
A Human Rights Bill for Scotland: consultation

Audit Scotland, Accounts Commission, Auditor General response

Background

1. Audit Scotland, the Accounts Commission and the Auditor General for Scotland welcome the opportunity to respond to this [consultation](#).

- The [Auditor General for Scotland](#) (AGS) is an independent crown appointment, made on the recommendation of the Scottish Parliament, to audit the Scottish Government, NHS and other bodies and report to Parliament on their financial health and performance.
- The [Accounts Commission](#) is an independent public body appointed by Scottish ministers to hold local government to account and help them improve by reporting to the public on their performance. The Controller of Audit is an independent post established by statute, with powers to report directly to the Commission on the audit of local government.
- [Audit Scotland](#) is a statutory body established under the Public Finance and Accountability (Scotland) Act 2000. It is Scotland's national public sector audit agency which provides the Auditor General and the Accounts Commission with the services they need to carry out their duties.

2. Public audit provides independent assurance that public money is spent properly and is providing value for money. Driving innovation and improvement and supporting the public sector to address inequalities and protect human rights is a priority area in our [work programme](#). Our latest [mainstreaming equality progress report](#) summarises progress in this area during 2021-23 and [Public Audit in Scotland](#) sets out our vision and ambitions for 2023-28. The Accounts Commission set out its [priorities for 2021-26](#), which includes highlighting the contribution local government makes to lessening the impact of inequalities on different communities.

3. We recognise the scale and ambition of the Scottish Government's plans for a Human Rights Bill for Scotland. Based on our audit work, we have highlighted several key considerations which are relevant to multiple questions within the consultation. Our response is based on the information publicly available as part of the consultation. These key areas we highlight are:

- the importance of clear accountability within complex governance arrangements for implementing the Bill and for scrutiny bodies and coordination, with a need for clarity around roles and responsibilities (Questions 21, 22, 30, 40, 41)

- the importance of transparent reporting with a focus on outcomes to assess whether the Bill is delivering the intended benefits and making a difference for people in equality of access and realising their rights (Questions 19, 22, 23, 40, 42, 44)
- a need for meaningful participation and co-design with rights holders and those with lived experience in developing the Bill framework and highlighting learning and good practice (Questions 13, 41, 42, 43)
- the need to prioritise limited resources and target them to where they are most needed to tackle inequalities, particularly in the most vulnerable groups who are often marginalised and excluded from services (Questions 14, 23, 43)
- the importance of good data and financial information to effectively measure progress with outcomes but not burdensome for public bodies, highlighting gaps and where there is scope to coordinate data and reporting in a proportionate and more efficient way (Questions 14, 23, 44)
- the need for strong leadership and collaborative working, highlighting key messages from reports, including on health and integration and the principles for community empowerment (Question 20)
- highlighting where more clarity and detail is needed within the Bill and where there are likely to be resource and capacity implications (Questions 23, 27, 38, 39, 42, 43).

4. We also make comments on the initial high-level proposals within the consultation regarding scrutiny bodies (Question 30), recognising that this needs to be further developed. We outline existing scrutiny coordination, intelligence sharing and how this has evolved and improved, emphasising the ethos and recommendations from the [Crerar Review](#) about minimising overlap and duplication of scrutiny. We look forward to further discussions about the roles and responsibilities of scrutiny bodies.

Accountability

5. It will be important that there is clear accountability within the complex governance arrangements for implementing the Bill. Public bodies being accountable to citizens is increasingly important in a landscape of service reduction. This is relevant for example, to the duty to comply, referenced at Question 21 of the consultation, where a focus on improving outcomes would be helpful.

6. Public bodies will need a clear and detailed understanding with no ambiguity about what they need to do to achieve the aims of the duty and to be fully compliant. It will be important that demonstrating compliance is not seen as a tick box exercise, so it would be helpful to have an emphasis on outcomes and actions needed to comply with the duties rather than a focus on the process. This will need to be supported by clear guidance, including specific detail on how to comply, and expert advice and support, and practical case studies.

7. Our [Health and social care integration: Update on progress](#) report highlighted challenges around a fragmented structure of services and complicated governance and approval processes, which can delay decision-making. Similar issues were highlighted in our [Adult mental health report](#).

8. Consideration of potential challenges around governance and decision making should be given within any provisions set out in a duty to comply and reporting requirements. There is a need to ensure that new duties are met by the appropriate bodies, and further duplication of processes/reporting criteria and sign-off should be mitigated against. However, transparency and openness around reporting on progress is critical in providing information to citizens and Parliament.

9. Clarity is also relevant to reporting, as referenced at Question 22 of the consultation, and clear guidance on what and how duty-bearers are required to report on compliance will be essential. Public authorities' experiences of implementing current reporting obligations including the PSED and its impact can provide valuable insights which should be considered in the development of this aspect of the Bill and associated guidance, including how to ensure it places no unnecessary burden on them.

Proposals for scrutiny bodies

10. We agree that scrutiny bodies can play an important role in holding devolved public services to account in relation to human rights, helping to drive culture change in service delivery ultimately leading to better outcomes for people across Scotland. The remit and range of work carried out by scrutiny bodies varies considerably and it will be important to understand how these differ and complement each other, and further clarity is needed around roles and responsibilities.

11. Our audit work is carried out independently from public sector bodies, including the Scottish Government and the Parliament. This is crucial as it allows us to:

- work in the public interest and for that interest only
- be apolitical and work free from interference or influence
- safeguard and protect our independence strongly
- make objective and evidence-based judgements and recommendations.

12. Our views on the three high-level proposals at Question 30 within the consultation document are set out below. We look forward to discussing these further to clarify the role of Audit Scotland, the Accounts Commission and Auditor General in the scrutiny of human rights obligations and to ensure our integrity and independence remain.

Proposal 1: Require scrutiny bodies, when undertaking their functions, to assess the bodies they oversee in light of the human rights obligations in the Bill, and to consider how these bodies can further mainstream human rights in the Bill

13. The broad range of powers that Audit Scotland, the Auditor General and the Accounts Commission currently have, generally allow for consideration of equalities and human rights-related issues across our work. Therefore, we would not envisage that substantive changes will be needed to current legislation in relation to our powers or statutory duties in auditing the implementation of human rights legislation.

14. The Auditor General, for example, has a general statutory power to carry out examinations into the economy, efficiency and effectiveness with which public bodies have used their resources in discharging their functions. Under this power, the Auditor General can examine how effectively public bodies have complied with legislation that applies to the delivery of their functions, including for example, being able to demonstrate how they are fulfilling the general equality duty under the Equality Act 2010. It is envisaged that this can be applied to the effectiveness of public bodies' arrangements for protecting human rights.

15. Within the Local Government in Scotland Act 2003 there is a statutory framework for Best Value for local authorities. This includes fairness and equality as a cross-cutting theme integral to all the functions and activities carried out by a local authority to deliver good outcomes and achieve Best Value. Revised statutory guidance for Best Value introduced in 2020, applicable to the work of Audit Scotland (on behalf of the Accounts Commission), contains an explicit reference to human rights.

16. Within Audit Scotland we have been introducing a human rights-based approach and we are currently considering how we integrate this into our internal policies and our audit approach. In our latest [progress report on mainstreaming equality](#), we have started to report on mainstreaming human rights within the public sector and highlighted where we have found certain groups facing barriers to their rights being met (see page 3). However, the significant additional requirements for scrutiny bodies are likely to have resource implication which could impact on audit delivery. It is difficult to determine the level of resource needed for Audit Scotland to assess how public bodies meet human rights obligations until more detail is available on the Bill framework.

Proposal 2: Enable scrutiny bodies to work more closely with each other – for example, making it easier to share information relating to human rights matters, being able to work together when looking at human rights issues and letting other scrutiny bodies know if there may be overlap in the issues they are looking at

17. Scrutiny coordination has been in operation since 2008, in response to the 2007 publication of the [Crerar Review: the report of the independent review of regulation, audit, inspection and complaints handling of public services in Scotland](#). Since 2008, the roles and responsibilities of groups designed to support effective scrutiny coordination have been amended and updated over

time to reflect changes in scrutiny bodies and in the way public services are delivered.

18.In May 2023, the Strategic Public Sector Scrutiny Network (SPSSN) and the Scrutiny Coordination Group (SCG) agreed terms of reference, which include effective joint working and sharing intelligence. (These will be publicly available soon on the [scrutiny improvement page](#) on the Audit Scotland website, which is currently being updated. Meanwhile, we are happy to share these with the Bill team.) The SCG sets out a range of commitments by members in its terms of reference, including contributing to the coordination of scrutiny activities and proactively sharing relevant intelligence, scrutiny findings and risks with other members at the earliest opportunity.

19.There is learning to be taken from the shared risk assessment approach, first introduced in local authorities in Scotland in 2009, including the need to take a proactive flexible approach and not to develop an overly bureaucratic or rigid process. Local Area Networks found it to be onerous in terms of time, and scrutiny partners attendance decreased or stopped, with outputs (scrutiny plans) becoming out of date very quickly. The key success factors were having access to named individuals in scrutiny partner organisations, being proactive about sharing intelligence and risks, and using oversight groups to share work plans, methodologies and relevant training.

20.An example of where scrutiny bodies have come together to agree an approach to scrutiny and supporting improvement around specific legislation, is in relation to the Community Empowerment (Scotland) Act 2015. Under the direction of the Strategic Scrutiny Group, a Community Empowerment Advisory Group was set up including experts in the field of community empowerment and representatives from Scottish public bodies and scrutiny bodies. The group worked together to produce [Principles for Community Empowerment](#). As well as providing a shared approach for scrutiny bodies, it also helped to raise awareness among public bodies and their partners about good practice and the expectations of scrutiny bodies. This was based on five principles: community control, public sector leadership, effective relationships, improving outcomes and accountability.

21.Audit Scotland has been part of a Sharing Intelligence for Health & Care Group in place since 2014, along with six other national agencies. The group was set up to share, consider, and respond to intelligence about relevant risks within Scotland's health and integrated care systems. Following a review of the group's structure and function, the group now also includes the nine health and social care professional regulatory bodies in Scotland. It has been renamed the Sharing Health and Care Intelligence Network (SHCIN). Its aims are to bring a more dynamic, current and responsive approach to sharing intelligence around emerging concerns relating to the safety and quality of care across the whole of the health and care system (previously the focus was on annual retrospective reviews of health boards, mainly acute services). This includes earlier sharing of any concerns with those accountable, acknowledging actions taken in response to emerging concerns and supporting improvement.

22.Crerar stated: 'Where scrutiny is needed, if there is more than one existing organisation, only one should be asked to do the work and to be responsible and fully accountable'. Scrutiny bodies will need a clear understanding of

respective roles and responsibilities, as well as that of other key organisations such as the EHRC and SHRC in relation to compliance. It will be important that clear guidance is in place for public bodies and how this relates to the revised PSED. The role of scrutiny bodies may change over time reflecting the change from an initial procedural duty on public bodies to a duty to comply. The SPSSN may be a useful forum for further discussions around roles and responsibilities.

Proposal 3: Require scrutiny bodies (including the SPSO) to inform the SHRC of any systemic human rights issues they come across, as well as informing other relevant organisations (such as the SPSO, the Children and Young People’s Commissioner Scotland, the Mental Welfare Commission and Environmental Standards Scotland) of any systemic human rights issues that may be relevant to their organisations

23. We would agree that any human rights issues and risks should be reported to relevant organisations and have set out above how scrutiny bodies already work together to share intelligence.

24. A clear definition of a systemic human rights issue will be essential, and guidance and training will be needed on how to identify a systemic human rights issue and which organisation should be alerted.

25. It will be important to be clear about the extent to which individual scrutiny bodies can comment on human rights issues within their respective remits and skills. For example, Audit Scotland staff are not qualified to comment on compliance with legislation. Our audit work looks at policies and decision making within public bodies, how effectively public money is being spent and managed, and identifies risks and areas for improvement.

Reporting

26. It is important that reporting is transparent and focuses on outcomes to assess whether the Bill is delivering the intended benefits and making a difference for people in equality of access and realising their rights. Reporting also needs to be accessible to all rights holders and steps should be taken to ensure this.

Human Rights Scheme (Questions 26, 40)

27. Requiring Scottish Ministers to publish a Human Rights Scheme would be an opportunity to demonstrate implementation of the framework across ministerial portfolios and responsibilities. A truly cross-sectoral approach will be needed and therefore all Ministers should be accountable, not just those directly responsible for equalities. Transparency will be key in implementing the Bill, and the scheme and progress should be clearly reported against ambitious but realistic actions.

28. The scheme and progress reporting should be made available to the public in an accessible way, including providing alternative formats, an easy read version, and jargon free summaries. The proposal to bring several aspects together in one place is welcome, however in the interests of accessibility and transparency it is important to maintain clear and concise reporting and present

the information in a digestible and visually appealing way. Learning could be taken from aspects of other reporting where large amounts of information are broken down and presented in different ways, such as: [SNAP2](#) in relation to clearly breaking down complex information into manageable chunks, which are easy to navigate; and the [Local Government Benchmarking Framework](#) and the [National Performance Framework](#) websites and dashboards for reporting performance and trends against indicators and outcomes (although some gaps exist in the data presented).

29. It will be helpful to take a participative approach to the development of a human rights scheme with key groups. It will be important that actions are sufficiently ambitious but achievable and focus on priority areas for recognising the progressive realisation of rights.

30. It will be useful for the scheme to include any plans to introduce further legislation to give effect to the human rights framework set out in the Act. During Stage 1 scrutiny of the NCS Bill, some stakeholders said that while human rights are included in the NCS Bill it is still to be seen how these are defined and whether they are actionable.

Public body reporting (Questions 22, 23)

31. We note and welcome the intention to strengthen the approach to reporting and monitoring. Openness and transparency around public spending and decision-making is a critical part of effective government. As we set out in [Public audit in Scotland 2023-2028](#), good quality reporting is clear, transparent, timely and accessible, is supported by evidence and explanations and allows for effective oversight and monitoring.

32. Reporting will need to go beyond a duty focused on the process of decision making and include a duty to report on achieving outcomes, the rights within the framework that have been realised, and gaps that remain. Clear guidance on what and how duty-bearers are required to report on compliance will be essential. Building public sector bodies' understanding of the framework through engaging with their experiences of implementing current reporting obligations, capacity building and clear guidance, will support them to apply good judgement about what information will most meaningfully contribute to its aims. In turn, this may reduce the focus on process and associated feeling of bureaucracy.

33. In support of this, consideration should be given to what tools or indicators may be used to measure the outcomes and how this can be done coherently with the National Performance Framework.

34. Good quality data will be necessary to better understand human rights concerns and risks, assess progress and monitor outcomes. Data should include qualitative data, including the lived experience of rights-holders. It should also include quantitative data, disaggregated where necessary, whilst ensuring a coherent approach and using existing data, not adding more onto an already overloaded system of fragmented data returns.

35. Implementation plans also provide an opportunity for identifying ways in which public sector bodies can learn from one another/develop shared approaches which would support understanding of the framework and its

practical application. Such an approach would support an effective balance between assurance and improvement.

36. It will be important that there is clarity and coherence between the new reporting requirements and the already existing duties and data returns such as the PSED, the Fairer Scotland duty and the proposed forthcoming UNCRC reporting duties. And a need not to overload the system with disjointed data requests, coordinate these where possible and link more explicitly to the overarching responsibilities in the NPF.

37. Public authorities' experiences of implementing current reporting obligations including the PSED and its impact can provide valuable insights which should be considered in the development of this aspect of the Bill and associated guidance, including how to ensure it places no unnecessary burden on them.

38. One proportionality consideration might be the size of organisations which are subject to the requirement. A more tailored approach could support smaller bodies to provide the most impactful responses possible. Areas which may benefit from flexibility include the nature of the output required of smaller public sector bodies as well as associated reporting timescales. Capacity and supporting resources may be a particular challenge for smaller organisations. So, there may be benefit in considering the scope to enhance the range of centrally held reference materials which can be accessed by duty-bearers. This would also support consistency of approach.

Participation

39. Data and evidence matter and it's essential that lived experience and community voices are embedded in the design and management of public services. Participation supports both implementation and the targeting of resources, accountability and the monitoring of outcomes. However, the participation must be meaningful (it must be acted upon), and it must be deliverable in practice by public bodies. (Question 13)

40. We have found good examples from our work on social security, where the design and delivery has been guided by and continues to learn from user experience and where data from users has led to changes in proposed regulations. This has included a Social Security Charter, co-produced with people who have experience of the current social security system. It is publicly accessible and clearly communicates what people can expect from the Scottish Government and Social Security Scotland. It sets out the eight principles from the Act and translates them into four key aims for the work of the Agency and Scottish Government. There is annual reporting on performance against the standards set out in the Charter with a measurement framework being co-produced with users. ([Social security: Progress on implementing the devolved benefits, May 2022](#) and [Social security: Implementing the devolved powers, May 2019](#))

41. However, we have also noted where meaningful participation is not occurring where it should. For example, we have recommended that the Scottish Government needs to develop a plan for co-producing proposed social care reform. This includes how it will continue to embed the voice of care experienced people in all aspects of developing, planning, and delivering

effective social care for people who require support and their carers. ([Social care briefing, January 2022](#))

42. The National Care Service (NCS) Bill has been designed as a framework Bill with the detail intended to be developed through codesign. While we commend the good intent behind the co-design, there have been concerns raised by stakeholders at stage one parliamentary scrutiny sessions on the slow progress of co-design and that it was difficult to scrutinise a framework Bill with limited detail. It is early days in relation to co-design for the NCS Bill and difficult to assess how successful it has been, but learning can be taken about how this is built in, the level of detail needed and timing. Relevant learning may also be drawn from the PSED review in terms of involving key stakeholders at early stages.

43. In our community empowerment and Best Value audit work, we have noted limited progress in citizen participation in budget processes, particularly for marginalised groups, for example in relation to participatory budgeting ([Principles for community empowerment, July 2019](#)).

44. Participative approaches will not always look the same so it will be important to clearly define what is meant by the right to participation setting out what people should expect. For example, in a co-production approach, public bodies and communities work together to co-define the issues, co-design the best responses and co-deliver using all the available public body and community resources and assets.

45. There needs to be clear expectations around how public bodies can support participation in the delivery of services. Strategies and plans should provide tangible information on how public bodies can support and promote participation. For example, there is limited reference to incorporating the voices of lived experience throughout the commitments in the Scottish Government's Mental health strategy 2017-27 ([Adult mental health](#), September 2023).

46. Public bodies should continue to evaluate and learn from their experiences and that of others, to continue to improve participation processes including learning from the review of the Public Sector Equality Duty, the NCS codesign process and social security. There are risks where participation processes are not done well for example, people may feel that they are repeatedly saying the same things but there is no clear change or that they do not include the seldom heard or those disengaged from public services. We welcome alignment with the revised PSED and other pieces of legislation with participation requirements to ensure approaches are cohesive and deliverable recognising the limited capacity of many organisations.

47. We also note elsewhere in this response, that where participation relates to the development of the Bill, it is important to ensure that the timing of the participation and the outcomes (duties and guidelines) enables duty bearers to be clear about their duties before they come into force.

Prioritising resources

48. There will be a need to prioritise limited resources and target them to where they are most needed to tackle inequalities, particularly in the most vulnerable groups who are often marginalised and excluded from services. Including an overarching equality clause will be important to ensure equal access to the rights in the Bill and to support effective oversight of progress on tackling inequalities (Question 14).

49. For example, we highlight in our [Adult mental health report](#) that some groups of people are disproportionately affected by mental health issues, and that access to mental health services is more difficult for some people. Public bodies need to support those who are most excluded to access core services. The inclusion of an equality provision that seeks to secure equality of outcome would help this to be prioritised.

50. It is important that the equality provision is clearly defined and operates within the limits of the equal opportunities' reservation in the Scotland Act 1998. It should be clear who the duty bearers are (including relevant private actors) and which services are implicated.

Good data to effectively measure outcomes

51. Data is a vital tool in tackling inequality and progressing human rights. [We have highlighted](#) that data skills and a data culture need to be part of strategies to tackle inequality where data can guide and target actions to reduce inequality and can enable effective monitoring and assurance. The Scottish Government has acknowledged in the Equality and Fairer Scotland Budget statement that gaps in evidence remain and have driven further efforts to work collaboratively with stakeholders and across the public sector to improve the range of equality data collected and reported.

52. Good data and financial information will be necessary to effectively measure progress with outcomes, but this should not be burdensome for public bodies. It is important to focus on what is needed to measure outcomes and realisation of human rights. We have highlighted gaps in data and financial information in many of our reports and summarised these in our [response](#) to the Equalities, Human Rights and Civil Justice Committee Budget Scrutiny 2023/24 (The impact of human rights budgeting) call for views.

53. The persistence of data gaps in some service areas may be exacerbating inequalities with individual needs not being understood or met, and/or a human rights-based approach to service delivery not being achieved. It also makes it difficult to know whether budget decisions and/or the performance of public bodies are supporting the progressive realisation of individuals' human rights.

Leadership and collaborative working

54. Embedding the rights of the Bill will be an important first step for duty bearers and require strong and clear leadership at a national level and within individual organisations to set the tone and culture. As we set out in [Principles for community empowerment](#), this will include an understanding and commitment from leaders, consistent messaging, and setting clear objectives and priorities.

55. To work effectively, sharing learning and good practice will be important through collaborative working. We set out traits of effective collaborative leaders in [Health and social care integration: Update on progress](#) (Exhibit 8).

56. It will be important for public bodies to have strong partnerships with the third sector and communities. There is a lot of learning to be taken from the Covid-19 pandemic about the vital importance of the third sector in reaching groups, meeting needs and realising rights. However, there are risks to third sector capacity with increasing pressures on resources. ([Local government in Scotland Overview 2022](#), May 2022; [Community empowerment: Covid-19 update](#), October 2021)

There is a need for more clarity and detail within the Bill and there are likely to be resource and capacity implications

The duties, Minimum Core Obligations (MCOs) and resource (Questions 24, 39)

57. It will be important to develop clear definitions of MCOs, of “progressive realisation” and of “maximum available resources”. MCOs will be helpful in setting out the rights and developing a shared understanding of what this means under the legislative framework. This needs to be considered recognising the importance of taking time for co-creation at the same time as public bodies are facing a range of pressures.

58. We welcome the acknowledgement that the processes for producing the guidance on the MCOs would have to take place in good time before the duties come into force. However, there could be significant resource implications for services to meet these obligations and it will be helpful to set out in the Bill framework any resources that will be made available to support public bodies.

59. It will be essential that the guidance is clear on what the content and scope of the duties are, including what the intended outcomes are, set out in a measurable way. For example, if certain outcomes should be prioritised and whether certain outcomes are inter-linked. This is important to ensure that the perspectives and expectations of duty bearers and rights holders are not in conflict. It is also important to enable duty bearers to be able to make decisions about what steps to take and what decisions are necessary in order that they may fulfil their duties. And it is important to enable the evaluation of whether a measure is achieving its aims and making best use of public money. In our 2018 [Early Learning and Childcare](#) report, we reported on the difficulty that councils faced in these respects when the Act and guidance were not clear enough.

Access to justice and advocacy (Question 27)

60. Learning can be taken from the Social Security (Scotland) Act 2018 around approaches to advocacy. Independent advocacy was made a legal right for disabled people under Section 10 of the Act. We reported in 2022 in our [progress report on social security](#) that the Scottish Government launched this service in June 2021, helping to make social security support accessible and fair for disabled people. *VoiceAbility* which was awarded a four-year contract to provide advocacy services has committed to improving long-term employment prospects. It plans to do this through the creation of 100 new jobs and recruiting

75 per cent of its staff from long-term unemployed or economically inactive candidates.

61. In our [Self-directed support: 2017 progress report](#), we highlighted a threat to the provision of independent information, advice and advocacy when dedicated funding comes to an end. We highlighted the need for good information and advice services and recommended that the Scottish Government, COSLA, and partners reviewed what independent information, advice and advocacy people will need in future.

62. We receive correspondence from members of the public who have a complaint about other public bodies. It's helpful for us to understand the landscape and be able to signpost correspondents to other bodies, where appropriate. Our [issues of concern policy](#) sets out that we will try to suggest other organisations which may be able to help, where appropriate. For example, we frequently suggest that a correspondent raises their issue with the audited body through the body's complaint process and we will also highlight the option to raise this further with the SPSO if they are not satisfied with the response they receive. Having clear information on any new advocacy or support available, would help us to be able to re-direct correspondents appropriately.