



**UNISON Scotland response:
Socio-Economic Duty**

September 2017

Introduction

UNISON is Scotland's largest trade union with members across the public, private and voluntary sectors. UNISON members work in a range of settings delivering essential services to Scotland's citizens.

UNISON is a leading human rights defender in day-to-day workplace situations. UNISON has also brought various direct challenges to the UK government in the Supreme Court and ECJ through individual cases and judicial review. Having invoked EU law, the ECHR and the Magna Carta to remove tribunal fees and restore access to justice, UNISON speaks with a degree of authority on the difficulties of tackling disadvantage and promoting human rights in the UK.¹

As we know from our work, many fundamental rights are remote and inaccessible to ordinary people, particularly people living with poverty and economic disadvantage. Many public bodies in Scotland have a lazy authoritarian disregard for public law duties to tackle poverty and inequality.² The new Socio-Economic Duty (SED) must be robust and enforceable if it is to offer practical benefit to people facing poverty and disadvantage. Scotland needs to empower excluded communities. The SED presents that opportunity but the proposed implementation will be ineffective. UNISON therefore welcomes the opportunity to take part in this consultation.

Overview

While we strongly welcome the Scottish government commitment to legislate for a socio-economic duty for public bodies we have concerns over the proposed retention of the duty as defined by the UK government in 2010. The 2010 measures were inadequate then and they are simply unlawful now. We firmly believe that Scottish government cannot be held to the requirement to mirror the arrangements proposed for England. The consequences of respecting the vision for the 2010 Act are very negative for Scotland:

- The powers focus on the consequences of poverty, not the causes.
- The definition of public bodies is too narrow.

¹ [UNISON v The Lord Chancellor \[2017\] UKSC 51](#)

² In 2016 the Scottish Government launched a two phase review of the Enterprise & Skills agencies. The review covered key state functions in which access to education, training, skills and employment are heavily segregated on grounds of gender, race and disability. Despite the fact that this segregation operates to the well established detriment of various disadvantaged groups no equality impact assessment was conducted prior to the conclusion of the two stage review. The review had several detailed work stream, none of which addressed equality, exclusion, poverty, ICESCR rights or Fair Work. When challenged, the programme coordinators indicated an intention to conduct an impact assessment at the end of the review.

- The focus on “strategic decision making” is too remote to have any practical impact on the causes of poverty, although it may ameliorate the health, crime and housing consequences of poverty.
- The obligations placed on public bodies are weak and ineffective.
- The proposal creates no meaningful or enforceable socio-economic rights for people in poverty; and,
- There are no adequate powers of enforcement and no effective remedy for individuals.

This “high level” approach intended for England risks giving Scotland more of the same – lofty strategic rhetoric about inclusion which bears no relation to the reality of poverty. The reality is that Scotland is a wealthy country where some full-time workers feed their families from food-banks. That is a consequence of power, how it is acquired, retained and exercised in violation of human rights including socio-economic rights. The UN has called on Scotland to address human rights violations as regards socio-economic disadvantage. Having committed to a human rights approach, Scotland should answer that call.

Before implementing the socio-economic duty it is essential that Government re-visits the analysis of power and how it creates poverty and disadvantage. That analysis will reveal the inadequacies of the EqA 2010 measures and the shortcomings of the existing public sector duties. The solution is to empower disadvantaged groups to exercise enforceable socio-economic rights BUT, to use public law measures to channel that power into collective, participatory dialogue about how public bodies function. The solution is not to empower individuals to sue public bodies for perceived losses linked to the new socio-economic duty.

Such a collective, human rights approach will be highly innovative for Scotland. The Scottish government delegation to the International Convention on Economic, Social and Cultural Rights (ICESCR) periodic review witnessed how community groups in Northern Ireland are using that approach to great effect. We can do something similar in Scotland.³

Failed Public Sector Equality Duties

Systemic discrimination remains rife within public bodies in Scotland and the existing equality duties have been demonstrably ineffective. The weakness of existing equality duties is evidenced in many ways including:

- The enduring failure of key public bodies to address the gender pay gap;⁴
- The costly and shambolic response of local authorities to equal pay litigation;⁵
- The deep and enduring segregation of education, training and employment on grounds of race, gender and disability; and
- The routine failure of councils, health boards, enterprise agencies and government departments to engage with equality duties.^{2, 4}

The substantive measures in the equality duties are largely adequate, the failure relates to the ineffective arrangements to ensure compliance and enforcement.

³ [Participation and the Practice of Rights 2015: ICESCR Periodic Review](#)

⁴ [No Small Change: The Economic Potential of Closing the Gender Pay Gap, 6th Report, 2017](#)

⁵ [Equal Pay in Scotland: Accounts Commission September 2017](#)

Example

The Accounts Commission recently reported that local authorities frittered away £750m in a stubborn and futile attempt to prevent women enforcing their equal pay rights. Each of these authorities pursued an aggressively discriminatory strategy at vast public expense despite having a binding public sector duty to proactively eliminate discrimination, promote equality and have due regard for equality in the delivery of Best Value.

The commission found that, despite the recent focus on pay audits and litigation, only fifty percent of councils were meeting their obligation to monitor and report on the gender pay gap. The commission were unable to report on whether the pay gap had been closed.

UNISON foresaw the full scale and cost of this travesty in 2006 and targeted one local authority in judicial review proceedings. The petition set out the new discrimination Falkirk Council proposed to impose by dismissing its entire workforce and re-engaging staff on deeply discriminatory terms and conditions.⁶

In its judicial wisdom, the Court of Session dismissed the UNISON case on the basis that pay discrimination could not be challenged as a matter of public law by way of judicial review. According to the court, the only appropriate remedy lay in protracted individual claims to Employment Tribunal.

The Accounts Commission record Falkirk Council as receiving more than 2,000 equal pay claims in the 10 years to 2016. Settlement costs to date are £21 million and over 1,500 claims remain to be resolved. UNISON strongly asserts that a public law solution to this situation in 2006 would have been significantly more equitable and financially efficient.

The Falkirk case is just illustrative of a wider problem. Press reports indicate that UNISON's recent Court of Session victory over Glasgow City Council could cost up to £500m. Again, the council was the subject of a failed public law intervention that might have brought an earlier, more efficient resolution. The EHRC investigated the Glasgow pay system in 2009 but the findings of the report have yet to be published. UNISON can only assume that the report was negative, otherwise Glasgow would have relied on the EHRC findings to defend the legal proceedings.

These mass equal pay cases demonstrate the wider need to use effective and enforceable public law rights and duties to improve the equality and financial performance of public bodies.

Scotland has had enough hot air from public bodies about inclusion and equality. We need effective public sector duties. And efficacy requires public law remedies that enable incompetent decisions to be challenged BEFORE they create waves of private individual litigation.

⁶ [UNISON & Ors v Falkirk Council\[2006\] CSOH 193](#)

The new proposed socio-economic duty is even more "light touch" than the existing public sector duties. The likelihood is that this initiative will have the same marginal and inadequate impact as the existing equality duties unless significant steps are taken.

UNISON believes that strengthening the proposed socio-economic duty is not just a desirable option, it is a binding obligation. Scottish government is legally obliged to deliver effective protection of social and economic rights. Effective protection requires a duty with broader scope and, crucially, effective remedies when social and economic rights are violated in a situation when a public body has the power and duty to protect those rights.

Human Rights Context

The right to state protection from social and economic disadvantage is already an established legal right. These rights are little known and rarely used because of the UK's longstanding contempt for international human rights.

The relevant legal rights and protections are set out in the United Nations Treaty - The International Convention on Economic, Social and Cultural Rights (ICESCR).⁷ The ECHR is also engaged although the economic focus of ECHR obligations is less precise than those contained in ICESCR.

The ICESCR rights are as follows:

Article 6 - The right to work

Article 7 – The right to just and safe working conditions, fair wages, equal opportunities for promotion, paid holidays and reasonable limitation of working hours.

Article 8 - The right of everyone to form or join trade unions and the right to strike in conformity with laws of particular country.

Article 9 - The right to social security.

Article 10 - The right to family protections such as: marriage only by consent, leave for new mothers and protection of children from exploitation.

Article 11 – The right to an adequate standard of living, including adequate food, clothing and housing.

Article 12 - The right to the highest attainable standard of health.

Article 13 - The right to education

ICESCR stipulates that all these rights must be provided with freedom from discrimination and, particularly, they must be provided equally to women and men. The convention requires that state signatories "progressively realise these rights to the maximum of its available resources". No person, group or government is lawfully empowered to destroy these rights, and Governments may only limit these rights in a way determined by law and in a way that is consistent with the Covenant.

⁷ [International Covenant on Economic, Social and Cultural Rights \[1966\]](#)

ICESCR is an excellent charter for basic social and economic rights. Given the distortions of the devolution settlement we would expect a progressive Scottish government to embrace the obligations required by ICESCR – they are an opportunity to ensure that public bodies play their full role in delivering the fairness, equality and inclusion to which Scottish ministers aspire.

UNISON notes that the consultation makes reference to ICESCR obligations but we also note:

- The consultation does not acknowledge that ICESCR obligations are legally binding and apply directly to Scottish Ministers and MSPs.
- ICESCR compliance requires creation of legally enforceable rights (The UN previously delivered a robust criticism of the UK Government for stating that ICESCR rights were “mere principles and values and that most of the rights contained in the Covenant are not justiciable”.⁸
- Nothing in the convention limits socio-economic rights to the high level decisions of strategic public bodies.

There are more than “obvious links” and “evident connections” between the SED and ICESCR rights. ICESCR is binding and its rights must be enforceable.

ICESCR Compliance

The United Kingdom ratified ICESCR in 1976 but, despite repeated calls from the economic and social committee of the United Nations, the United Kingdom has never incorporated those rights into domestic law. The UN Committee on Economic and Social Rights regularly highlights the various ways in which the UK erodes socio-economic rights and fails to protect individuals when fundamental rights are violated.

In 2009 the UN treaty body analysed the UK’s treaty compliance and reported as follows:

“The Committee reiterates the concern it expressed in its previous concluding observations that, despite the adoption of a wide range of laws with regard to economic, social and cultural rights, the Covenant has still not been incorporated into the domestic legal order of the State party and cannot be directly invoked before the courts. It also regrets the statement made by the State party’s delegation that economic, social and cultural rights are mere principles and values and that most of the rights contained in the Covenant are not justiciable.

“The Committee urges the State party to ensure that the Covenant is given full legal effect in its domestic law, that the Covenant rights are made justiciable, and that effective remedies are available for victims of all violations of economic, social and cultural rights. The Committee reiterates its recommendation that, irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), following ratification of an international instrument, the State

⁸ [Concluding Observations on the fifth periodic report on the United Kingdom of Great Britain and Ireland page 3, para 13](#)

party is under a legal obligation to comply with such an instrument and to give it full effect in its domestic legal order.”⁹

The UK took no action on incorporation in response to the 2009 report and the UN revisited the issue in the recent 2016 assessment:

“The Committee recalls its previous recommendation and urges the State party to fully incorporate the Covenant rights into its domestic legal order and ensure that victims of violations of economic, social and cultural rights have full access to effective legal remedies.”¹⁰

On the specific subject of the proposed socio-economic duty on public bodies the UN made the following important conclusion:

“While welcoming the adoption of the Equality Act 2010, the Committee is concerned that some of its provisions, particularly those relevant for enhancing the protection of economic, social and cultural rights without discrimination, are not yet in force, such as the duty of public authorities to consider socio-economic disadvantage in decision-making processes.”

“The Committee recommends that the State party bring into force the relevant provisions of the Equality Act that refer to the public authorities’ duty with respect to socio-economic disadvantage, as well as with respect to the prohibition of intersectional discrimination, in order to enhance and guarantee full and effective protection against discrimination in the enjoyment of economic, social and cultural rights.”

Section one of the Equality Act 2010 was not the product of innovative policy by the then Labour Government in Westminster. It was a fairly ineffective response to UN pressure to go beyond the basic rights of the ECHR and give limited legal effect to the specific social and economic rights contained in ICESCR. Following the Scotland Act 2016, the legal duty to comply with this specific direction of the UN falls to the Scottish government. For reasons we explain below, inaction is not an option: nor is inadequate implementation.

Human Rights – A Scottish Approach

The creation of an effective duty on public bodies to address socio-economic disadvantage is key to Scotland’s future compliance with international human rights as set out in the UN ICESCR Convention. By accepting the devolved obligation to respect social and economic rights Scotland has acquired an important opportunity to take its own path. If we accept the model for implementation set out by the UK Government in 2010 this important opportunity will be missed.

By delivering a robust socio-economic duty on public bodies Scotland can achieve the following vital goals:

⁹ [Concluding Observations on the fifth periodic report on the United Kingdom of Great Britain and Ireland](#)

¹⁰ [Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland](#)

- Use the improved decision making of public bodies to reverse the steady erosion of economic and social rights;
- Task public bodies with the job of actively tackling social and economic disadvantage;
- Give momentum to key government policies such as Fair Work, Inclusive Growth, Fairer Scotland etc through compliance by public bodies;
- Shape or influence the human rights behaviours of the private and voluntary organisations with whom public bodies do business;
- Preserve and strengthen vital links with international human rights standards;
- Use enhanced human rights to guard against the worst social and economic consequences of secession from the EU; and,
- Prepare institutional and constitutional defences against the UK government's intended repeal of the Human Rights Act and partial secession from the ECHR.

An Obligation Not an Option

The Scotland Act 1998 devolves human rights compliance insofar as those rights apply to policies and decisions within the devolved competence of the parliament. In fact the 1998 Act goes further and expressly prohibits Scottish ministers and MSPs from acting in breach of international human rights.

CESCR compliance and the creation of a new socio-economic duty are not just devolved competencies, they are devolved obligations. Inaction is not an option. Similarly, weak or ineffective implementation is not an option for MSPs and Ministers because s.57(2) of the Scotland Act 1998 requires them to comply with human rights standards in all they do.

If the new socio-economic duty falls short of ICESCR requirements and does not address the observations of the UN in 2016, those issues will be raised with the treaty body at the next periodic review and Scotland will pick up the record of human rights violations where the UK government left off.

What does CESCR compliance require?

Compliance requires more than high level consideration of the “desirability” of doing good things for poor people. That’s all the UK wording offers in the Equality Act 2010. Scotland must go further.

In short, the scope of the duty must include all public bodies, not just those with a strategic function. The impact of the duty must include all decisions that affect social and economic rights, not just strategic decisions about policy and strategy. The standard of compliance can be no lower than a due regard for ICESCR rights. And, as the UN made clear in 2009 and 2016, compliance requires that these economic rights are justiciable and individuals have access to effective legal remedies.

None of this should be complicated or controversial. And it is not a gravy train for private lawyers and claims companies. The important lesson from equal pay is that inadequate remedies under public law actually fuel mass litigation and destabilise public services and public finance. Access to justice in public law promotes removal of the illegalities that drive private law disputes.

Example – Zero-Hours Contracts

The UN analysed the growth of zero-hours contracts during the sixth periodic review of ICESCR compliance in the UK. The concluding report made the following observations on zero- hours contracts:

“31. The Committee is concerned at the high incidence of part-time work, precarious self-employment, temporary employment and the use of “zero hour contracts” in the State party, which particularly affect women. It is also concerned about the negative impact that all those forms of employment have on the enjoyment by workers of their right to just and favourable conditions of work. Furthermore, the Committee is concerned about the high number of low-paid jobs, which affects in particular certain sectors, such as the cleaning and home-care sectors (arts. 68).

"32. The Committee recommends that the State party:

(a) Take all appropriate measures to progressively reduce the use of temporary employment, precarious self-employment and “zero hour contracts” , including by generating decent work opportunities that offer job security and adequate protection of labour rights”¹¹

Bearing in mind the UN ICESCR position on zero hours contracts and working conditions, consider the following hypothetical scenario. A major discount retailer proposes to build a large distribution centre in Scotland. Investment grants are sought from enterprise agencies. Planning permission and other consents are required from the local authority. Training Levy funds are sought to support the provision of shelf-stacking apprenticeships. The company’s work practices have been methodically analysed. They routinely use zero hours contracts for the majority of their staff. They have been the subject of HMRC enforcement action for underpayment of the National Living Wage with resultant underpayments of pension contributions, income tax and national insurance. There is significant case study evidence of discrimination on various prohibited grounds including gender and pregnancy.

We say it is desirable that all the public bodies in this type of scenario are empowered to have due regard for the socio-economic impact of any decision to support this retail distribution centre. In fact we go further. We say the nature of the ICESCR obligations demand that the new socio-economic duty requires public bodies to have regard for social and economic impact of state support for such developments.

Such an obligation would not act as a barrier to economic development. Rather, a dialogue between developers and public bodies will shape the quality of state investment as developments are approved and advanced. Employers will have a clear vested interest in developing their ability to evidence, for example, Fair Work Practices. Investments will become more economically inclusive. Fairer work will enable more secure labour market participation. Productivity will be enhanced and the benefits of productive growth will be shared more equitably at source, in the labour market, thereby reducing the extent to which government relies on the tax and benefit systems to redistribute the unequal distribution of wealth.

¹¹ [Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland](#)

ICESCR and Inclusive Growth

Scotland lacks the legislative competence to directly intervene in employer and employee relations through the creation of individual legal rights. Arguably, the socio-economic duty offers a more effective, collective structural solution.

Most employers engage with a wide range of public bodies and require state permission or assistance in the form of licensing, planning, grant aid, investment or the procurement or purchase of specific products and services.

This network of legal relations offers the opportunity to shape and influence the business practices of most, if not all, Scottish employers. This need not be a regulatory, compliance or enforcement relationship between public bodies and employing organisation. Simply permitting public bodies to have regard for the social and economic impact of the employers they deal with when discharging their public functions enables Scotland to talk to employers about Fair Work in a meaningful way. The relationship between the state and employing organisations under the new SED should be a constructive dialogue about fairness. The justiciable rights and effective remedies apply to public bodies if they fail to have regard to economic rights during their dialogue with employing organisations. If employing organisations make Fair Work commitments to public bodies and then renege on that pledge, the individual remedy against the employer remains in the employment tribunal.

Admittedly, a public body would require robust evidence of an adverse social or economic impact before licences could be revoked or planning consent declined. All such matters can be addressed in ministerial guidance. But empowering public bodies to influence the terms on which they do business with other agencies and organisations offers a significant boost to the Government's commitment to Fair Work and inclusive growth.

Power to Amend the Equality Act 2010

We anticipate civil servants may advise that the hands of the Scottish government are tied by the specific terms of the Scotland Act 2016 which seek to limit the scope of the duty. We strongly reject that analysis.

UNISON's position is that the Scottish government is obliged to amend and strengthen the provisions in the Equality Act 2010 to achieve ICESCR compliance. There are three legal sources for that power.

- a. The terms of the Equality Act 2010 expressly permit Scottish Ministers to increase the range functions of a public body to which the duty applies and to broaden the range of named public bodies.
- b. Any ambiguity about the flexibility afforded to Scottish Government under the EqA 2010 is removed by the Scotland Act duty to comply with human rights obligations.
- c. s.57(2) of the Scotland Act 1998 expressly prohibits Scottish Ministers and MSPs from acting in breach of human rights obligations. ICESCR rights are binding legal obligations on Scottish Government, they do not rely on the Human Rights Act 1998 for application in Scotland.¹²

¹² [Scotland Act 1998](#)

The Scotland Act 2016 enables Scottish ministers to extend the scope and depth of the SED when those powers are read alongside the ICESCR duties, as incorporated by the Scotland Act 1998.

Consultation Questions

1. Defining the key terms

The consultation paper reads as if it has been prepared by the public services transformation team rather than specialists in human rights, equality or anti-poverty work. The suggestion appears to be that economic disadvantage can be tackled by better co-design of health, crime and housing services. This is an implausible scenario. It may improve public services and ameliorate the consequences of poverty but it will not alter the relationship between low income groups and the institutions and organisations responsible for the unequal distribution of wealth. It certainly does little to address key ICESCR rights such as fair work.

“Socio-economic disadvantage”

The proposed definition covers the consequences of poverty, not the causes. The disadvantages that drive poverty are unemployment, under employment, precarious employment, unequal pay, injustice at work, inflexible work, discrimination, restricted trade union rights, poor pensions, inadequate welfare and so on.

The duty must be grounded in a recognition that public bodies can influence these causes of poverty.

“Inequalities of outcome”

This text appears to accept that there will always be a harsh divide between affluent areas and deprived areas and then embarks on a mission to improve public services in deprived areas. It is grossly unfair to imply that public bodies are in some way responsible for deprivation and that the solution to disadvantage is to co-design better public services in low income communities.

If, as is stated, better outcomes correlate with greater wealth, the duty should focus on empowering excluded groups to acquire greater wealth through fair work, equal pay, better pensions and higher benefits. Those are the causes of disadvantage that require to be addressed if communities are to change.

“Decisions of a strategic nature”

This is perhaps the most troubling aspect of the consultation. This limitation is not permitted by ICESCR. ICESCR does not enshrine the right to live under better bureaucracy or the right to co-design a strategy to leave wealth inequalities in place but make poverty more tolerable.

The focus on strategic decisions also portrays an implausible optimism about the community impact of high level decision making in public bodies. Labour market participation is the most significant determinant of wealth. The terms on which labour market participation is offered are deteriorating rapidly. Low paid and precarious work has extended beyond traditional sources of in-work poverty to include public services, all forms of education, retail, leisure, transport etc. The SED must enable public bodies to ‘push back’ against the rising tide of

unfair work when the opportunity arises and, having due regard to all the circumstances, the SED permits.

The questions for local authorities are – how do you treat your staff? How do your business partners treat their staff? How much attention do you pay to the business practices of the companies you support or licence to make money in your area?

The key questions for IJBs relate to the low pay and unfair work practices adopted by health and social care providers. Government must use ICESCR to empower IJBs to be more proactive in delivering the Scottish government’s living wage and fair work pledges. A public body is not ICESCR compliant if it has no adequate regard for working practices when commissioning health and social care services.

The inclusion of police authorities reflects the extent to which this consultation has strayed away from ICESCR compliance and towards enhanced public service reform. The impact of better policing on civil and criminal justice rights is significant; the relevance to social and economic rights as defined by ICESCR is marginal.

“Due Regard”

UNISON’s believes that the Scottish government has failed to have due regard for binding obligations under ICESCR. This has a significant effect on the approach to “due regard”.

We do not disagree with the general commentary on how “due regard” operates. Decision makers require to have in mind the nature of the duty or obligation, the underlying aim of that duty, the degree to which options before them might advance or hinder compliance with the duty, along with countervailing factors such as efficiency, effectiveness, and cost etc.

What is missing is due regard for ICESCR obligations. ICESCR influences the definition and application of “due regard” in two broad respects – the aim that decision makers should have in mind, and the specific measures they are required to observe.

The aims of ICESCR are as follows:

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷

The aim is progressive realisation of ICESCR rights to the maximum of available resources. ICESCR rights are listed as employment, fair work, equality of treatment, union membership, social security, housing, health etc.

The consultation misses this objective by focusing, again, on the duty to address inequality of outcome. Outcomes should, indeed, be equalised – by addressing the causes of poverty.

To achieve that, there are proactive measures that decision makers should have in mind – are we creating jobs? Are those jobs providing living wages and fair work? Are we working with union-busting employers or promoting union membership? Do we or our business partners support flexible work arrangements?

Also, the doctrine of progressive realisation is vital. In colloquial terms it means no backsliding on the socio-economic gains of the past. For example, ICESCR might not, of itself, prohibit the outsourcing of public services. But if the proposed provider was an expressly anti-union employer with a history of blacklisting and avoiding employment law obligations it would be a breach of ICESCR duties to contract with that particular provider.

Due regard for ICESCR would require that the decision makers gather that information during the procurement process, evaluate it against ICESCR obligations and make the required decision.

The definition should therefore be strengthened to include a direct reference to ICESCR aims, to give effect to the doctrine of progressive realisation and to embed the ICESCR provisions in the guidance on those issues that should be considered within decision making processes.

Section 2 – The Public Authorities Covered

For the reasons stated above we reject the suggestion that Scottish Government is bound by the terms of the Equality Act 2010. ICESCR applies directly to the Scottish Government. Nothing in ICESCR permits this limitation on the application of convention rights and obligations.

Section 6 of the Human Rights Act 1998 prevents Scottish Government from relying on the Equality Act 2010 as a defence to criticism by the UN for failing to progressively realise social and economic rights.

All public bodies are therefore in scope. It is particularly important that all agencies that influence labour market participation and labour market justice are included. For example all enterprise agencies, Skill Development Scotland, SQA, SFC, colleges and universities, Care Inspectorate, SSSC

NGOs including trade unions will be reporting to the UN in the next periodic review and we look forward to reporting on a step change in ICESCR compliance resulting from devolution, a position we expect to be in contrast to that of the report on the UK government.

Section 3 – Meeting the Requirements of the Duty

Although we have criticised the impact of the PSED, that criticism relates to monitoring, compliance, enforcement and the absence of effective remedies. The substantial requirements of the duties are reasonably good.

The requirements of the proposed SED are not as effective. It would streamline the public duty compliance of public bodies if there was a consistency of approach across equality duties and human rights duties:

- Similar data gathering;

- Similar requirements for stakeholder engagement;
- Similar planning and strategising for compliance;
- Similar methods for assessing impact AHEAD of decision making; and,
- Similar monitoring and reporting requirements;

Step 1 – while there might be a method for screening out insignificant decisions (strategic and operational) the starting position is that all decisions are in scope

Step 2 – before looking at inequalities of outcome public bodies must adopt a policy position on the causes of disadvantage within their sphere of operation. There is no point in waiting three years to see if a racist organisation generates unequal outcomes from an apprenticeship programme and then withdrawing funds. Racism is a known cause of inequality and, therefore, public bodies should not be funding organisations that have a proven record of race discrimination. To vet and block funding to discriminatory organisations places the focus on tackling the cause of disadvantage and offers an enhanced, effective and efficient way of applying the duty by moving the assessment “upstream” towards the cause of poverty rather than the effect.

Step 3 – Consultation and impact assessment are essential and MUST precede decision making. Thereafter it is sufficient to follow guidance with due regard to recommended factors and due regard to the outcome of the consultation and impact assessment.

Step 4 – Monitoring. As we have said, the monitoring arrangements should mirror the PSED

Question 3B – Scottish public bodies should be required to participate in evidence gathering for Scottish Government reports to UN periodic reviews of ICESCR compliance.

Question 3C – Implement the recommendations for gender budgeting as submitted previously by the Scottish Women’s Budget Group and extend the framework to include analysis by all protected characteristics including social and economic disadvantage

Question 3D – No comment

Question 3E – Scottish Government should ensure improved gathering of data on poverty and inequality in Scotland disaggregated by protected characteristics as demanded by the UN during the sixth periodic review of ICESCR.

We also require reliable Scottish data on Scottish Living Wage compliance and data to capture or measure Fair Work against agreed Fair Work measures or criteria – prevalence of precarious work, union recognition, sanctions at employment tribunal etc

Question 3F – no comment

Question 4A – The preface to this submission sets out why we believe section 4 and the links to ICESCR should be the starting point for implementation of the duty. It takes the SED beyond strategic planning, broadens the scope of the bodies affected, sharpens the definition of due regard and, through the specific rights of the convention, identifies positive measures to tackle disadvantage that public bodies should have in mind during both operational AND strategic decision making

Question 4B – as evidenced by the Accounts Commission report on equal pay, Scottish public bodies have some distance to travel when it comes to an integrated human rights-based approach to anti-poverty work.

Conclusion

UNISON is Scotland's largest trade union with members across the public, private and voluntary sectors. UNISON members work in a range of settings delivering essential services to Scotland's citizens.

UNISON is a leading human rights defender in day-to-day workplace situations. As we know from our work, many fundamental rights are remote and inaccessible to ordinary people, particularly people living with poverty and economic disadvantage. UNISON believes that strengthening the proposed socio-economic duty is not just a desirable option, it is a binding obligation. Scottish government is legally obliged to deliver effective protection of social and economic rights. Many public bodies in Scotland have a lazy authoritarian disregard for public law duties to tackle poverty and inequality.¹³ The new socio-economic duty must be robust and enforceable if it is to offer practical benefit to people facing poverty and disadvantage. Scotland needs to empower excluded communities. The Socio-Economic Duty presents that opportunity but the proposed implementation will be ineffective.

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¹³ In 2016 the Scottish Government launched a two phase review of the Enterprise & Skills agencies. The review covered key state functions in which access to education, training, skills and employment are heavily segregated on grounds of gender, race and disability. Despite the fact that this segregation operates to the well established detriment of various disadvantaged groups, no equality impact assessment was conducted prior to the conclusion of the two stage review. The review had several detailed work stream, none of which addressed equality, exclusion, poverty, ICESCR rights or Fair Work. When challenged, the programme coordinators indicated an intention to conduct an impact assessment at the end of the review.