards and the principles of non-discrimination and equality coupled with judicial interpretation of the relevant principles and associated values could enable movement beyond the formal equality approach, which human rights instruments would be most effective? Whilst the incorporation of ICESCR would provide direct access to the relevant social and economic rights, CEDAW, CERD and the CRPD are explicitly focused on the elimination of discrimination in specified contexts. Through the application of an equality lens so as to contextualise rights for different groups, these key treaties could be pivotal in synergising the right not to suffer discrimination on specified grounds and the exercise of social and economic rights so that, for example, poverty and gender can combine to improve outcomes for poor women.

This interplay between domestic provision of equality law and international standards can currently be used in the exercise of existing rights without the need for further legislative action. However, it is not a common feature of claims before domestic courts or of judicial decision-making.²⁵ Incorporation provides an opportunity to change this by making rights visible through the production of a comprehensive and integrated rights framework. The question that remains is, would full incorporation of the key treaties alongside ICESCR be possible and/or desirable under the current devolution arrangements, specifically the reservation of equal opportunities? The following section will consider this by focusing on the potential incorporation of CEDAW.

5. Incorporating CEDAW

When considered in the broader context of the range of identity categories, there is arguably a strong case for focusing attention on the category of 'women' in the attainment of equality: if legislative action is targeted specifically at improving women's lives, other protected characteristic group members (e.g. disabled people, older people, BAME communities, etc) benefit directly because approximately half of each category will be comprised of women and

²⁴ Fredman, *ibid.*

²⁵ Christopher McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties?: A Comparative International Law Analysis of CEDAW'.

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also indirectly because of women's disproportionate role as the providers of informal care across other protected groups.

The UK has a comprehensive framework of equality legislation and policy which originates from the 1970s with the current Equality Act having been in place for 10 years. EU law has contributed to the evolution and extension of that framework, particularly in the area of sex discrimination. Nevertheless, social and economic inequality on the ground of sex remains a feature of life in Scotland. The Scottish Government has introduced a range of initiatives aimed at tackling gendered inequalities including the establishment of a National Advisory Council on Women and Girls. Incorporating the social and economic rights provided by ICESCR without specifically gendering those rights risks reproducing and perpetuating existing inequalities which could become further institutionalised as the new rights framework becomes operational.

The need to focus on gender as a means of overcoming structural inequality within Scottish society was recognised in part by the Smith Commission in its report (see above at 3.1) resulting in the introduction of gender quotas on public boards. Although the additional amendment to the exception to the reservation made by the Scotland Act 2016 (under Schedule 5, L2 (4)) does not specifically refer to gender or sex, it could potentially be used in this context, for example to support the incorporation of CEDAW (and CERD, CRPD), and to facilitate gender mainstreaming aligned with and supported by the existing and new 'due regard' duties. Furthermore, the Scottish Government has instigated a separate parallel process of incorporation of the CRC which it has committed to completing during the current parliamentary session. Given the interrelationship between the rights of women and children, the CRC's incorporation would be facilitated and strengthened by the full incorporation of CEDAW.

Given the limits imposed by the reservation of equal opportunities, the questions that remain in relation to CEDAW's incorporation are: can it be incorporated? what model of incorporation is possible and/or preferable? what benefits would the specific incorporation of CEDAW bring?

5.1. *Can CEDAW be incorporated?*

The potential for CEDAW's incorporation into Scots law has been considered in detail elsewhere.²⁶ The conclusion that incorporation was possible but was largely dependent on political will was reached in 2018 before the FMAG's recommendations and their acceptance by the Scottish Government at the end of that year. The current proposed framework makes CEDAW's incorporation into Scots law wholly possible.

5.2. *Models of incorporation*

If CEDAW's incorporation is undertaken as part of the current process, it should follow the process set out by the FMAG, that is full incorporation starting with the imposition of a due regard duty moving to full compliance on expiration of a specified period and the triggering

²⁶ Nicole Busby and Muriel Robison, CEDAW: How Can Women's Rights be Better Realised in Scotland?, available: <https://www.engender.org.uk/content/publications/CEDAW-incorporation-paper.pdf>

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of the sunrise clause. As with the incorporation process generally, matters to be considered would include access to justice for the violation of a right including an effective remedy with appropriate enforcement mechanisms.

Given the reservation of equal opportunities, the main challenge facing the Scottish Parliament will be to ensure that a balance is struck between ensuring the proposed ASP is within the legislative competence of the Scottish Parliament whilst respecting the interdependent and indivisible nature of CEDAW. As Boyle and Nolan explain in relation to the UNCRC,

Treaties are designed to be read as a whole, and human rights by their nature are both universal and interdependent – meaning to deconstruct them proves difficult as it may undermine their full meaning and risk undermining their full enjoyment. In other words, the question before the parliament will be how best to deal with incorporating the treaty in its fullest sense whilst avoiding encroaching on reserved matters.²⁷

The challenges that this careful balancing act poses are not to be underestimated, particularly given the limitations of the formal equality approach adopted by domestic legislation outlined in this paper. Added complexities are caused by the fact that the amended exception under Schedule 5 is untested and the combined extent of the existing due regard duties under the Equality Act and proposed due regard duty is unknown. Expert views on the substantial constitutional issues should thus be sought in order to establish what is possible in terms of giving meaning to CEDAW's provisions. However, none of these factors mitigate against CEDAW's incorporation. Their relevance relates to the extent to which CEDAW's contextual substantive approach to equality can be pursued within the context of UK equality law and its specific enactment in Scotland. In this regard the flexibility offered by international human rights law is relevant. Like its sister treaties, the UNCRC, UNCRPD and UNCERD, CEDAW is a flexible and pragmatic instrument which allows domestic governments and parliaments to give effect to its provisions in the way most appropriate to the domestic context. In this respect, CEDAW's relationship with domestic law might be seen to provide an aspirational framework within which, so long as the minimum standards are met, national variations based on cultural or constitutional differences are permitted with CEDAW's transformative potential providing for and supporting incremental progression over time.

5.3. Benefits of CEDAW's incorporation

The final question for consideration relates to the particular benefits that CEDAW's incorporation would bring at this time. Aligned with the need to address Scotland's socioeconomic inequality is the need to apply a nuanced approach in order to effectively target such inequality. As stressed throughout this paper, current devolution arrangements coupled with the gender-neutral formal equality model adopted by the Equality Act, restrict legislative action. However, alongside its ability to influence legislative development, CEDAW has much to offer to the policy framework through its normative potential, i.e. as a means of shaping policy and providing direction. This application of CEDAW, although possible under current arrangements, is rarely used in the UK context. For a table outlining CEDAW's key provisions and their interplay with current Scottish provision, see Annex 1.

²⁷ See Katie Boyle and Aoife Nolan 'Incorporation of UNCRC', available: <https://www.gov.scot/publications/incorporation-of-uncrc-discussion-paper/>, para 12.

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Making CEDAW more visible in Scots law through incorporation has the potential to open up its use as a powerful awareness-raising tool in relation to women's existing right to equality and continued disadvantage. As well as assisting in its justiciability, this process could catalyse CEDAW's use as an agenda-setting framework capable of engendering the PSED, FSD and proposed due regard duty relating to social, economic, cultural and environmental rights in Scotland. Furthermore, the incorporation of CEDAW into Scots law would send a powerful and important message to the international community regarding Scotland's commitment to ending gender inequality, a message that would have particular significance in the context of Brexit.

6. Conclusions and Recommendations

This paper has considered the potential provision of an equality clause within the proposed ASP recommended by the FMAG as a means of directly incorporating international human rights standards into Scots law. The paper outlined the relevant provisions of the domestic law framework including the reservation of equal opportunities under the Scotland Act 1998.

Although these arrangements limit what Scotland can do in relation to equality legislation, the exceptions contained in Schedule 5 of the Scotland Act 1998, as amended by the Scotland Act 2016, provide some opportunity for distinctive action which, along with the provision of the PSED and FSD and proposed due regard duty under the ASP, could shape and provide direction for the policy framework by embedding the substantive conception of equality and non-discrimination envisaged by international law. Furthermore, the Equality Act's permitted exceptions to the formal approach may provide greater scope for the use of positive action than has been utilised to date. This potential should be explored to uncover whether it provides Scotland (and the rest of GB) with an opportunity to adopt a more substantive approach to equality than that currently realised by UK legislation.

The content, nature and scope of the equality clause will depend on the outcome of such inquiry but its essential features would, at the very least, include a clear articulation of its legal status and interrelationship with the pre-existing equality framework along with guidance relating to its essential principles and their definitions under the ASP.

Finally, the paper considered whether the proposed ASP should incorporate the key treaties providing specific rights alongside the social, economic and cultural rights contained in the ICESCR. Focusing on CEDAW, the rationale for specific incorporation was presented. The need to engender economic and social rights so as to avoid the perpetuation of existing inequalities was stressed as was the interdependent and indivisible nature of CEDAW which would require incorporation in its entirety.

How the incorporation of CEDAW (and the other key treaties providing rights to specific groups) takes place, i.e. whether as part of the current process or under a separate process, is a political decision and, thus, outwith the scope of this paper. However, the incorporation of the rights contained within ICESCR without specific consideration of how those rights will apply to all members of Scottish society risks replication and perpetuation of existing inequalities within the new framework. Realisation of the full potential of the international

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human rights framework in Scotland will require careful consideration to the current provisions of equality law and their interaction with the current devolution arrangements based in part on detailed constitutional law advice. In addition, the incorporation of CEDAW (and its sister treaties CERD and the CRPD) would benefit from a participatory and consultative process, similar to that undertaken in preparation for the incorporation of the CRC, involving rights holders and those with expert knowledge of the specific protected characteristic groups.

In the event of full incorporation, CEDAW's pragmatic and flexible nature would assist in the challenging task of ensuring that the required legislation remained within the legislative competence of the Scottish Parliament. Despite the legislative restrictions that would inevitably apply, CEDAW's incorporation would bring significant benefits including through its value as an agenda-setting tool in the policy context and in respect of the important message regarding the place of women in Scottish society that its incorporation would send both at home and to the international community.

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ANNEX

KEY RIGHTS IN CEDAW

| CEDAW Provision | Currently realised in EU/UK/Scots law? | Within Scottish Parliament's competence? |
|---|---|---|
| Art 1: Definition of discrimination against women | EU/UK - but CEDAW definition wider and adopts substantive equality model whereas EU/UK adopts formal equality model. | No |
| Art 2: Constitutional right to non-discrimination against women | EU No explicit constitutional provision in UK/Scots law. | Yes – although substantive rights are reserved. |
| Art 2: Principle of effectiveness | EU No explicit provision in UK/Scots law | Yes through articulation |
| Art 3: principle of equality between men and women | EU/UK, albeit as formal equality rather than substantive equality as provided by CEDAW. | No |
| Art 4.1: Affirmative action/positive discrimination | Partially realised in EU / UK but confusion regarding what is legally permissible. Restricted by (mis)interpretation of EU law. Perhaps uniquely in this context Brexit provides an opportunity for UK / Scotland to act? | Yes – See exception to reservation of equal opps under Scotland Act 2016 (limited to public bodies) |
| Art 4.2: Different treatment in relation to maternity | EU/ UK in relation to work-related rights, e.g. basis for maternity leave, right to return, etc. | No |
| Art 5.1: State obligation to eliminate social cultural (historical) patterns leading to discrimination against women. | Not explicitly. This is an obligation placed on states in line with CEDAW's substantive equality approach | Yes, although difficult to see how substantive rights could flow due to devolution restrictions. |
| Art 5.2: Recognition (through education) of maternity as a social function and promotion of gender-free co-parenting. | Partially realised in EU / UK law under 'work-family reconciliation' but progress has been slow and incremental. | Yes in relation to education, health and social security. |

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| | | |
|--|---|--|
| Art 6: Suppression of human trafficking in women and exploitation of sex workers | Realised in EU / Scots law | Yes |
| Art 7: Non-discrimination in domestic political participation. | Realised in UK law but subject to restrictions of formal equality. | Yes |
| Art 8: Non-discrimination in international political participation. | Realised in UK law but subject to restrictions of formal equality. | Yes |
| Art 9: Non-discrimination in acquisition, retention and change in nationality for women and their children. | Realised in EU / UK law. | No |
| Art 10: Non-discrimination in education | Realised in UK / Scots law but subject to restrictions of formal equality. | Yes |
| Art 11.1: Non-discrimination in employment encompassing: the right to work; the right to equality in recruitment and selection; rights to free choice of occupation, vocational training, equal conditions of employment, promotion and job security; the right to equal pay for equal work and work of equal value; the right to social security; the right to protection of health and safety in working conditions. | Realised in EU / UK law but subject to the restrictive effect of formal equality on terms and conditions. | Right to non-disc in social security may be possible |
| Art 11.2: Non-discrimination on the grounds of marriage or maternity encompassing: | Realisation in EU / UK law mixed and restricted due to formal equality. | No |

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| | | |
|---|--|--|
| <p>prohibition of pregnancy or marital dismissal; right to paid maternity leave with protection of employment (right to return and preservation of terms and conditions); state provision of support to facilitate gender-free work/family reconciliation including childcare; protection of health and safety of pregnant workers.</p> | | |
| <p>Art 12: Non-discrimination in health care including family planning and rights to free pregnancy and post-natal care –</p> | <p>Realised in Scots law but improvements in abortion services needed.</p> | <p>Yes</p> |
| <p>Art 13: Non-discrimination in family benefits, financial services, participation in recreational and cultural activities.</p> | <p>Partially realised in Scots law and improvement possible with part-devo of social security.</p> | <p>Yes in respect of all but financial services (reserved)</p> |
| <p>Art 14: Non-discrimination for women in rural communities.</p> | <p>Partially realised through Scottish policy rather than law.</p> | <p>Yes</p> |
| <p>Art 15: Legal equality in civil matters, e.g. legal status, capacity to form contracts and to own and administer property, right of equal access to legal procedures, equal rights to freedom of movement.</p> | <p>Realised in UK / Scots / EU law but improvements needed.</p> | <p>Yes – except free movement.</p> |

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