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RESPONSE FROM THE FACULTY OF ADVOCATES

to the

HUMAN RIGHTS BILL FOR SCOTLAND CONSULTATION

Introduction

The Faculty of Advocates welcomes the opportunity to respond to this consultation. Faculty does not, in general, proffer views on questions of political policy. There is not a consensus among members of Faculty as to the benefits of incorporation of the relevant international treaties in securing the realisation of economic, social and other rights. However, given the clear direction of travel set out by Government, we will respond to those questions in the consultation where we consider Faculty's input may assist.

PART 4: INCORPORATING TREATY RIGHTS

Question 1

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

We note that section 10 of the South African Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. That is one mechanism for bringing dignity to the forefront of the court's consideration. What is proposed here is not a "right to dignity" but rather a benchmark or principle against which the courts are to interpret other rights. Scottish courts are already familiar with the concept of dignity through the interpretation and application of Articles 2, 3 and 8 of the European Convention on Human Rights (ECHR). A recent example of the approach the courts may take in a different context is found in *Secretary of State for Work and Pensions v AT* [2023] 3 CMLR 2. There, the court held that the Secretary of State for Work and Pensions was obliged to act compatibly with the applicant's rights under the Charter of Fundamental Rights of the European Union, and to carry out an individualised assessment of whether the refusal of universal credit would leave her unable to live in dignified conditions. We do not, therefore, think that referencing dignity in the Bill is problematic provided its meaning is clear.

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Question 2

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

We have no difficulty in principle with using dignity as a key threshold. However, in the absence of a draft Bill, we are unclear as to how it is intended the legislation will work. If dignity is an interpretative tool for the rights in the Bill, what role does dignity have in the expression of minimum core obligations? And vice versa – if dignity is part of the minimum core obligations, why is its inclusion as an interpretative principle necessary? It is also unclear from the consultation document whether the concept of dignity as a key threshold for MCOs is intended to be a collective consideration (for example, the dignity of users of the health service), or whether it is intended that the MCOs will guarantee dignity for an individual service user (which may be more burdensome on the duty-bearer).

Question 3

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

We are in favour of the Bill including in an interpretative provision the potential sources of law or other guidance. However for an effective interpretative provision, consideration needs to be given to three things. First, the nature of the interpretative obligation should be specified. The government should consider whether the court 'must' have regard or 'may' have regard to particular categories of material, perhaps depending on their status in international law. Second, the government should consider whether more specification is needed as to the sources to which a court is to or may have regard. The term "international law, materials and mechanisms" used in the consultation paper is arguably too vague, particularly in the context where different treaty bodies may interpret the same right differently, depending on the context. If the intention is to have the courts consider specific types of material in relation to a particular right or set of rights, it may be helpful to set them out (such as General Comments on a specified treaty, Concluding Observations of specific UN Treaty Monitoring bodies etc). We do note, however, that this may prove cumbersome and, in the context of the non-treaty rights, such as the right to a healthy environment, it will be very difficult to specify potentially relevant sources of law. Reference to "other mechanisms at the international or regional level" is unclear but we observe that courts can and do engage in comparative law analysis including with regional

and international courts' jurisprudence where relevant. The third issue to consider is how the courts are to interpret a right in circumstances where it is possible that the Minimum Core Obligation as ultimately defined under Scots law differs from the MCO internationally under the originating treaty.

Question 4

What are your views on the proposed model of incorporation?

We agree that the proposed model of incorporation (by replicating the treaty text in so far as relating to devolved areas) is sensible. This will assist in making the interpretative provision easier to apply as there will be a direct connection between the text of the domestic right and the originating treaty along with the sources interpreting or applying it.

Question 5

Are there any rights in the equality treaties which you think should be treated differently? If so, please identify these, explain why and how this could be achieved.

The incorporation of CEDAW, ICERD and UNCRPD in the context of the progressive realisation of economic and social rights with the maximum available resources may give rise to a conflict of rights, or at least competition as between different groups of rights holders. The proposal set out that the provisions in the equality treaties inform the interpretation of the core ICESCR rights and the right to a healthy environment for those groups will assist in minimising such a competition. Treating some rights as "stand alone" arguably runs contrary to that approach. We express no view as to whether any specific rights should be treated differently beyond welcoming the indication in the consultation paper that the government is continuing to give consideration as to how best to deal with the equality treaties while delivering a coherent and workable overall framework.

PART 5: RECOGNISING THE RIGHT TO A HEALTHY ENVIRONMENT

Question 6

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

Environment is, generally, a devolved area. But depending on how 'the environment' is defined, tensions could arise with the right to a healthy environment in the context of reserved/devolved issues and other legislative frameworks which concern the environment, such as climate change legislation.

The consultation paper states that consideration is being given as to whether to draw on the definition used in the Aarhus Convention. 'The environment' is not defined within the Convention. However, "environmental information" is defined (Article 2(3)). It includes "[f]actors, such as substances, energy, noise and radiation…". Annex 1 to the Convention lists activities relevant to Article 6(1)(a). These include matters related to the oil and gas, and nuclear, sectors.

Energy, which includes electricity, oil and gas, nuclear energy, and energy conservation, is a reserved matter under the Scotland Act 1998 (Schedule 5, Part II, Head D). Further, it is possible that the environment as it extends to "air, atmosphere, water, soil, land, landscape and natural sites" (mentioned in Article 2(3)(a) of Aarhus) could be adversely affected by certain reserved matters, such as energy policy.

Depending on how the text of the Bill is drafted, the right to a healthy environment could be engaged in relation to reserved matters. Careful attention should, therefore, be given as to whether, or to what extent, the definition within Aarhus should be adopted. Aside from a potential competence challenge, the risk is that it could result in a breach of duty by a duty-bearer even though the causative factor relates to a reserved matter over which the duty-bearer has no responsibility or control. If such a definition is adopted, care should be taken to ensure that a duty-bearer should not be found liable for a breach of the right in respect of a matter over which it has no responsibility or control. In that context, we note the 'defence' set out in section 6(2)(a) of the Human Rights Act 1998, that the duty-bearer could not act differently as a consequence of primary legislation. That provides a useful model for a similar protection within this Bill.

Question 8

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

If the right to a healthy environment is to be recognised and given proper effect, both substantive and procedural rights will be needed. In respect of the substantive aspects of the right, consideration should be given to making clear that the obligation in respect of these rights (e.g. the right to clean air) is one of progressive realisation. In other words that duty-bearers must take continual steps towards fulfilment of these rights applying the maximum available resources. In relation to the procedural aspects, these are essential to enable individuals to claim their rights as well as to hold duty-bearers to account and we agree with the proposed list of procedural aspects set out in Part 5.

PART 6: INCORPORATING FUTHER RIGHTS AND EMBEDDING EQUALITY

Question 12

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

While we recognise the ambition to state all rights belonging to the people of Scotland in one place, as the consultation document recognises, there is a significant risk in rehearsing civil and political rights within the proposed Bill. Regardless of whether simply stating the rights in the new Bill would in and of itself attract a legal challenge, the new Bill can have no effect on the application or interpretation of those rights which are incorporated under the Human Rights Act 1998. Rather than providing clarity as to rights, a re-statement of civil and political rights may give rise to confusion for rights-holders as to the governing statute, the legal test to be applied, standing and available remedies. In our view, it is already clear from the devolution settlement that the civil and political rights guaranteed under the European Convention on Human Rights form a core pillar of human rights law in Scotland.

Question 14

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What are your views on the proposed approach to including an equality provision to ensure everyone is able to access rights in the Bill?

We welcome any attempts to ensure that the rights in the Bill are easily and equally accessible to everyone and that everyone is equally protected. There is concern that an equality provision may give rise to an issue of legislative competence as a result of the reserved rights contained within the Equality Act 2010 framework. But if such a provision can be framed so as to be within competence, we are in favour.

Question 15

How do you think we should define the groups protected by the equality provision?

Article 14 of ECHR enshrines the right not to be discriminated against in the enjoyment of the rights and freedoms set out in the Convention. It is therefore an attractive model for this proposed Bill.

The purpose and effect of the Equality Act 2010 is different (i.e. to prohibit discrimination as such). Nonetheless, it is important to note the material difference between the "protected characteristics" of the Equality Act and the various types of "status" set out in Article 14 of ECHR (or Article 2 of ICESCR).

Should a situation arise where an individual's circumstances engaged both the protections that are accessed via the UK regime through the Equality Act and the rights accessed via the devolved regime through this Bill, having different definitions of characteristics or status may be problematic. It will certainly lead to complexity. Similarly, where an individual's situation engages their Convention rights via the Human Rights Act 1998 as well as rights under this Bill, any difference between the scope of Article 14 of ECHR and the definitions within this Bill's equality provision may be problematic.

Question 16

Do you agree or disagree that the use of "other status" in the equality provision would sufficiently protect the rights of LGBTI and older people?

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First, there is a broader question around the use of "other status" in the equality provision. The jurisprudence on "other status" in Article 14 extends its scope beyond those characteristics protected by the Equality Act as well as beyond the particular groups (LGBTI and older persons) envisaged by the consultation document or covered by the equality treaties to be incorporated via the Bill. "Other status" has a wide meaning and is not limited to characteristics that are personal in the sense of being inherent or innate. For example, membership of a trade union, military rank, and paternity have been included within "other status". We would suggest that a decision needs to be made as to whether the Bill provides an exhaustive list of characteristics or statuses which are to be covered by the equality provision, or whether the scope of the protection from discrimination is to be capable of extension through interpretation by the courts.

Second, in relation to the specific question of whether 'LGBTI' and 'older people' should be listed as statuses or should fall under the umbrella of "other status", we make the following observations:

The ECtHR has held that Article 14 covers both sexual orientation and gender identity (as they describe it). They are recognised as two distinctive characteristics. It would be appropriate for these to be separately stated if they are to be expressly included. The jurisprudence of the ECtHR recognises that discrimination on grounds of sexual orientation is as serious as that based on race. It is likely that a similar degree of recognition would arise in relation to gender identity. It could be argued that ascribing "other status" to LGBTI people diminishes (not legally, but in the perception of the public) the recognition which such status ought to be afforded when compared with other described groups.

Age – whether young or old – is not expressly included as a status in Article 14. It falls within "other status". Under the Equality Act, age is a protected characteristic and is apt to cover both young people and older people and allows flexibility when comparing the treatment of one age group against another. If age is to be expressly listed as a status, it would not be appropriate to separately recognise "older people". If it is intended to list "older people" as a separate status, it would in our view be wise to define what that (apparently comparative) term means.

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PART 7: THE DUTIES

Question 19

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

We agree with the view expressed in the consultation paper that "the duties should apply, so far as possible, to bodies carrying out devolved public functions" (emphasis added) as it would not be within competence to go beyond this. We note that, in relation to private actors, as a starting point the intention is to mirror the UNCRC Bill's proposed approach, which applies the duties of the Bill to bodies carrying out functions of a public nature, including bodies acting under a contract or other arrangement with a public body. The reference to a 'contract or other arrangement' is not used in the definition of a 'public authority' for the purposes of section 6 of the Human Rights Act 1998, which has been defined by the courts in a number of cases (e.g. *YL v Birmingham City Council* [2008] 1 AC 95). That narrower definition is open to criticism. Whatever approach government decides upon, it should only be after proper consideration is given to potential areas of overlap between duties which might arise under the Bill and duties arising from other legislation, such as the Human Rights Act and the Scotland Act 1998. Confusion may arise from overlap, particularly where there would be two interpretations of 'functions of a public nature', meaning that a body may fall within the definition of 'public authority' under the Bill but not under the Human Rights Act.

Question 20

What is your view of the proposed initial procedural duty intended to embed rights in decision-making?

We consider that it would be sensible to allow a period of time for duty-bearers to ready themselves for the duty of compliance. A balance needs to be struck between affording adequate time for duty-bearers to prepare on the one hand and ensuring timely commencement of the substantive duty on the other. The impact of the Bill will be diminished in the event of an overly long initial compliance period. The consultation paper states that "[t]his duty would focus on ensuring that the rights in the Bill are taken into account by duty-bearers, built into the fabric of their decision-making processes and adequately taken into account in the delivery of services." We presume that, given the context, duty-bearers will not bear civil liability for breach of

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this procedural duty. However, consideration could be given to make clear what consequences, if any, would follow should a duty-bearer fail in its initial procedural duty.

Further, transition between the procedural duty and commencement of the substantive duty is logically described as a "sunrise" clause. It is unclear whether the procedural duty is to be subject to a sunset clause – in other words, whether the procedural duty will subsist beyond the point at which the substantive duty to comply comes into force.

Question 21

What is your view on the proposed duty to comply?

In order for the Bill to have meaningful impact, there must be a duty to comply placed on duty-bearers. Consideration needs to be given to how this duty is framed, including whether it is framed as a general duty applying both to ICESCR rights and the right to a healthy environment, or whether differently framed duties should apply to ICESCR rights on the one hand and the environment on the other. It will also be necessary to consider the consequences for breach of duty and whether, and how, this should be expressly set out in the Bill. We note that is it as yet unclear whether and how the duty to comply will relate to the rights originating from CEDAW, UNCRPD, and ICERD.

Question 25

What are your views on the right to a healthy environment falling under the same duties as economic, social and cultural rights?

It is important to be able to identify who are the duty-bearers for the substantive duty, as well as the content of the obligations upon them. For the right to a healthy environment, this may be more complex than for ICESCR based rights. It strikes us that the environment cuts across sectors and potentially across different public bodies.

PART 8: ACCESS TO JUSTICE FOR RIGHTS HOLDERS

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Question 28

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

Any steps which enhance the human rights knowledge and capacity of front-line complaints handling mechanisms are to be welcomed. To effect real culture change, it is essential that those who handle complaints made to and about duty-bearers recognise when an individual's rights are engaged, whether or not the complaint is framed by reference to a specific right. The proposal to empower SPSO to issue a declaration of non-compliance with updated procedures will assist in holding duty bearers to account. However, we note the consultation document is silent as to any consequences for a failure to take steps towards compliance.

Question 29

What are your views in relation to our proposed changes to the Scottish Public Service Ombudsman's remit?

We welcome any changes that make it easier for a rights holder to access remedies, such as permitting SPSO to receive oral complaints. The consultation document states that further consideration is being given to a number of matters. In relation to possible expansion of the 'own initiative' investigation powers of SPSO, we would simply note that it is important that there is clarity as to roles as between SPSO and SHRC, particularly where systemic issues require investigation. The consultation documents notes that further consideration is to be given to the interaction of SPSO complaints processes with court routes to remedy such as judicial review (on which, see: *McCue's Guardian v Glasgow City Council* 2021 SC 107). We welcome that. It is important that access to justice and remedies is enhanced rather than hampered by any proposed changes.

Question 30

What are your views on our proposals in relation to scrutiny bodies?

Additional scrutiny of duty bearers' fulfilment of their obligations is to be encouraged. Accountability is a fundamental part of a human rights-based approach. Any steps which assist in identifying systemic issues enabling them to be properly investigated and addressed are welcomed.

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Question 31

What are your views on additional powers for the Scottish Human Rights Commission?

We welcome to the proposals to increase the powers of the SHRC to investigate systemic issues and bring civil proceedings under the Bill. This should help advance the fulfilment of rights and increase accountability of duty bearers. It is important if such additional powers are enacted that the SHRC is able to exercise them effectively. It appears to us that a significant increase in the resources of the SHRC would be necessary.

Question 32

What are your views on potentially mirroring these powers for the Children and Young People's Commissioner Scotland where needed?

We have no view but would observe that if powers are mirrored, there should be a statutory requirement for the Commissioner to enter into a Memorandum of Understanding with SHRC to avoid duplication of work and identify who takes priority in areas of common interest.

Question 33

What are your views on our proposed approach to standing under the Human Rights Bill? Please explain

We see the utility in group interventions for various reasons, including economy of scale as well as the understanding that individuals affected can find litigation too onerous, or they can find it hard to access legal assistance. Legal aid is not always available for such actions. We note that the consultation makes oblique reference to legal aid reform but provides no detail at all. Permitting groups, whether funded by legal aid or self-funded, to assert rights is in our view important.

The Courts have developed jurisprudence on the meaning of sufficient interest through judicial review cases. It is important that government considers that jurisprudence in order to determine whether the scope of 'sufficient interest' as

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presently applied is apt to cover those groups or third sector organisations to whom it is intended to open up a right of action to address systemic issues.

The case of *AXA v Advocate General* 2012 SC (UKSC) 122 is instructive on standing in relation to Convention rights (under Article 34 of ECHR, 'victim' status is needed). In that context, the Court decided that it was sufficient to show that a natural or legal person was a member of a class whose Convention rights could be directly affected by the impugned measure. 'Directly affected' is the key phrase.

In *Christian Institute v Lord Advocate*, at first instance the court held that the groups involved had no standing. The Inner House concluded, applying the AXA approach, that they did have sufficient interest to mount a challenge on EU law grounds (they had conceded they were not 'victims' in relation to the Convention) having a "genuine interest in family matters" (2016 SC 47, paras 41-43).

It may therefore be considered that the sufficient interest test, as developed by the courts to date, will be adequate to permit group actions and representative bodies to raise proceedings.

Question 34

What should the approach be to assessing reasonableness under the Human Rights Bill?

The 'traditional' factors noted in the consultation document that are currently taken into account in judicial reviews can be a useful touchstone for whether a decision was reasonable. But we agree that the Wednesbury test is a high bar. Nonetheless we also note that there are advantages to the test. It recognises that the government/local authority which is entrusted with making a decision is a body which has knowledge and expertise and is therefore well placed to make the decision. As such it should be a high bar to interfere. The Wednesbury test was designed so as to avoid the court becoming the primary decision maker. It avoids a merits-based review by the court.

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We also have experience of the proportionality test working well in human rights cases. The proportionality test asks the decision maker to take account of all the relevant circumstances, which can be an attractive approach to rights-based problems.

It may be thought that stepping away from the Wednesbury test will provide more effective access to the rights in the Bill by lowering the threshold in the test for reasonableness. We recognise that in order for a right to mean something it needs to be practical and effective so the definition should achieve that. We recognise the need to take account of government resources in this context, but also that there needs to be a remedy that is realistic and can be accessed: arguably the traditional Wednesbury approach to reasonableness would make it harder to vindicate economic and social rights. We would therefore favour a proportionality test.

Question 35

Do you agree or disagree that existing judicial remedies are sufficient in delivering effective remedy for rights holders?

While the existing judicial remedies offer a suite of options that can provide effect remedies, we would encourage the consideration of additional remedies if they would support the effective enforcement of rights on an on-going basis.

Question 36

If you do not agree that existing judicial remedies are sufficient in delivering effective remedy for rights holders, what additional remedies would help do this?

We are interested in the idea of structural remedies to assist with systemic problems in particular. Structural interdicts could be explored which might afford a useful additional remedy provided it could sit comfortably with existing judicial remedies. We would encourage an emphasis on a suite of remedies that are effective (see for example, the practice in Colombia, where since 1997 the Colombian Constitutional Court has handed down structural remedies in relation to the social security system, prison overcrowding, and failures in the health care system).

We would commend consideration of structural remedies that would allow for a more effective route by which the state might assist individuals in enforcing rights.

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In this context we note the progressive approach taken by the South African courts following the *Grootboom* case, which amongst other things ensured that rights are not seen in isolation of each other, but rather, mutually supportive. The use of additional government agencies beyond the courts can support remedies and implementation of solutions to systemic problems, possibility under the supervision of the court.

Question 37

What are your views on the most appropriate remedy in the event a court finds legislation incompatible with the rights in the Bill?

We do not have a concluded view on this question. The Scottish courts have experience of two models – the declaration of incompatibility under the Human Rights Act 1998, whereby the legislation remains in force unless and until the UK Parliament decides to change it; and the 'strike down' power under the Scotland Act 1998, whereby the result of a declaration is that the Act of the Scottish Parliament is 'not law'. There is a view that section 4 of the Human Rights Act produces an absurd result – that law remains in force which is incompatible with fundamental rights. However, there is also a view that, economic and social rights present a different situation. Unlike civil and political rights (some of which are absolute), the obligations in respect of economic and social rights involve progressive realisation applying the maximum available resources. In that context, there is an argument that the decision as to whether the law remains in force or is amended or repealed ought to rest with the Parliament. Regardless of whether the Bill includes a strike down power or a simple declaration of incompatibility, it should contain a provision which enables a period of time for the Parliament to consider the ruling and remedy the problem before the declaration or strike down takes effect.

Question 38

What are your views on our proposal for bringing the legislation into force?

We do not consider there is any legal difficulty in the proposal to commence an initial procedural duty first, followed by a duty of compliance at a later date. Consideration should be given to whether the date for the commencement of the duty of compliance is fixed in the Bill or is to be left to secondary legislation. There is a risk to the realisation of rights in not setting an outer time limit for commencement of the duty

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of compliance in the primary legislation (even if the precise date of commencement is left to secondary legislation).

Question 41

What are your views on enhancing the assessment and scrutiny of legislation introduced to the Scottish Parliament in relation to the rights in the Human Rights Bill?

Pre-legislative scrutiny is a valuable tool in the protection of human rights. The current procedure under the Scotland Act 1998 does not require any explanation to be set out as to why a Bill is said to be incompatible with the ECHR. A more transparent certification system involving publication of the analysis would be of benefit as it will enable parliamentarians as well as the public to better understand their rights and how they are (or are not) being protected and fulfilled. In the context of the progressive realisation of economic and social rights, we would welcome an approach to pre-legislative scrutiny that requires consideration of whether the particular legislation goes far enough in advancing the fulfilment of rights, as opposed to considering only whether it reaches the minimum threshold to avoid a breach of rights.

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