

Blog 2 - Rights for particular groups: going as far as devolution allows

A blog series by Barbara Bolton, Legal Director and Partner

In addition to economic, social, cultural and environmental rights, the Taskforce recommended incorporation of:

- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (Recommendation 3);
- the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Recommendation 4);
- the Convention on the Rights of Persons with Disabilities (CRPD) (Recommendation 5).

It further recommended the incorporation of a right for older people (Recommendation 6) and an equality clause that protects and promotes the full and equal enjoyment of rights of LGBTI people (Recommendation 7).

The SG accepted all these recommendations and committed to fulfilling them to the greatest extent possible under devolution.¹

The Consultation proposals do not fulfil that commitment.

CRPD / CERD / CEDAW

One of the most disappointing aspects of the Consultation is the treatment of CERD, CRPD and CEDAW. These Treaties are relegated to the “equality treaties,” suggesting that they do no more than require equal treatment in relation to the rights set out in ICESCR and the International Covenant on Civil and Political Rights.² In fact, each of these Treaties contain important standalone, substantive rights relevant to these groups.

Having relegated them to the “equality treaties”, the proposal is that there will be no duty on any public authority or provider of services to comply with these rights. If there is no duty to comply, there is no prospect of holding public authorities to account, or of enforcing these rights (as explained below). Without a corresponding

¹ As confirmed in the guide to the consultation: <https://www.gov.scot/publications/human-rights-bill-scotland-guide-consultation/> and as noted by the Scottish Government in its submission to the Universal Periodic Review in October 2022: <https://www.gov.scot/publications/universal-periodic-review-2022-scottish-government-position-statement/pages/4/> (see <https://www.justrightscotland.org.uk/2023/09/access-to-justice-and-the-new-scottish-human-rights-bill/> and [Access to Justice and the Right to an Effective Remedy \(justrightscotland.org.uk\)](https://www.justrightscotland.org.uk/))

² ICCPR has not been included in the incorporation proposals. This was raised during the Taskforce process, but ultimately there was no recommendation for incorporating ICCPR. Incorporation of

right to an effective remedy for breach, this can not really be said to be incorporation of these rights. If the limits of devolution meant that it was impossible for the SP to pass legislation incorporating these rights with a duty to comply, that would be a reasonable explanation for the SG's proposal. However, that does not appear to be the case.

It is acknowledged that some rights in CEDAW and CERD would conflict with the approach taken in the Equality Act, and therefore cannot be incorporated due to devolution limits (as explained below). However, there are a number of rights in CRPD, CEDAW and CERD that it appears could be incorporated within devolved limits, in whole or in part, including but not limited to:

CRPD: Art 5 equality and non-discrimination; Art 8 awareness raising; Art 9 accessibility; Art 17 integrity of the person; Art 19 independent living etc; Art 29 participation in political and public life; Art 30 participation in cultural life; Art 31 statistics and data collection.

CEDAW: Art 2 elimination of discrimination; Art 3 development and advancement; Art 5 elimination of prejudice etc; Art 6 trafficking; Art 7 political and public life; Art 10 education; Art 12 health; Art 14 women in rural areas; Art 15 equality before the law; Art 16 marriage and family relations.

CERD: Art 2 elimination of discrimination; Art 4 incitement to racial hatred; Art 7 combatting prejudice.

The basis on which these rights, or parts of them, may be capable of being incorporated within devolved limits is set out below.

The SG appears to accept that some rights in CEDAW, CERD and CRPD could be incorporated within competence, but nevertheless proposes to apply a blanket approach to these Treaties, omitting a duty to comply even where it would be possible. The reason given is the desire to produce an accessible piece of legislation. That is not convincing.

Clarity of legislation is always important, but it is not clear that incorporating additional rights would overly complicate the Bill. This legislation is also highly unlikely to be a document an individual will be able to refer to directly to understand their rights. What legislation *is* used in that way? It is unlikely to be used in that way even by "duty-bearers," those with the obligations under the Bill. They are not likely to be able to discern their obligations in specific situations from reading this Bill, without reference to guidance. Guidance will have to be developed to explain the meaning of the Bill in different contexts, as has been done for the Equality Act. Indeed, clear guidance is going to be critically important to the effective implementation of this Bill.

Moreover, the justification suggests that incorporation of ICESCR rights does not involve assessment of devolved limits, removal of parts of rights and adaptation of language, in order to remain within devolved competence. For ICESCR, the Consultation proposes to incorporate only what is referred to as "core ICESCR rights." They do not clearly define which ICESCR rights are covered. They may be referring to: the right to an adequate standard of living; the right to health; the right to education;

the right to social security and the right to take part in cultural life and enjoy the benefits of scientific progress.³ These rights have elements that are reserved, which will need to be carved out of the Bill for it to be within competence.

That is not recognised in the Consultation, which seeks to present ICESCR as entirely straightforward in contrast with the other Treaties. Adaptation of Treaty provisions will be required no matter which model of incorporation is used and which rights are covered. If the Treaty text is included in the Bill, it will need redactions and amendments to create coherent legislation that fits within devolved competence. That is the same, to some extent, for many of the rights across all of the Treaties. If work can be done to determine where the line between reserved and devolved falls for each of the core ICESCR rights, it can also be done to determine that line for the other ICESCR rights (the right to work; just and favourable conditions of work; trade unions and the right to strike, and protection of the family and maternity) and for the rights in CERD, CEDAW and CRPD.

Therefore, the suggestion that incorporation of any rights contained in CERD, CRPD and CEDAW with a duty to comply would require careful navigation of devolved competence, and adaptation of Treaty text, is not a convincing explanation for the SG failing to go as far as it could do.

The Taskforce recognised that it was “important that the way in which [ICESCR, CEDAW, CERD, CRPD] are incorporated is effective for ensuring the protection and realisation of rights in people’s everyday lives.”⁴ It recommended that there should be “full incorporation, subject to competence constraints”, of these treaties. That is what the SG committed to and that is what it should be held to - incorporation with a duty to comply for every right possible, giving those who would benefit from those rights the maximum protection possible.

If it is the SG’s position that certain rights in ICESCR and the whole of CERD, CRPD and CEDAW cannot be incorporated with a duty to comply within competence, it should explain how it arrives at that conclusion. The very limited information in the Consultation is inadequate. As Lady Carmichael noted in a recent Court of Session decision, in a consultation: “The decision maker must give sufficient reasons for any proposal to permit intelligent consideration and response.”⁵ It is not adequate for the Scottish Government to say that in its view competence constraints and the objective of creating accessible legislation means it will only incorporate ICESCR “core rights.” Given the legitimate expectation raised by its acceptance of the Taskforce’s recommendations, it must give sufficient reasons for how it has arrived at that view.

³ These rights are referred to on page 16 of the Consultation, which is referred back to later in the document for more detail on which rights are included, however page 16 does not clearly state that these are the core ICESCR rights they propose to incorporate, only that ICESCR includes these rights, and that is within a section on Taskforce recommendations.

⁴ <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/> at page 30, and recommendations 1(b), 2, 3, 4 and 5.

⁵ [2022cs0h68.pdf \(scotcourts.gov.uk\)](#) at para 29

We appreciate actual legal advice cannot be shared, but it can explain its position without reference to any legal advice.

It is also relevant that Scotland is leading the way on incorporation in the UK, with interested parties in Northern Ireland, Wales and England looking on to draw on this experience in pushing for incorporation through their devolved legislators or at a UK level. As a pathfinder, Scotland should set the strongest possible example, going as far as it possibly can.

We set out our own analysis below, explaining why in our view the SG and SP could incorporate a number of substantive rights from CRPD, CERD and CEDAW, within the limits of devolution. Before doing so, we explain why the SG's proposal to incorporate CRPD, CERD and CEDAW with only a "procedural duty" is wholly inadequate if they could incorporate with a duty to comply.

"Procedural Duty"

For CERD, CEDAW and CRPD, the Consultation proposes that only a "procedural duty" would apply to these rights. The Consultation notes that the intention is to ensure that duty-bearers (those with obligations under the Bill) consider the rights in CERD, CRPD and CEDAW when delivering ICESCR rights and in other decision-making. Those engaging with the Consultation are asked to give their views on that. To do that, we firstly have to understand what the proposal means and what its effect would be.

Disappointingly, there is no explanation of this proposal in the Consultation. Not only does it not specify what "procedural duty" they propose, how that would work or what it would require, they do not make it clear that this would mean these rights would not be enforceable. There would be no effective remedy for breach of these rights. Indeed, the Consultation states that the "procedural duty" would ensure that duty-bearers could be held accountable if they did not take the rights into account in their decision-making (page 19). Without more detail, that is misleading.

Duty to have due regard

While they have not said what "procedural duty" they are proposing, we have existing examples in national law that we can draw from in order to engage with the proposals, in the absence of an explanation.

The Public Sector Equality Duty (PSED) in the Equality Act is a duty on public authorities to "have due regard" to the need to eliminate discrimination, advance equality of opportunity and foster good relations between those who share protected characteristics and those who don't. It is *not* a duty to take steps to achieve the elimination of discrimination, equal opportunity or good relations. It is only a duty to consider, take into account, or think about these needs when making decisions. If a public authority does so, and can demonstrate having done so if challenged, its decision cannot be challenged even if it is detrimental to equal opportunity. It is a process duty, not an outcome duty.

As Professor Katie Boyle advised the Taskforce⁶ in 2020:

“Due regard is what is known as a procedural duty which confers the right to a process. When decision makers are asked to comply with the duty to have due regard it means that they must take into consideration, or take into account, a particular matter as part of the decision making process. It provides the right holder with a right that a particular process will occur: i.e. that the decision maker has regard to the rights in question as part of the decision making process...

If the decision maker has had due regard as part of the decision making process then the duty will be dispensed with, even if this results in no substantive change to the outcome in favour of the rights holder. The duty is concerned with the lawfulness of the process and not the lawfulness or the adequacy of the outcome.”⁷

Discussing the PSED Professor Boyle noted that:

“[the]public sector equality duty in the UK requires that a decision maker has due regard to promote equality of opportunity between different disadvantaged groups.... **This is not a duty to achieve the outcome of equality of opportunity**, but rather, a duty to have due regard to the need to achieve this outcome.

Criticism of the weakness of this approach has been noted by the Equality and Human Rights Commission who concluded that there was limited evidence of positive change through the implementation of the public sector equality duty. One of the reasons provided was because there is a tendency to focus on outputs rather than outcomes.

It is important to note that while the duty to have due regard might be helpful as a means of implementing, or integrating, ESC rights into decision making processes **this duty does not incorporate the rights into domestic law because there is no remedy for a failure to comply with the rights framework. The duty would not be transformative in nature and if implemented alone would fall short in terms of the principles of keeping pace and global leadership.**”⁸

⁶ <https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/#:~:text=On%2012%20March%202021%2C%20the,will%20bring%20internationally%20recognised%20human>

⁷ *The Meaning and Content of Duties to be Considered for Inclusion in the Bill* by Professor Katie Boyle, 1st June 2020, paper for the Academic Advisory Panel to the National Taskforce for Human Rights Leadership:

<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-katie-boyle---meaning-and-content-of-duties/aap-paper-katie-boyle---meaning-and-content-of-duties/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BKatie%2BBoyle%2B-%2BMeaning%2Band%2BContent%2Bof%2BDuties%2B-%2BJuly%2B2020%2B%25281%2529.pdf>

⁸ Examples of that research include <https://www.equalityhumanrights.com/en/publication-download/reviewing-aims-and-effectiveness-public-sector-equality-duty-psed-great-britain>; <https://www.equalityhumanrights.com/sites/default/files/review-of-public-sector-equality-duty-psed->

In justifying its proposals, the Scottish Government has asserted that a procedural duty is “justiciable”, meaning that it is possible to challenge a decision in court relying on a procedural duty, and a court will review whether or not the duty was complied with. That is accurate, in the sense that challenges can be made relying on the PSED, and the Court of Session will consider if it has been complied with. However, it will review whether or not the process has been followed, not the merits of the decision. The due regard duty was explained by the English Court of Appeal in 2008:

“The duty is not a duty to achieve a result, namely to eliminate unlawful ... discrimination or to promote equality of opportunity and good relations between persons of different ... groups. It is a duty to have due regard to the need to achieve these goals. The distinction is vital. [...] What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged [group] that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.”⁹

In a more recent example, in a case concerning cuts to financial support for asylum seekers, the Inner House of the Court of Session held that:

“Section 149 of the 2010 Act, which contains the PSED, is relatively precise in describing what is required of a public authority. It is to have “due regard” to certain specified matters. Having “due regard” is explained in the section itself. The duty has been analysed in a number of cases in England and Wales, culminating in *Hotak v Southwark LBC* [2016] AC 811. In distilling these cases, Lord Neuberger said (at para 75) that the duty:

“must be exercised in “substance, with rigour, and with an open mind” ... **[It] is for the decision-maker to determine how much weight to give to the duty:** the court simply has to be satisfied that ‘there has been a rigorous consideration of the duty’. **Provided that there has been ‘a proper and conscientious focus on the statutory criteria’** ... **‘[T]he court cannot interfere ... simply because it would have given greater weight to the equality implications of the decision.’**”¹⁰

[effectiveness.pdf](https://www.equalityhumanrights.com/en/publication-download/effectiveness-psed-specific-duties-scotland); <https://www.equalityhumanrights.com/en/publication-download/effectiveness-psed-specific-duties-scotland>

⁹ [Baker & Ors, R \(on the application of\) v Secretary of State for Communities & Local Government & Ors \[2008\] EWCA Civ 141 \(28 February 2008\) \(bailii.org\)](https://www.bailii.org/uk/ew/cas/2008/141.html) at para 31.

¹⁰ Lord Carloway for the Inner House in (FIRST) NATASHA TARIRO NYAMAYARO and (SECOND) OLAYINKA OLUREMI OKOLO Petitioners and Reclaimers against THE ADVOCATE GENERAL, representing THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Respondent <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih29.pdf?sfvrsn=0> at para 83.

The Court of Session said it was unable to improve upon that formulation of the duty, thereby upholding that approach. The challenge to cuts to child support failed. In rare cases, a failure to comply with the PSED can result in a decision being reduced (set aside as unlawful). For example, in September 2022 the Outer House of the Court of Session held that a decision by Scottish Borders Council to close a day care centre was unlawful, as it had failed to carry out an equality impact assessment in relation to that specific closure, and had not complied with the PSED.¹¹ However, the court's decision only goes as far as striking out the decision of the local authority; they cannot direct a public authority to fulfil a particular outcome. The public authority could simply retake the decision, this time ensuring they comply with the procedural requirements, documenting having taken into account the likely impacts of their decision on different groups, but coming to the same conclusion, that they will shut the centre. If they've complied with the process requirements, the court cannot interfere with merits of the decision and it cannot replace the local authority's decision with a decision of its own.¹²

The extent of the distinction between a duty to comply and a procedural duty ought to have been spelled out in the Consultation. It should have been made clear that a procedural duty will not enable duty-bearers to be held to account for failure to fulfil a substantive right. The example of the PSED ought to have been provided, along with an explanation of its severe limitations. For people to engage with the proposal they need to have that detailed explanation. Without that, it is not meaningful consultation. Having explained why incorporating CERD, CRPD and CEDAW with only a "procedural duty" will not give people enforceable rights in national law, below we set out our analysis leading to the view that the Scottish Parliament can incorporate a number of additional rights within competence.

Devolved competence

All Scottish Parliament ("SP") legislation must be within competence, as set by the Scotland Act, which reserves to the UK Parliament a number of whole policy areas. The SP cannot pass legislation that relates to those reserved areas,¹³ or modify specified Acts of the UK Parliament, including the Human Rights Act 1998.¹⁴ The UK Secretary of State can also prevent Scottish legislation from becoming law if (i) it modifies the law as it applies to reserved matters, and (ii) they have reasonable grounds to believe it would have an adverse effect on the operation of the law as it applies to reserved matters.¹⁵

¹¹ https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csoh68.pdf?sfvrsn=261fb57a_1

¹² In some cases, the decision of the court to reduce the public authority's decision will prompt the public authority to reconsider, leading to a different outcome. However, this is far from guaranteed.

¹³ Section 29(2)(b). SP legislation will not be considered to "relate to" a reserved area if it has merely a loose, incidental, or consequential connection with a reserved matter (*Martin v Most* [2010] UKSC 10; *Imperial Tobacco v LA* [2012] UKSC 61). However, a provision that impinges on a reserved matter will be outwith the competence of the SP even if the main purpose of the legislation relates to a devolved matter.

¹⁴ Section 29(2)(c) and Sch 4 Pt 1, para 2.

¹⁵ Section 35(1)(b).

The Consultation confirms that the main concern in relation to incorporation of CERD, CEDAW and CRPD is the reservation of “equal opportunities.”¹⁶ In the Scotland Act:

“Equal opportunities” means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.

The Explanatory Notes to the Scotland Act¹⁷ explain that:

“Current legislation makes provision in relation to the prevention or elimination of discrimination on grounds of sex, marital status, race or disability. There is no current domestic legislation dealing with discrimination on grounds such as age or sexual orientation. All these matters are, however, reserved.”¹⁸

This confirms that what is reserved is the whole policy area of equal opportunities, not only what is covered by the Equality Act.

However, there are important exceptions to the reservation of equal opportunities, including two that were added in 2016. As Professor Nicole Busby pointed out in a paper for the National Taskforce,¹⁹ the second additional exception may present an opportunity for greater incorporation than would have been possible before the Scotland Act 2016.

The second additional exception covers:

“Equal Opportunities in relation to the Scottish functions of any Scottish public authority or cross-border public authority....

The provision falling within this exception does not include any modification of the Equality Act 2010, or of any subordinate legislation made under that Act, but does include:

- (a) provision that supplements or is otherwise additional to provision made by that Act;
- (b) in particular, provision imposing a requirement to take action that that Act does not prohibit.”²⁰

This provision has yet to be interpreted by the courts. However, applying the rules of statutory interpretation, taking the ordinary meaning of the words within the context of the Scotland Act, it appears to mean: the SP can legislate on equal opportunities in relation to Scottish public authorities, and Scottish functions of cross-border public authorities, in ways that add to or supplement the existing provisions of the EA,

¹⁶ Scotland Act, 1998, (Schedule 5, Pt 2, head L2)

¹⁷ <https://www.legislation.gov.uk/ukpga/1998/46/notes/contents>

¹⁸ Age and sexual orientation were subsequently added to the list of protected characteristics.

¹⁹ *[AAP+Paper+-+NationalTaskforce+-+Nicole+Busby+-+CEDAW+FINAL+%281%29.pdf](#)
(www.gov.scot)

²⁰ Scotland Act, 1998, (Schedule 5, Pt 2, head L2)

provided they do not modify the EA and do not impose a requirement to take action prohibited by the EA.

It is acknowledged that the precise parameters of what would be permitted, supplementing but not modifying and avoiding any requirement to act in a way prohibited by the EA, require careful consideration in relation to each provision that is being considered for incorporation. However, that detailed legal analysis can and should be done.

Preliminary analysis suggests that a number of standalone substantive rights from CRPD, CERD and CEDAW could come within this exception and so be incorporated with a duty to comply, within competence.

CRPD

In considering the CRPD rights referred to above (including the right to independent living, living in the community etc), the following points should be taken into consideration:

- it is not clear that CRPD rights must be framed in terms of “the prevention, elimination or regulation of discrimination between persons on account of disability.” They would only be caught by the equal opportunities reservation if framed in those terms;
- even if framed in terms of preventing, eliminating or regulating discrimination, the EA permits direct discrimination in favour of disabled people. Incorporating CRPD rights, and fulfilling those rights, may not be additional to or supplementing the EA, it may simply be action to support disabled people that is expressly permitted under the EA.
- even if seen as going beyond the EA, supplementing or adding to the EA’s requirements is permitted, provided it does not modify the EA or require anything prohibited by the EA.

The EA permits discrimination in favour of disabled people.²¹ This is a departure from the usual position under EA, whereby discrimination in either direction is usually prohibited. However, in the case of disability, non-disabled people are not a protected group, for obvious reasons, and measures that support disabled people do not disadvantage non-disabled people.

Therefore, it is difficult to follow the SG’s stated concern that incorporation of CRPD rights with a duty to comply could result in unlawful discrimination in breach of the EA, and therefore put that section of the Bill outwith devolved competence. As the SG has not explained its position on this, it is not possible to engage with it beyond setting out our analysis.

²¹ Equality Act 2010, Section 13(3): “If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.”

It appears to us that at least the following provisions could be incorporated with a duty to comply, in whole or in part, within competence: Art 5 equality and non-discrimination; Art 8 awareness raising; Art 9 accessibility; Art 17 integrity of the person; Art 19 independent living etc; Art 29 participation in political and public life; Art 30 participation in cultural life; Art 31 statistics and data collection.

CERD and CEDAW

There are aspects of these Treaties that cannot be incorporated within devolved competence, because the international human rights approach to equality is to promote substantive equality, or equality of outcome, whereas the EA (based on EU law) focuses only on formal equality, or equality of treatment. Requiring the taking of steps to achieve equality of outcome based on sex or race/ethnicity would likely come into conflict with the EA prohibition on positive discrimination (other than for disability) and constitute unlawful discrimination against others.

However, the EA allows positive action in relation to all protected characteristics, including race and sex.

Section 158 of the EA provides:

“(1) If a person (P) reasonably thinks that:

- (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
- (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
- (c) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—

- (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
- (b) meeting those needs, or
- (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.”

The explanatory notes explain:

“This section provides that the Act does not prohibit the use of positive action measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce their under-representation in relation to particular activities, and meet their particular needs. It will, for example, allow measures to be targeted to particular groups, including training to enable them to gain employment, or health services to address their needs. Any such measures must be a proportionate way of achieving the relevant aim.

The extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things, on the seriousness of the relevant

disadvantage, the extremity of need or under-representation and the availability of other means of countering them. This provision will need to be interpreted in accordance with European law which limits the extent to which the kind of action it permits will be allowed.

To provide greater legal certainty about what action is proportionate in particular circumstances, the section contains a power to make regulations setting out action which is not permitted under it.”

“Examples

Having identified that its white male pupils are underperforming at maths, a school could run supplementary maths classes exclusively for them.

An NHS Primary Care Trust identifies that lesbians are less likely to be aware that they are at risk of cervical cancer and less likely to access health services such as national screening programmes. It is also aware that those who do not have children do not know that they are at an increased risk of breast cancer. Knowing this it could decide to establish local awareness campaigns for lesbians on the importance of cancer screening.”²²

Although we cannot locate any regulations providing greater certainty around the distinction between permitted positive action and prohibited positive discrimination (other than for disability), we do have guidance from the UK Government Equalities Office for voluntary and community service providers, and for the employment context in relation to Section 159 (which allows positive action specifically in recruitment and promotion), which can be used to further clarify what is permitted under Section 158.²³ The guidance explains:

“You can take positive action when three conditions are met:

1. You must reasonably think that a group of people who share a protected characteristic and who are, or who could be, using your services:
 - suffer a disadvantage linked to that characteristic
 - have a disproportionately low level of participation in this type of service or activity, or
 - need different things from this service from other groups.

‘Reasonably think’ means that you can see the disadvantage, low level of participation or different needs, but you do not have to show any detailed statistical or other evidence.

2. The action you take is intended to:

²² [Equality Act 2010 - Explanatory Notes \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2010/10/section/158)

²³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85026/vcs-positive-action.pdf ;

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/85045/positive-action-practical-guide.pdf

- meet the group's different needs
 - enable or encourage the group to overcome or minimise that disadvantage, or
 - enable or encourage the group to participate in that activity.
3. The action you take is a proportionate way to increase participation, meet different needs or overcome disadvantage. This means that the action is appropriate to that aim and that other action would be less effective in achieving this aim or likely to cause greater disadvantage to other groups.”

On that basis it appears that at least some elements of the following rights could be incorporated and fulfilled without modifying or conflicting with the EA:

CEDAW: Art 2 elimination of discrimination; Art 3 development and advancement; Art 5 elimination of prejudice etc; Art 6 trafficking; Art 7 political and public life; Art 10 education; Art 12 health; Art 14 women in rural areas; Art 15 equality before the law; Art 16 marriage and family relations.

CERD: Art 2 elimination of discrimination; Art 4 incitement to racial hatred; Art 7 combatting prejudice.

The same analysis may apply to rights for older and LGBTI people. There is no Treaty to incorporate for these groups, but other international human rights sources can be drawn from and a number of the CERD and CEDAW rights referred to above may also be relevant to these groups.

As the SG has not explained its position on this, it is not possible to engage with it beyond setting out our analysis.

***This is a work in progress and more content will be added on a rolling basis. Additional sections will be added to this blog.**