

A Human Rights Bill for Scotland
Equality Network Response
Scotland's LGBTI+ Community and Our Human Rights
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1. Introduction:

Lived experience of our unrealised rights

We opened a survey¹ directly in response to the consultation to ensure rights holders were able to meaningfully engage. It was imperative to us that this call from Scottish Government was made accessible to those who are not having their rights realised, from whom we felt would not otherwise be heard due to the inaccessible and complex nature of the Scottish Government's consultation.

We worked to 'translate the consultation' and sought to ask the community about issues pertinent to them in relation to the International Covenant on Economic and Social Rights (ICESCR) and to their right to a Healthy Environment. We wanted to ensure that we were able to take the experiences of the LGBTI+ community and feed them directly into the shaping of this Human Rights Bill for Scotland (the Bill, hereafter) and the implementation work that will follow.

¹ Human Rights and LGBTI+ Experiences in Scotland Today: This survey was launched on the 8th of August and survey data was pulled for analysis on the 11th of September. The survey is available here <https://www.equality-network.org/human-rights-and-lgbti-experiences-in-scotland-today/>. The survey will remain open until we begin partnership work on the implementation phase of this Bill.

The survey featured questions on living environment, access to services and cultural rights, safety and violence, dignity, health, heritage, access to information, and awareness and understanding of human rights. We have had almost 700 useable² responses from the LGBTI+ community to our survey so far.

In addition to this survey, Scottish Trans, the trans specific project of Equality Network, ran a survey from March 2023 – June 2023³ with questions about people’s experiences of their neighbourhood, public services, housing and homelessness, work, and benefits, and the ‘cost-of-living crisis.’ The survey had around 575 responses from trans and non-binary people across Scotland. Although currently unpublished, we have also included data from this survey where relevant.

It is clear from our survey data that LGBTI+ people in Scotland are not having their human rights realised, and many are suffering because of this. We must act to ensure that this improves.

Qualitative data of most significant concern to this response was in relation to Articles 11, 12, and 15 of ICESCR and the right to a healthy living environment, with demonstrable problems in accessing these rights highlighted repeatedly by respondents.

1.1. In relation to Article 11 of ICESCR, adequate standard of living, and the right to a healthy living environment

There are significant issues with housing, living situations, and experiences of one’s neighbourhood for the LGBTI+ community in Scotland.

This includes housing insecurity; ability to access one’s own property (flights of stairs as an example) and dangerous living situations – for example, vermin, unstable housing, damp conditions, collapsed structures, mould, draughts, faulty windows, lack of central heating, cold buildings, the ‘cost-of-living crisis’, and the threat of eviction.

² The survey responses we received had to be cleaned of apparent ‘bot’ responses and some mal intended responses.

³ ‘Trans and Non-binary Experiences Survey’ - <https://www.scottishtrans.org/our-work/research/scottish-trans-and-non-binary-experiences-2023/>

Some examples from our most current survey data demonstrate the threats to Article 11 and the right to a healthy living environment.

We are approaching the right to a healthy living environment in a holistic way, encompassing all living conditions - domestic and neighbourhood, sanitation and safety, and the conditions necessary to allow for human flourishing. In sum, we are considering all aspects of environment that have the potential to be detrimental to one's physical and mental health, and to human dignity:

"I live in a very small cramped one-bedroom housing association flat [...] Overrun by mice [...] I am scared at times to go out or answer my door for fear of abuse"

"My home not being in a fit living state has caused my mental health to drop dramatically in the past and still does to this day causes me emotional distress."

"I used to frequently get ill from the conditions in my home."

"My lung conditions have worsened considerably since moving into the property both from the pollution"

"In winter the damp and cold impacts my health"

"There was a serious mould problem in the flat that started to impact my physical health. The stress of worrying about food and making rent and the constant problems with heating - it was drafty and poorly insulated, and I often slept in multiple sweaters just to get to sleep - were a constant stress. I felt tired all the time and lost about thirty pounds from stress, living there."

"The rise in the cost of living on feeding, for example, leads to inadequate nutrition".

Prior to the launch of this survey, during an event bringing community stakeholders together, we heard of real despair in relation to the rise in the cost of living. Alongside the work of researchers at the University of Stirling⁴ to understand LGBTI+ people's access to welfare and assets and to highlight welfare inequalities faced by the community, it has become

⁴ 'Welfare Access, Assets and Debts Of LGBT+ People In Great Britain': <https://lgbtqwelfare.stir.ac.uk/about-this-project/>

clear that the LGBTI+ community is disproportionately affected by the 'cost-of-living crisis.'

Yet unpublished findings of this research⁵ allude to a disproportionate impact on the community because LGBTI+ people are more likely to be single, more likely to live in the private rented sector, and more likely to be affected by the benefits cap.

The findings of the research have indicated that LGB+ people become significantly more likely than heterosexual people to receive benefits as they get older. Age and disability have a further negative impact on welfare. This research also found that women more commonly received benefits, and a larger proportion of gay men received benefits at higher levels than heterosexual men. This research, through qualitative interviews, found that trans and non-binary people struggled with denied identities in interactions with welfare state administration. Much like in other walks of life, people suffered threat to safety, discrimination, and humiliation within "in real life" benefit environments, and felt access was easier when online during the covid pandemic. It was also found that hyper-masculine and heteronormative work environments made obtaining employment harder.

This initial presentation of the above findings highlighted substantive concerns regarding the LGBTI+ community and financial precarity in the 'cost-of-living crisis.' These included: what was referred to as the 'queer cushion,' a survival mechanism where people were sharing and lending small amounts of cash; fewer support networks, particularly for trans people; some community members turning to survival and sex work; and an inability to be able to afford gender affirming items (for e.g. clothing and aesthetic treatments) or to socialise. For respondents, the current financial crisis presented a need to merely survive, but many had no ability to weather change or sudden expenses, as they had no savings nor any means to save money.

Our survey further evidenced that the 'cost-of-living crisis' is having significant impacts on members of the community. It appears that this is a distinctly intersectional issue, with disabled LGBTI+ people being

⁵ Presented to stakeholders at a Cost of Living and the LGBTI+ community event hosted by Equality Network and LGBT Health and Wellbeing in April 2023.

disproportionately affected. Difficulties in job attainment and job security, financial precarity, unaffordable utilities and rent, and struggles accessing benefits - comes an inevitable impact on living circumstances, access to food, and adequate housing and amenities. This in turn has an impact on both mental and physical health.

Many respondents had experienced homelessness due to their LGBTI+ status, and some were estranged from familial support networks. Some faced homelessness due to domestic abuse:

“When I came out as a lesbian later in life, I left my husband and temporarily had no address of my own. I lived with friends for 8 months: a couple and their two adult children in a 2-bedroom flat. 3 of us slept in the living room together. I did not feel comfortable staying with family members because of difficult family relationships. The friends I stayed with are incredibly supportive and helped me so much at that difficult time.”

On being made homeless: “My abuser was deeply homophobic and transphobic.”

“I felt unable to return to family home and prejudice against my sexuality led to me losing a job, leading to the homelessness.”

23% of respondents to Scottish Trans’ survey⁶ had ever been homeless. Of those who had been homeless, 35% felt that their trans status, history, or gender identity had contributed to their homelessness. Themes that emerged in comments left on this question related to domestic abuse, discrimination from private landlords, and discrimination in the workplace resulting in financial hardship and subsequent homelessness:

“I left an ex-partner because they refused to let me come out, live as or be the true me-after a number of years of that and their violence I couldn't take more so I walked out on everything in the hope I could at least be me”

“Was lodging with a lady that opened my mail revealing my successful Gender Recognition Certificate application. She

⁶ Unpublished findings from the Scottish Trans ‘Trans and Non-binary Experiences Survey’ (2023)

obviously must have read this as I was evicted via e-mail the next day after staying there happily for some months.”

“Around the time I was figuring out my trans identity I had lost a job and home by being physically assaulted during working period though from external antagonists. Subsequently suffered from intense agoraphobia and could not do my current job and became unemployed, homeless, and stuck indoors at a friend's place”⁷

Scottish Trans’ survey also found that 23% of respondents had had problems staying in a property that was rented with a private landlord. An even greater proportion, 38%, had had to stop living with family:

“When I started to transition as a young person, my relationship with my family broke down and I had to move out of my family home, so I was homeless. I stayed in young people's homeless temporary accommodation for two years before getting a housing association rented property.”

“Flatmate wanted me to move out because I came out as trans”.⁸

Thus, access to adequate, safe housing is a clear issue for trans people in Scotland, with their trans status, history or gender identity often having a direct impact.

The most prevalent issues evidenced in relation to Article 11 in Equality Network’s survey data were with regards to the ability to be safe within one’s neighbourhood. Many felt that it was dangerous to be LGBTI+ in neighbourhoods at night, and that there was a heightened risk of experiencing hate crime. It was common to have experienced homophobia, biphobia, and transphobia and / or harassment from neighbours. There was a palpable fear of violence within neighbourhoods felt by a number of respondents:

“Homophobia creeps into neighbourly relations- Previous couple had to leave their house due to insidious aggression, gossiping and direct provocation by our current neighbours”

⁷ Ibid.

⁸ Ibid.

“Harassment from neighbours (bins tipped out onto our driveway, window broken) after a pride flag was put in the window, had to move to another part of town”

“Years ago, I had to sell my flat because of harassment, including stones thrown through my windows and homophobic graffiti on the stair door, as well as verbal attacks in the street. The police were involved, but I felt too unsafe and moved house.”

“I am considering moving to somewhere safer for me because I am trans, disabled, and Jewish, and all of those things lead me to feel unsafe where I currently live.”

“I paid £500 per month for a flat [...] which was really hard to find as an international student. When I got there, it was incredibly poorly maintained, with mould on the walls and a floor that caved in. My flat was vandalized 4 times in a year for having a BLM poster in the window - someone would leave bananas and chicken bones on my doorstep regularly, and the cops did nothing about it. Finally, my girlfriend at the time was physically assaulted in broad daylight in a hate crime within two blocks of my flat.”

“I don't feel safe in my own building at times due to a neighbour downstairs, but outdoors I have faced abuse from violent men in the street after I first moved here. All after 9PM. I've had screaming in my face, and on one occasion someone walked up to me as I was walking home and lifted both fists as if he was going to punch either side of my head.”

“[I experience] harassment every single day living here”

“Within 1 month of moving into our flat someone had spray painted "FAG" onto our door”

“[I] have been harassed on the street for being a lesbian in the past outside my flat”

Scottish Trans' survey found that 22% of people felt that their trans status, history, or gender identity had a negative impact on their experience of their neighbourhood. 29% felt it had both positive and negative impacts, 7% only positive impacts, and the remaining 41% felt it had no impact.

Some of the most common negative themes that trans people mentioned in relation to their neighbourhood were experiencing fear or feeling unsafe, experiencing harassment, abuse and violence, and people staring at them or making comments:

“I've been made homeless multiple times by transphobia so it's always on my mind, together with other forms of discrimination. I feel too afraid to be in public often and sometimes even keep my blinds shut all day.”

“I'm often fearful of going outside, not because it's a bad area just because I don't know how people might react to me.”

“I am not out in my neighbourhood through fear of violence or harassment as this has happened in previous homes.”

“I have been harassed outside of my home, and when walking around my local area. I feel unsafe to go out and will often take longer routes than necessary in order to avoid certain areas where I feel particularly unsafe around the people that live there.”

“I can't walk home at night without having something happen to me. I have been harassed multiple times. I have also experienced it on the subway around these areas.”

“Experience almost daily bigotry directed at me. Feel physically and mentally unsafe.”

“The looks and comments I receive walking down the street makes me feel unwelcome and unsafe. I never received this attention before I was visibly trans.”

For many, the experience of feeling unsafe in one's living environment causes emotional distress and poor mental health. Some participants told us that this also influenced their ability to take physical exercise and to be in nature and in fresh air – further impacting their physical health. This is exacerbated by a lack of access to appropriate, equalities-competent mental health services and support, particularly within rural areas of Scotland. This is further compounded by a lack of safe and inclusive LGBTI+ spaces.

These findings align with those of research by Dr Paul Behrens⁹ in relation to the UN (United Nations) Committee on Economic, Social and Cultural Rights (CESCR) concluding observations relating to LGBTI+ peoples' experiences of violations of their ICESCR rights. The concluding observations noted that state parties have a responsibility to ensure that housing and rental agencies are not engaging in discrimination against LGBTI+ people. They also noted that state parties had an obligation to protect against harassment from neighbours who may be hostile to LGBTI+ people. CESCR has remarked upon efforts to reduce LGBTI+ peoples' disproportionate rates of homelessness.

1.2. In relation to Article 12 ICESCR – the right to health

Issues are experienced as an LGBTI+ person in relation to minority stress, housing conditions, the 'cost-of-living crisis,' a lack of access to appropriate healthcare, and prejudice and discrimination within mainstream health care institutions.

Fear of persecution due to LGBTI+ status has a glaring impact on the community's realisation of the right to health.

One participant to our survey told us that witnessing the community 'being attacked, not just by people but governments too' takes a toll on their mental and physical health. They felt that the 'grief' of this manifests within their body. This is a common presentation of minority stress, currently felt by some in the LGBTI+ community in Scotland.

Another respondent told us that, due to the current 'debate' surrounding trans rights, they experienced panic attacks and physical sickness, while one other said that their anxiety was heightened in public and social spaces, as they felt like they needed to be on alert for transphobic attitudes. This then also impacted on their irritable bowel syndrome (stress and anxiety being a common cause for this condition).

Some respondents reported that they suffered with complex Post-Traumatic Stress Disorder that was related to their identity, discrimination, and abuse.

These concerns were compounded by a fear of health services, and a lack of access to appropriate healthcare, within our survey responses. We

⁹ Paul Behrens, "Selected ICESCR Rights and Their Impact on LGBTI+ Matters", in partnership with Human Rights Consortium and Equality Network (unpublished, 2023).

have highlighted these issues in previous Equality Network reports. There continues to be evidence that mainstream health services still pathologise LGBTI+ identities, show discriminatory heteronormative views towards LGBTI+ people, and have worsening waiting times for adequate, competent care. Many within the community are forced to find, and fund, private healthcare, impacting their financial stability and security.

Respondents told us that being trans affected almost every interaction they had with medical professionals, and that they found this ‘absolutely exhausting and dehumanising.’ One person told us that their medical provider displayed disbelief towards their symptoms and suggested that they were simply due to an ‘anxiety about being gay and/or trans.’ This individual was later confirmed as having a medical condition that had nothing to do with this type of stress. Another respondent told us that an outcome of racial discrimination and discrimination based on sexual orientation resulted in their mental health concerns being taken less seriously. Both examples present a conundrum – on the one hand people are experiencing a dismissal and trivialisation of their physical health complaints based on assumed poor mental health, and on the other, individuals are experiencing a dismissal and trivialisation of their very real mental health concerns, assumed to be a symptom of being LGBTI+. Comments such as these demonstrate that pathologisation of the LGBTI+ community is still prevalent within mainstream medical services and that this can have a detrimental impact on both the physical and mental health of the community and their access to care.

Scottish Trans’ survey found that 27% of people rated the care provided by their GP practice as poor or very poor. People described a lack of knowledge about trans people’s health needs from GPs, and difficulties with being referred to specialist gender identity services or shared care between GPs and these services for their ongoing gender affirming care.

In addition to these survey findings, there is the ongoing crisis within the provision of NHS gender affirming healthcare. Many trans people must wait several years before being able to access even their first appointment with specialist gender identity services.

As well as exceptionally long waits to access services, they are also far too centralised and specialised, which further exacerbates long waiting times. Services over-rely on psychologists and psychiatrists to provide routine, low level appointments that could be just as safely managed by a much wider and more diverse range of healthcare professionals. This

approach to service delivery reflects the continuation of the historic approach to these services, which were designed at a time where trans identities were significantly more pathologised.

A survey that Scottish Trans conducted in 2016 (that informed a Scottish Public Health Network needs assessment of gender identity services) asked about the impacts of such long waiting times and found that:

- 67% experienced poorer mental health
- 62% experienced lower self-esteem
- 58% felt more isolated and excluded
- 30% were less likely to access other services
- 29% self-harmed
- 13% attempted suicide¹⁰

Waiting times have continued to grow in the seven years that have followed, meaning that it is likely that many more people are experiencing the negative effects recorded in 2016.

According to Behrens¹¹, CESCR has called on states to ensure that LGBTI+ people have access to healthcare without discrimination, that healthcare workers who obstruct access should be sanctioned, and that this healthcare must be timely and appropriate. They have called on states to eradicate the concept of some sexual or gender identities being pathologies and have noted with concern the connection between pathologisation and conversion practices. In General Comment 22, at paragraph 23, CESCR has said that regulations ‘requiring that LGBTI persons ‘be “cured” by so-called “treatment,” are a clear violation of their right to sexual and reproductive health.’ CESCR has also called on state parties to carry out awareness campaigns to eliminate stigma and stereotypes about LGBTI+ people among health professionals.

CESCR has further stated that widespread discrimination and hate speech are contributors to elevated levels of depression and suicidality

¹⁰ Rachel Thomson, Jessica Baker, and Julie Arnot, ‘Health Care Needs Assessment of Gender Identity Services’ (Scottish Public Health Network, May 2018), https://www.scotphn.net/wp-content/uploads/2017/04/2018_05_16-HCNA-of-Gender-Identity-Services-1.pdf.

¹¹ Paul Behrens, "Selected ICESCR Rights and Their Impact on LGBTI+ Matters", in partnership with Human Rights Consortium and Equality Network (unpublished, 2023).

among LGBTI+ people and that state parties should work to address these societal root causes.¹²

The Committee has called on state parties to ensure that unnecessary, non-consensual medical procedures are not performed on intersex children or adults¹³, and to ensure that medical professionals are trained on the health needs and human rights of intersex people.¹⁴

Lastly, CESCR has been clear that the pathologisation of transgender identity is a violation of trans people's right to the highest attainable standard of health. CESCR has called for efficient procedures for legal gender recognition, while the UN High Commissioner for Human Rights has called for gender self-identification, and the UN Independent Expert on Prevention of Violence and Discrimination Based on Sexual Orientation and Gender Identity has noted that the procedures required for gender recognition can have additional impacts on other rights.¹⁵ It is interesting to note that the UN High Commissioner for Human Rights also notes that the [legal recognition procedure] should also permit the recognition of non-binary identities, 'by a simple administrative process' and 'give minors access to recognition of their gender identity.'¹⁶

1.3. In relation to Articles 15 ICESCR and cultural access:

Current and historical persecution of LGBTI+ people deeply affect our access to cultural rights. A lack of access to places where we can be assured physical and emotional safety, and experiences of violence, abuse, and trauma within public and social spaces, will of course impact the realisation of these cultural rights for the community. Many feel the

¹² Ibid, 11. And see Concluding Observations Luxembourg (2022), E/C.12/LUX/CO/4, para 37(b); Concluding Observations Czechia (2022), E/C.12/CZE/CO/3, para 39(d); Concluding Observations Denmark (2019), E/C.12/DNK/CO/6, para 65(b).

¹³ CESCR was primarily concerned with the particular issue of operations on children, see Concluding Observations Luxembourg (2022), E/C.12/LUX/CO/4, para 37(b); Concluding Observations Czechia (2022), E/C.12/CZE/CO/3, para 39(d); Concluding Observations Denmark (2019), E/C.12/DNK/CO/6, para 65(b).

¹⁴ Paul Behrens, "Selected ICESCR Rights and Their Impact on LGBTI+ Matters", in partnership with Human Rights Consortium and Equality Network (unpublished, 2023): 11

¹⁵ Ibid.

¹⁶ OHCHR, Living Free and Equal (New York and Geneva 2016), HR/PUB/16/3, at 6.1, 95

need to suppress aspects of themselves to be safer within social, cultural, work, and public spaces. One respondent told us that their ‘daily social and cultural experience of the world is extremely negative due to the persistent invalidating, disrespectful, political, hateful, and dangerous discussion, commentary, and legislation surrounding the rights of people based on their sexuality and gender identity.’ They added; ‘I don't feel safe most of the time.’ One respondent informed us that ‘socially, emotionally and culturally [their] area [was] pretty isolating and lonely.’ they added, ‘there isn't much of an LGBTQIA+ scene’ and ‘it's not very safe here.’

Evidence of this lack of access to cultural rights for the LGBTI+ community in Scotland was widespread within our current survey data. We have included many examples here to show just how vital the need is to comprehend the threat of unrealised access to cultural rights – some of this risk comes from a lack of appropriate inclusive spaces, and some of this comes from the fear of repercussions, due to past lived experience, when accessing public spaces.

“[I] Wasted a year's gym membership when younger because, after an induction evening, a gym member tried to chat me up, and when I mentioned I had a girlfriend he sneered "Well your sort isn't welcome at this gym" and I was too scared to go again.”

“On one occasion, when out for dinner my partner and I experienced verbal abuse from one woman sitting at a table of between 6-10 because we were being affectionate with each other. She said that 'we were disgusting, and lesbians are disgusting' Nobody interfered on their table and both my partner, and I felt overwhelmed and taken back to be able to respond.”

“Disclosing that you are LGBTQ+ these days is basically an invitation for abuse and it's horrible. I have to always check beforehand whether the people around me are safe or if I should expect to have to defend my existence. I experience online harassment frequently, there has been violent comments as well. At my work, I also have to listen to people who are doing everything they can to push LGBTQ+, especially trans people, out of public spaces.”

“Since the hate crimes I have become more frightened of going to activities that aren't queer-centred.”

“I'm terrified of attending events due to being trans and the culture war that has been imposed on us as trans people”

“As I'm new here and recovering from hate crimes and discrimination I'm still very afraid about being involved in large cultural/social events”

“I can feel very self-conscious and worried about certain situations - for example going to the fireworks show each year [...] - I am conscious of not being too affectionate or 'obvious' in that environment - to protect myself and my partner. I would never hold hands. I also would not go to some bars in Inverness without hiding myself.”

“I get a lot [of] looks anytime I leave the boundaries of my street when I'm more fem presenting. I've been called a p*do a few times when walking about outside on my own or to the train station. I don't really go outside that much because I don't have any close proximity friends and there is not really anywhere to go here, it's all just houses and a shopping centre. I always end up looking for trans meetups online and going into the city, the issue is they are always in the evening and the city can be quite unsafe especially at night. You can't really win.”

“I'm very wary about being visibly trans when there are lots of people around, especially if people have been drinking alcohol. I often go in "boy mode" to big events such as concerts for the sake of an easy life. I've been singled out for mockery on public transport so I avoid late buses and tubes, or public transport around large events such as football matches.”

“On meeting myself and my friend for a flat viewing it became clear that the woman was extremely homophobic. She gave us the most fleeting viewing of the flat then told us we didn't "seem right" for it so it would be best if we left. I had booked a double room in a Guest House near Loch Lomond for a holiday with my girlfriend and when we arrived the landlord said he didn't have any "twin bedrooms". When I told him I had intentionally booked a double, he told me he could no longer accommodate us. The look of disgust he gave us will stay with me forever.”

Respondents living in rural Scotland face additional challenges in accessing their cultural rights, as they are forced to travel outwith their own geographical area to access LGBTI+ affirmative, inclusive or LGBTI+ specific safe spaces so that they might access services, support, or social interaction or work:

“There are no specific queer services in my area and the nearest ones are several hours away”

“There could be more accessible LGBTQ+ safe spaces such as libraries, cafes, meeting groups, etc and not just bars which tend to be physically inaccessible. As a sober person, being in a bar socializing sober can be daunting and I would really appreciate more LGBTQ+ cafes, or sober spaces.”

“Not much available here for LGBTQI+ people generally. Plus, lack of decent public transport means you have to drive everywhere, and petrol is expensive, so I have to prioritise”

As mentioned in the previous section of our response, financial mobility was a hindrance too. People were struggling to go out, and to move away from dangerous local living situations.

Respondents to our survey highlighted major concerns with regards to LGBTI+ phobic services. This included cultural, public, and private services such as social services, rental services, interactions with landlords, at hotels, food banks, with adoption services, at hairdressers, and with tradespeople in the home. It also included an inability, due to fear, to attend sporting events, large events, to exercise in public, to go swimming, to go to the cinema, to attend any non-LGBTI+ events, to visit shops, and, alarmingly but not surprisingly, to use public toilets. Additionally flagged were a lack of appropriate spaces for older LGBTI+ people and a lack of appropriate or safe religious spaces for community members. This demonstrates that concerns are felt across a huge array of cultural and social activities presenting significant threat to the realisation of rights, not to mention positive wellbeing.

Of further relevance is access to our LGBTI+ culture and the representation of our lives, and intersectional LGBTI+ historical and

current cultures and identities. There is a current and historical erasure of LGBTI+ identities and lives within cultural narratives.

CESCR has expressed concern about states limiting access to information about LGBTI+ people and discussion of LGBTI+ topics in schools, as well as negative portrayals of LGBTI+ people in textbooks and educational material. They further noted that bullying based on sexual orientation or gender identity poses a barrier to LGBTI+ people's ability to engage with education systems.¹⁷

Looking at the larger international human rights jurisprudence, the European Court of Human Rights has ruled that LGBTI+ rights demonstrations must be protected from violence from private parties. CESCR has issued general comments and concluding observations on states' obligations to ensure the preconditions for participation in cultural life and access to cultural goods.¹⁸

1.4. The LGBTI+ community's cognisance of the realisation of their human rights

This is an important aspect of our data collection which will be explored further when we come to discuss participation and implementation of the new Bill.

Some respondents told us that they had only a vague understanding of what realising their human rights meant in practice, while others had *no* understanding of what this meant. Respondents did not know where to seek out information regarding human rights should they need it. They highlighted that human rights were not taught within the school curriculum and that they faced difficulties in understanding how English and Scottish laws related to one another, or whether Scotland had any powers to improve situations for her citizens. Some felt that they understood the *concept* of human rights, but did not understand if, or how, these applied to their daily life. They said:

“I understand the legislative landscape and the legal protections I should have. This does not always translate into the reality of lived experience”

¹⁷ Behrens, 'Selected ICESCR Rights' (2023), 13.

¹⁸ Ibid.

“I feel as though I know very little of what my human rights are, and how they are upheld.”

“I understand my basic human rights fairly well but the more specific ones and how they intersect with our legal system are more of a mystery to me”

“I am deeply uncertain about whether the same rights from the Human Rights Act are upheld and protected in Scotland and worried that when they are attacked in England it will mean the same for Scotland.”

“I think access to justice and rights is very poor as most people can't afford to see a lawyer. Or fight councils or debt collection companies, there is little sympathy or understanding of issues”

“It is extremely difficult to get any free information about rights, whether it's about employment rights, human rights, or anything else.”

We will discuss this further in relation to the implementation of the Bill.

1.5. In relation to CEDAW, CRPD, and CERD:

It is evident within our survey data (and anecdotally) that LGBTI+ women, LGBTI+ people of colour, disabled LGBTI+ people, and LGBTI+ people of minority faiths, are further stifled in the realisation of their human rights.

“When going to Islamic events, I tend to pretend that I am straight”

“I don't attend enough cultural events etc due to communication issues cos I'm deaf and a BSL user”

“Some Indian festivals and events I don't attend because of being queer”

“I don't feel safe to go certain places within my neighbourhood alone as a female, I have experienced unwanted attention and even been followed by kerb crawlers and men shouting, "how much?"”

“As a woman, I sometimes restrict what I do and where I go because of anxieties about safety.”

“I never feel safe outside on my own at night while I’m somewhere men might be. Always checking over my shoulder like any animal threatened by predators.”

“In the past, I stayed in a property and received racial abuse daily. I lived there for 1 week then had to leave. [Moved] in with my aunty due to how bad it was.”

“My partner and I required access to public transportation. At the time, we were both often using canes. We experienced a hate crime in which they threw tomato paste and shouted slurs at us at the bus stop. They used both disability and queer related slurs.”

“While I was able to rent a flat, I had [a] terrible neighbour who seemed to have a problem with me despite the fact I never did anything wrong, which makes me think they disliked me for my gender and ethnicity; they were abusive and that made me feel unsafe.”

“Local nazi graffiti makes me feel unsafe as a Jew.”

“I think being a woman is where I've probably experienced most hatred and abuse, particularly verbal comments, and threats of sexual assault. These have been pretty common since about the age of 14. This has also combined with being a lesbian on occasion, for example, I've had several incidents where I've been out with my partner at a pub/club etc. and someone has not believed we could possibly be together, or asked to join us as a threesome (mainly cis men) or asked us to kiss and prove it etc. I even had one incident where a man in a club tried to kiss my partner after telling us we couldn't be together - I think these interactions are specific to being a woman + being gay and the mix of the two characteristics”

“I have bipolar disorder & autism and I was homeless for a period after my partner left me when my mental health deteriorated.”

“I think being a migrant worker (though still white, educated, and with some financial support from family) in the UK without

any place in the systems of banking or accommodation was the biggest contributor [to my homelessness].”

Alongside LGBTI+ phobia respondents were clear in their experiences of racism, ableism, and misogyny. Respondents also detailed experiences of apparent hyper-sexualisation, fatphobia, and exclusion due to chronic illness and / or fatigue, and neurodiversity.

It is imperative that the incorporation of these treaties realises the intersectional experiences of marginalised people, and that their rights will be relegated without the full incorporation of all four treaties. It is essential that LGBTI+ people are included within the Equality Clause so that these treaties can be read as applying equally to LGBTI+ people experiencing racism, misogyny, and ableism.

2. Consultation Response Focus:

We will be focusing much of our consultation response on parts 4, 6, and 9 of the consultation. We will also touch on parts 5 and 8.

2.1. Our Focus:

We will address all questions related to:

- Dignity and inherent worth.
- The interpretive clause, and the need for law makers and judiciaries etc to be able to interpret international best practice, jurisprudence, and guidance etc – particularly considering LGBTI+ people being named in no treaty explicitly.
- The Equalities Clause and the necessity for explicit inclusion of LGBTI+ people.
- The importance of LGBTI+ people being named on the face of the Bill (beyond ‘other status’) as well as named and defined in supporting documents and in any statutory guidance or accompanying documents to the Bill;
- The importance of third sector, LGBTI+ sector, and intersectional equalities organisational involvement and participation in the development of, and implementation of the Bill; and

- The value of the Human Rights Scheme in ensuring adequate attention is given to LGBTI+ rights as we progress forwards beyond the drafting of the Bill.

We will reflect others in pushing for extended powers to SHRC and will comment on commissioners and the hope for an LGBTI+ rapporteur to be considered.

We provide a focussed look at LGBTI+ people and their lived experiences / realisation of ICESCR Rights. Here we will reference Dr Paul Behrens' report, as well as our own survey data and analyses of almost 700 LGBTI+ responses gathered throughout the consultation period. We engage where possible with the rights of the CRPD, CERD, and CEDAW in relation to the lived experiences of LGBTI+ people with intersecting identities and the realisation of their rights.

We take a broad approach to the Right to Healthy Environment, which will include living standards and pay, and reference to the social and cultural impacts of the LGBTI+ experience of work, housing, poverty, access to safe housing, and to safe public and private environments. We will use survey responses to highlight the inadequate living situations of many within the community due to a lack of access to other cultural and economic rights.

2.2. Calls and Support

We call for/ support:

- An Equalities Clause that is inclusive of LGBTI+ rights holders
- An Interpretive Clause
- A framework encompassing human dignity
- Increased further powers for the SHRC
- An LGBTI+ Rapporteur within the SHRC
- Explicit reference to LGBTI+ people on the face of the Bill beyond 'other status'
- Explicitly detailing this in any of the Bill's supporting documents.

Alongside Amnesty Scotland, the SHRC, and the HRCS, we hope that the Bill will seek to take a maximalist approach, building upon a human rights

culture for Scotland, bringing Scots Law in line with international human rights standards. These efforts must not be stifled or prevented from developing and growing, ensuring that Scotland ‘establishes a floor, not a ceiling,’ enabling us to keep in step with other progressive countries worldwide.

To do this most effectively, a fully participatory and collaborative process must continue to take shape through implementation, and this must support an intersectional approach. With this, we must see empowerment and access to justice, full accountability, and legal certainty.

As Scotland’s leading LGBTI+ policy charity, we hope for meaningful and effective inclusion of LGBTI+ people, and for proper protections for those whose human rights are not realised due to their sexual orientation, gender identity and/ or I/VSC status. To do this, rights holders and civil society organisations working for the advocacy and protection of marginalised communities must be involved at every step of the way.

3. Our views on key consultation themes

Here we wish to ensure our key messages in relation to the proposed Bill are communicated before we move on to addressing the specific consultation questions.

3.1. Dignity:

Takeaway: The consideration of dignity within the drafting, and implementation, of the Bill is imperative for the LGBTI+ community.

As a marginalised community historically, and presently, often considered and treated as without dignity, the LGBTI+ community has long experienced othering, being treated as inherently wrong and without equal worth, and further dehumanised due to our sexual orientations, gender identities and intersecting aspects of who we are.

As evidenced in our survey data, LGBTI+ people are not treated with dignity. This is particularly stark in health settings. Trans people face extremely long waits to access specialist gender identity services and must then navigate a system that they often tell us they feel pathologises

and scrutinises them, rather than supports them to access the care they need to live happy and healthy lives.

The wider LGBTI+ community faces a lack of access to appropriate healthcare and support leaving them risking dignity without access to care. Some turn to ‘DIY’ mechanisms, treatments, and medicines, and some leave themselves in precarious financial situations whilst they are forced to use little financial means to pay for private healthcare and treatments. One respondent told us, “Due to the several years wait for trans healthcare currently, I’ve been forced to go privately and have had to take out credit card loans to pay the bills alongside medical care.” Some trans people, unable to access gender affirming treatments, face further persecution and ridicule. LGBTI+ people feel vulnerable in medical services where their identities and self are not affirmed, where they are mocked, pathologised, dismissed, and where they face discrimination and prejudice.

As the community is affected by the rise in the cost –of –living, some are looking to alternative means of income and sustenance of income, some feeling their sense of self and dignity is at risk in doing so.

Many within the community are still subjected to humiliation, discrimination, and phobic, racist, misogynistic and ableist judgement (being treated without dignity) in social and public life. This is leaving members of the community facing barriers in accessing and participating in public life. This has a detrimental impact on mental and physical health.

The Academic Advisory Panel Briefing Paper on the underpinning concept of human dignity has stated that the concept of dignity is useful in engaging the lay population with human rights when these concepts can often seem abstract.¹⁹ This holds true for the LGBTI+ community. It is often argued by those outside the community that we have achieved equality due to equal marriage, legal gender recognition, and other advances in formal equality. However, the day-to-day experience of being denied dignity in trying to access services is familiar and salient to many.

¹⁹ Elaine Webster, ‘The Underpinning Concept of “Human Dignity”’ (Academic Advisory Panel to the National Taskforce for Human Rights Leadership, June 2020), 2.

Philosopher Richard D. Mohr, a leading voice in the debate that led to equal marriage becoming a reality in many countries, has long argued that ‘gay oppression is chiefly the denial of gay dignity’.²⁰

Philosopher Chris Cuomo argues that the dignity of LGBTI+ people is not only the freedom to ‘be’ in our identities, but the freedom to act on, and to express ourselves and our identities.²¹ She argues that this ‘doing’ – freedom to act and express – is an affirmation of our identities that is essential to living a life with dignity.

Both Mohr and Cuomo highlight that even when there is formal legal equality, for example decriminalisation of homosexuality, legal gender recognition, and recognition of same-sex relationships in the law – the denial of dignity can remain. There are persistent structural denials of dignity within public, private, and social life; systems not designed to accommodate the LGBTI+ community in an equitable nor dignified way.

Cuomo defines equality as the demand for enough space and enough power to regularly experience both liberty and dignity.²²

Dignity has also been at the heart of some of the most important human rights decisions made that have extended rights to our communities. In the case of *Goodwin v UK*, which resulted in the introduction of legal gender recognition across the UK, the European Court of Human Rights said in their judgement:

“The Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth.”²³

Placing dignity at the heart of this legislation, and having it inform decisions by judges, tribunals, and duty-bearers is a welcome component of this legislation.

The denial of dignity to the LGBTI+ community is not only a matter of philosophy, but a tangible, daily lived experience.

²⁰ Richard D. Mohr and Richard D. Mohr, *The Long Arc of Justice: Lesbian and Gay Marriage, Equality, and Rights* (New York: Columbia University Press, 2005), 77.

²¹ Chris Cuomo, ‘Dignity and the Right to Be Lesbian or Gay’, *Philosophical Studies* 132, no. 1 (19 January 2007): 75–85, <https://doi.org/10.1007/s11098-006-9052-1>.

²² *Ibid*, 85.

²³ *Christine Goodwin v the United Kingdom* App no 28957/95, accessed: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-60596%22%7D>.

A pressing example is the difficulty trans people in Scotland can face in accessing significant numbers of services and economic, social, and cultural rights due to the difficulty and indignity of obtaining a gender recognition certificate (GRC). The UK Government's LGBT survey (2018) found that only 12% of respondents who had begun their transition had a GRC (rising to 39% of those who described themselves as having 'completed' their transition)²⁴. Of those who had not obtained one, only 7% said this was because they did not want to do so. However, the process of obtaining a GRC provides an encapsulation of the difference between formal legal equality and the ability to live fully, openly, and with dignity.

At present, the process of obtaining a GRC requires the recipient to be at least 18 years old, live in what is termed their 'acquired gender' for two years, and submit detailed personal and medical information to a panel of strangers who will determine their legal identity. Quite apart from the indignity of an opaque and bureaucratic process of having their own identity determined by committee, the delays and barriers that have prevented many trans people from receiving legal recognition amount to a denial of their cultural, economic, and social rights.²⁵

It should be noted that non-binary people do not have access to any kind of legal recognition of their gender. As well as no access to legal gender recognition, non-binary people lack access to options on identity documents other than male or female, meaning that they often, even where a birth certificate is not required, must rely upon identity documents that incorrectly describe them as male or female.

One individual told Scottish Trans:

"I would feel far more comfortable if my passport, driver's licence, etc., said my actual gender rather than the one I was assigned at birth. The gender on them currently feels wrong, and I feel like having my real gender on those items would be a big step in making myself and others feel more comfortable

²⁴ 'National LGBT Survey Research Report' (Government Equalities Office, July 2018),

<https://assets.publishing.service.gov.uk/media/5b3b2d1eed915d33e245fbc3/LGBT-survey-research-report.pdf>.

²⁵ Concluding Observations Azerbaijan (2021), E/C.12/AZE/CO/4, para 19(d).

with our identities, and in making sure people in general know about and acknowledge non-binary people.”²⁶

Via a survey Scottish Trans carried out with non-binary people across the UK, we learnt about the impact this lack of recognition had on their daily lives, including accessing services and whilst at work.

We found that 65% of non-binary people felt that services never included them. When we asked respondents what impact this lack of inclusion had, we were told:

- 84% felt that their gender identity was not valid
- 83% felt more isolated or excluded
- 76% had lower self-esteem
- 65% had poorer mental health
- 63% were less likely to access other services.²⁷

Another individual told Scottish Trans;

“I do not feel confident accessing services as a non-binary person. It is an identity which is constantly delegitimised, and because it is not recognised as a valid gender identity by most people, it is very easy to discount. I feel that...disclosing my gender identity is likely to cause discrimination, if not overt than at least covert.”²⁸

A lack of recognition of non-binary people in the law allows for service provision which excludes people who do not identify simply as men or women.

When we asked non-binary people in the UK about their experiences in employment, we were told:

- 90% worried their identity would not be respected
- 88% worried it would make their work environment more difficult

²⁶ Vic Valentine, ‘Non-Binary People’s Experience in the UK’ (Scottish Trans, November 2016), <https://www.scottishtrans.org/wp-content/uploads/2016/11/Non-binary-report.pdf>.

²⁷ Ibid.

²⁸ Ibid.

- 80% felt they had to pass as male or female to be accepted
- 52% had to adhere to gender stereotyped dress codes/uniforms
- 42% had heard that non-binary people were not normal at work.²⁹

Another individual told Scottish Trans that:

“Working in an environment that is not inclusive of non-binary identities is exhausting and damaging to your mental health. You need a lot of support from outside work and strategies to keep yourself going throughout the day. It is hard because not only are you facing discrimination, no one sees it as that because they don't see non-binary as existing.³⁰”

A lack of recognition of non-binary people in the law allows employers not to recognise their non-binary employees, and makes non-binary people feel unable to be open about their identities in the workplace.

Whilst non-binary people have no access to legal recognition to their gender identity, the barriers that exist within the current process to obtain legal gender recognition can have significant impacts across trans communities on their ability to access their cultural, economic, and social rights.

Without access to a GRC, trans people face either hiding their identities, or taking the risk of being outed in educational and work settings, as well as when dealing with government bureaucracies around benefits and pensions. So, while they may have formal legal equality to access these economic and social rights, they cannot do so with dignity.

This can be particularly pronounced for younger trans people in educational settings, who currently have no access to legal gender recognition. Younger people are more likely to rely on a birth certificate as a form of identification, making it more likely that this will out them when, for example, beginning a new college course.

The barriers to obtaining legal gender recognition can cause substantial difficulties for people in claiming and receiving benefits. In Scottish Trans' recent survey, 13% said that they felt their trans status, history, or gender identity had had a negative impact on them claiming benefits, and 7% on

²⁹ Ibid.

³⁰ Ibid.

receiving benefits for which they had already successfully claimed. In large part this was a result of their records being designated as “special customer records” when they had updated their name and title with the Department of Work and Pensions but had not been able to update their sex due to not having a Gender Recognition Certificate. To protect their privacy, their records were restricted so that many staff were unable to access them. This can cause significant delays when querying lack of payments of benefits, or when trying to progress a claim. These impacts are felt disproportionately by disabled trans people, who are more likely to currently be on benefits or to have ever claimed them (66%), than non-disabled trans people (44%).³¹

Another group that is significantly impacted by an inability to access their rights with dignity is older LGBTI+ people, and a key reason we support the inclusion of older people in the Equality Clause as discussed below. While older LGBTI+ people have formal legal equality in access to care, they experience unique forms of abuse in care settings as documented by Compassion in Care’s report *Stripped of Pride*.³² Using the concept of dignity to interpret rights clarifies that older LGBTI+ people’s inability to access their right to care without either hiding their identities or risking abuse constitutes a breach of their rights.

Dignity is, therefore, an essential concept for ensuring true equality in access to human rights for LGBTI+ people and other marginalised groups.

3.2. The Equality Clause:

Takeaway: We support an Equality Provision (Clause) that is explicit in its inclusion of both LGBTI+ people and Older People, and this must be made explicit on the face of the Bill and in any guiding documents.

The taskforce recommendation³³ was that there should be an Equality Clause within the Bill that provides equal access to everyone to the rights in the Bill. The consultation notes that while it proposes incorporating CEDAW, CRPD, and CERD, not all groups are protected by these treaties.

³¹ Data from unpublished Scottish Trans survey, 2023.

³² Eileen Chubb, ‘Stripped of Pride Part 2’ (Compassion in Care, August 2023), <https://compassionincare.com/wp-content/uploads/2023/08/Stripped-of-all-Pride-part-2.pdf>.

³³ ‘National Taskforce for Human Rights Leadership Report’ (National Taskforce for Human Rights, March 2021), 30-31.

The consultation suggests models for an Equality Clause that mirror ICESCR Article 2 or ECHR Article 14, but neither of these models (unlike the Equality Act) include LGBTI+ people. This is problematic.

The consultation document recognises this and is consulting on whether to include LGBTI+ people and Older People specifically within any Equality Provision in the Bill.

We believe that if there is to be an Equality Provision at all, it must include LGBTI+ and Older People. Anything less than full inclusion would seem to be creating a hierarchy of rights where there would be ambiguity as to who has the protection of this Bill. It would also send a message to the LGBTI+ community that the Scottish Government does not see us as a priority for protection or inclusion.

Inclusion on the face of the Bill would also ensure that duty bearers were more likely to consider the ways that meeting their obligations extends to LGBTI+ (and Older) People, despite the lack of a specific treaty relating exclusively to our human rights. This will hopefully result in decision making and actions that protect and progress LGBTI+ people's rights, rather than making invisible our communities and risking leaving us behind.

If an Equality Clause is to be included in the Bill, LGBTI+ people must be explicitly named in it. An Equality Clause that does not specifically name LGBTI+ people would send the unacceptable message that we do not have equal standing in Scottish society. While 'other status' would provide some protection, the LGBTI+ community is a small minority whose needs are often not considered in public policy. Leaving us out of the Equality Clause would further this unequal treatment.

3.3. The Interpretative Clause:

Takeaway: In theory we support the notion of an Interpretative Clause, however we feel we need more clarity on what judicial and international instruments and materials may be interpreted here.

The taskforce recommended³⁴ an Interpretative Clause that would provide courts and tribunals clear instruction on the intent of the legislation, including the underpinning value of human dignity, as well as international

³⁴ 'National Taskforce for Human Rights Leadership Report' (National Taskforce for Human Rights, March 2021), 32-33.

law and comparative law. The consultation notes that the Scottish Government wants an Interpretative Clause that allows duty-bearers, courts, and tribunals to interpret the rights in line with international human rights law, materials and mechanisms including the General Comments and recommendations of UN Committees, as well as the concept of dignity. Scottish Government is also considering how to include the principles of universality, indivisibility, interdependence, and interrelatedness of rights into the Framework.

This proposed Interpretative Clause is important for LGBTI+ people - protecting our dignity and human rights by enabling judiciaries to look to other international instruments, guidance, best practice, and jurisprudence where the treaties to be incorporated into Scots Law do not explicitly reference nor protect us.

For example, no treaties specifically name LGBTI+ people. However, the materials that the Interpretative Clause could include are UN reports, General Comments, and other work of the treaty bodies that comment on sexual orientation, gender identity, and I/VSC status. These could be helpful in ensuring that the legislation is interpreted in a way that meaningfully protects and includes us. We would like to see clarity on exactly which materials may be referenced and interpreted when applying the law in relation to this Bill.

It has been proposed that the Interpretative Clause include the general comments of UN treaty bodies. These general comments contain significant material for LGBTI+ people. Looking only at the ICESCR general comments, these contain specific reference to LGBTI+ people needing special consideration for access to the benefits of scientific progress³⁵, for specific attention to be paid to employment rights and equal pay for LGBTI+ people, for groups representing LGBTI+ people to be consulted in the formulation of labour policy, and that ensuring LGBTI+ people can access our rights without discrimination constitutes a core obligation.³⁶

We can also see examples of ICESCR general comments interpreting state obligations around the right to the highest attainable standard of health that engage with the specific experiences of LGBTI+ people, and

³⁵ CESCR, *General Comment No. 25: Article 15 (Science and economic, social and cultural rights)*, adopted 30 April 2020, UN Doc E/C.12/GC/25.

³⁶ CESCR, *General Comment No. 23: Article 7 (Just and favourable conditions of work)*, adopted 26 April 2016, E/C.12/GC/23.

the barriers that we face to achieving these rights. Such comments, for example, state that denial of LGBTI+ inclusive sex education, the perpetration of conversion practices, involuntary surgery on intersex people, and coerced sterilisation of trans people, are violations of the right to the highest attainable standard of health.³⁷

In general recommendations from the CEDAW Committee there are specific references to intersectionality, and the inclusion of LGBTI+ people as part of meeting treaty obligations. An interpretative clause could further protect LGBTI+ people by making visible where we are protected by other treaties that public bodies will be required to pay 'due regard' to when upholding ICESCR rights and the right to a healthy environment.

For example, in General Recommendation 28 on Core Obligations of State Parties, the CEDAW Committee says that:

“The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.’³⁸

And in General Recommendation 33 on access to justice, the CEDAW Committee says that:

“Discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women. Grounds for intersecting or compounded discrimination may include ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal

³⁷ CESCR, *General Comment No. 22: Article 12 (Right to sexual and reproductive health)*, adopted 1 May 2016, UN Doc E/C.12/GC/22.

³⁸ CEDAW, *General Recommendation No. 28: Article 2 (On the core obligations of States parties under Article 2 of CEDAW)*, adopted 16 December 2010, UN Doc CEDAW/C/GC/28.

status, age, urban/rural location, health status, disability, property ownership and identity as a lesbian, bisexual or transgender woman or intersex person. These intersecting factors make it more difficult for women from those groups to gain access to justice.”³⁹

Alongside Behrens⁴⁰, we welcome the proposal to include the concluding observations of treaty bodies. These are valuable components of international human rights monitoring that make significant contribution to the understanding of how LGBTI+ people's ICESCR rights are not being fulfilled, and states' obligations to commit the maximum available resources to rectifying this. Behrens' report has also noted that, while ICCPR has traditionally been the treaty used to secure LGBTI rights, that ICESCR has been underutilised and contains many important rights that relate to LGBTI people.⁴¹

According to Behrens⁴², the CESCR concluding observations note that the economic, social, and cultural rights guaranteed by the treaty must, per Article 2, apply equally without discrimination of any kind, and call out the specific ways in which LGBTI+ peoples' ESC rights are not being upheld. CESCR has stated that state parties must address discrimination in both the public and private spheres, has identified a positive duty to 'promote equality' for LGBTI+ people, and has rejected the idea that 'morality' and 'culture' are valid reasons to allow discrimination against LGBTI+ people. It has further noted the problems LGBTI+ people can have obtaining suitable housing, including discrimination by both governments and private landlords, as well as hostility from neighbours - and how this can contribute to the high rate of homelessness among LGBTI+ people.

Inclusion of the concluding remarks of treaty bodies, especially the Committee on Economic, Social, and Cultural Rights, are therefore important for ensuring that courts, duty-bearers, and tribunals consider these more detailed and specific readings of the rights protected by ICESCR, and how those apply to LGBTI+ people. This would enhance

³⁹ CEDAW, *General Recommendation No. 33: (On women's access to justice)*, adopted 3 August 2015, UN Doc CEDAW/C/GC/28.

⁴⁰ Paul Behrens, "Selected ICESCR Rights and Their Impact on LGBTI+ Matters", in partnership with Human Rights Consortium and Equality Network (unpublished, 2023).

⁴¹ Ibid.

⁴² Ibid.

decision making and more closely connect the broad ICESCR rights with the day-to-day lived experiences of LGBTI+ people.⁴³

UN OHCHR Guidance

The consultation has suggested that the Interpretative Clause will include 'the text of international treaties', as well as refer to 'accompanying guidance, concluding observations, and international jurisprudence'. There is, however, reference to including 'other materials' and we would seek more clarity as to what other materials are being considered. The UN Office of the High Commissioner for Human Rights produces guidance on how to apply human rights treaties, such as their report *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in Human Rights Law*. This is a document that provides guidance on how human rights treaties (including ICESCR, CERD, CRPD, and CEDAW) should be applied in protecting the rights of LGBTI+ people, compiling the many Concluding Observations and General Comments that specifically reference LGBTI+ people. Providing this type of guidance to duty bearers would ensure that they have the resources to ensure that the rights of LGBTI+ people - especially those with intersecting characteristics - are realised.

The Yogyakarta Principles

We would like to see the inclusion of the Yogyakarta Principles (the principles) in the materials included within the Interpretative Provision. These are a set of principles, developed in 2007, intended to serve as an interpretative aid to the UN Human Rights Treaties to better realise the rights of LGBTI+ people. The principles were developed at a meeting of the International Commission of Jurists and the International Service for Human Rights. They have support from across the human rights sector and have been cited by courts the world over in decisions on LGBTI+ rights.

Including the principles in the materials that courts, tribunals, and duty-bearers can consider in making their decisions would significantly protect LGBTI+ rights and ensure that the needs of the LGBTI+ community are considered in the absence of a treaty specifically protecting our rights.

The value of the Interpretative Clause would also be in how it resolves conflicts between different pieces of international law, General Comments,

⁴³ Ibid.

and other guidance. Building in the concepts of universality, indivisibility, interdependence, and interrelatedness will help to resolve these conflicts.

3.4. 'Other Status':

Takeaway: Leaving several marginalised protected people who frequently suffer human rights violations, to exist within this Bill under 'Other Status' only is inappropriate, unacceptable, and irresponsible.

LGBTI+ people must be referenced explicitly within the Bill and in all supporting documents and guidance. This refers to sexual orientation, gender identity and intersex status/ variations in sex characteristics (I/VSC). This must be appropriately defined within guidance where 'LGBTI' is named. To not do so will leave communities vulnerable to having their human rights left unrealised.

LGBTI+ people constitute a small minority who are often disregarded in policymaking. As we are not listed specifically in any of the treaties being incorporated in this legislation, it is essential that both the Bill and the supporting documents (including the guidance provided under the Bill) explicitly name both LGBTI+ people and Older People. It is important that this correctly defines the characteristics protected, for example gender identity, sexual orientation, and I/VSC.

Including LGBTI+ people on the face of the Bill is not only important to ensuring that the provisions are interpreted in a way that includes LGBTI+ people, but to engaging and communicating with the LGBTI+ community about accessing rights by ensuring that we see ourselves reflected in it. It is also important to note the message that it would send both to the LGBTI+ community and to duty-bearers if it was not considered important to name LGBTI+ people in the Bill.

The consultation document suggests that there will be guidance that ICESCR and the Right to a Healthy Environment should be interpreted considering the Equality Treaties. As LGBTI+ people are not included in any of these, not only do we lack the protection of a specific treaty, but there is no treaty covering us to inform interpretation of ICESCR and the Right to a Healthy Environment. Ensuring that we are named in the Bill avoids creating a hierarchy of rights where only those who are protected by specific treaties can access their rights more fully.

As evidenced in our survey data, many in the LGBTI+ community do not have access to information with regards to their human rights and how they may be being breached. Respondents told us that they did not know how to ensure their human rights were realised in practice, and that they did not know how to improve their own situations if they needed to. Including LGBTI+ people specifically within the Bill, and within the supporting documents and guidance produced for its implementation, will address this more effectively than if our community remains invisible through presumed inclusion via the listing of ‘Other Status.’

4. Specific answers to the set questions in parts 4, 5, 6, 8 and 9:

4.1. PART FOUR

4.1.1. On Dignity

Question 1: What are your views on allowing dignity to be considered by the courts?

OUR RESPONSE:

We agree with the proposition, that “human dignity [is] to be a helpful tool in understanding and interpreting key human and comparative constitutional rights” (consultation page 14).

As covered in the above section defining dignity and laying out its importance in the struggle for LGBTI+ equality, we agree with the proposal to allow the concept of human dignity to be integrated into Scotland’s human rights framework and used in interpreting it.

Dignity captures the need for services to be inclusive – for example, housing needs to not just be available, but in conditions that are not dehumanising both in terms of quality and suitability, as well as being accessible without degrading treatment. Further detail on the need for inclusive services to ensure that people are treated with dignity will be provided in the section on minimum core obligations.

Including comprehension of dignity as part of the framework, alongside naming LGBTI+ and Older People on the face of the Bill, will increase protections against degrading treatment.

Multiply marginalised older LGBTI+ people currently lack protection. They face degrading treatment in care systems with little recourse to addressing this treatment as a systemic issue.⁴⁴ Requiring those responsible for planning, developing, and implementing services, as well as those responsible for ensuring those services are lawful, to consider dignity would provide a tool for addressing these issues.

Question 2: What are your views on our proposal to allow for dignity to be a key threshold for defining the content of MCOs?

OUR RESPONSE:

As discussed above, dignity as a concept is essential to ensuring not only formal equality for LGBTI+ people, but that we can flourish.

For a right to be realised, it must be accessible in a way that is compatible with human dignity. The concept provides a tool for looking at the way systems and services are developed, and for ensuring that they will be delivered without dehumanising and degrading treatment.

Building dignity into the defining content of MCOs will allow services to be delivered in a way that more meaningfully realises rights. This is especially important to LGBTI+ people who are often not treated with dignity, especially regarding there being an expectation that we can choose to hide our sexual orientation and/or gender identity to access services.

Many ESC rights for trans people are not presently being realised. Rights can be impossible to access with dignity due to the present onerous, invasive, and undignified system of legal gender recognition.

Some examples of economic, social, and cultural rights as recognised by ICESCR that are presently limited by an inability to access them in a way that is compatible with human dignity include:

- Right to social security – as referenced in section 3.1, trans people without a GRC are unable to access services from the DWP in the same manner as cisgender people since their records cannot be updated

⁴⁴ 'Fit for Purpose: Inclusive Housing and Social Care for Older LGBT+ People' (LGBT Health and Wellbeing, September 2023), <https://www.lgbthealth.org.uk/wp-content/uploads/2023/09/Fit-For-Purpose-Report-2023.pdf> and Eileen Chubb, 'Stripped of Pride Part 2' (Compassion in Care, August 2023), <https://compassionincare.com/wp-content/uploads/2023/08/Stripped-of-all-Pride-part-2.pdf>.

- Right to adequate standard of living – as referenced in section 1.1, LGBTI people have a formal right to not be discriminated against in housing, but are at higher risk of unsafe, unhealthy living conditions both due to living disproportionately in the private rented sector and due to hostility from neighbours

Rights to the highest attainable standard of physical and mental health are not being realised:

- Trans and non-binary people often tell us that the way gender identity services are currently delivered is pathologising, and does not provide them with opportunities to feel listened to or be supported to make the right decisions to live happy and healthy lives
- A lack of access to appropriate healthcare and significant waiting times for gender affirming care and support leaves many in undignified positions, without care, accessing ‘DIY’ treatments and going untreated for health concerns and physical ailments.
- This is true of reproductive healthcare, as well as mental and physical healthcare services.
- Many leave themselves in precarious financial situations due to seeking private healthcare beyond their financial means leading to precarity in other aspects of their life.
- LGBTI+ people are disproportionately affected by the ‘cost-of-living crisis’ and inequality in the welfare system. Financial precarity is leaving them in situations of poor living conditions, without adequate food or means to pay bills, a reliance on friends for financial support, a turn to survival work, and low ability for social interaction.
- Humiliation, discrimination, and phobic, racist, misogynistic and ableist judgement (being treated without dignity) is leaving members of the community facing significant barriers in accessing and participating in public life - with detrimental impact on mental and physical health.
- LGBTI+ people feel vulnerable in medical services where their identities and self are not affirmed, where they are mocked, pathologised, dismissed, and where they face discrimination and prejudice.

For the concept of dignity to be meaningful in defining MCOs it must be understood intersectionally, considering the ways in which people can experience indignity. This can mean services which are not culturally appropriate, or in which people feel that they need to hide aspects of their identity. It is welcome that ICESCR and the Right to a Healthy Environment are meant to be interpreted through the lens of CEDAW, CRPD, and CERD, reflecting that human rights are universal, indivisible, interdependent, and interrelated. Having to ensure that these rights are interpreted together, alongside the concept of dignity, should help to ensure that people with intersecting characteristics are able to access their rights.

Question 3: What are your views on the types of international law, materials, and mechanisms to be included within the proposed interpretative provision?

OUR RESPONSE:

The inclusion of additional types of international law, materials, and mechanisms is essential to ensuring that LGBTI+ people have our full range of rights protected under this Bill. LGBTI+ people do not have an Equality Treaty to protect our rights and we are, therefore, reliant on the supplemental materials that have been developed to help interpret existing treaties to realise LGBTI+ people's rights.

The consultation has proposed including the General Comments and Concluding Observations of the UN treaty bodies. As discussed extensively above in sections 1 and 3.3, as well as in Paul Behrens' report⁴⁵, the General Comments and Concluding Observations both give considerable attention to the different ways that LGBTI+ people's rights can be realised through ICESCR.

As referenced above, we would also like to see the guidance provided by the UNOHCHR on the interpretation of human rights treaties to be included. Particularly, *Born Free and Equal* (2nd Edition, 2019), provides a detailed compilation of the ways that treaty bodies have interpreted rights for LGBTI+ people. Being directed to this guidance would assist duty-bearers in fulfilling their responsibilities toward the LGBTI+ community.

We would also like to see the Yogyakarta Principles, included in the Interpretative Provision. They have become a tool used internationally to

⁴⁵ Behrens, 'Selected ICESCR Rights'.

interpret human rights for LGBTI+ people, having featured in two of the Supreme Court of India's landmark decisions on LGBTI+ rights - the 2014 decision on gender recognition and the 2017 decision decriminalising homosexuality.⁴⁶ The Inter-American Court on Human Rights also cited the Yogyakarta Principles in its 2018 opinion on both the right to legal gender recognition and for same sex couples to have family rights, including marriage.⁴⁷ They are a well-developed standard in international human rights law and their inclusion would go a long way toward ensuring LGBTI+ people's rights are realised.

4.1.2. On model of incorporation

Question 4: What are your views on the proposed model of incorporation?

OUR RESPONSE:

We have concerns about the use of a direct model of incorporation when significant portions of the Equality Treaties would need to be redacted to avoid conflict with the Equal Opportunities Reservation and conflict with the Equality Act 2010.

Directly copying the language of decades-old treaties could result in outdated concepts and terminology being incorporated into our body of law. Many of these treaties use gendered language that excludes non-binary people, while others use masculine terminology to refer to all people.

We have concerns about ICESCR Article 10 referencing the family as 'the natural and fundamental unit of society'. LGBTI+ people's experiences of family often differ from the wider community's, which has resulted in the historical denial of rights to LGBTI+ people (for example lack of equal marriage rights, lack of parental rights etc), and which often continues to

⁴⁶ 'Living with Dignity: Sexual Orientation and Gender Identity- Based Human Rights Violations in Housing, Work, and Public Spaces in India' (International Commission of Jurists, 2019), <https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf>.

⁴⁷ 'Inter-American Court Relies on Yogyakarta Principles and YP+10 in Landmark Decision', *International Service for Human Rights*, 11 January 2018, <https://ishr.ch/latest-updates/lgbti-rights-inter-american-court-relies-yogyakarta-principles-and-yp10-landmark-decision/>.

be ignored within the policy-making process, resulting in our communities having unequal access to our rights.

Equality Network's Kinship Report documents how historically our community, having been neglected by wider society and subject to discrimination, alienation, and estrangement, forms alternative kinship networks.⁴⁸ The report shares lived experience and evidence of this:

'Many have been alienated or ostracised from their biological family, and some have separated themselves due to prejudice or fear. Some have 'chosen' their own families instead [...] Rather than defining family, or kin, by biological ties, many LGBTI+ people choose whom they consider family.'

LGBTI+ people are more likely to prioritise 'found family,' to have strained relationships with biological family, and are less likely to have children of our own. Enshrining language as to what constitutes a 'natural' or idealised living situation within our body of law could have detrimental effects to our community.

4.1.3. On rights and the Equality Treaties

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.

OUR RESPONSE:

We echo the call from the Human Rights Consortium Scotland (HRCS) to implement the Equality Treaties to the maximum extent possible under devolution. While we recognise the necessity of only imposing a procedural duty on elements of the Equality Treaties that could contravene the Equal Opportunities Reservation, we concur with HRCS's position that a duty to comply should be placed on all the CRPD substantive rights within devolved competence.

It is especially important for LGBTI+ people that the rights to independent living, habilitation and rehabilitation, and personal mobility be placed under a duty to comply. As detailed in Section 3.1 on dignity, LGBTI+ people are at elevated risk of abuse in care settings. Ensuring that

⁴⁸ Alice Nagle, Rebecca Crowther, and Eleanor Sanders White, 'Kinship, Family, and Support Networks in Scotland's LGBTI+ Community' (Equality Network, August 2023), https://www.equality-network.org/wp-content/uploads/2023/08/22031-Kinship-Family-and-Support-Networks-S3-V1_hyperlinks_web.pdf.

disabled LGBTI+ people can live independently is essential to realising a range of rights that extend beyond CRPD.

We also note calls from Engender for the Scottish Government to carefully evaluate which provisions of CEDAW might be able to have a stronger duty to comply applied to them. Similarly, CEMVO Scotland have called on the Scottish Government to reconsider the proposed incorporation method to find ways to apply a stronger duty to comply to rights within CERD – for example when applying to public bodies in Scotland when exercising their Scottish functions, or when these rights do not amount to regulating discrimination. We support both calls.

The LGBTI+ community is diverse and made up of people with many intersecting characteristics. We do, therefore, need the protection from sexism, ableism, and racism these treaties provide if they are implemented to their maximum extent.

4.2. PART 5: Recognising The Right to Healthy Environment

4.2.1. On the right to a healthy environment

Question 11: Are there any other substantive or procedural elements you think should be understood as aspects of the right?

OUR RESPONSE:

We believe that The Right to a Healthy Environment within Scots Law must encompass the whole of the environment that people live in that can affect their enjoyment of a healthy life. We believe that this right should be broadly interpreted to include – domestic living conditions and neighbourhood, sanitation and safety, and conditions that can allow for human flourishing - as well as, for example, the more widely understood rights to clean water, clean air, and access to healthy natural ecologies. Though perhaps defined more tightly within established OHCHR guidance, we believe that it is vital that all aspects of environment that have the potential to be detrimental to one’s physical and mental health, and human dignity, should be considered.

“All human beings depend on the environment in which we live. A safe, clean, healthy, and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water, and sanitation.

Without a healthy environment, we are unable to fulfil our aspirations. We may not have access to even the minimum standards of human dignity.”

“The human rights and the environment mandate, created in March 2012 and extended in 2018, examines the human rights obligations as they relate to a safe, clean, healthy, and sustainable environment. It also promotes best practices relating to the use of human rights in environmental policymaking.”⁴⁹

The right to a healthy environment seeks to provide a protection of the ecological systems that provide human health. Human health is affected by domestic living standards. With a broader interpretation of ecology to include both natural and manufactured living environments (housing, public space, neighbourhoods) human rights would be more effectively realised for all in both urban and rural geographies.

LGBTI+ people are more likely to live in urban environments and more likely to rent their homes than non-LGBTI+ people.⁵⁰ Therefore, LGBTI+ people are more subject to the unhealthy living environments that plague renters – damp, mould, poor insulation, inefficient heating systems, inability to make repairs, tight housing markets forcing us to accept poorer conditions, and insecure housing. Higher rates of renting can also mean more susceptibility to the cost-of-living crisis due to rent increases in non-rent-controlled properties. Living in urban environments can mean higher exposure to air pollution, vermin, and having less access to green spaces.

Some cities in Scotland have been built to be car-dominated, making active travel difficult and increasing exposure to pollution. This can contribute to unhealthy environments experienced by populations, such as the LGBTI+ community, who are more likely to live in urban areas.

LGBT Health & Wellbeing’s data from before the ‘cost-of-living crisis’ suggested that 13% of LGBTI+ people had ever experienced

⁴⁹ ‘About Human Rights and the Environment’, OHCHR, accessed 3 October 2023, <https://www.ohchr.org/en/special-procedures/sr-environment/about-human-rights-and-environment>. (emphasis added)

⁵⁰ ‘LGBT+ People and Housing | Welfare Access, Assets And Debts Of LGBT+ People In Great Britain’, 15 November 2022, <https://lgbtqwelfare.stir.ac.uk/2022/11/15/lgbt-people-and-housing/>.

homelessness and 23% of respondents to the Scottish Trans Survey had – significantly higher than the 8% of the general population who have been homeless.⁵¹ Equality Network’s own survey showed that 21% of respondents had in the past been homeless, and currently 3% were without fixed abode. This can contribute to experiencing unhealthy environments, whether sleeping rough, in temporary accommodation, or in shelters.

4.3. PART 6: Incorporating Further Rights and Embedding Equality

4.3.1. On Participation

Question 13: How can we best embed participation in the framework of the Bill?

OUR RESPONSE:

It is essential that participation is built into the framework of this Bill, and we are pleased to see that this consultation is seeking advice on how to make this a reality.

For participation to be meaningful, the Scottish Government must make every effort to involve organisations already working in marginalised communities and with groups who are not having their rights realised, at every step of the process, from development to implementation. These organisations must be adequately resourced to carry out this work. The development of the detail of the Human Rights Scheme must be a participatory process that seeks out the involvement of those who are most at risk of having their rights not realised.

Any consultative or participatory process must be conducted in an accessible manner. This does not only mean ensuring that venues are physically accessible, but that every effort has been made to engage people and organisations who have had past negative experiences, that people are not excluded due to rurality, care responsibilities, or other constraints, and that people are not left out-of-pocket because of having

⁵¹ ‘Health Needs Assessment of LGBT+ People’ (NHS GGC, NHS Lothian, and Public Health Scotland, June 2022), <https://www.lgbthealth.org.uk/wp-content/uploads/2022/10/Health-Needs-Assessment-of-LGBT-People-Scotland-Infographic-Summary-Final3-13-June-2022.pdf>.

participated. All documents and modes of consultation must be written in a way that is accessible and be provided with clear and accessible communication. Processes must be easily navigable and look to limit any disadvantage for those who have limited access to technology or limited comprehension of technology. Participants must be given clear guidance, a consistent set of expectations, and receive after-care in the form of follow-up and recognition of their contributions. There must be transparency about how their contributions will influence outcomes.

The language and aims of any participatory and consultative efforts must be accessible to people the Scottish Government wants to reach. The SHRC has noted that there is a poor understanding of human rights in Scotland, and many people do not understand the role of NHRIs, who to turn to when their rights have been violated, or what rights they do hold.⁵² Any meaningful participation will have to be accompanied with significant public education about human rights and the treaties in question - especially economic, social, and cultural rights. Additional powers and resources must be given to the SHRC to conduct its work in a way that connects with the public.

Per Elaine Webster's work, the concept of dignity provides an accessible, easily understandable way to help people engage with human rights. The experience of this consultation has shown how difficult it can be even for those who work on human rights issues on a daily basis to engage with the complexities of human rights treaties and how they can be incorporated into law / how rights can be realised.

Participatory processes must bear in mind the essential core principle that human rights are universal, indivisible, interrelated, and interdependent. As such, engagement and participation must be non-hierarchical, and include a range of views from diverse groups, as well as from academia, third sector, lived experience, and those involved in governance and implementation, on an equal basis.

⁵² 'At a Crossroads: Which Way Now for the Human Rights System in Scotland?' (Scottish Human Rights Commission, June 2023), https://www.scottishhumanrights.com/media/2456/crossroads_what-next-for-human-rights-protection-in-scotland-shrc-june-2023.pdf.

For participation to be ongoing throughout developing additional monitoring, reporting, and the continuing processes of evaluation, there needs to be continuous engagement and recruitment to the participatory process, and there must be a strengthening of the human rights culture throughout Scotland. The Lived Experience Boards should continue to sit and be actively recruited to ensuring diverse representation. Action must be taken to ensure that Scotland's 2nd National Human Rights Action Plan (SNAP2)⁵³ is implemented, and that marginalised people can see, in their day-to-day lives, that Scotland is working to become a rights-respecting country.

Ensuring active, meaningful, sustainable participation through the lengthy process of developing, implementing, and monitoring the results of the Bill is challenging and complex, but it is also the crucial step that will turn the ambitious idea of human rights incorporation into transformative reality.

4.3.2. On the Equality Provision

Question 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?

OUR RESPONSE:

An Equality Provision would be a welcome addition to the incorporation of the four treaties. LGBTI+ people do not currently have an international treaty that we can look to for incorporation into Scots Law, leaving us without this solid footing. However, many of the rights enshrined within the four treaties, particularly within ICESCR, not only apply to LGBTI+ people, but LGBTI+ people have specific needs, experiences, and barriers to accessing these rights.

An Equality Provision would be a recognition of the need to specifically protect LGBTI+ people in law, acknowledging the historical marginalisation of our community, and the continuing inequality we face. It would drive the inclusion of LGBTI+ people in policymaking by making it explicit to duty-bearers that they must take us into account. It would offer the opportunity to consider any international work that may strengthen and encourage the rights of LGBTI+ people. An Equality Provision would help

⁵³ See SNAP 2: <https://www.snaprights.info/>

to ensure that LGBTI+ people and older people are properly thought about across all four treaties. It would mean that we do not fall through the cracks of other legislation, where we are not explicitly mentioned.

However, an Equality Provision will only confer this protection if it specifically names LGBTI+ people. As we discussed in the Equality Provision section in the introduction to this response, anything short of naming LGBTI+ people in the Bill would send a message that LGBTI+ people do not deserve the same rights as other marginalised groups and would be a betrayal of the concept of human rights as universal, indivisible, interdependent, and interrelated.

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

OUR RESPONSE:

We welcome the definitions provided in the paragraph provided here within the consultation document, which acknowledge that certain groups are marginalised within society and require specific mentions e.g., based on sex, race, colour, language, religion, political or other opinion, national or social origin, property, or birth. However, placing LGBTI+ people not in this list, but hidden within ‘Other Status,’ is problematic.

Being LGBTI+ is a fundamental part of people’s identities, and often a specific cause of the lack of realisation of our human rights. Many international treaties were drafted at times where the explicit inclusion of LGBTI+ people would have been considered too provocative, or indeed beyond contemporary understandings of who rights-holders were and what realisation of their rights may look like. The Bill is an opportunity to reflect the improving recognition of LGBTI+ communities as populations who share threats to the realisation of their rights, and the need of duty-bearers to take action to protect and progress them. In our experience, when LGBTI+ people are not explicitly mentioned or considered, then our needs go unmet. This is clear in wider research, as well as within many of our own studies. Our current survey, which links directly to this consultation’s proposals showed this too.

LGBTI+ people must be named explicitly within the Equality Provision. We also support calls from CEMVO Scotland, Human Rights Consortium Scotland, and others to ensure that Older People are named. Naming Older People is of particular importance to protecting LGBTI+ rights. As mentioned in our introductory section, the campaign group Compassion

in Care found that older LGBTI+ people experience compounding marginalisation in care settings, and in care settings are subject to extreme homophobic and transphobic abuse.

4.3.3. On ‘Other Status’

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? If you disagree, please provide comments to support your answer.

OUR RESPONSE:

We disagree with the use of ‘other status’ to cover LGBTI+ and Older People. Encompassing LGBTI+ people only under ‘other status’ would suggest that LGBTI+ people are somehow less included, and of less importance than other marginalised characteristics. There is a danger of creating a “hierarchy of rights”⁵⁴ within this process, something which sits in strong opposition to the knowledge that inequality should be viewed intersectionally, and that all people should be protected.

The use of ‘other status’ provides far less clarity as to whether our rights are to be protected than if they were included on the face of the Bill. Given that LGBTI+ people do not have an international treaty, it is of particular importance that sexual orientation and gender identity are mentioned in an equality clause, as this may be the only opportunity within the Bill to encourage and promote our rights.

The decision to use ‘other status’ would go against the original taskforce recommendations and the First Minister’s Advisory Group’s report. As restated in a recent briefing paper by Professor Nicole Busby and Dr Kasey McCall-Smith, the Bill should “provide rights for older people and LGBTI communities which are not yet explicitly provided for by a UN

⁵⁴ Nicole Busby and Kasey McCall-Smith, ‘Incorporation of the CERD and CRPD and Equivalent Rights Provision for LGBTI Communities and Older Persons’ (Academic Advisory Panel to the National Taskforce for Human Rights Leadership, January 2021),

<https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-busby-and-mccall-smith---un-treaties/aap-paper-busby-and-mccall-smith---un-treaties/govscot%3Adocument/AAP%2BPaper%2BNicole%2BBusby%2Band%2BKasey%2BMcCall-Smith%2BUN%2BTreaties.pdf>.

treaty. It will also provide protection against poverty and exclusion. (FMAG Report, p. 31).”⁵⁵

Explicitly referring to LGBTI+ people in the Bill would recognise the specific injustices and harms that we face. It would mean that duty-bearers would have greater recourse to consider us when implementing ICESCR, as well as CEDAW, CERD, and CRPD. While we understand that some areas within these treaties are reserved, there are many areas that fall within devolved competence of the Scottish Government too. These areas, such as in ICESCR, are particularly relevant to LGBTI+ people, including the right to housing, food, and clothing; to the highest attainable standards of physical and mental health; to education; and to (some areas) of cultural life.

As mentioned in Part 4, the proposed model of incorporation would direct duty-bearers to the Equality Treaties to interpret ICESCR Rights and the Right to a Healthy Environment. As none of the three Equality Treaties to be incorporated explicitly names LGBTI+ or older people, this could create a misunderstanding that some aspects of people’s identities are of greater importance when duty bearers take decisions to protect and progress people’s human rights. Explicit inclusion in the equality provision for LGBTI+ people and older people would mitigate this risk substantially.

4.3.4. On Specifics needs of LGBTI people for consideration

Question 18: Do you think the Bill framework needs to do anything additionally for LGBTI or older people?

OUR RESPONSE:

Yes. LGBTI+ and Older People need to be named in the Bill. There needs to be recognition of the barriers LGBTI+ people face in accessing our rights that might otherwise be dismissed if there is not specific, clear wording that LGBTI+ and Older People are entitled to ICESCR and Healthy Environment Rights that are compatible with our human dignity.

Older LGBTI+ People sit at the intersection of two forms of discrimination and are subject to a loss of their rights in a way that does not apply to younger LGBTI+ or older non-LGBTI+ people (see Compassion in Care’s

⁵⁵ Ibid.

‘Stripped of all Pride’ reports).⁵⁶ Both, therefore, need to be named in the Bill in order for these issues to be addressed.

If the Bill framework is using CERD, CRPD, and CEDAW to interpret ICESCR and Right to a Healthy Environment this leaves out both groups, except as far as both LGBTI+ and Older People can be women, disabled, or subject to racism. It is important therefore that the Bill framework consider other lenses through which to interpret ICESCR and the Right to a Healthy Environment.

The Bill framework needs to be explicit about including the types of materials from international law and treaty bodies that have contributed to the evolving and progressive realisation of LGBTI+ rights. As mentioned in section 3.3 on the interpretative clause, this would mean explicitly including the Yogyakarta Principles as materials that courts, tribunals and duty bearers can consider when interpreting human rights. In the absence of a treaty protecting LGBTI+ people, these are essential to ensuring our rights are realised.

We would like to see the Human Rights Scheme address the barriers to accessing rights faced by LGBTI+ people who are marginalised in multiple ways by requiring effective and ongoing data collection that is disaggregated to show if, and how, this impacts different communities. This should include collecting data and reporting on issues that disproportionately affect LGBTI+ people, such as access to, and quality of housing; access to care; access to tertiary education and vocational training; and health. We also call for disaggregated data to be collected so that the status of human rights of the LGBTI+ community in all its diversity can be accurately assessed.⁵⁷

⁵⁶ Eileen Chubb, ‘Stripped of Pride Part 2’ (Compassion in Care, August 2023), <https://compassionincare.com/wp-content/uploads/2023/08/Stripped-of-all-Pride-part-2.pdf>.

⁵⁷ We note that within various CESCR Concluding Observations, though not specifically on Sexual Orientation or Gender Identity they state:
“7. The Committee is concerned that the lack of disaggregated statistical data hampers accurate assessment of the extent of inequality and discrimination, as well as the development of effective and targeted policies and programmes.
8. The Committee recommends that the State party improve its data collection, with a view to producing reliable data disaggregated by sex, gender, ethnic origin, urban and rural populations and other relevant criteria and to identifying those groups that are disadvantaged in their exercise of economic, social and cultural rights. The

4.4. PART EIGHT – Ensuring Access to Justice for Rights-Holders, SHRC Powers and the Commission

4.4.1. On Advocacy and Support

Question 27: What are your views on the most effective ways of supporting advocacy and/or advice services to help rightsholders realise their rights under the Bill?

OUR RESPONSE:

We note the SHRC’s concern that the present accountability landscape in Scotland is complex and that rightsholders are often not aware of what institutions exist to assist them or how to access those institutions.⁵⁸ We support their call for increased awareness-raising and the inclusion of human rights education within the curriculum.⁵⁹

The Scottish Government needs to work closely with advocacy and advice services that are already working with marginalised people to learn how best to reach these communities and make them aware of their rights. Adequate resourcing must be given to ensure that the rights incorporated by this Bill exist in actuality and not just on paper.

We echo the SHRC’s calls for increased funding and expanded powers for them to be able to bring or intervene in civil proceedings under the Bill and be able to proactively investigate systemic issues relating to rights in the Bill. This would give a clear accountability mechanism that advocacy and advice services could turn to in helping rightsholders realise their rights. The SHRC has also called for consideration around the infrastructure of local rights centres and legal aid to facilitate signposting and advice on human rights issues.⁶⁰ Lastly, the SHRC presently does not

Committee refers the State party to the publication by the Office of the United Nations High Commissioner for Human Rights (OHCHR) on a human rights-based approach to data.⁵⁷ - China, Macao and Hong Kong (2023) (emphasis added)

AND

“13. The Committee recommends that the State party: [...] (c) Systematically collect disaggregated statistics on the level of enjoyment of Covenant rights by disadvantaged and marginalized individuals and groups.” - Latvia (2021) (emphasis added)

⁵⁸ SHRC, ‘At a Crossroads’, 10.

⁵⁹ ‘Building a New Human Rights Framework for Scotland: Key Legal Features’ (Scottish Human Rights Commission, September 2022), 19.

⁶⁰ SHRC, ‘At a Crossroads’, 21.

have the ability to give legal advice to individuals and has called on the Scottish Government to extend this ability to them.⁶¹ In their consultation response, HRCS noted that the SHRC's inability to give legal advice has left a gap in Scotland's human rights framework as the EHRC *does* provide legal advice, but not in devolved areas. This means there is no NHRI responsible for providing legal advice to individuals in Scotland on human rights breaches.

We note the calls from various groups, also highlighted in the consultation document, for Commissioners representing various marginalised groups – Women, Older People, Disabled People, and LGBTI+ people, among others. Whether a commissioner-led model, or a model of rapporteurs within SHRC is followed, having a named person responsible for specific areas of human rights would help rightsholders to understand who to contact when their rights have been violated. If the rapporteur model is followed, it is then essential to ensure that SHRC can provide legal advice to individuals, otherwise rightsholders will still not know where to turn to for help in having their rights realised.

The Health and Social Care Alliance Scotland, in their response, highlighted the importance of independent, impartial advocacy to help rightsholders realise their rights. We support their call for adequate and sustainable resources for independent advocacy.

There will need to be education and training provided to advocacy and advice organisations on working within the new Bill and how it works within the devolution settlement. This will help to make advocacy and advice more effective and ensure that everyone is aware of the new pathways to realising rights.

4.4.2. On New Powers for SHRC

Question 31: What are your views on additional powers for the SHRC?

OUR RESPONSE:

We support the proposal to increase the SHRC's powers by allowing it to bring or intervene in civil proceedings under the Bill and to give it investigatory powers to allow for accountability for systemic issues relating

⁶¹ Ibid, 21.

to rights in the Bill. However, this does not go far enough. The SHRC's recent report "*At a Crossroads: which way now for the human rights system in Scotland?*" points out how under-staffed and under-resourced the SHRC is relative both to other small countries' National Human Rights Institutions and relative to other public bodies in Scotland. Any increase in responsibilities for the SHRC must come with appropriate resourcing.

The consultation has not proposed additional powers beyond those listed above. However, the SHRC has called for increasing its powers to uphold human rights by, in addition to the above, allowing it to provide legal advice to individuals and giving it the power to compel information. We support these calls to increase the SHRC's powers beyond the proposals in the consultation.

As noted in our response to Question 27 above, there is currently a gap in Scotland's Human Rights framework due to the SHRC lacking the powers to provide legal advice to individuals. The EHRC has these powers but will not provide advice in devolved areas. Therefore, there is presently no NHRI that can advise individuals in Scotland on human rights matters within their remit. This power should be extended to the SHRC to ensure this gap is filled.

4.4.3. Additional Comment: On an LGBTI+ Commissioner

We note with interest that the consultation document mentions wider asks in relation to specific Commissioners focused on advancing the rights of specific groups and areas. The consultation document mentions women, disabled people, and older people, but neglects to mention LGBTI+ people. In their recent report "*At a Crossroads,*" the SHRC recorded proposals for 10 new Commissioners, including an LGBT (Conversion Practices) Commissioner. If establishing new Commissions or Commissioners is a route the Scottish Government is planning to take, we call for an LGBTI+ Commissioner with a broad remit for all LGBTI+ rights, rather than a narrow focus on conversion practices.

However, we note that the SHRC does not favour a model of developing separate Commissions and Commissioners. They note that accrediting bodies are hesitant to accredit NHRIs that have splintered remits as this violates the principle of human rights being universal, indivisible, interdependent, and interrelated, and have provided examples of

institutions which have failed to be accredited or have received low grades. They note that New Zealand is now moving away from a model of separate Commissioners, and that the Australian Human Rights Commission has had its accreditation delayed due to its fragmented mandate.⁶² The SHRC has proposed, instead, a Rapporteurship model which would incorporate small teams within the SHRC working on the rights of particular groups of people, or particular human rights treaties. This model has received favourable accreditation from the United Nations.

Whichever model is used to ensure that specific marginalised groups have a point of contact and dedicated team working on their issues, we reiterate our call that there must be a commissioner, rapporteur or team dedicated to LGBTI+ issues on an equal basis to whichever model is established for other groups.

4.5. PART NINE: Implementing the New Scottish Human Rights Act

4.5.1. On Minimum Core Obligations and Participation

Question 39: What are your views on our proposals to establish Minimum Core Obligations through a participatory process?

OUR RESPONSE:

It is vital that MCOs are established through a participatory process.

As stated in our response to Question 13, meaningful participation requires more than consultation. The Scottish Government must take responsibility for ensuring that communities who are not often consulted, or who are frequently left out of decision-making, are pro-actively recruited to participate in this process. Those who are most at risk of not having their rights realised must have their voices heard in the process of creating MCOs.

Highlighting the concept of dignity when engaging in participatory processes will help the public to understand that MCOs should not simply be subsistence level, but rather the minimum necessary to live a *dignified* life.

⁶² SHRC, 'At a Crossroads', 21.

As previously stated, ensuring meaningful, long-term participation also requires adequately resourcing organisations who do outreach to marginalised populations. Participation is essential, but participation fatigue can set in when groups are not adequately resourced and when there is not long-term, respectful, open communication setting reasonable expectations and providing follow-up afterwards.

We have seen through the recent COVID pandemic that LGBTI+ people are often not considered when policy is made⁶³. Establishing MCOs through a participatory process is therefore essential to our community.

4.5.3. On The Human Rights Scheme

Question 40: What are your views on our proposals for a Human Rights Scheme?

OUR RESPONSE:

We wholeheartedly support the proposals to place a duty on ministers to bring forward a Human Rights Scheme (HRS) to truly realise the rights that are being incorporated by this Bill. For the Bill to be effective, there must be detailed plans for implementation and monitoring which would be reflected by the Scheme.

The Human Rights Scheme would help ensure that there is ministerial accountability for implementing the Act, that this must be reported on to Parliament, and that there will be parliamentary scrutiny of the reports. We would hope that making the ministers accountable through parliamentary scrutiny, and the awareness that they are responsible for producing this reporting, will encourage pro-active action on progressively realising the human rights incorporated by this Bill.

It has been proposed in the consultation document that the Bill could set out some specific groups whom Scottish ministers must consult in preparing the Scheme proposal, and as part of their reporting duty. It is imperative that this list of specific groups focuses on those most at risk of

⁶³ Nagle, Crowther and Sanders White, 'Kinship, Family, and Support Networks in Scotland's LGBTI+ Community'.

not having their rights respected and that they are named. This includes naming LGBTI+ people explicitly as a listed group. It has further been proposed that this could include individual rights-bearers. As mentioned earlier in this document, we would like to see the Lived Experience Boards continue to recruit and operate to enable the ministers to engage with rights-bearers. It is imperative that the views of this group are heard and that their views and experiences are considered in a meaningful way with regards to development of implementation plans.

Having the groups that must be consulted with to prepare the Scheme, and as part of their reporting duty, named on the face of the Bill, will future-proof the Bill by ensuring that named groups representing oft-disregarded marginalised groups cannot be left out of the processes of reporting. This will ensure that those most at risk of not having their rights realised will continue to have influence on the process of implementing the Bill.

Parliamentary scrutiny, the duty to produce reports, and international reporting should also improve transparency of reporting on progress. Requiring ministers to consult specific groups and those with lived experience when producing this reporting will also increase transparency.

We support the proposals for the Scheme to include reporting on the actions of SNAP2, on access to justice, on embedding human rights in budgeting, on information and awareness-raising, on accountability, and on the degree to which public participation is informing the implementation of the Bill. We also support the proposal for the Scheme to include measures for international accountability, including reporting to the UN, Council of Europe, and other international bodies.

The proposals that the Scheme monitor and report on both participation, and work done towards information and awareness-raising, are important ones. It is only through participation of the people of Scotland in all their diversity, including groups most likely to be at risk of having their rights violated, that we can be said to be building a rights-respecting country. Participation, however, hinges on awareness-raising so that organisations and the public can engage with the work being done.

Lastly, we would again call for the Scottish Government to consider the additional work being created for both individuals and organisations by engaging in multiple, long-term, participatory, and reporting processes.

Not only do organisations who will be consulted need the resources to be able to respond and participate in a meaningful way, but those who are commissioned by public bodies (and will therefore have reporting duties to Ministers) will need resources to ensure that they can comply.

4.5.4. On Moving Forward

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

OUR RESPONSE:

Of utmost importance here is financial resource, building of and sustainability of capacity, clear and competent guidance, and access to information.

To build capacity across the public sector for engagement with, and implementation of, the new Bill, and to ensure the new rights within the Bill are realised for all, it is important for Scottish Government to place resources on third sector organisations who are commissioned by public bodies to deliver work. This will ensure that they have the capacity to adhere to duties.

Alongside Engender we suggest that lessons must be learnt from failures to meaningfully embed Public Sector Equality Duties in Scotland. It is imperative that Scottish Government do the work to understand the specific resources and need for growth in capacity that parts of the public and third sector may need to effectively fulfil these duties.

HRCS has suggested in their response that both statutory and non-statutory guidance must be given on how public sector organisations may build their capacity and on what help, and information is available. As with other organisations in the third sector who advocate for the rights of marginalised groups, we would ask that LGBTI+ organisations are consulted with on where there is a need to provide guidance on the specific implementation of the Equalities Clause, and duties. Where public bodies have a duty to uphold the rights of LGBTI+ people, the experiences of these people must be understood: Public sector organisations will

benefit from guidance on human rights and guidance on how to assess their practices from a human rights perspective. They will need a full understanding of how individual rights are experienced by marginalised people. It is important that public bodies are provided with all the information they may need and every opportunity to be able to meaningfully adhere to these new duties, and to meaningfully realise human rights in Scotland. The third sector can help here but must be resourced to be able to do so.

In time, all useful data relating to breaches of human rights, and which groups are experiencing these breaches, should be made available to public bodies. The publication of reports in relation to diverse groups by Ministers will help here. Both should be made accessible to the public and to rights holders, and these rights holders should be continuously consulted to maintain improvements and continually develop meaningful implementation and progress.

4.5.5. On Awareness Raising

Question 43: How can the Scottish government and partners provide effective information and raise awareness of the rights for rights-holders?

OUR RESPONSE:

As we have outlined in our opening comments, some within the LGBTI+ community are not familiar with what their human rights are, nor how to ensure that they are realised, nor what to do when they are not. Whilst the community may not have a strong understanding of the formal language of human rights, they do know that their basic needs are not being met under the current system. The concept of dignity is helpful here, as people instinctively understand when they are not being treated with dignity or given the means to live dignified lives. However, even when given the tools to understand that their rights are not being realised, the public are not aware of how to pursue justice or seek further information.

For rightsholders to be aware of their rights and the means of having them realised, they need:

- **Human rights to be embedded in the education system** so that the next generation is equipped with the knowledge required to pursue realisation of their rights. Work should be done to include 'understanding your human rights' within the school curriculum or otherwise implement awareness raising within all schools. This should cover the full gambit of rights within Scotland's incorporation, the different treaties, the Equalities Clause and what it means, what is devolved and reserved, where people can find information about their rights, access to justice and where they may go for advice should their human rights be being infringed upon.
- **A public information campaign** that is created in collaboration with third sector organisations that represent and advocate for marginalised groups in order that this information is accessible to, and 'speaks to' all within Scotland's population. This campaign must represent all and make clear the distinct and intersectionally experienced risks to our rights, as well as where to seek advice, how to access justice and how to get involved in the development and implementation of the new Bill.
- **Further public engagement:** It would be useful here to fully understand the extent of the public's awareness or lack of awareness surrounding their human rights – We believe that more public consultation / engagement may be needed here ahead of creating such a campaign. Specific effort should be made to reach marginalised communities.
- **Resource for advocacy and support organisations:** Again, resourcing for the third sector is of importance here. Like our colleagues at Engender we ask that resource be considered here. This will ensure diverse audiences see, engage in, and have access to this campaign, materials, and information. Investing in those who can further the reach of this campaign work and reach areas of Scottish society where the mainstream may not be able to is an area for exploration. Like Engender we too see this campaign also consisting of third sector helping the public sector to understand their duties in relation to marginalised and at-risk groups.

4.5.6. On Monitoring and Reporting

Question 45: What are your views on monitoring and reporting?

OUR RESPONSE:

Monitoring and reporting are vital in ensuring the successful implementation of the new Human Rights Bill. There must be clarity on exactly what is to be reported and in relation to which groups and rights.

We refer here to our answer to question 18. It is important that the duty on Ministers as part of the mechanics of the Human Rights scheme (HRS) is meaningfully implemented. As part of this they must consult with the LGBTI+ community and engage in effective ongoing data collection that is disaggregated to allow for analysis of implications for the community as well as other marginalised, at-risk, and listed groups. As we stated previously, this should include collecting data and reporting on issues that disproportionately affect LGBTI+ people.

With reference to listed groups within this duty / aspect of the HRS, we must be named explicitly here as an at-risk group to be consulted, monitored, and reported on. The community may then feedback on aspects of social and public life that are still of concern, and enter a dialogue around proposed action, actions to be taken and improvements realised.

With concern we note that, currently the proposals state only 'rights holders' as a listed group - a broad group of all who have ICESCR rights. This must be more explicitly defined and include at risk groups considered within the Equalities Provision, but also further at-risk groups such as care experienced people, those in poverty and intersectionally marginalised people.

There must be meaningful engagement with these listed groups on MCOs, in turn improving clarity on what is needed to be included in reporting. This aspect of the scheme, and the scheme as a whole, should be kept under review. This should be in line with ongoing participation, analysis, and development of successful implementation.

We, along with others in the third sector ask that the reporting cycle timescales be carefully considered to monitor actual and timely change and to not impose a burden on the public sector and commissioned organisations from within the third sector. Over expectation of reporting such as this could lead to tokenism and an inability to adhere to the duty fully or meaningfully, or worse, a lack of compliance. There must be coherence across reporting duties – we need good and quality compliance with this duty within stretched capacity. The content of this reporting must identify gaps as part of the HRS and, through consultation with stakeholders, identify challenges to implementation and the impact of the scheme.

Finally, we ask that the reporting, and documents related, are accessible, and transparent, and that they specify rights holders and an accurate reflection of experiences in Scotland today. We ask that these experiences shape the reports, and subsequent improved realisation of rights for all, including those most marginalised.

5. Conclusion and any final comments

In conclusion, we refer to our opening evidence. LGBTI+ people are facing significant and persistent breaches to their human rights in many aspects of life in Scotland.

For that reason, we call for and support the proposals of an Equalities Clause that is inclusive of LGBTI+ rights holders; an Interpretive Clause and a framework encompassing human dignity; increased further powers for the SHRC and an LGBTI+ Rapporteur within the SHRC. We ask that there is explicit reference to LGBTI+ people on the face of the Bill beyond ‘other status’ and that this inclusion is adequately detailed in any of the Bill’s supporting documents.

We reiterate that the collaborative and participatory development of implementation is vital in getting this right for everyone, and that the reporting duty within the HRS is a part of this process to improve life meaningfully for all people in Scotland.

We think that the Bill presents a significant opportunity to enable sustainable and measurable improvements for marginalised people in

Scotland who, to date, have experienced significant breaches to their human rights.

END