**A Human Rights Bill for Scotland: consultation – SAMH response**
**October 2023**

**Introduction**

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises everyone’s right to the “enjoyment of the highest attainable standard of physical and mental health”. Mental health is a human rights issue.

Our mission is to lead by example; to be innovative, purposeful and challenging in all that we do. We campaign for rights and rights-based services, challenging stigma and discrimination and promoting inclusion. We work to raise the aspirations and expectations of people who use services, people who deliver services and society as a whole. We aim to promote mental health and wellbeing within community and corporate life.

We therefore welcome the Scottish Government’s plans to incorporate ICESCR and three other international human rights treaties – the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and the Convention on the Rights of Persons with Disabilities (CRPD) – into Scots law.

This document is our response to the [Scottish Government’s consultation on proposals for a Human Rights Bill](https://www.gov.scot/publications/human-rights-bill-scotland-consultation/), which would achieve this incorporation. We have added this introduction and a short summary of our response to the Scottish Government, which we hope makes it easier to read and understand.

**Summary**

Dignity is one of our organisational values and we agree that dignity should be a foundational principal in the Bill. Courts should be expected, or even required, to consider dignity when interpreting rights.

We broadly agree with the proposed model of incorporation. Direct incorporation will enable us to maintain the link with international human rights law. It will be essential that the drafting of this Bill takes into account reform to mental health and capacity law as a consequence of the Scott Review.

We welcome the Government’s intention to incorporate CERD, CEDAW and CRPD into law and recognise the challenges arising from the need to ensure incorporation is lawful and navigates the equal opportunities reservation. We believe the Scottish Government should seek to attach a duty to comply to those rights in CRPD, such as article 19 on independent living, which offer specific protections – beyond rights included in ICESCR – to disabled people, including people living with mental health problems.

Given the significance of our physical environments for mental health and wellbeing, we are strongly supportive of efforts to ensure that all people in Scotland live in a healthy environment.

Participation is central to a human rights-based approach. We agree with the need to explicitly embed the requirement for participation, which must be meaningful and not merely consultative, into the Bill. Disabled people can face additional challenges to realising their rights and can be at greater risk of having their rights breached. The participation of disabled people, including people experiencing mental health problems, in decisions that affect them is therefore all the more important.

Disabled people are not explicitly listed in the non-discrimination provision in either ECHR or ICESCR. While the proposals seek to incorporate CRPD, we nevertheless believe it is desirable to have “disability” specifically listed in the Bill’s equality provision. This would provide certainty for disabled people that they are included with respect to ICESCR and environmental provisions and would align with the Equality Act 2010.

We agree that duties should apply, as far as possible, to bodies carrying out public functions. This should include private actors carrying out public functions. We also agree with the proposed general approach to stagger implementation of the Bill, including the need for an initial procedural duty for duty holders ahead of a duty to comply. The time period between the initial procedural duty coming into force and the duty to comply becoming operational should be time-limited. This should be no more than two years and set out on the face of the Bill. The procedural duty should be a duty to have ‘due regard’. We strongly agree that a duty to comply is necessary to ensure rights proposed for incorporation are realised in practice and enforceable. Retaining both duties will make clear to duty-bearers that they have ongoing obligations in regard to both process and decision-making, and outcomes.

The Scottish Government should work with stakeholders (including existing regulatory bodies such as the Care Inspectorate) and importantly people with lived experience to co-produce the monitoring and reporting framework and obligations arising from the legislation. Aligning reporting duties arising from this legislation with existing reporting obligations would be a proportionate approach.

We support the proposed duty to publish a Human Rights Scheme. The scheme should be laid before parliament and debated on a regular basis, and should as far as possible be co-produced with rights-holders and stakeholders. We also think it is important that the duty to report on the scheme covers not just actions taken but the impacts and outcomes of those actions.

Advocacy is an essential element of the realisation of human rights. We absolutely support any intention to further expand access to advocacy through this Bill, but observe that current duties to provide advocacy are yet to deliver on legislative ambition. Any new advocacy provision relating to this Bill, and compliance with existing duties to provide access to advocacy, will require substantial investment.

We agree with the proposed changes to the Scottish Public Service Ombudsman (SPSO). In particular, we welcome proposals to widen the means by which the SPSO can receive complaints, which will make engagement more accessible for people with mental health problems. We also suggest that there should be an explicit ‘no wrong door’ approach to complaints, where if a person has complained to a scrutiny or other public body, but that body is not the one relevant to that complaint, the body complained to should identify which body is appropriate and pass the complaint on. Regulatory and scrutiny powers commensurate with the scope and ambition of the proposals will be necessary if those ambitions are to be realised.

We agree that widening standing in relation to the proposed Bill would have a positive effect, by widening access to justice. Individual and collective advocacy organisations should be able to bring court action in relation to human rights breaches.

It should be as straightforward as possible for people with mental health problems to claim their rights and seek redress. There should be consistency across domestic human rights incorporation legislation and therefore the Bill should adopt the proportionality test of the Human Rights Act 1998. It will also be essential for judges and the Scottish Courts and Tribunal Service to consider issues of stigma and unconscious bias in relation to mental health and court processes and decisions.

We broadly agree with the proposals for a Human Rights Scheme and legislative scrutiny and believe that a participatory process will be key to establishing Minimum Core Obligations. We support proposals for capacity-building programmes for both duty-bearers and rights holders. Monitoring and reporting should be focused wherever possible on outcomes, rather than processes or actions.

**Consultation questions**

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

Dignity is one of our organisational values. We believe that everyone has the right to be treated with dignity, respect and equality. This is the basis on which we work with others, in order to support them holistically as human beings with complex and nuanced lives.

We agree that dignity should be a foundational principle, and key to both courts’ reading of the legislation and in defining minimum core obligations. However, we consider that the commitment to dignity could be stronger; rather than simply allowing courts to consider issues of dignity, there could be a stronger expectation of ‘should’ or even ‘must’. That is, courts would be expected, or even required, to consider dignity when interpreting rights under this Bill.

We firmly believe that treating people with dignity, including in relation to public service delivery and judicial proceedings, will positively impact on mental health and wellbeing.

**2. What are your views on our proposal to allow for dignity to be a key threshold for defining the content of minimum core obligations (MCOs)?**

As above, we agree that dignity should be a foundational principle, and key to both courts’ reading of the legislation and in defining minimum core obligations.

We firmly believe that treating people with dignity, including in relation to public service delivery and judicial proceedings, will positively impact on mental health and wellbeing.

**4. What are your views on the proposed model of incorporation?**

We broadly agree with the proposed model of incorporation. Direct incorporation will enable us to maintain the link with international human rights law. We do have views on the proposed duties which we address in answers to subsequent questions.

It is also important to note the ongoing process in relation to the recommendations from the Scott Review of mental health law, to which we contributed. The Scottish Government estimates that responding in full to the Review’s recommendations could take up to ten years, which means this Bill is likely to conclude its legislative process well in advance. It is therefore essential that the drafting of this Bill takes into account, and leaves open the possibility of, substantial reform to mental health and capacity law.

Existing mental health law enables the lawful restriction of some people with mental health problems’ right to liberty. As the Scottish Government will know, there is dispute at the UN level regarding the so-called ‘Geneva impasse’ and whether such detention is permissible under the CRPD. It will be essential that the interaction between this Bill and future legislative reform maximises the rights of people with mental health problems, and we hope that the Scottish Government will be able to address and at least recognise this need in its proposals for this Bill.

**5. Are there any rights in the equality treaties which you think should be treated differently?**

In regard to the so-called equality treaties, our remarks relate principally to the CRPD though we also strongly welcome the Scottish Government’s intention to incorporate CEDAW and CERD.

We warmly welcome the Government’s intention to incorporate the CRPD into law and we recognise the real challenges arising from the need to ensure incorporation is lawful and navigates the equal opportunities reservation.

We believe – where possible and lawful – the Scottish Government should seek to attach a duty to comply to those rights in CRPD which offer specific protections – beyond rights included in ICESCR – to disabled people, including people living with mental health problems. This would ensure that people whose rights under CRPD are breached (in relation to devolved functions, such as health and social care) have access to recourse, including judicial remedy.

Article 19 (“Living independently and being included in the community”) is of particular relevance and should have a duty to comply. We believe action to support people to maximise independence and live fulfilling, dignified lives within their community should be the cornerstone of health and social care. But we know that long-standing structural problems, including the lack of easily accessible mental health care and support in the community, represent real barriers to independent living.

Persistent delayed discharge from psychiatric hospital settings is one example of where the right to independent living is yet to be realised. The 2022 Mental Health & Learning Disability Inpatient Bed Census showed that 10% of patients were experiencing a delayed discharge, with an average (median) length of delay of over two months.[[1]](#footnote-1) Other structural issues related to the mental health system include the lack of appropriate specialist community mental health care support resulting in people being stuck within conditions of excessive security in psychiatric in-patient settings. There are instances where people cannot move to community or low secure settings due to a lack of beds in lower secure wards and too few places available in community support services.[[2]](#footnote-2) We believe the incorporation of article 19 of CRPD, with a duty to comply, would provide an essential framework for tackling these and other long-term barriers to independent living and appropriate community support.

Beyond article 19, we believe the Scottish Government should explore attaching a duty to comply to other substantive CRPD rights including article 9 (accessibility), article 17 (protecting integrity of the person), article 20 (personal mobility), and article 26 (habilitation and rehabilitation). How this can be achieved in practice should be discussed with disabled people and relevant stakeholders.

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

We agree with the Scottish Government’s proposed basis for defining the environment. In particular, we support and draw attention to the Aarhus Convention’s Preamble and Objective (article 1) which makes explicit the connection between the proposed right and health and wellbeing:

* “Recognising that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.”
* “Recognising also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”
* “In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

Using the Aarhus Convention as the basis for a new right to a healthy environment would make clear the inextricable link between the right to a healthy environment and the ability to realise and enjoy other human rights, such as the ICESCR article 12 right to the highest attainable standard of physical and mental health. The physical environments in which we live and work – and our relationship to these environments – form part of the wider context of our lives. As such, they have significant impact on our mental health and wellbeing. This is something we have recognised in our work for over 30 years through our therapeutic horticulture services and we strongly agree this should be acknowledged and protected by law.

The inclusion of the above would also make clear the obligation that individuals and duty-bearers have in protecting our environment for the health and wellbeing of future generations. While the burden of, and anxiety relating to, environmental harm does not sit solely with children and young people, it is disproportionately felt by them. A 2021 study on anxiety and the climate emergency, which polled 10,000 young people aged 16-25 in ten countries, including the UK, found that sixty percent of respondents were very or extremely worried about the climate crisis, while three-quarters agreed with the statement that “the future is frightening”.[[3]](#footnote-3)

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

Given the significance of our physical environments for mental health and wellbeing, we are strongly supportive of efforts to ensure that all people in Scotland live in a healthy environment.

We therefore welcome the formulation of substantive aspects of the right to a healthy environment to include clean air, safe climate, safe and sufficient water, non-toxic environments, and healthy biodiversity and ecosystems.

Continued climate breakdown adversely effects many of the social determinants of mental wellness. For example, mental health impacts can be direct (from changes in our climate itself like flooding and heat), indirect (through feelings of anxiety or fear of the effects of climate change), and societal (occurring through weakened infrastructure and less secure food systems). This means that the climate emergency poses significant risk to Scotland’s mental health.

We recognise that this harm will not be felt equally, particularly impacting those in poverty and in certain equality groups. This includes people with severe and enduring mental illness. For example, some psychotropic medications – such as anti-psychotics, anti-depressants and mood stabilisers – can impair the body’s ability to regulate its own temperature.[[4]](#footnote-4) That means that during periods of elevated heat – an overarching impact of the climate emergency – those who take these medications for pre-existing mental health conditions may be vulnerable to heat stress.

The procedural element of the right should enable people experiencing mental health problems to know, recognise and claim their rights with respect to their environment.

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

Participation is central to a human rights-based approach. We agree with the need to explicitly embed the requirement for public participation into the Bill, including in the development of the proposed human rights scheme.

Participation, which must be meaningful and not merely consultative, should be embedded throughout the proposed human rights framework that the proposals seek to create. For example, in relation to the proposed ‘duty to comply’, the Bill should ensure the development of Minimum Core Obligations through a co-production approach. The same principle should apply to monitoring and reporting, both at a national level (through the proposed human rights scheme) and at a duty-bearer level.

We know that people living with mental health problems often face barriers to participating as equal partners, including in decisions around their care and treatment. Findings from our 2020 research into experiences of treatment for depression found that where people were fully involved in decisions about their treatment and support they were more likely to be satisfied with their treatment.[[5]](#footnote-5) Worryingly, over a third of respondents to our survey (36%) were unhappy with their level of involvement, with barriers including a lack of information and choice over treatment options and a lack of understanding from practitioners.[[6]](#footnote-6) Similar barriers exist across health and social care, as well as structural barriers such as the lack of involvement of people with lived experience of mental health problems in health and social care service design, commissioning and procurement. This can result in services designed and commissioned around local budgetary considerations rather than the needs of people who require support. (We note that it is also important for duty-bearers – in this case, service providers – to be more involved with service design and commissioning decisions too.)

For the Bill to be effective it must ensure that participation as a right and principle is embedded across policy-making and practice, including health and social care service design and delivery. Alignment between this Bill and proposals for the National Care Service will be key to ensure proposals such as ethical commissioning are rooted in a genuine human rights-based approach.

To ensure participation is meaningful and systematic, rather than tokenistic or merely consultative, adequate resource must be provided to facilitate a fully accessible co-productive approach. Duty-bearers – for example health and social care providers delivering publicly funded services – must be provided with, and commit, adequate resource to embed participation at all points of service design, delivery and monitoring/evaluation.

Disabled people can face additional challenges to realising their rights and can be at greater risk of having their rights breached. The participation of disabled people, including people experiencing mental health problems, in decisions that affect them is therefore all the more important. In some circumstances, disabled people may require additional support to participate, and this should be recognised in the proposed legislation.

Models of participation that the Scottish Government may wish to consider learning from – particularly in relation to development of the human rights scheme – should include the national Suicide Prevention Lived Experience Panel and the Social Security Experience Panels.

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

We agree that there should be an equality provision which is intended to ensure everyone’s access to rights in the Bill.

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

Disabled people are not explicitly listed in the non-discrimination provision in either ECHR or ICESCR. While the proposals seek to incorporate CRPD, we nevertheless believe that it is still desirable to have “disability” specifically listed in the Bill’s equality provision. This would provide certainty for disabled people that they are included with respect to ICESCR and environmental provisions and would align with the Equality Act 2010.

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

We strongly support a maximalist approach to coverage of the duties in the Bill, in so far as the devolution settlement allows.

We therefore agree with the Scottish Government that duties should apply, as far as possible, to bodies carrying out public functions. This should include private actors carrying out public functions, such as health and social care service providers delivering publicly funded services.

To ensure compliance with any duties in the Bill, commissioned service providers must be resourced appropriately to ensure they have capacity – both staffing and resource – to comply with duties arising from the Bill, including any monitoring and evaluation processes.

It will be imperative that co-produced and accessible guidance is developed for duty-bearers, clearly outlining obligations arising from the duties in the Bill. In line with Taskforce Recommendation 17, guidance should be co-produced with a wide range of duty-bearers, stakeholders and rights-holders. Sector-specific guidance and capacity-building (for example for health and social care) should be developed to ensure contextual understanding and clarity. This should be undertaken through co-production with both duty-bearers working within relevant sectors and rights-holders, such as people in receipt of health and social care services.

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

We agree with the proposed general approach to stagger implementation of the Bill, including the need for an initial procedural duty for duty holders ahead of a duty to comply. To ensure meaningful changes in practice, through embedding a human rights-based approach, duty-bearers will require time to build capacity and change processes in line with rights arising from the incorporated treaties. An initial period where only the procedural duty applies will support this.

Crucially, the time period between the initial procedural duty coming into force and the duty to comply becoming operational should be time-limited. This is to ensure no unnecessary delay in rights-holders being able to realise their rights and seek redress where public bodies and other duty-bearers are not upholding obligations arising from incorporation. We believe this time period should be around 18 months – and certainly no longer than two years – from royal assent and should be set out in primary legislation, through a sunset clause.

The consultation does not specify what type of duty the Scottish Government has in mind for the initial procedural duty. We believe, as suggested by the Taskforce, that this should be a duty to have ‘due regard’. This would require duty-bearers to demonstrate that they have embedded consideration of rights arising from the incorporated treaties into their decision-making processes and practice, including budgetary processes and service design and delivery. The ‘due regard’ duty also has the benefit of already being familiar to public bodies, including through the Equality Act 2010’s Public Sector Equality Duty.

It will be vital that duty-bearers, such as health and social care providers, have access to relevant sector-specific guidance, resources and capacity-building to support genuine embedding of the procedural duty in their practice.

**21. What is your view on the proposed duty to comply?**

We strongly agree that a duty to comply is necessary to ensure rights proposed for incorporation are realised in practice and enforceable. This duty should ensure duty-bearers deliver Minimum Core Obligations and demonstrate progressive realisation of rights.

As set out in our answer to question four we believe the duty to comply should also apply to key rights under the CRPD, including article 19 (the right to independent living).

As set out in our answer to question 20, we recognise that adequate time following the Bill becoming law will be necessary for the Scottish Government, public bodies and other duty-bearers to prepare and change practice to ensure that they are taking a human rights-based approach and delivering on minimum core obligations. It is imperative that there is clarity on this time period, with the period being as short as reasonably possible. This would ensure there is no unnecessary delay for people being able to realise their rights and seek redress where rights are being infringed. We agree with others, including the Scottish Human Rights Consortium,[[7]](#footnote-7) that the period between the implementation of the procedural duty and the duty to comply coming into force should be no more than two years. As recommended by the Taskforce, this time period should be set out on the face of the Bill, though a sunset clause.

The proposals are not clear on whether the intent is for the procedural duty to lapse once the duty to comply is in legal force. We believe both duties should remain in place on a permanent basis, as recommended by the Taskforce. We believe the procedural duty (which should be a due regard duty) and the duty to comply are complementary, and retaining both duties will make clear to duty-bearers that they have ongoing obligations in regard to both process and decision-making, and outcomes.

**22. Do you think certain public authorities should be required to report on what actions they are planning to take, and what actions they have taken, to meet the duties set out in the Bill?**

Yes.

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

Reporting and monitoring of duty-bearers' actions to comply with the legislation and progressively realise rights will be crucial to ensuring positive change and compliance. The Scottish Government should work with stakeholders (including existing regulatory bodies such as the Care Inspectorate) and importantly people with lived experience to co-produce the monitoring and reporting framework and obligations arising from the legislation.

While reporting is key, it should not detract focus or capacity from compliance with the Bill’s other requirements. As such, we believe where possible aligning reporting duties arising from this legislation with existing reporting obligations would be a proportionate approach. In particular, we note proposals elsewhere to allow duty-bearers to have flexibility on their reporting under the PSED specific duties such that it can form part of organisations’ usual business reporting, including annual reports. This approach is logical and could apply here too.

In the context of health and social care, recognition of long-standing workforce and provider pressure is needed, with adequate resource provided to health and social care providers to meaningfully comply with any new reporting and scrutiny duties. Learning from the Covid-19 pandemic should be used when designing reporting duties. During the pandemic, scrutiny of providers from a variety of statutory bodies increased. This often duplicated work for providers and those regulating services. Whether reporting or enforcement powers are maintained or enhanced through the Bill it is crucial that providers subject to these powers are given the necessary direct support and guidance from relevant regulatory bodies.

**24. What are your views on the need to demonstrate compliance with economic, social and cultural rights, as well as the right to a healthy environment, via minimum core obligations (MCOs) and progressive realisation?**

We have set out our overall views in relation to the proposed duty to comply in our answers to questions 20 and 21.

Additionally, we note that article 12 of the ICESCR states that all people should have the right to the highest attainable standard of mental and physical health. The incorporation of ICESCR into Scots law represents an opportunity to explicitly reinforce notions of parity between mental and physical health. We would be keen to work with Scottish Government and others, including people with mental health problems, to develop relevant minimum core obligations and a meaningful concept of progressive realisation.

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

We believe that all substantive rights to be incorporated through the Bill, including the right to a healthy environment, should be subject to the same duties.

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

We support the proposed duty to publish a Human Rights Scheme. The scheme should be laid before parliament and debated on a regular basis, and should as far as possible be co-produced with rights-holders and stakeholders.

We also think it is important that the duty to report on the scheme covers not just actions taken but the impacts and outcomes of those actions.

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

Advocacy is an essential element of the realisation of human rights.

In terms of health and social care, a 2022 Mental Welfare Commission survey of chief officers for health and social care partnerships (HSCPs) found that only 48% had an advocacy planning group covering their area.[[8]](#footnote-8) The same MWC survey found that just over half (58%) had a strategic advocacy plan covering their area, though only 11 out of the 18 plans were up to date.[[9]](#footnote-9) Given this, any statutory footing for collective or individual advocacy will need to be properly resourced with funding that is sustainable in the long term.

It is also worth noting that while all Local Authorities have a duty to provide advocacy with regard to mental illness, learning disability, dementia or personality disorder under the Mental Health (Scotland) Act 2015, very few local authorities have advocacy in place for children and young people.

We absolutely support any intention to further expand access to advocacy through this Bill, but observe that current duties to provide advocacy are yet to deliver on legislative ambition. Any new advocacy provision relating to this Bill, and compliance with existing duties to provide access to advocacy, will require substantial investment.

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

We agree that it will be necessary for duty-bearers to update their complaints-handling mechanisms in light of the Bill, and that a new model template is likely to be helpful. However, duty-bearers will need to have the flexibility (and the knowledge and capacity) to adapt the template to their own circumstances.

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

We agree with the proposed changes to the Scottish Public Service Ombudsman (SPSO). In particular, we welcome proposals to widen the means by which the SPSO can receive complaints. It will be important to be specific about which formats are acceptable. A wide range of clearly-defined formats will improve the accessibility of making complaints to the SPSO. This will make it easier for people with mental health problems, and their families, to engage.

However, we consider that it may be appropriate for the SPSO to designate binding recommendations in some circumstances.

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

We broadly support the proposals in relation to scrutiny bodies.

We also suggest that there should be an explicit ‘no wrong door’ approach, where if a person has complained to a scrutiny or other public body, but that body is not the one relevant to that complaint, the body complained to should identify which body is appropriate and pass the complaint on. This would mean that people do not have to struggle to identify the appropriate body or repeat their complaint multiple times. This type of approach would be in line with proposals for complaints relating to the National Care Service.

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

We do not have a particular view on where these powers should be located, but we agree that regulatory and scrutiny powers commensurate with the scope and ambition of the proposals will be necessary if those ambitions are to be realised. In our view, it will make it easier for people with mental health problems to claim their rights if the relevant powers and mechanisms are concentrated in as few bodies as possible.

It will also be essential that the Scottish Human Rights Commission, if that is where the powers end up, is adequately resourced to meaningfully and robustly deploy its new powers.

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

We would support additions to the role of the Children and Young People’s Commissioner Scotland so long as these are properly resourced and enable creation of a strong rights-based environment for children and young people.

However, we would caution against duplication of roles and powers, so that people – including children and young people – experiencing mental health problems are able to easily understand the roles of different organisations. Clear delineation of remits will be essential.

**33. What are your views on our proposed approach to ‘standing’ under the Human Rights Bill?**

We agree that widening standing in relation to the proposed Bill would have a positive effect, by widening access to justice.

In our submission to the Scott Review we argued that individual and collective advocacy organisations should be able to bring court action in relation to human rights breaches. This was recognised in recommendation 11.25 of the Review. We would like to see this recommendation delivered in relation to this Bill, which we think would increase the likelihood that people with mental health problems’ human rights are respected, protected and fulfilled.

We also take this opportunity to again note that it is essential that the proposals for this Bill are developed with the Scott Review recommendations in mind, to ensure alignment and read-across between these proposals and future reform of mental health and capacity law.

**34. What should the approach be to assessing ‘reasonableness’ under the Human Rights Bill?**

This is not our area of expertise but we believe that it should be as straightforward as possible for people with mental health problems to claim their rights and seek redress. As the proposals recognise, the Wednesbury test of reasonableness sets a very high bar. It seems to us that it would be more appropriate to seek consistency across domestic human rights incorporation legislation and therefore adopt the proportionality test of the Human Rights Act 1998.

It will also be essential for judges and the Scottish Courts and Tribunal Service to consider issues of personal and institutional stigma and unconscious bias in relation to mental health and court processes and decisions. These are not always easy to identify or understand and we believe it would be appropriate for any Bill-related capacity-building programme to incorporate training and development on these issues, for judges and other staff in the courts and broader legal system. It may also be appropriate to offer this to other public and scrutiny bodies in relation to their complaints-handling work.

Addressing stigma is a key element of ensuring that people are treated with dignity, which the proposals suggest will be a key principle for the Bill and the courts could consider when interpreting the law. We are keen to better understand what this would mean for the proportionality test and whether it would be appropriate to explicitly mention dignity in relation to the test.

We would also refer to SeeMe’s response on these issues, which we support.

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

We think it is important to consider a range of possible judicial remedies, although we note that every effort should be made to resolve breaches prior to litigation, which must be a last resort. Again, this is not our area of expertise but we agree with others, including the Human Rights Consortium Scotland, who argue that those bringing cases should be given an opportunity to contribute to thinking on appropriate remedies, and that any compensation should be commensurate with the seriousness of the rights breach.

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

As above at questions 20 and 21, we agree that a bedding-in period where only an initial procedural duty applies would be appropriate, before a duty to comply is added in parallel with the procedural duty. We believe that the procedural duty should be a duty of ‘due regard’, and that the moment when the duty to comply comes into force should be specified on the face of the Bill and be no more than two years from Royal Assent.

**39. What are your views on our proposals to establish minimum core obligations (MCOs) through a participatory process?**

We believe that a participatory process will be key to establishing MCOs and address this above at question 13. We would expect that any participatory process would be designed to be accessible to and inclusive of people with mental health problems. Indeed, it may be appropriate to co-design the participatory process itself.

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

As above at question 26, we support the proposal for a human rights scheme, which should be developed in partnership with stakeholders and rights-holders, including people with mental health problems.

**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?**

We broadly agree with the proposals for legislative scrutiny. In particular, we think it may be useful to specify requirements for things to be included in the statement of compatibility (or in the accompanying policy memorandum), including who the Scottish Government (or relevant Member) has engaged with in preparing the Bill, and how their proposals have changed as a consequence of this engagement.

**42. How can the Scottish Government and partners effectively build capacity across the public sector to ensure the rights in the Bill are delivered?**

The specifics of any capacity-building programme will depend on the shape and detail of the Bill, but we agree that tailored guidance – ideally sector-specific – will be necessary, and that duty-bearers would benefit from support to develop their human rights capacities, and to translate any new duties into their local contexts.

It would also be helpful for the Scottish Government (or the SHRC) to develop resources on how new obligations under the Bill can dovetail with existing obligations, including in relation to the Equality Act 2010 and other regulatory requirements, so that duty-bearers can be helped to build their human rights duties seamlessly and effectively into their ordinary business planning and delivery.

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

We also think there should be a capacity-building programme aimed at rights-holders, enabling them to understand what rights they hold, how they are relevant to their lives, and what they can do and who they can speak to to ensure that their rights are respected, protected and fulfilled.

This may include helping duty-bearers to develop materials that can be shared with their service users, as well as a broader public education campaign. It may also be appropriate to resource the SHRC and other relevant bodies to provide information and advice on the Bill and its implications. This could include sector-specific support, which might for example be tailored for people in receipt of health and social care services, or people with mental health problems.

**44. What are your views on monitoring and reporting?**

Any monitoring and reporting needs to be intersectional, regular, consistent and collect data which is useful, and meaningful enough to enable demonstration of clear evidence of compliance (or non-compliance). In particular, monitoring and reporting should be focused wherever possible on outcomes, rather than processes or actions. It would also be desirable for the information to be publicly available and easily searchable to enable communities, groups and rights-holders to access information themselves.

**About SAMH**

Around since 1923, SAMH is Scotland’s national mental health charity.

Today, we operate over 70 services in communities across Scotland, providing mental health social care support, addictions and employment services, among others. Together with national programme work in See Me, respectme, suicide prevention, and physical activity and sport, these services inform SAMH’s policy and campaign work to influence positive social change.

**For more information**

Please contact publicaffairs@samh.org.uk.

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