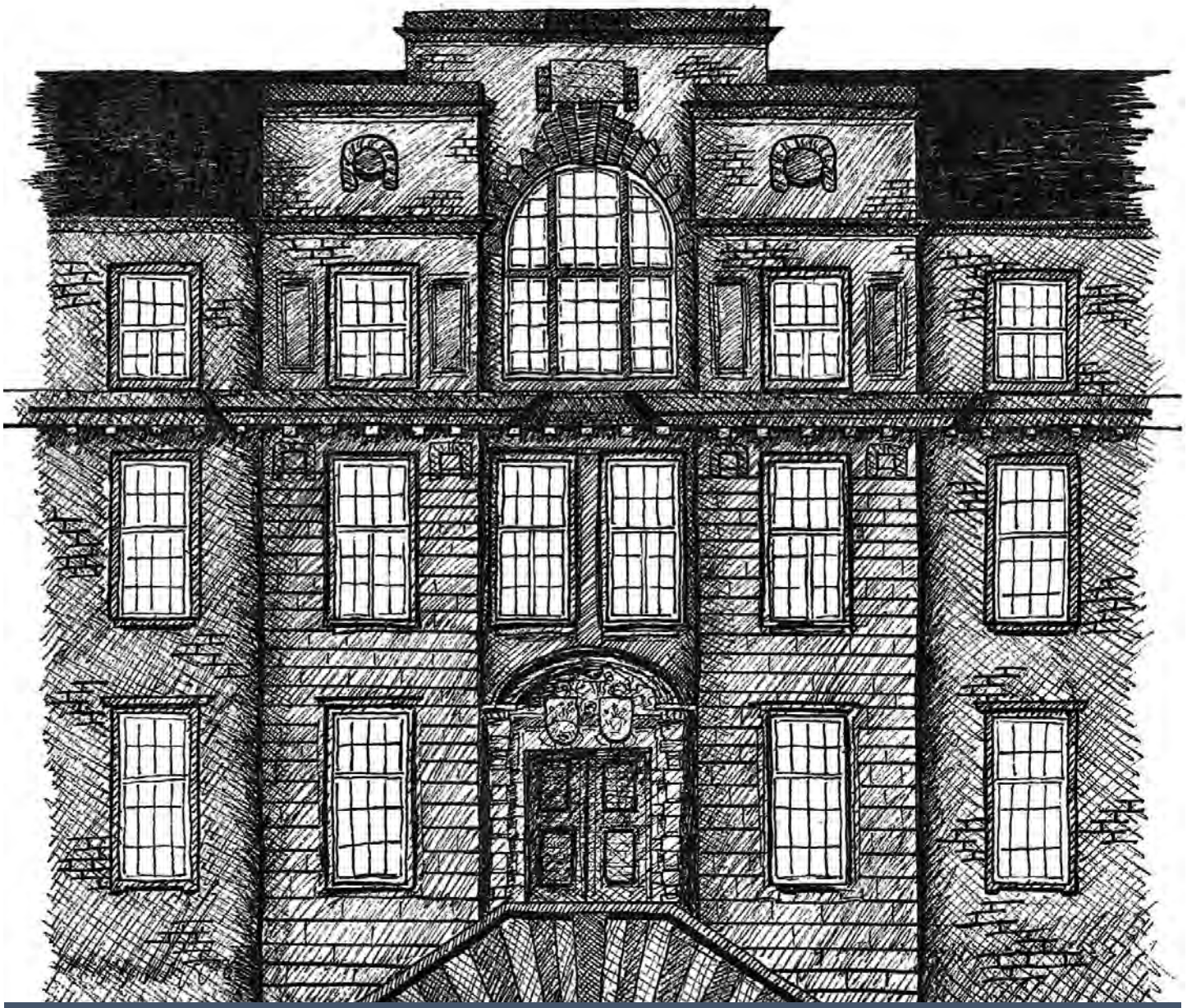

# Dundee Student Law Review
# Volume X | October 2024

## *Tenth Anniversary Special Edition*

# Dundee Student Law Review



Volume X – Autum/Winter 2024

# DLSR X - Contents

# Preface

Dear reader,

Having been founded by a select group of undergraduates in 2014, the Dundee Student Law Review has continually striven to promote and exhibit the superlative academic works of Dundee Universities' School of Law, in all its various forms. During the decade past, the Journal has featured submissions from various essay competitions, honours dissertations, and articles from as far afield as Hong Kong and Nigeria - spanning all areas of law, legal theory, legality, and jurisprudence.

In recent times, regrettably, the Journal has evaded the student consciousness and has gradually receded in student involvement. Upon the backing of its decennial, my intention with *Volume X* is both to rejuvenate and bolster the Journal, and the contributors which it duly celebrates. Accordingly, the Journal has diversified its purview to accept submissions from neighbouring law schools, dramatically increased its scale, facilitated national research, and now actively promotes and seeks contributors from further afield. This was no small project, and I hope to set a precedent for forthcoming volumes of the DSLR.

*Volume X* commemorates the tenth anniversary of the Journal, and all those who have aided and enjoyed it. What follows is a special edition to celebrate the Journals history, contributors, and future aspirations. I do hope you enjoy.

With Gratitude,

Tom. P. S. Edwards – *Senior Managing Editor & Chair.*

## Acknowledgments

*In no particular order:*

The creation of *Volume X* was manifestly supported by the DSLR 2024-25 editorial board: Oriel Leavy Gray, Valeriia Liubymtseva, Safaa Salih Mohamedali Omer, Katia Sher, and Zara Singleton. I wish to acknowledge the academic supervisors involved in both the articles exhibited within the volume, and the volume itself: Dr Sean Whittaker, Yvonne Evans, Brian Dempsey, Dr Erin Ferguson, and Dr Isla Callander.

I wish to extend my gratitude to both Amelia Mah, for her kind introduction to *Volume X*, and to George Dick for his amiability and thorough historical foreword. Moreover, I wish to acknowledge The Lord Lyon King of Arms Joe Morrow CVO, CBE, KStJ, KC, DL, FRSE and Brian Dempsy for their involvement in the Jonathan Leslie Memorial Essay Prize Competition 2023.

I am grateful for both the DSLR's inaugural staff liaisons, Professor Angela Daly, Dr Alex Simmonds, Dr Lorna Gillies, and inaugural Senior Staff Editor, Professor Pamela R Ferguson, who will ensure the Journal's continued success in this next decade.

I wish to acknowledge Professor Peter McEleavy, Lucie Johnston, and Tracey Reid for their promotion and facilitation of The Journal, and James Ryan Ross for the artwork he has produced for *Volume X*. Finally, whilst certainly not least, I wish to acknowledge the diligent authors featured within this issue, without which there would be no Journal to speak of: Mollie McGoran, Jack Anderson, Hannah Rhodes, Sebastien Richardson (and the editors of the St Andrews Law Review), Christiana Cameron, Sashka Bakalova, and Erin Lewis.

They all have my gratitude.

# Opening Remarks[1]

On behalf of the DSLR Editorial Board: welcome to the Dundee Student Law Review's special 10th anniversary edition, 'Volume X'.

Volume X serves as yet another wonderful publication to supplement the diverse and expansive *corpus* of work published by the DSLR in the past decade. In particular, this special anniversary edition features multiple award-winning honours dissertations, exemplary work from neighbouring law schools, and a thorough historical foreword by George Dick (Tutor and PhD Candidate, University of Edinburgh).

Now, as a practising Advocate, I am encouraged to see how the DSLR has gone from strength to strength in its 10 years. Having completed both my LLB and PgDip at the University of Dundee, I was fortunate enough to witness the growth of the DSLR for 5 years.

The quality and range of the submissions throughout all the editions have been impressive; featuring topics from every and all specialisms of the law, from court dress in the Inner House, to commercial law, to criminal and delictual matters. The quality of this edition continues to be exceptionally high.

In light of the outstanding quality of Volume X, I am certain that the success of the DSLR will no doubt continue for years to come.

Sincerely,

Amelia Mah, Faculty of Advocates (Ampersand Advocates)

[1][DOI]: https://doi.org/10.20933/100001332

# The Dundee Student Law Review at 10: Its Roots, History and Accomplishments[1]

a foreword by George Dick. LLB. LLM[2]

## Introduction

It is truly a privilege to have been invited to provide a contribution for the 10th Anniversary Edition of the *Dundee Student Law Review*. As someone who was an editor (2016-17), Managing Editor (2017-19) and then a contributor (2020), the *Dundee Student Law Review* has been a surprisingly large part of my personal academic journey thus far – and it is an initiative which has provided me with many fantastic opportunities and fond memories. As such, I am grateful for the kind invitation by current Senior Managing Editor Tom Edwards to prepare a piece for Volume 10, which coincides with the tenth anniversary of the *Dundee Student Law Review*.

To mark the occasion, I thought that it would be interesting to produce a short article on the history of the *Dundee Student Law Review*, alongside some reflections on the accomplishments of the journal over its first decade. Additionally, given the occasion, I also thought it would be fitting to include a tribute to, and a record of, all of the students who have collectively contributed their time to reviewing and editing pieces on behalf of the journal over the years. After all, alongside the journal's phenomenal contributors, it is truly thanks to their exemplary efforts that the *Dundee Student Law Review* has been a success.

## 1. Some Contextual Background

Before I continue, however, I do appreciate that not every reader who comes across this article will necessarily be acquainted with the *Dundee Student Law Review*, or with the nature of student-edited journals more generally. Thus, I thought it would be fruitful to begin with some contextual background, both on the *Dundee Student Law Review* itself and the wider trends which originally inspired its creation.

So, for the benefit of any uninitiated readers, what exactly is the *Dundee Student Law Review*? Well, the *Dundee Student Law Review* (hereafter '*DSLR*') is a student-run law journal which was formally established in 2014, with the original purpose of showcasing the academic work of law students from the University of Dundee – though, the journal has also always welcomed

[1] [DOI]: https://doi.org/10.20933/100001333
[2] LLB (Hons) University of Dundee, LLM University of Edinburgh, PhD Candidate and Tutor at The University of Edinburgh (DSLR Managing Editor 2017-2019).

submissions from elsewhere. Volume I was published in October 2015, and new volumes have been produced annually since then. The entire editorial process – from evaluation and revision, to proofing and publication – has been student-led since the *DSLR*'s inception, though later stages of the review process are supplemented by double-blind peer review by faculty members of Dundee Law School. Membership on the journal's editorial board is reserved only for currently enrolled law students at the University of Dundee. New editors are selected annually through a competitive application process; once selected, an editor may serve as a member of the editorial board for the remainder of their studies. Finally, the operations of the *DSLR* are overseen by two 'Managing Editors', who are democratically appointed by other members of the editorial board to lead the initiative each academic year.

While the *Dundee Student Law Review* is a distinctive publication in many ways – with its own unique history and fascinating contributions – it should be acknowledged that the *DSLR* is not an entirely novel student initiative. Instead, the *DSLR* is part of a wider trend where entrepreneurial law students are establishing their own student-led academic law journals, with editorial and operational control being primarily or exclusively in the hands of the students themselves rather than university faculty members.[3] This approach is in sharp contrast with how academic periodicals are traditionally operated, both within law and in other academic fields. Under the conventional model of journal publishing, the editorial workload of an academic journal is tackled almost exclusively by seasoned academics, with assistance from conscientious peer reviewers; meanwhile, operational matters (like management, marketing and publication) are handled by senior editorial staff, usually in conjunction with an academic publisher.[4] However, the widespread use of this model of journal publishing has not deterred plucky law students across the world from starting their own academically-styled and student-edited law journals.

To give an abridged history of these journals' growth elsewhere, student-edited law journals first appeared in the United States in the late 19th century, and rapidly spread across the country following their success at institutions like Harvard, Yale and Columbia.[5] Known in American parlance as 'law reviews', these student-edited journals quickly rose to become the most

[3] For a good overview, particularly of the British context, see C.R.G. Murray, Lida Pitsillidou and Catherine Caine, 'Student-led law reviews: what every UK law school needs?' (2017) 51 The Law Teacher 170.
[4] For broad overviews, see Rob Johnson, Anthony Watkinson and Michael Mabe, 'The STM Report: An overview of scientific and scholarly publishing' (5th edn, International Association of Scientific, Technical and Medical Publishers, 2018) <https://www.stm-assoc.org/2018_10_04_STM_Report_2018.pdf> accessed 18 July 2024, 14-17; Sally Morris *et al*, *The Handbook of Journal Publishing* (Cambridge University Press, 2013), chs. 1-4.
[5] For the early history of student-edited journals in America, see Michael Swygert and Jon Bruce, 'The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews' (1985) 36 Hastings Law Journal 739, 763-791.

prestigious law journals in North America[6] – a reputation they retain to this day.[7] This trend of student-edited law journals was, however, initially slow in gaining a foothold in Europe, with only a handful of student-edited periodicals emerging during the early-mid 20th century.[8] However, since the 1990s, the number of student-edited law journals in Europe has risen exponentially. This has been driven by a number of factors – but among the most prominent is that European students are increasingly keen on having a local extra-curricular activity which both (a) allows them to enhance their own academic skills and résumés, and (b) gives them an outlet to showcase exemplary works authored by students, rather than just legal academics or practitioners.[9] Moreover, these student initiatives have been facilitated by developments in internet technologies, which have both significantly reduced production costs and even allowed for the emergence of purely online student publications.[10]

Like their contemporaries in the rest of Europe, Scottish law students were initially slow in jumping aboard the student publishing bandwagon. Up until 2009, only three student-led legal publishing initiatives had ever appeared in Scotland: the *Old College Times* (1981-88), *Scottish Student Law Review* (1990-91) and *Scots Law Student Journal* (2000-02).[11] However, during the 2010s, a new wave of student-edited law journals emerged across the various universities of Scotland. Facilitated by the contemporary ease of online publishing, and driven by deep-rooted student enthusiasm, nine such journals have appeared in Scotland in recent years. In chronological order, by year of first publication, these are: the *Edinburgh Student Law Review* (2009),[12] *Aberdeen Student Law Review* (2010),[13] *Edinburgh Napier Student Law Review* (2013, relaunched 2020),[14] *The University of Glasgow Law Review* (2014, formerly '*The*

[6] This unique reputation has continued to astonish even the most seasoned legal academics. See, for example, Reinhard Zimmermann, 'Law Reviews: A Foray Through a Strange World' (1998) 47 Emory Law Journal 659; Lawrence Friedman, 'Law Reviews and Legal Scholarship: Some Comments' (1998) 75 Denver University Law Review 661, 661.

[7] In terms of 'ranking', American student-edited law reviews are frequently among the highest rated law journals in the world (usually based on citation data). See, for example, Washington and Lee University Law Library, 'W&L Law Journal Rankings' (W&L Law, 15 July 2024) <https://managementtools4.wlu.edu/LawJournals/Default.aspx> accessed 5 August 2024; Google Scholar, 'Top publications: Law' (Google Scholar Metrics, 2024) <https://scholar.google.com/citations?view_op=top_venues&hl=en&vq=soc_law> accessed 5 August 2024.

[8] Notable examples include the University of Cambridge's *Cambridge Law Journal* (est. 1923; taken over by faculty in 1954), the University of Iceland's *Úlfljótur* (est. 1947) and KU Leuven's *Jura Falconis* (est. 1964).

[9] These sentiments are often acknowledged in the inaugural editorials of these journals. For a sample from across Europe, see Oisin Quinn, 'Introduction' (1991) 1 Irish Student Law Review 2; Nicolas Nohlen, 'Editorial' (2004) 1 Studentische Zeitschrift für Rechtswissenschaft Heidelberg ii; Robin Dangoor, ''Chefredaktören har ordet' (2009) 1 Juridisk Publikation 5; Maria Sonam, 'Introduction' (2012) 1 Oxford University Undergraduate Law Journal vii; The Board of Editors, 'Letter from the Board' (2016) 1 LSE Law Review i; Nicole Gibbs and Veronika Valizer, 'From the Editorial Desk' (2024) 1 Maastricht Student Law Review iv.

[10] See, Murray, Pitsillidou and Caine, 'Student-led law reviews' (n.1), 179.

[11] For analysis of these early Scottish student-edited periodicals, see Alisdair MacPherson and Alasdair Peterson, 'The Rise of Student Law Journals in Scotland' [2017] Juridical Review 207, 207-208.

[12] https://journals.ed.ac.uk/index.php/eslr

[13] https://www.abdn.ac.uk/law/student-activities/aberdeen-student-law-review-95.php

[14] https://blogs.napier.ac.uk/edinburghnapierlawreview/

*Glasgow University Law Society Law Review*'),[15] *Strathclyde Law Review* (2014),[16] *Dundee Student Law Review* (2015),[17] *St Andrews Law Review* (2020)[18] and *The Journal for Law & The Common Good* (2023, based in Glasgow Caledonia University).[19] Students from St Andrews also formed a second publication in 2020, the *St Andrews Law Journal*, but only one volume has appeared in print thus far (alongside a handful of standalone articles).[20] This new wave of Scottish student-edited journals is an absolutely fascinating trend in its own right – but in-depth analysis is best suited for another occasion.

In some respects, the *Dundee Student Law Review* is very much a product of these wider trends. While the *DSLR* is characterised by its distinctly Dundonian composition and its unique published content, the journal's core philosophy and goals are very reminiscent of other student-edited periodicals which came before it. After all, like many of its contemporaries elsewhere, the *DSLR*'s ambition each year is to publish a new volume of fascinating articles (penned by students or professionals alike), while offering students the opportunity to hone their academic skills in a welcoming and supportive environment.

However, the *DSLR* is so much more than just being part of some wider trend. Instead, at its heart, the *DSLR* is Dundee's *own* student law journal. It is an initiative which has uniquely impacted the lives of many Dundonian law students, through giving them opportunities which they may never have experienced otherwise. Moreover, the *DSLR* is a publication with its own unique history, consisting of its own demanding challenges and its own tremendous successes – driven forward by its own editorial staff, who proudly worked together to make it all possible.

As such, given that the present volume is a celebration of the tenth anniversary of the *DSLR*'s inaugural publication in 2015, I thought that now would be a good time to recount the history of the journal thus far. Though the initiative has passed through the hands of several 'generations' of law students, everyone who has been involved in the initiative has shared a common passion for the academic side of their legal studies – and over the years, students have consistently come together to ensure the *DSLR*'s continued success. The story of the *DSLR* is one of deep-rooted student enthusiasm – and it is a history which deserves to be celebrated.

## 2. Some History

Though the journal has only existed for just over a decade, the *Dundee Student Law Review* has a surprisingly rich history – a history which, admittedly, is far more expansive than I can

[15] https://www.glasgowuniversitylawreview.com/
[16] https://www.strathclydelawreview.com/ & https://www.strath.ac.uk/humanities/lawschool/strathclydelawreview/
[17] https://sites.dundee.ac.uk/dundeestudentlawreview/
[18] https://www.standrewslawreview.com/
[19] https://www.caledonianblogs.net/lawclinic/gcu-law-journal-for-the-common-good/
[20] https://standrewslawjournal.wp.st-andrews.ac.uk/our-contributors/

do justice to in such a short article. Nevertheless, in this section, I hope I can provide an illuminating snapshot of the history of the *DSLR* – with a focus on how the journal was founded and how it developed in the years which followed.

The idea of the *Dundee Student Law Review* was first conceived in the spring of 2014 by four enthusiastic undergraduate students from Dundee Law School: Koo Asakura, Robin Van Mulders, Arfan Rauf and Sharon Skipper. Throughout their time at the University of Dundee, the four had been active members of Dundee's vibrant law student community. However, over time, they each had begun to feel that something was missing from the law student experience at Dundee – namely, an opportunity for law students to express their own views on legal issues outside of the classroom and their assessments. In a recent conversation, founding editor Robin Van Mulders put this sentiment in the following way:

> *"Our law school excelled in a range of ways: teaching and in particular mooting. Although we frequently were encouraged to review journals as part of classes, a thing that appeared missing was an avenue for students amongst our own ranks at the university to express their own thoughts."*[21]

Aware of the existence of student-edited law journals elsewhere, the four students decided that the forum offered by such a journal would be perfect for allowing students to articulate their well-reasoned views on different legal issues of the day. Additionally, such a journal could also offer students the opportunity to exhibit their exemplary coursework or even original pieces to a wider audience. Moreover, such an initiative would also give students at Dundee an extracurricular opportunity to further develop their academic skills – whether as an editor or as a contributor.

The idea sounded very promising on paper – so, the four founders decided to approach the faculty of Dundee Law School to get some advice on how to get started. Reaching out proved to be a wise decision. In general, the staff of Dundee Law School have always been supportive of student initiatives at the law faculty – and this time was no exception. Staff from across the Law School were quick to show their support for the initiative, and many would go on to volunteer to be peer reviewers for the *DSLR*'s inaugural volume. One member of staff though, Dominic Scullion, was particularly pivotal in the early days of the *DSLR*. A few years prior, he had served as the founding editor of the *Aberdeen Student Law Review.*[22] As such, he was well-versed in what it took to get a student-edited law journal off the ground. For the remainder of his time at Dundee, Scullion remained a constant source of support and advice – and when he returned to private practice, he helped the *DSLR* secure a sponsorship from his new place of

[21] Correspondence from Robin Van Mulders to George Dick, 7 November 2024.
[22] 'The Editorial Board 2009 – 2010' (2010) 1 Aberdeen Student Law Review 3. For Scullion's lively reflections on the founding and growth of the *Aberdeen Student Law Review*, see Dominic Scullion, 'Anniversary Note by Dominic Scullion, Managing Editor of Volume 1' (2020) 10 Aberdeen Student Law Review xiv.

work, Anderson Strathern. Scullion would continue to be the (ever patient!) sponsorship liaison for the next five years – and the early editors of the *DSLR* (including myself) remain indebted to his unending support of the initiative.

With the blessing of the Law School, and the recruitment of two more editors in the form of Harry Milligan and Samuel White, the *DSLR*'s inaugural editorial board got to work creating the first volume. To solicit the journal's first submissions, the editors decided it would be best to advertise its first call for papers on a purely internal basis. Thus, to spread word of the initiative, they relied entirely on internally circulated emails to law students, visits to different classes and classic word of mouth. Though modest in nature, these methods were tremendously successful – and it was not long before the *DSLR* received its first batch of submissions from the wider law student community. The review process itself naturally had its challenges. Though each of the editors were excellent students in their own right, many of them had never scrutinised the work of their peers in such a way before. However, after months of tireless reviewing and editing, which was supplemented superbly by the peer reviewers from Dundee's law faculty, Volume I of the *Dundee Student Law Review* was published in the October of 2015 – consisting entirely of exemplary essays from Dundee's own law students. The inaugural volume was very warmly received by the wider law school community in Dundee, much to the delight of the editors. To give my own insight, I had not long started my own undergraduate studies at Dundee, and I notably remember the 'buzz' revolving around the publication of the *DSLR*'s first ever volume (and, as it happens, it is how I myself first came to learn of the initiative). All in all, Volume I had been a resounding success – and the editors were keen to keep up the momentum in the years that followed.

From Volume II onwards, the main goals of the journal were to formalise its editorial processes and to expand the outreach of the journal (both within Dundee and beyond). The former goal was largely achieved during the production of Volume II, under the stewardship of founding editors Koo Asakura and Robin Van Mulders. It was during this period that the *DSLR*'s management structure – consisting of two Managing Editors leading a team of novice ('Tier 1') and experienced ('Tier 2') editors – was properly established, alongside formal procedures on the appointment of members to the editorial board. This managerial approach proved to be effective, both during Volume II and in later issues, and as such it has remained broadly unchanged to this day (to the delight of Volume II's editors, I am sure!). During their tenure as Managing Editors, Asakura and Van Mulders also worked to improve the journal's production efficiency, particularly through expanding the size of the editorial board to further spread workload responsibilities. In doing so, they successfully managed to produce Volume II within a single academic year, setting the standard for years to follow.

However, the goal of broadening the *DSLR*'s outreach has continued to be a multi-volume project. Much of the groundwork was laid though during Volume II (and the tail end of Volume

I). It was during this time that Asakura and Van Mulders created the *DSLR*'s first social media page (on Facebook),[23] and acquired a page on Dundee Law School's website to publish and promote the journal.[24] Additionally, to attract submissions from Dundee's students, Asakura and Van Mulders thought it would be great to have a prize of some kind which they could offer for the best submission each year. Given that many of Dundee's senior students were keen to acquire work experience, the Managing Editors settled on the idea of trying to get a prize consisting of a short vacation scheme at a law firm – an experience which could be truly life-changing for its recipient. But how on earth would the *DSLR,* a humble student initiative, be able to offer such a prize? Well, to get some ideas, they consulted with the *DSLR*'s longtime supporter, Dominic Scullion. Their timing, as it turns out, was perfect – as Scullion had just been offered employment by Anderson Strathern, one of Scotland's leading law firms. After some back and forth about logistics, Anderson Strathern agreed to both sponsor the *DSLR* and to offer a paid vacation scheme to the Dundonian student with the best submission. Thus, the 'Anderson Strathern Prize' was born, and over the next four volumes it would be awarded to four fantastic students: Jessica Gray,[25] Mark Milne,[26] Iain Mathieson[27] and George Beaton.[28] With the publication of Volume II in June of 2016, both Asakura and Van Mulders would graduate in the summer of the same year. However, over the first two volumes, the pair and their colleagues had been successful in laying the foundations for the Volumes which followed.

For Volume III, the journal was left in the competent hands of long-time assistant editor Harry Milligan (who had been with the *DSLR* from the very beginning as an editor, alongside being a contributor to Volume II[29]) and Samuel Morton (who contributed to Volume I,[30] before becoming an editor for Volume II). The first order of business for the new Managing Editors was to recruit new members for the Editorial Board, as besides themselves, only three other veteran editors returned for Volume 3. It was during this time that I joined the Editorial Board – and I vividly remember the inclusive attitude of both Managing Editors and the kindness of my editorial colleagues (both fellow novices and veterans), who all welcomed and supported

[23] https://www.facebook.com/dundeeSLR/
[24] https://www.dundee.ac.uk/law/opportunities/dundeestudentlawreview [Nowadays, a defunct hyperlink. If you want to see how earlier versions of the website looked, feel free to use this address on the Wayback Machine.]
[25] Jessica Gray, 'Relocation, Relocation, Relocation: A Comparative Study of 'Leave to Remove' Applications in England and Scotland' (2016) 2 Dundee Student Law Review No. 1.
[26] Mark Milne, 'A contextual analysis of the 2004 revisions to the substantive test for competitive harm in the EU Merger Regulation' (2017) 3 Dundee Student Law Review No. 3; Mark Milne, From Injunctions to Damages: Analysis of the remedies applied by the English law of private nuisance based on the economic arguments of Ronald Coase' (2017) 3 Dundee Student Law Review No. 4.
[27] Iain Mathieson, 'A Critical Assessment of the Case for Reform of National Insurance Contributions for the UK's Self-Employed' (2018) 4(1) Dundee Student Law Review No. 3.
[28] George Beaton, 'Can mere incompetence constitute a break of fiduciary duty?' (2019) 5 Dundee Student Law Review No. 1.
[29] Harry Milligan, 'Directors' Remuneration: A Practical Critique of Corporate Governance Effectiveness' (2016) 2 Dundee Student Law Review No. 4.
[30] Samuel Morton, 'Of Wigs and Gowns: A Critique of the Abolition of Court Dress in the Inner House of the Court of Session' (2015) 1 Dundee Student Law Review No. 2.

this bundle of nerves! The production of Volume III itself was largely a smooth process, with some tremendous highlights throughout the year. Perhaps the most notable was that the *DSLR* was successful in attracting, and eventually publishing, its first submission from authors affiliated to an institution outside of Dundee (and, as it happens, outside of Scotland).[31] Thus, in just its third year of operation, the *DSLR* had already begun to be appealing to authors outside of Dundee. However, Volume III would also be defined by a sadder moment in the *DSLR*'s history. Mid-way through the academic year, Morton unfortunately had to step back from the role of Managing Editor due to serious health concerns. Volume 3 was thus dedicated to Morton and his recovery, as well as to "his friendship and his unstoppable wit".[32] Ever resolute against adversity, Morton did thankfully make a recovery – but he opted not to return to the *DSLR* so he could concentrate on completing his studies (though, I can say that he remained a constant source of support to the *DSLR* throughout the rest of his time at Dundee). Milligan's efforts during this time are also worthy of recognition, as his exemplary leadership ensured the smooth sailing of the *DSLR* for the remainder of the year.

With Morton retiring from the *DSLR* and Milligan stepping back to complete his studies, two new Managing Editors were required to lead the production of Volume IV. The task fell to Conor Keir (who joined the *DSLR* during Volume II) and myself, George Dick (who joined the *DSLR* during Volume III). Keir and I had ambitious plans for the *DSLR*. Primary among them was to publish two issues in one year. While this sounded like a good idea at the time, in hindsight this decision to double our publishing output made production much more stressful! However, assisted by our editorial board of experienced veterans and eager newbies, we were ultimately successful in producing two issues that year in March and September of 2018. This achievement was made possible by the fact that the *DSLR* received its (then) largest number of submissions that year. The *DSLR* also presented a one-off prize that year for the best 1st Year submission entitled the 'Sam Morton Prize', in honour of our predecessor who himself had a piece published in the *DSLR* during his first year at Dundee Law School. This unique accolade was won by Kimberly Dewar for her piece on combatting rape myths in the context of criminal trials.[33] It was also during Volume IV's production that the *DSLR* moved to its current website, whose creation I personally oversaw (and I am delighted to see that, at the time of writing at least, not too much has changed over the years since!).

Following the completion of Volume IV and its two issues, Keir stepped back from the role of Managing Editor to focus on his LLM studies (though he remained on the editorial board for

[31] Cedric Vanleenhove and Jan De Bruyne, 'EU Member States' Courts Versus U.S. Punitive Damages Awards for Physical Harm in Football: An Attempt at Defining Best Practice' (2017) 3 Dundee Student Law Review No. 1 [both authors were affiliated with Ghent University in Belgium at the time of submission].
[32] Harry Milligan, 'Dedication' (Dundee Student Law Review, originally published 30 March 2017) <https://sites.dundee.ac.uk/dundeestudentlawreview/publications/>
[33] Kimberley Dewar, 'Common Rape Myths and the Scottish Legal System' (2017) 4(2) Dundee Student Law Review No. 1.

the 18/19 academic year). Taking his place as Co-Managing Editor alongside myself was Ritchie McNeil (who had joined the *DSLR* as an editor for Volume IV) – and we both immediately got to work preparing Volume V. Our primary goal remained the same as the previous year: produce two issues in the one academic year. Anticipating a similar number of submissions as the previous year, when it came to recruiting new editors, McNeil and I opted to form the largest Editorial Board for the *DSLR* up until that point, consisting of 18 students (alongside ourselves). Such a move not only gave us Managing Editors increased flexibility (whereby submissions could be more easily assigned for evaluation or revision around our editors' already busy student schedules), but it also meant we could give as many students as possible a chance to hone their editing skills in a friendly and supportive environment. Having a large Editorial Board turned out to be worthwhile too, as we in fact exceeded the submission figures from the previous year (and, as a bonus, we ensured that every editor got the chance to review at least two pieces each). However, in regard to publishing two issues, McNeil and I unfortunately faltered. Due to delays in the editorial process, which led to a number of pieces being not quite ready for early publication, McNeil and I ultimately thought it would be best to release Volume V as a single issue, rather than rushing out two issues. As such, Volume V appeared as a single issue in the September of 2019. It was remarked at the time that due to the natural stress and strain of producing two issues, coupled with the potential for delays in the editing process, the *DSLR* would be reverting back to a single-issue format for its future volumes.[34] While this was certainly a good decision in hindsight, I must say that attempting to consistently publish two issues was undoubtedly a very fruitful learning experience, as it shed light on the challenges of maintaining a high publication output when one is also striving for good-quality pieces. In any event, I am glad that the *DSLR* that year chose to pursue quality over quantity – and I am delighted to see that this trend has continued in subsequent years.

Entering the era of Volume VI, your narrator bows out of the story, as I graduated from Dundee in the summer of 2019. Joining Ritchie McNeil for Volume VI was the ever-enthusiastic Jack Jones (who had joined the *DSLR* in the previous year). Going into the academic year of 2019/20, the pair were particularly keen to boost the *DSLR*'s outreach, both by forging deeper ties with Dundee's other law student societies and through getting the *DSLR* archived in some online databases. Additionally, McNeil and Jones began to wonder about ways to diversify the publishing output of the journal beyond the usual annual volume of essays. The idea they landed on was starting a blog section on the *DSLR*'s website. In a recent conversation, Jones provided some lively reflections on why the *DSLR* chose to start the 'DSLR Blog':

> *"Ritchie and I, alongside several of the other editors, had noticed that the DSLR always received several good quality submissions that did not quite meet the requirements (in*

[34] George Dick, Ritchie McNeil and Jack Jones, 'Editorial Comment and Acknowledgements' (2019) 5 Dundee Student Law Review i.

*terms of length or formality) for our annual publication. Additionally, some applicants were interested in writing about areas of law that were likely to have changed substantially by the time of publication. The blogpost offered a space to address topical, dynamic issues such as COVID-19 restrictions and regulations. In this sense, it gave us a space that was much more responsive to current events and much more accessible than formal publications. Since we were already receiving a number of submissions that seemed better served as blog posts, and academia in general appeared to be trending in the direction of increased short-form content, we decided it simply made to sense to start a blog."*[35]

While the *DSLR* was broadly successful in achieving these above goals, especially in the first semester, a horror was looming on the horizon – the COVID-19 pandemic. Like the rest of the world around it, the *DSLR* would face significant challenges during this period, especially as university life moved online during the lockdown era. However, because much of the *DSLR*'s infrastructure was already online, the journal managed to persevere under McNeil's and Jones' capable and empathetic leadership. Throughout the remainder of Volume VI's production, the journal would prioritise the wellbeing of its editorial board and contributors above all else – and over time, Volume VI steadily came together. With the publication of Volume VI in the November of 2020, the *DSLR* and its editorial team had pulled off a most tremendous feat given the circumstances.

With McNeil graduating from Dundee at the end of the 19/20 academic year, Jones would be joined for Volume VII by new Co-Managing Editor Aaron Feeney (who had joined the *DSLR* at the beginning of the previous academic year). Going into Volume VII, the pair were anxious about how the new academic year would go, especially as COVID-19 was still at the forefront of our lives in Scotland. Though COVID-19 restrictions would continue to be implemented intermittently throughout the year, the *DSLR* would continue to thrive – with a very successful editor recruitment period, alongside a steady rate of submissions throughout the production process. The creation of Volume VII was thus remarkably smooth given the circumstances, with the new volume appearing in the July of 2021. All in all, everything went very well for the *DSLR* that year – with Jones, Feeney and the editorial board at-large doing an excellent job maintaining the *DSLR* through the remainder of the COVID-19 restrictions period.

The production of Volumes VIII and IX mark the beginning of a much slower period for the *DSLR*, which was necessitated by new challenges and setbacks. At the beginning of Volume VIII, then-senior Managing Editor Aaron Feeney unfortunately had to completely step back from the initiative due to personal circumstances. With Jones graduating from Dundee in the summer of 2021, the new leadership of Isla MacLeod and Cameron Weatherburn were thus suddenly thrown in at the deep end – with the pair needing to adapt quickly to leading the

[35] Correspondence from Jack Jones to George Dick, 10 September 2024.

initiative. Though Volume VIII's production took a little longer than previous years (around 15 months or so), the *DSLR* and its team were successful in adapting to the challenging circumstances. However, the slower production of Volume VIII had a knock-on effect for Volume IX. Because Volume IX would be started mid-way through the academic year of 22/23, the Managing Editor team of MacLeod and Vasileios Maniakas decided to slow down Volume IX's production time, rather than rush out another volume. This more relaxed approach would allow for the *DSLR* to recuperate its strength for the upcoming academic year – and it allowed for the editorial team to focus on another project: the production of the 10th Anniversary Edition. For Volume X itself, MacLeod and Maniakas would step back to focus on the final year of their undergraduate studies. Nonetheless, though they had a busy year of studies to contend with, the pair were successful in compiling together Volume IX, a shorter issue which was published in the July of 2024.

And so, we arrive at the present volume: Volume X. Taking the lead on its production were two brand new Managing Editors, Tom Edwards and Zara Singleton (who had both joined the *DSLR* during Volume VIII). Given the challenges of the last few volumes, it was decided that Volume X ought to be a sort of 'reset' for the *DSLR*, where the standard could be set for future volumes and changes could be implemented to ensure the journal's continued prosperity. To that end, the *DSLR* decided to reach out to Dundee Law School to ask whether any members of staff were interested in serving as formal staff liaisons, who would help the *DSLR* in producing future issues. In previous years (from Volume III onwards), staff had only served as peer reviewers for the journal. By having formal staff liaisons, the hope was that staff could do a bit more than just peer review - such as helping with getting the *DSLR* archived in more online databases, getting proper Digital Object Identifiers set up for each article (past and future), and by serving as standing advisors for future Managing Editors (guiding them through the highs and lows of their journey with the initiative). With Prof. Pamela Ferguson volunteering to be the volumes Senior Staff Editor, and with various other staff members volunteering to help with archiving the *DSLR*'s previous issues and advising the *DSLR'*s future editors, the *DSLR*'s student editorial team is optimistic that the journal will continue to prosper for years to come.

In regards to the content of Volume X, Edwards and Singleton were keen to have a diverse range of exciting contributions. To attract submissions, Edwards created a Linkedin page for the journal, and alongside circulating the usual internal call for papers among Dundee's law students, the Managing Editors also reached out to other student-edited journals in Scotland to advertise the opportunity to contribute to the upcoming issue. Students from Aberdeen and St Andrews showed particular interest, and sent along a number of contributions which were accepted for publication. Additionally, the editors had heard that a Dundee student, Jack Anderson, had recently won the Jonathan Leslie Memorial Essay Competition. Keen to help celebrate Anderson's fantastic achievement, the *DSLR* got permission from the competition's organisers to publish Anderson's winning entry within Volume X. Finally, the editors of Volume

X decided that an anniversary edition would not be complete without a couple of celebratory forewords. To pen these introductory contributions, the editors decided to get in touch with some alumni – with the aim of having one foreword written by an exemplary Dundonian alumni from legal practice, and another authored by an alumni of the *DSLR*. For the former, the editors chose to contact Amelia Mah, an LLB graduate from Dundee who had recently been called to the Scottish bar, following her superb undergraduate studies and her successful time in private practice. Meanwhile, for the *DSLR* alumni contribution, the editors made the (hopefully not regrettable!) decision to contact George Dick (your present author). Ever since I graduated from Dundee, I had always tried my best to keep up with the student initiative which had shaped so much of my undergraduate years. Moreover, over the years I participated in the organisation, the *DSLR* had substantially contributed to my love of the academic side of my legal studies – which eventually led me to pursue my present PhD studies. Thus, the *DSLR* forever has a place in my heart – and as such, I was honoured to write this contribution.

As I am writing this piece, the editors of Volume X are making the final touches to the 10th Anniversary Edition – and soon, it will appear in print. From there...I am not entirely sure what the future holds for the *DSLR* or its editors (though I am sure that Volume XI will be on the horizon!). Whatever the case may be, I have the feeling that the *DSLR* has a bright future ahead of it.

## 3. Some Reflections

As mentioned previously, both above and in this volume's two delightful forewords,[36] Volume X of the *Dundee Student Law Review* is, in part, a celebration of the 10th Anniversary of the publication of the *DSLR*'s inaugural volume (alongside being a celebration of both the works of Volume X's contributors and the efforts of Volume X's editorial staff). Given that anniversary occasions are often a time for reflection, I thought that now would be a good time to look at how far the *DSLR* has come over the years. While the above chronicle of the *DSLR*'s history showcases many of the journal's accomplishments, I thought it would be interesting to examine other data-points, to give a broader picture of the publication's progress. One minor hurdle though to constructing such a profile of the *DSLR* is that the initiative does not actively track several metrics which other journals typically use to appraise their success (such as citations,[37]

[36] See the contributions by Tom Edwards and Amelia Mah, this volume.

[37] Out of curiosity, I decided to investigate whether any *DSLR* articles had ever been cited elsewhere. To my pleasant surprise, I found two instances: Ümit Vefa Özbay, 'Dijital Peculium Kavramı' (2021) 70 Ankara Üniversitesi Hukuk Fakültesi Dergisi 867 [citing Francesco Cavinato and Federica Casano, 'AI-"Agents": to be, or not to be, in the legal domain' (2019) 5 Dundee Student Law Review No. 2]; Robert Shiels, 'Undermining the Advice of a Solicitor: *HM Advocate v* Hawkins [2017] HCJAC 79; 2017 SLT 1328; 2018 SCCR 1' (2019) 83 The Journal of Criminal Law 125 [self-citing Robert Shiels, 'Scots Criminal Law and the Right of Silence' (2018) 4(2) Dundee Student Law Review No. 3].

article views, and publishing timelines[38]). However, in my view, these sorts of metrics are not the most useful tools for evaluating the progress of a extra-curricular passion project like the *DSLR*. Instead, I thought it would be much more fruitful to look at the *DSLR*'s publishing output and its editorial staff, as I suspect these data-points are far more relevant to the wider goals of the initiative. Plus, analysis of both dimensions reveal some fascinating trends, which I thought I would share on this most special of occasions.

*(a) Publication Overview*

Over the last ten volumes, the *DSLR* has published 46 fascinating articles. However, among these articles, there is a number of interesting trends which can be picked out – particularly in relation to Dundonian submissions, other contributions, and the diversity of subjects the *DSLR* has featured in its many volumes.

Back in 2014, the *DSLR* was established in order to be "a forum for students to showcase intellectual capability",[39] with a particular focus on "showcasing the academic fortitude of the University of Dundee School of Law".[40] Thus, since its beginning, one of the primary aims of the *DSLR* has been to publish the academic work of law students from the University of Dundee – whether they be original pieces or exemplary coursework submissions. In this regard, the *DSLR* has been quite successful. Over its ten volumes, the *DSLR* has published 29 articles authored by University of Dundee law students, with the grand majority being written by undergraduates (at the time of submission).[41] This number is certainly not surprising, given that the *DSLR* specifically advertises itself to University of Dundee law students as an opportunity to publish their written work.

However, given the journal's stated goal above and the fact that many other Scottish universities have their own student-edited law journals, one may have intuitively thought that the distinctly '*Dundee* Student Law Review' would only attract submissions from students based in Dundee. However, this has not actually proven to be the case. In recent years, the *DSLR* has published multiple articles from students from other Scottish universities.[42]

[38] While publishing timelines like 'Submission to First Decision' are not actively tracked, the *DSLR*'s student editors nevertheless do aspire to complete the initial review process as quickly as possible (usually over a timeline of 2-6 weeks). Peer review timelines, from my experience, vary considerably depending on the time of year. However, the publication of new volumes has generally been consistent at approximately one year after the initial call for submissions.

[39] Robin Van Mulders and Koo Asakura, 'Volume I Foreword' (2015) 1 Dundee Student Law Review i (on file with the author).

[40] Dundee Student Law Review, 'Home' <https://sites.dundee.ac.uk/dundeestudentlawreview/>.

[41] I only know of one author who published a paper with the *DSLR* during their LLM studies at Dundee- Sergio Arias Arbeláez, 'Dual-class Shares Structure in the Premium Tier in the UK - Arguments in Favour and Applicable Conditions' (2024) 9 Dundee Student Law Review 15.

[42] Cheryl Warden, 'The Implications of *GS Media v. Sanoma Media Netherlands*' 'New Public' on Digital Distance Learning' (2018) 4(2) Dundee Student Law Review No. 4; Grace Gubbins, 'A Critical Analysis of the Admission of Sexual History and Bad Character Evidence of Complainers in Scots Law' (2021) 7 Dundee Student

Moreover, the *DSLR* has even managed to attract submissions from further afield – which has led to the publication of pieces written by students (and even one lecturer) from Europe,[43] North America[44] and Asia.[45] Interestingly, among these non-Dundee authors, there has been a good mix of both undergraduate and postgraduate students. Thus, the *DSLR* has certainly not solely been a home for undergraduate student papers. The journal even caught the eye of a solicitor-advocate, Robert Shiels, who has been a regular contributor to many Scottish legal periodicals over the years – and the editors are proud to have published four of his articles across multiple volumes.[46] Thus, the *DSLR* has managed to cultivate a surprisingly broad appeal to potential authors, both in Dundee and beyond – which has subsequently led to a diverse range of articles being published by the journal.

Now is a good opportunity to talk about this diverse output, as over the years the *DSLR* has notably published articles on a wide variety of subjects. This includes papers on everything from private law[47] and commercial law,[48] to environmental law[49] and intellectual property.[50] The journal has also published papers on niche but thought-provoking topics, such as the victimisation of indigenous women and girls in Canada,[51] the codification of Scots law,[52] and

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Law Review 1. See also the contributions by Christiana Cameron, Erin Lewis, Sashka Bakalova and Sebastien Richardson *et al*, this volume. Despite being a Dundee alumnus, I also technically fall into this category, as I published an essay with the *DSLR* during my LLM studies at Edinburgh- George Dick, 'Grotius' Contribution to Natural Law- A Reappraisal' (2020) 6 Dundee Student Law Review 24.

[43] Cedric Vanleenhove and Jan De Bruyne, 'EU Member States' Courts Versus U.S. Punitive Damages Awards for Physical Harm in Football: An Attempt at Defining Best Practice' (2017) 3 Dundee Student Law Review No. 1; Francesco Cavinato and Federica Casano, 'AI-"Agents": to be, or not to be, in the legal domain' (2019) 5 Dundee Student Law Review No. 2; Giacomo Cotti, 'The Making of Trials and Plays in the Context of Show Trials' (2020) 6 Dundee Student Law Review 1.

[44] Kristen Lew, 'Human Rights Protections in the United Kingdom Post-Brexit: The Case for a Codified Constitution' (2021) 7 Dundee Student Law Review 16.

[45] Ko Tsun Kiu and Lam Wan Shu, 'Piercing the Corporate Veil? A critical analysis on *Prest v Petrodel Resources Ltd and Others*' (2019) 5 Dundee Student Law Review No. 3.

[46] Robert Shiels, 'Scots Criminal Law and the Right of Silence' (2018) 4(2) Dundee Student Law Review No. 3; Robert Shiels, 'The Investigation of Suicide in Victorian and Edwardian Scotland' (2019) 5 Dundee Student Law Review No. 4; Robert Shiels, 'Scots Criminal Procedure, the Investigation of Crime and the Origins of Police Interviews' (2020) 6 Dundee Student Law Review 60; Robert Shiels, 'The Reform of Summary Criminal Procedure in Edwardian Scotland' (2021) 7 Dundee Student Law Review 53.

[47] Leanne-Sydonie Goodlad, 'Dealing in Good Faith? The future of an implied good faith doctrine in English Contract Law' 8 Dundee Student Law Review 21; Mark Milne, 'From Injunctions to Damages: Analysis of the remedies applied by the English law of private nuisance based on the economic arguments of Ronald Coase' (2017) 3 Dundee Student Law Review No. 4.

[48] Erin Lewis, 'The Pari Passu Principle: Paramount or Pointless', this volume; Harry Milligan, 'Directors' Remuneration: A Practical Critique of Corporate Governance Effectiveness' (2016) 2 Dundee Student Law Review No. 4.

[49] Kelsey Laird, 'The Success and Failures of Environmental Regulatory Systems' (2024) 9 Dundee Student Law Review 1; Daniel Mosley, ''Public Watchdogs': An analysis of the role of the public in Environmental Impact Assessments' (2018) 4(1) Dundee Student Law Review No. 3.

[50] Kathleen Sargent, 'The Benefits of the Bolar Exemption in the UK' (2020) 6 Dundee Student Law Review 49; Cheryl Warden, 'The Implications of *GS Media v. Sanoma Media Netherlands*' 'New Public' on Digital Distance Learning' (2018) 4(2) Dundee Student Law Review No. 4.

[51] Kenna Draper, 'An Analysis of Missing and Murdered Indigenous Women and Girls: The RCMP Perpetuation of Colonial Violence' (2022) 8 Dundee Student Law Review 1.

[52] Alasdair Forsyth, 'The Scottish Law Commission and the glistering code – Does codification simplify and modernise the law?' (2018) 4(2) Dundee Student Law Review No. 2.

the theatre of show trials.[53] The most popular subjects, however, have been criminal law[54] and taxation,[55] with 10 and 8 articles respectively. Nevertheless, it is evident that the *DSLR* is a non-specialist journal, whose many volumes have been enriched by the diverse range of subjects touched upon by its many contributors. As such, I for one look forward to seeing what exciting topics are covered within the *DSLR*'s future volumes!

### *(b) The Editors*

Alongside the journal's many contributors, the other key players in the *DSLR*'s history have been its editorial staff. Over the last ten years, the *DSLR* has had more than 70 editors,[56] 12 of whom have led the *DSLR* as a Managing Editor. The editorial team has largely been comprised of undergraduate law students from the Scots Law, English Law, and Dual Qualifying LLB programmes. However, the *DSLR* has also recruited editors from Dundee's postgraduate law community, including PhD, LLM, Diploma and Graduate LLB students. Out of all of these different students, only a handful had any prior editing experience before joining the *DSLR* – which is perfectly understandable given that the vast majority of the editors were still in the early stages of their careers. As such, the *DSLR* has always dedicated time to the training of its newbie editors, through both group training sessions and individual feedback. Thus, like many of its European counterparts, the *DSLR* has always aspired to offer Dundee's law students a unique opportunity to hone their academic skills in a welcoming extracurricular environment – and I have always had the impression that the *DSLR* has been very successful in this regard.

However, while the development of one's skills is an appealing reason to join initiatives like the *DSLR*, it is certainly not the only reason. For me personally, I found the *DSLR* to be a great opportunity to meet like-minded law students from across different year groups who shared my enthusiasm for academic legal writing (and I met many people I am now glad to count among my friends). Alongside the natural pedagogical and networking benefits, if one is passionate about the academic side of their legal studies, participation in organisations like the *DSLR* is also a great way to further foster that enthusiasm – especially as you get the opportunity to engage more deeply with a range of legal subjects, while also getting a glimpse into the world

[53] Giacomo Cotti, 'The Making of Trials and Plays in the Context of Show Trials' (2020) 6 Dundee Student Law Review 1.
[54] See, for example, Grace Gubbins, 'A Critical Analysis of the Admission of Sexual History and Bad Character Evidence of Complainers in Scots Law' (2021) 7 Dundee Student Law Review 1; Robert Shiels, 'Scots Criminal Law and the Right of Silence' (2018) 4(2) Dundee Student Law Review No. 3; Kerri Montgomery, 'Abuse of Process: Time for Change?' (2016) 2 Dundee Student Law Review No. 2.
[55] See, for example, Emma McFarlane, 'Concerns About the Check Employment Status Tool' (2021) 7 Dundee Student Law Review 32; Alex Illiescu, 'A Game of Transfer Pricing: An Analysis of the Suitability of the Arm's Length Principle and the Proposed Alternative of Formulary Appointment' (2016) 2 Dundee Student Law Review No. 5; Emma Webster, 'Does the General Anti-Abuse Rule (GAAR) improve upon pre-existing methods of tackling Tax Avoidance?' (2015) 1 Dundee Student Law Review No. 4.
[56] This approximate figure is intentional, as I am anxious about having missed anyone! However, I believe the exact figure is around 72 total editors.

of legal academia. And for those who are more career-focused, membership on a student-edited law journal is also a distinctive way to enhance one's CV in an ever-increasingly competitive job market. As such, to any and all law students at Dundee: I would thoroughly recommend joining the *DSLR,* or at least contributing to its future issues. I gained a ton of experiences I really would not have acquired anywhere else, and I made many fantastic new friends along the way. I honestly could not recommend the initiative more!

At this juncture though, one may be curious: what sort of careers have other, previous editors of the *DSLR* gone on to pursue? Well, the vast majority of the *DSLR*'s former editors have gone on to work in the UK legal sector, most commonly as solicitors – and they can be found across a wide range of specialisms and firms. Some have opted to pursue careers in legal academia, where they can now be found as lecturers, PhD students or research assistants. And others have chosen to pursue successful careers outside of law, such as in business, banking, and university administration. Though each of these editors ultimately pursued their own unique path, each of them are linked together by their time in the *DSLR* – and I am sure each of the Managing Editors are grateful to each of them for contributing their time at university to making the *DSLR* a success. Moreover, on behalf of all of the Managing Editors over the years, I hope that all of the editors had a great time participating in the initiative. I can imagine that things were stressful from time to time – but I hope the experience as a whole was a worthwhile one!

## 4. A Closing Tribute

Ten volumes on from its inaugural publication in 2015, I think it would be fair to say that the *Dundee Student Law Review* has proven to be a very successful endeavour indeed. As a Dundee alumnus, I am delighted that Dundonian law students have managed to maintain this fantastic initiative for over a decade – and I am sure the *DSLR* will continue to prosper in the years to come!

None of this, however, would have been possible if it was not for the *DSLR*'s many contributors. Preparing a piece for publication is certainly not easy, no matter the journal – and the *DSLR* has always been appreciative of its contributors' kindness and patience, coupled with their intellectual rigour. Thus, for all of your submissions, the *DSLR* and its staff are eternally grateful.

While the *DSLR* is indebted to its contributors, the journal also owes its success to one more remarkable group of individuals: its enthusiastic and conscientious editorial staff. At their heart, student-edited law journals like the *DSLR* are ultimately a team effort – and if it was not for the many volunteers from Dundee's law student community, the *DSLR* would have never got off the ground, nor prospered in the years which followed.

Thus, to conclude this article, I thought I would do something a little bit different. Rather than offering a conventional conclusion, I thought it would be more fitting to bring this essay to a close by recording the names overleaf of all of the students who volunteered their time to reviewing and editing submissions on behalf of the journal over the years – so that their efforts may be recognised and their names logged for posterity. To each and every editor of the *DSLR*: thank you again for being part of this fantastic initiative, and thank you again for all of your hard work! And, on behalf of all of the Managing Editors over the years, we hope you had a fantastic time with the *DSLR* during your university years!

I hope you enjoy the rest of Volume X, and hopefully you will stick around for the *DSLR*'s future volumes. In the meantime though: here's to the future of the *Dundee Student Law Review*!

*Dundee Student Law Review*

Editorial Boards (2014 – 2024)

**Volume 1 (2014/15)**

**Inaugural Editorial Board:**

Koo Asakura, Harry Milligan, Arfan Rauf, Sharon Skipper, Robin Van Mulders, and Samuel White.

**Volume 2 (2015/16)**

**Managing Editors:**

Koo Asakura & Robin Van Mulders.

**Editors:**

Conor Keir, Faye Lipton, Iain Mathieson, Stuart McRobbie, Harry Milligan, Samuel Morton Zane Powell, and Giorgos Vrakas.

**Volume 3 (2016/17)**

**Managing Editors:**

Harry Milligan & Samuel Morton.

**Editors:**

George Dick, Molly Ferguson, Irene Issaias, Conor Keir, Faye Lipton, Iain Mathieson, Kerri Montgomery, Keanu Newman, Alexander Rapis, and Christopher Vannart.

**Volume 4 (2017/18)**

**Managing Editors:**

George Dick & Conor Keir.

**Editors:**

Kerry Armstrong, Lucy Campbell, Molly Ferguson, James Ford, Faye Lipton, Iain Mathieson, Ritchie McNeil, Alexander Rapis, Beth Simpson, Christopher Vannart, and Samuel White.

**Volume 5 (2018/19)**

**Managing Editors:**

George Dick & Ritchie McNeil.

**Editors:**

Alethea Barretto, Lucy Campbell, Kim Dewar, Rebecca Fletcher, James Ford, Alasdair Forsyth, Katy Hepburn, Jack Jones, Conor Keir, Vanessa Constant Laforce, Faye Lipton
Peter Mather, James MacDonald, Rebekah McNeill, Alexander Rapis, Kathleen Sargent, Beth Simpson, and Samuel White.

**Volume 6 (2019/20)**

**Managing Editors:**

Jack Jones & Ritchie McNeil.

**Editors:**

Amelia Carrothers, Kim Dewar, Aaron Feeney, James Ford, Alasdair Forsyth, Katy Hepburn
Hiral Jain, James MacDonald, Emma McFarlane, Rebekah McNeill, Matthew Ogden, Kathleen Sargent, and Cameron Weatherburn.

**Volume 7 (2020/21)**

**Managing Editors:**

Aaron Feeney & Jack Jones.

**Editors:**

Amelia Carrothers, Kim Dewar, Fiona Duncan, Hiral Jain, Sofia Mechtidou, James MacDonald, Isla MacLeod, Vasileios Maniakas, Emma McFarlane, Matthew Ogden, Thomas Singleton, Cameron Weatherburn.

**Volume 8 (2021/22) & Volume 9 (2022/23)**

**Managing Editors:**

Isla MacLeod, Vasileios Maniakas, and Cameron Weatherburn.

**Editors:**

Akshay Anand, Zenab Aslam, Nadia Blaikie, Danielle Brownlie, Kwame Chacha, Kenna Draper, Jezneel Durogene, Tom Edwards, Greg Harden, Erin Hornibrook, Shona Lean, John Leonard, Jacintha Aihevba, Vasileios Maniakas, Edward Maullin-Sapey, James MacDonald, Kirsty McLeod, Sofia Mechtidou, Sandy Milne, Zara Singleton, Olivia Waddell, Nick Whelan.

**Volume 10 (2023/24)**

**Managing Editors:**

Tom Edwards & Zara Singleton.

**Editors:**

Oriel Leavy Gray, Valeriia Liubymtseva, Safaa Salih Mohamedali Omer, and Katia Sher.

# The Jonathan Leslie Memorial Essay Prize Competition

# 2023 Winning Article[1]

Selected by the Lord Lyon King of Arms[2]

By Jack Anderson[3]

With a foreword by Brian Dempsey[4]

## I. FOREWORD:

*Remembering Jonathan Leslie*

Jonathan Leslie, a graduate of the School of Law, took his own life in 2020 following intense homophobic harassment, leaving family and friends bereft. Jonathan was remembered fondly by those of us teaching in the School when he was here and we were all shocked that such a terrible thing could still happen.

In February 2022 the University hosted a memorial event at which Jonathan's husband, Edward, shared memories of Jonathan. The University's commitment to equality, diversity and inclusion and to challenging homophobia was affirmed by Professor Wendy Alexander, vice principal for Internationalisation, Dr Sarah Hendry, Head of the School of Law, Dimitris Vidakis, President of Dundee University Students' Association and Erin Hardee of the University's LGBTI+ Staff & Postgraduate Network.

As a further mark of respect the School then arranged a student essay competition on the topic of the opening of marriage to same sex couples in 2014. The topic was chosen to allow consideration of improvements in the law for many LGBT+ people in Scotland despite the fact that much more still needed to be done.

We were honoured that Dundee graduate Lord Lyon King of Arms Joe Morrow CVO, CBE, KStJ, KC, DL, FRSE agreed to judge the essays. The competition was open to all Dundee University law students (Undergraduate, Diploma and Post Graduate). In addition to consideration of publication in the Dundee Student Law Journal, the winning submissions received a prize of £100 and the two runners up received prizes of £50, funded personally by select law school staff.

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[1] [DOI]: https://doi.org/10.20933/100001334
[2] Lord Lyon King of Arms Joe Morrow CVO, CBE, KStJ, KC, DL, FRSE.
[3] Level 4 Scots Law (Hons) University of Dundee.
[4] Lecturer in Law, Dundee Law School, School of Humanities, Social Sciences and Law.

A minority of people in the lgbtqi+ community, myself included, were not uncritical of the opening of marriage to same sex couples. The fear was that lgbtqi+ lives would be 'domesticated' and the potential recognition of relationships such as unmarried cohabitation would constrained by privileging marriage, with all its baggage, as the only model. Be that as it may, and I would again stress that those of us with that fear were very much in the minority, there is no doubt that the open of marriage with very little homophobic 'backlash' during the legislative process reflected a much greater acceptance of lgbtqi+ people in Scotland than had been evident in the 1960s, 1970s and even the 2000s.

Brian Dempsey, Lecturer, University of Dundee School of Law.

## 1. INTRODUCTION:

Marriage has been at the centre of society in Britain for centuries. So why has the desire for a same sex couple to get married cause major controversy? The issue is that until recently marriage has been by *'longstanding definition and acceptance'*[5] in law a relationship between a man and a woman. However, with the increasing acceptance of gay and lesbian relationships, the Marriage and Civil Partnership (Scotland) Act 2014 was passed overwhelmingly by the Scottish Parliament with 108-15 votes.

Throughout this essay, the arguments around opening marriage to same sex couples will be considered; as well as the most significant aspects of the relevant legislation.

## 2. ARGUMENTS FOR SAME SEX MARRIAGE:

### 2.1. Removes discrimination by the law:

The primary argument for opening marriage to same sex couples is that it removes the discrimination that existed by the law. Same sex couples had been prohibited from marrying which was an option that was exclusively available for opposite sex couples.

It was not until the Civil Partnership Act 2004 came into effect that same sex couples could enter into civil partnerships. This gave them most of the legal rights and responsibilities that came from traditional marriage. However, the Equality Network argued 'people do not propose to their partner by asking "will you civil partner me?" because civil partnership does not have the same meaning'.[6] Civil Partnerships went a considerable way to removing discrimination towards same sex relationships, but if it is

[5] *Wilkinson v Kilzinger & Ors* [2006] EWHC 2022 (Fam) at para 122.
[6] Equality Network, 'Six reasons to support equal marriage' (October 2013).

acceptable in law for allowing same sex civil partnerships to exist, what reasonable justification could there be for not allowing marriage?

This is submitted to be the most persuasive argument for opening marriage to same sex coupes as it gave LGBT+ and opposite sex relationships an equal status in Scots law. This ensured that everyone has an equal opportunity to marry and have their relationship recognised by the law. This undoubtably made the law fairer and more inclusive.

2.2. Reduce stigma around same sex marriage:

When the law prohibited same sex couples from getting married, it created the impression that these relationships were inferior to opposite sex relationships. The *'segregation of heterosexual and homosexual couples into separate institutions constitutes a cognisable harm'*.[7] By recognising opposite sex and same sex marriages, the law signalled that both types of relationships are equal. In time, this has the possibility of improving the discrimination and abuse LGBT+ people face within society. I also consider this argument to be very persuasive.

2.3. Reflect changing views in society:

Over the last couple of decades, public opinion has modernised in almost every area of society. Family law has been significantly impacted by the decrease in religious membership,[8] most significantly influencing societies views on opening marriage to same sex couples. In 1980, 75% of the public were opposed to same sex marriage but by 2010, this has changed to 60% of the public supporting the concept[9]. This shows that support for same sex marriage was increasing faster than the law was being changed. I consider this argument to be persuasive as the law must be changed to reflect society's views.

## 3. ARGUMENTS AGAINST SAME SEX MARRIAGE

3.1. Religious Beliefs:

The strongest resistance to allowing same sex marriage came from religious groups. Christianity, which has been the main religion in Western Europe for many centuries, believes at its core that marriage should be between a man and a woman.[10]

[7] ibid.
[8] BBC News, 'religious affiliations in Scotland declines sharply' (1 July 2017).
[9] Bonnie Gardiner, 'same-sex marriage in Britain' (YouGov, 19 March 2012).
[10] KJV Bible, 19:8.

The influence of Christianity remains an important part of the history and culture of Western Europe.[11] The views of religious groups are well taught and strongly held. Consequently, many religious groups expressed concern that they would be forced to permit same sex marriages and in response the Catholic Church said that it would *'step up their campaign against same sex marriage'*.[12]

It is submitted that religious beliefs are to be considered the most persuasive argument against opening marriage to same sex couples, albeit with religious membership decreasing in Scotland. It is a powerful argument as it would be inappropriate to impose legislation on all religious groups, particularly when it goes against their faith. That would also have the potential of breaching the European Convention on Human Rights guarantee of freedom of thought, conscience and religion[13] as well as freedom of expression.[14]

3.2. Potential to increase demand to expand marriage further:

Another argument that was put forward was that if the traditional view of marriage was expanded, it would have the possibility of creating a "floodgate" effect. Recognising same sex marriage may be harmless, but it could lead to demand for the recognition of other forms of marriage that would be considered more extreme in society, for instance, opening marriage to more than two people or to include inanimate objects.

It is submitted that this argument is not to be considered persuasive, as it would be inappropriate to prohibit same sex marriage on the grounds of a hypothetical problem. Since the introduction of same sex marriage, there has not been an increase in demand for expanding marriage further. However, should such demand emerge in the future it would be appropriate to consider it in light of society's views at that time.

## 4. SCOPE OF THE LEGISLATION:

The main objective of the legislation was to make provisions for marriage between same sex couples, but it also deals with a number of other important issues.

4.1. Same sex marriage:

[11] Harrison Peter, *Christianity and the rise of Western Medicine* (8 May 2012).
[12] Paul Williams, 'Catholics step up attack on same sex marriage law (The Sunday Times, 11 March 2012).
[13] European Convention on Human Right, Article 9.
[14] ibid, Art 10.

The most significant provision in the Marriage and Civil Partnership (Scotland) Act 2014 is that it opens the "institution" of marriage to same sex couples for the first time in Scotland. Section 2[15] repealed s 5(4)(e) of the Marriage (Scotland) Act 1977 which impeded marriage where *'both parties are of the same sex'*.

The legislation also redefined the definition of marriage as *'between persons of different sexes and marriage between persons of the same sex'*.[16] Prior to this marriage had been defined as *'the voluntary union for life of one man and one woman to the exclusion of all other'*.[17]

The legislation does not create a 'new institution' of marriage for same sex couples. Brian Dempsey criticised the legislation for using the terminology 'same sex' and argued that this was *'misleading as there will only be one status of marriage, open to both mixed sex and same sex couples'*.[18]

Scots law goes further than the European Convention on Human Rights which does not extend the '*right to marry'*[19] to same sex couples. Article 12 states *'men and women of marriageable age have the right to marry and found a family'*[20]. The European Court of Human Rights said that the right *'could [not] be interpreted as imposing an obligation on contracting states to open marriage to same sex couples'*.[21]

4.2. Conversion of a civil partnership to marriage:

Many same sex couples entered into civil partnerships while they were prohibited from getting married.[22] The legislation makes provisions for parties in a *'qualifying civil partnership to change their civil partnership into a marriage'*.[23] In order for the civil partnership to qualify for being changed, it must have been registered in Scotland and not have been dissolved, annulled or ended by death.[24] In 2015, 935 same sex couples converted their civil partnership into marriage – this amounted to over half of the same sex marriages registered for that year.[25]

The civil partnership can be changed to marriage by the parties meeting with a registrar. Alternatively, the parties may choose to hold a marriage ceremony, either civil, religious or belief.

[15] Marriage and Civil Partnership (Scotland) Act 2014.
[16] ibid, s 4(15).
[17] *Hyde v Hyde and Woodmansee* (1866) 1 P&D 130 per Lord Penzance at 133.
[18] Brain Dempsey, 'Marriage redefined' (Law Society of Scotland, 15 July 2013).
[19] European Convention on Human Rights, Article 12.
[20] ibid.
[21] *Chapin and Charpentier v France* [2016] ECHR 504.
[22] National Records of Scotland, 'Scotland's Population- Annual Review of Demographic Trends' (2019).
[23] Marriage and Civil Partnership (Scotland) Act 2014, s 10(1).
[24]Marriage (Scotland) Act 1977, s 5(6).
[25] National Records of Scotland, 'Scotland's Population- Annual Review of Demographic Trends' (2019).

When a civil partnership is changed to marriage, the civil partnership *'ends on the date on which the marriage was solemnised or the change took effect'*.[26] The length of the marriage is backdated to when the civil partnership was registered.[27] The Law Society of Scotland said that the purpose of the inclusion period was to '*emphasise that a change from partnership to marriage is a symbolic one'*.[28]

### 4.3. Ending of a Marriage:

There are two grounds of divorce which are available to both same sex and opposite sex marriages.[29]

#### 4.3.1. Irretrievable breakdown:

The first ground of divorce is that the marriage has broken down irretrievably. It can be established on the proof of the defender's adultery;[30] intolerable behaviour[31] or the non-cohabitation of the parties.[32]

In particular, the ground of adultery has caused some controversy. Adultery has been defined as *'voluntary sexual intercourse between a married person and a person of the opposite sex, not being married to the partner'*.[33] Adultery '*in relation to marriage between persons of the same sex, adultery has the same meaning as it has in relation to marriage between persons of different sexes'*.[34]

Hence, the definition of adultery was not amended to reflect the opening of marriage to same sex couples and as a result, a same sex spouse can only be divorced on proof of adultery if that spouse had sexual intercourse with a person of the opposite sex during the marriage. This demonstrates the continuing prejudice by the law towards LGBT+ people. However, where a spouse has been unfaithful there would be the grounds to establish that the behaviour had been 'intolerable'.[35]

#### 4.3.2. Gender recognition certificate

The second ground of divorce is that an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the date of the marriage been issued to either of the spouses.[36]

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[26] Civil Partnership Act 2004, s 1(3)(c).
[27] ibid, s 11(2).
[28] Nadine Martin, 'With this Act I thee wed' (Law Society of Scotland, 15 December 2014).
[29] Divorce (Scotland) Act 1976, s 1(1).
[30] ibid, s 1(2)(a).
[31] ibid, s 1(2)(b).
[32] ibid, s 1(2)(d) and s 1(2)(e).
[33] *MacLennan v MacLennan* 1958 S.L.T. 12.
[34] Marriage and Civil Partnership (Scotland) Act 2014, s 5(2).
[35] Divorce (Scotland) Act 1976, s1(2)(b).
[36] ibid, s 1(1)(b).

Prior to the Marriage and Civil Partnership (Scotland) Act 2014, if a man and women were married and one of them decided to transition gender, they were required by law to get a divorce.[37] This would be required even if it was not what both spouses desired because same sex marriage was prohibited. Schedule 3[38] set out that this is no longer a requirement by law.

Where the applicant for a gender recognition certificate's does not consent to the marriage continuing, the Gender Recognition Panel will issue an interim gender recognition certificate. The interim gender recognition certificate can then by submitted to the Court to establish the ground of divorce. Either spouse can seek a divorce on this ground. If the applicant, within six months applies to the Sheriff Court for a full gender recognition certificate they will be granted it.[39]

However, if the applicant's spouse consents to the marriage continuing, they must provide a declaration of the applicant and the applicant's spouse's intention for the marriage to continue after a full gender recognition certificate has been issued. The Gender Recognition Panel will then issue a full gender recognition certificate, and the marriage will continue.

4.3.3. Voidability of marriage:

Section 5(1) of the Marriage and Civil Partnership (Scotland) Act 2014 addressed the provision for the voidability of marriage where one of the parties at the time of the marriage is permanently and incurably impotent in relation to the other spouse. It states that this '*has effect only in relation to marriage between person of different sexes*.'[40]

4.4. Persons who may solemnise marriage:

A religious group may be prescribed to solemnise marriage between same sex couples by the Scottish Ministers if *'the body requests them to do so'*[41] and *'the body meets the qualifying requirements'.*[42] Persons who may be given permission to solemnise marriage include *'a minister, clergyman, pastor, [or] priest'*.[43]

The Marriage and Civil Partnership (Scotland) 2014 Act does not '[impose] *a duty on any religious or belief body to make a request'*.[44] In addition, '*any person who is an approved celebrant'* is not required

[37] *Goodwin v UK* 2002 (No 28957/95).
[38] Marriage and Civil Partnership (Scotland) Act 2014, Sch 3.
[39] Gender Recognition Act 2004, s 4E(2).
[40] Marriage and Civil Partnership (Scotland) Act 2014, s 5(1).
[41] ibid, s 12(2)(1A)(b)(a).
[42] ibid, (1A)(b)(b).
[43] ibid, (1B)(a)(i).
[44] ibid, (2)(1D)(a).

to carry out same sex marriages, even where the religious body has been given those powers by Scottish Ministers.[45]

This provision in the legislation is contrary to the one status of marriage in Scotland as same sex and oppositive sex marriages are not treated equally. Any religious body has the ability to refuse to carry out same sex marriages, whereas in a civil ceremony the registrar cannot refuse to marry a couple on the grounds that they are the same sex.

However, many religious groups who first opposed same sex marriage have since changed their stance. In 2018, the Church of Scotland voted in favour of a motion which allowed ministers to conduct same sex marriages.[46] This could suggest that the importance of this provision is decreasing.

4.5. Changes to common law:

4.5.1. Bigamy

The Marriage and Civil Partnership (Scotland) Act 2014 made the common law offence of bigamy a statutory offence. This occurs if *'A purports to enter into a marriage with another person (B) knowing that…* [one of them] *is already married or in a civil partnership'*.[47] This applies to both same sex and opposite sex marriages.

4.5.2. Reset

Section 7 abolished the common law defence to a charge of reset which had existed when *'a wife who receives or conceals goods stolen by her husband'*.[48] This had not been in the bill that was originally proposed to the Scottish Parliament but was widely criticised as it would not have applied *'where the wife is married to another women'*.[49]

**5. ATTIUTUDES TO FAMILY LAW:**

There is now a general expectation in society that family law will respond to the publics changing views. There is no doubt that the publics views changed in regard to same sex marriage over recent decades, and the law was modernising slower than public opinion was evolving.

[45] ibid (1D)(d).
[46] The Guardian, 'Church of Scotland to draft new same-sex marriage laws' (20 May 2018).
[47] Marriage and Civil Partnership (Scotland) Act 2014, s 28(1)(a).
[48] ibid, s 7(1).
[49] Brain Dempsey, 'Marriage redefined' (Law Society of Scotland, 15 July 2013).

The role of family law is to protect everyone, that now includes both same sex and opposite sex marriages. The reforms which have been made to family law mean the law will only get involved when dealing with the consequences of a marriage, such as when spouses are getting divorced. This is in contrast to the law centuries ago which would set and enforce the standard for society to follow – it is now not the role of family law to impose certain values or principles on society. In terms of personal relationships, the public do not expect the state to get involved. There would be outrage if there was a requirement to register when you started dating someone. This suggests that the role of family law is becoming less restrictive.

The law must adapt to public opinion but there are limitations to this approach. The law cannot be amended beyond what the public are willing to support. There was significant public and media backlash after the Scottish Parliament passed a bill changing the way someone gains a transgender recognition certificate.[50]

## 6. CONCLUSION:

The introduction of the Marriage and Civil Partnership (Scotland) Act 2014 was undoubtably a historic step forward for the rights of LGBT+ members. It allowed same sex couples to get married for the first time in Scotland. The main argument against opening marriage to same sex couples came from religious groups, but this is by no means a universally held view now.

Despite the progress which has been made, the law continues to be prejudiced against LGBT+ members. The ground of adultery in divorce should be changed to reflect the opening of marriage to same sex couples. Moreover, when it comes to religious and belief ceremonies, same sex and opposite sex couples are not treated equally by the law despite the protected characteristic of sexual orientation.[51] Therefore, there is a clear tension that exists around the religious "opt-out" and the equality of same sex and mixed sex marriages.

Notwithstanding the criticism, the legislation allowing same sex marriage was a humane response to the long established discrimination which LGBT+ members have been subjected to and it is commendable that steps were taken to rectify this. However, the law must be amended further to give greater protection to LGBT+ members.

[50] Dale Miller, 'Gender Recognition Certificate: Nicola Sturgeon says bill about rights not ideology (The Scotsman, 6 February 2023).
[51] Equality Act 2006, s35.

# Scotland's Energy Transition: A brief Analysis of Law and Policy[1]

Mollie McGoran LLB[2]

## Introduction:

The efficiency of Scotland's energy transition measures is a truly interesting question. Scotland has supported the introduction of measures to combat global warming and the climate crisis, evidenced by the unanimous approval of the Climate Change (Scotland) Act 2009[3], the specific creation of a Cabinet Secretary with a portfolio for Net Zero and Just Transition[4] and that Scotland was one of the first nations to declare a 'Climate Emergency'[5].

One of Scotland's largest and most important industries and resources is renewable and non-renewable energy. Energy, particularly oil and gas, has been fundamental for generations to the Scottish economy and job market, bolstering infrastructure and growth in coastal towns and cities like Aberdeen and Dundee.[6] However, this industry has a significant negative environmental impact as production, transmission and usage are very carbon intensive.[7]Scotland acknowledged this and announced a move away from non-renewable energy but in a fair and resilient way, known as the 'Just Transition Plan.'[8] In the ministerial statement attached to Scotland's most recent Energy Strategy and Just Transition Plan, Michael Matheson MSP states "Our vision is that by 2045, Scotland will have a climate-friendly energy system that delivers affordable, resilient and clean energy supplies for Scotland's households, communities and business." [9] The following paper will examine whether Scotland's law and policy concerning an energy transition will deliver on this vision. Climate legislation and the shift to renewables have been chosen as headings as they are central to the paper's question,

[1] [DOI]: https://doi.org/10.20933/100001335
[2] LLB, University of Dundee.
[3] The Climate Change (Scotland) Act 2009
[4] Scottish Government Website 'Cabinet Secretary for Net Zero and Just Transition'
[5] BBC News 'Nicola Sturgeon declares 'climate emergency' at SNP conference' Paragraph One
[6] Nature Scot Website 'Oil and Gas'
[7] World Wildlife Federation Website 'Oil and Gas Developments' Paragraph One
[8] National Just Transition Planning Framework Strategy
[9] Scotland's Energy Strategy and Just Transition Plan: Ministerial statement (gov.scot.) Para 47

whereas greenwashing and the circular economy bill have been explored as relevant issues which paint a fuller picture of the current landscape in Scotland.

**Background:**

As a public body of the Scottish Government, the Scottish Environment Protection Agency (SEPA) is Scotland's principal environmental regulator, whose aim is to protect, improve and restore Scotland's natural environment and resources, whilst aiding contribution to sustainable economic growth. Within the energy industry, SEPA's role is "to advise, influence, regulate and monitor the effects of electricity, heat and fuel generation, transmission and consumption on the environment, human health and the economy."[10] Even though they have no legal powers or responsibilities to uphold, SEPA is essential to the Scottish energy sector as a responsible regulator, particularly in the fields of oil and gas and nuclear decommissioning.[11]

The Scotland Act 1998[12] outlined specifically what issues are reserved to the UK Parliament and which are devolved to the Scottish Parliament. Energy policy was clarified as a reserved matter, therefore strategic decisions on making roles and responsibilities relating to energy issues, like market fairness, affordability, security and regulations, are all made at a UK Government level. However, issues like agriculture, transport, environment and land use, which all relate to the renewable energy transition and tackling the climate crisis, are issues devolved to Scotland.[13] Scotland has exercised these devolved powers to create ambitious climate policies, which have received a varied response from the public, other governments and international authorities.

A body that has provided a mixed reaction to the bold policies is the Committee on Climate Change (CCC), the Scottish Government's statutory adviser for its emissions reduction targets. It was established under the Climate Change Act 2008[14] and its purpose is to independently advise and report to parliaments of the UK and devolved governments on the progress that has been made in reducing greenhouse gas emissions and adapting to the threat of climate change. The committee has a statutory function to review Scotland's emissions reduction targets every

[10] Scottish Environment Protection Agency Website 'Energy' Paragraph One

[11] Scottish Environment Protection Agency Website 'Sector Plans'

[12] The Climate Change (Scotland) Act 2009

[13] Scottish Parliament Website 'Devolved and Reserved Powers' incomplete reference?

[14] ~~The Climate Change Act 2008~~

five years at a minimum, and they also publish reports, open letters and blogs which hold the government to account and allow the public to stay informed about progress on policies and statutory targets. Although they have responded positively to specific areas, the committee have criticised new climate legislation as 'wholly inadequate' to deliver energy efficiency improvements and low-carbon heat to the required scale and called for immediate action to rectify this. [15] They join many other organisations and charities in holding the government to account for its promises of a just energy transition.

**Climate Legislation**

Even though Scotland only declared an official climate emergency in 2019, the Scottish Government has had specific climate legislation in place since 2009, demonstrating its long-term commitment to tackling this issue. The Climate Change (Scotland) Act 2009[16]provided specific guidance on energy efficiency and renewables and gave Scottish Ministers powers and responsibilities to improve and promote renewable heat.[17] The Climate Change

(Emissions Reduction Targets) (Scotland) Act 2019[18] furthered this by changing the target from an 80% reduction in greenhouse gases to 100% by 2045, with interim goals of 75% by 2030 and 90% by 2040. These targets are all legally binding and the Act imposed a duty on Scottish Ministers to ensure these are met. However, it was the Climate Change Act 2019[19]and the introduction of the Scottish Climate Change Plan that implemented the modern principles of an equitable transition into law.[20] The Scottish Government commented on the 'intergenerational scarring' that has come from unplanned structural changes and that we have the 'opportunity to improve the collective wellbeing of our nation' through planning and future-proofing its society, economy and infrastructure.[19] This legislation has set out ambitious targets but lacks a clear plan on how to deliver on them, according to the CCC. A quote from Lord Deben, the Chair of the CCC states:

[15] Committee on Climate Change 'Scotland's climate targets are in danger of becoming meaningless' Paragraph Eight

[16] The Climate Change (Scotland) Act 2009

[17] The Climate Change (Scotland) Act 2009, Chapter 3 s61

[18] The Climate Change (Emissions Reduction Targets) (Scotland) Act 2019

[19] The Climate Change Act 2019

[20] Scottish Government Website 'Just Transition Policy' Paragraph 4 [19] Ibid

"In 2019, the Scottish Parliament committed the country to some of the most stretching climate goals in the world, but they are increasingly at risk without real progress towards the milestones that Scottish Ministers have previously laid out … I called for more clarity and transparency on Scottish climate policy and delivery. That plea remains unanswered."

This lack of a transparent and actionable delivery plan is dangerous. It has the potential to result in missed statutory targets and commitments, putting the Scottish Climate Framework at risk and contradicting the Government's emphasis on a just and fair transition. According to a report from the CCC, since the enactment of the Climate Change Act in 2009, The Scottish Government has failed to achieve seven of its eleven legal targets. Even though many positive strides have been taken in the energy sector, this information paints a worrying picture of the Just Transitions future.

**Shift to Renewables**

As of 2020, 97% of Scotland's energy consumption is renewable compared to just 24% in 2010[21]. This is indicative of an effective culture shift towards green energy and renewables, fostered by the Just Transition and multiple funding schemes that have incentivised clean energy projects. Although the majority of companies that would have contributed to this shift in renewables would have been larger organisations, Scotland still places value on smaller-scale renewable projects and demonstrates this through its Community and Renewable Energy Scheme (CARES) funding commitment. The CARES has provided more than £58 million ~~pounds~~ [22] to over 600 projects and advice to over 900 organisations, encouraging local and community ownership of renewable energy projects across Scotland.[23]This empowerment of local communities is a very positive step forward, as although national regulations have power, localised projects are more tailored to the needs of the communities they serve. Entrusting local councils with funds and allowing them to invest in energy projects creates a strong sense of community, upskills and develops the workforce, and fosters a sense of pride in their project. Even though Scotland is limited in its powers for granting energy projects due to the devolved

[21] Scottish Renewables Website 'Renewable Energy Facts & Statistics' Chart 4

[22] Scottish Government Website 'Local and small-scale renewables, Renewable and low carbon energy' Paragraph 5

[23] Scottish Government Website 'Local and small-scale renewables, Renewable and low carbon energy' Paragraph 2 [23] Cambridge Dictionary Website 'Greenwash'

nature of its Government, small-scale funding and renewable schemes show that they are using those limited powers to the best of its ability to contribute to its 'Just Transition Plan.'

**Greenwashing**

An issue that impacts the public, businesses and regulators alike is Greenwashing, a term which describes when companies claim that their products are more environmentally friendly than they are, to generate more profits and improve their brand image.[23] This occurs in every sector, but in the energy industry, it most commonly presents as oil and gas companies publicly promoting their clean energy ventures but continuing to invest significantly more capital into their fossil fuel extraction. This deceives consumers, who are increasingly conscious of their environmental impact and want to make greener choices. There was a widely criticised case of this in Scotland which was labelled a 'bold action to tackle the climate emergency' by the Cabinet Secretary for Net-Zero, Energy and Transport at the time.[24] Innovation and Targeted Oil and Gas (INTOG) is a project that leases offshore wind projects to oil and gas companies drilling for fossil fuels to directly reduce its emissions, allowing them to maintain turbines on oil rigs. Climate campaigners saw this as a mockery in the strive towards clean energy and a just transition, and aptly labelled the initiative greenwashing. Activist Freya Aitchison expressed this dissatisfaction in an interview with Recharge:

"*The irony should not be lost on anyone that as the fossil fuel industry thinks about attaching wind turbines to oil platforms, they are also pushing to drill every last drop of oil and gas… cutting emissions from producing oil and gas is a drop in the ocean compared to the pollution from actually burning the final oil and gas produced*."[25]

Schemes like these may seem promising and do contribute to emissions reductions but they distract from the real issues. In the International Energy Agencies' 2023 Net Zero Road Map[25], it expressly stated that 'the time for new oil and gas was over' and that if countries want to adhere to the 1.5 degree warming target, outlined in the Paris Agreement, no new oil, gas or coal developments could be approved outside existing fields. The day after this report was

[24] Recharge News 'Greenwash' | Climate group slams Scotland's offshore wind-to-oil push as tinkering with emissions' [25] Ibid [fix the footnote]

[25] International Energy Agency 'Net Zero Road Map: A Global Pathway to keep the 1.5 goal in reach'

published, the UK Government approved drilling in Rosebank, the UK's largest untapped oil field, situated off the coast of the Shetland Islands in Scotland. This approval evidenced the UK Government's blatant disregard for its Paris Agreement commitments, despite Scottish Ministers' and officials' vocal disagreement with the project.[26] This paints a picture of a UK Government that neglects the views of its devolved counterparts for profits. Scotland's limited powers over energy policy are detrimental to its goal of a Net Zero nation and facilitating a Just Energy Transition, as they are constantly undermined and restricted by the powers of Westminster.

**The Circular Economy Bill**

The Circular Economy Bill, introduced in June 2023, received a mixed reception. The bill would require Scottish Ministers to guide Scotland towards a Circular Economy model, which would include publishing a strategy and developing targets and plans to reduce overall waste. The Ellen MacArthur Foundation defines a circular economy as an economy that 'favours activities that preserve value in the form of energy, labour, and materials. This means designing for durability, reuse, remanufacturing, and recycling to keep products, components, and materials circulating in the economy.'[28] This model would be beneficial to Scotland's energy sector and to the Just Transition goals as it avoids the use of non-renewable resources, including fossil fuels, decreasing its reliance on them and prioritising investments in renewable resources. Replacing the current linear model would encourage creativity in repurposing its resources, which will create higher-skilled job opportunities as well as career upskilling to satisfy demand. It would also benefit the economy and the environment, instead of compromising one for the other, which is the current norm.

However, the Bill is currently before Parliament's Finance and Public Administration Committee who are scrutinising the attached financial memorandum to the legislation. One panel member has reflected the worries of many, ~~in a quote~~ stating that the committee will have 'no real idea' of the final costs of a bill that would impose charges for and ban the disposal of unsold consumer goods. When giving evidence to the committee, the minister with the relevant portfolio, Lorna Slater MSP, insisted that the budget outlined was an appropriate one but committee members highlighted that Bills which incites that frameworks often incur hidden

[26] The Independent 'Developing Rosebank oil field 'wrong decision', says Scottish First Minister' [28] The Ellen MacArthur Foundation Website 'The Circular Economy in detail' Paragraph Five

and subsequent costs, the burden of such the committee could not estimate. Slater emphasised that the long-term benefits of the bill on society and the economy would diminish any expenses incurred from implementation but the committee were not convinced.[27] This blind support from ministers demonstrates a lack of realism with regard to the bill and perhaps the Just Transition as a whole. Scotland's current economic and regulatory frameworks incentivise the linear model and a move away from this would be ultimately beneficial to the energy transition but this saga has contributed to the narrative that the Scottish Government is overly optimistic and unrealistic in relation to its climate policy. Although the bill has hit an impasse the Scottish Government continue to emphasise the importance of 'Reuse over Refuse', through project funding, the 'controversial'[30] deposit return scheme and smaller upcycling schemes.

**Conclusion**

In conclusion, the evidence outlined above illustrates a worrying picture of Scotland's future concerning its energy transition. Overall, they have pitched themselves as a 'world leader', bolstering bold Net Zero and zero waste targets with limited comprehensible plans on how to achieve them, leading to confusion in the sector. Ambition is nothing without action, and Scotland must create clear and tangible plans if it has any hope of achieving the high targets it has set for itself. There is one clear barrier to Scotland progressing further on its Just Transition journey and that is its limited power over Energy Policy as it is a matter reserved to the UK Government. Collaboration with the UK Government is paramount but the importance of communication and empowering local authorities and communities cannot be understated. Looking to the future, scientists, officials and campaigners alike would conclude that it is unlikely that Scotland will reach its targets of net zero by 2045 even though positive progress has been made, notably the move towards renewable energy and the funding schemes which has supported this. In summary, the appetite for a progressive and equitable energy transition is prevalent but the plans and authority necessary to execute it are absent.

[27] Insider (Craig Paton and Peter A. Walker) 'Committee has 'no real idea' of cost of Circular Economy Bill' The Ferret Website Why is the deposit return scheme so controversial? Para 4.

# Outlaws: Can Non-Binary Identities be Equitable Incorporated into Scots Law?[1]

Mollie McGoran LLB[2]

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**Abstract**

This article explores possibilities surrounding legal gender recognition for non-binary individuals, particularly in Scotland. People have been rejecting the gender binary since it was established, and in modern times there has been an increased appetite for official legal incorporation into Scots Law. Recent gender reform legislation for transgender people has been a highly contested issue in law and politics, and approaching gender legislation from the new angle of equality for non-binary and gender-fluid identities is exciting.

There are six chapters, including an introduction and conclusion, that each explores an aspect or key consideration of legal gender recognition. Chapter One introduces the topic, gives some background and describes the scope and structure of the paper. Chapter Two sets the scene, introducing non-binary identities and their current legal standing. Chapter Three leads onto the more political aspects, explaining calls for and against incorporation and a key barrier. Chapter Four details two possible incorporation models, with comparisons to the current system for the transgender community and other countries' legal non-binary recognition systems. It also touches on the question of social or legal change and which should come first. Chapter Five concludes the article, reverting to the Scottish focus and examines the potential impact of devolution on legal recognition.

Chapter Six presents the articles overall findings, conclusions and gives some recommendations for equitable incorporation. The conclusions highlight the work of each chapter, drawing examples from the evidence presented, such as the need for thorough and informed consultation on proposed legislation with those who have experience living outside the gender binary. Even though the topic focuses on non-binary identities reaching legal recognition, there are overarching themes in the paper of intersectionality, patriarchal structures and LGBTQ+ rights.

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**List of Abbreviations and Acronyms**

**Cis** - Abbreviation of Cisgender

**ECHR** - European Convention of Human Rights

**ECtHR** - European Court of Human Rights

**EQIA** - Equality Impact Assessment

**FWS** - For Women Scotland

**GRA** - Gender Recognition Act

**GRC** - Gender Recognition Certificate

**GRP** - Gender Recognition Panel

**GRR** - Gender Recognition Reform (Scotland) Bill

**NBEAP** - Non-Binary Equality Action Plan

**NBEWG** - Non-Binary Equality Working Group

**SNP** - Scottish National Party

**TERF** - Trans Exclusionary Radical Feminists

**Trans** - Abbreviation of Transgender

**Glossary:**

**Agender** - People who identify as having no gender or that their gender is absent or neutral. [3]

**Cisgender** - People who experience their gender identity, gender expression and biological sex as consistent with each other. The word also implies a person who performs the gender role that social convention dictates is appropriate to their sex.[4]

**Intersectionality -** accounts for the ways in which social categories including race, class and gender sexuality, embodiment, and ability overlap to produce systems of oppression or

[3] Hines S 'Is Gender Fluid? : A Primer for the 21st Century' Page 10.
[4] Ibid Page 38

disadvantage. Thus, instances of oppression in one or more of these categories should be analysed together, in context with one another. [5]

**Intersex** - encompasses various conditions in which a person has reproductive or sexual anatomy that does not fit typical definitions of male or female.[6]

**Gender Critical Feminists** - Gender-critical feminism advocates reserving women's spaces for cis women, arguing that biological sex is different from gender.[7]

**Gender Dysphoria -** A medical term used to describe the experience of feeling that one's emotional and embodied identity is different to that which was assigned at birth. [8]

**Gender Fluid** - Where people experience their gender identity as changing over time or between different situations and may not feel restricted to anyone's gender identity.[9]

**Gender Identity** - Each person's internal sense of being male, female, a combination of the two or neither, and it is a core part of who people know themselves to be. [10]

**Genderqueer** - Describes someone whose gender identity does not sit within the social norms of masculine or feminine, but in between or outside of these binaries. [11]

**Non-binary** - Any gender identity or expression outside the categories of male and female. [12]

**Patriarchy** - originally referred to a society or system of government led by men, but it is now used to refer to a social system in which men hold the most power over other genders.[13]

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[5] Ibid Page 15

[6] Ibid Page 38

[7] Aleardo Zanghellini 'Philosophical Problems With the Gender-Critical Feminist Argument Against Trans Inclusion'
[https://journals.sagepub.com/doi/10.1177/2158244020927029]

[8] Hines S 'Is Gender Fluid? : A Primer for the 21st Century' Page 105

[9] Ibid

[10] Ibid

[11] Ibid

[12] Ibid

[13] Ibid Page 17

**Transgender** - An umbrella term describing people whose innate gender expression is different from the sex they were assigned at birth, with some transitioning physically from one biological sex to another. [14]

**Transexual** - a man or woman who undergoes a gender transition. It has more recently been replaced by 'transgender' with 'transsexual', now less used, coming to mean specifically people who have undergone or wish to undergo gender affirmation surgery.[15]

## Chapter One: Introduction

### 1.1 Topic Outline

The following paper will explore the legalities of introducing non-binary identities into Scots Law. An analysis of the legislative and judicial landscape will be conducted, scrutinising case law, bills and acts, and current policies that impact 'non-binary' identities. The paper will then examine the calls for and against legally recognising non-binary identities, what possible methods of implementation could look like and what the main barriers to incorporation could be.

### 1.2 Background

With a score of 67/100 on Equaldex,[16] the internationally recognised metric which measures the progress of LGBTQ+ rights across the world,[17] Scotland stands as a relatively progressive nation with legal same-sex marriage,[18] anti-discrimination laws[19] and individuals are allowed to legally change their gender, albeit with a medical diagnosis of gender dysphoria.[20] The only two areas where Scotland could improve (according to the Equaldex) are criminalising conversion therapy and legally recognising 'non-binary' identities. With conversion therapy becoming a live issue in parliament with a public consultation underway,[21] and the government publishing a 'Non-Binary Equality Action Plan' (NBEAP),[22] it is clear that there is appetite for progress relating to LGBTQ+ Rights.

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[14] Ibid Page 38

[15] Ibid Page 93

[16] Equaldex Website 'Scotland' [https://www.equaldex.com/region/united-kingdom/scotland]

[17] Equaldex Website 'Equality Index' [https://www.equaldex.com]

[18] Marriage and Civil Partnership (Scotland) Act 2014

[19] Equality Act 2010

[20] Gender Recognition Act 2004 s.2(1)(a)

[21] Scottish Government 'Ending Conversion Practices in Scotland: A Scottish Government Consultation' [https://www.gov.scot/publications/ending-conversion-practices-scotland-scottish-government-consultation/documents/]

[22] Scottish Government 'Non-Binary Equality Action Plan 2023' [https://www.gov.scot/publications/non-binary-equality-action-plan/]

As outlined in the Equality Impact Assessment (EQIA) of the NBEAP, "there is limited data on non-binary people in Scotland and their experiences."[23] This sentiment carries forward into cases, legislation and policy, with very few references to non-binary identities outwith the NBEAP.[24] This lack of representation serves as a stark reminder of the topic of this paper's importance. Even though the aim of this paper is to examine possibilities of introducing non-binary identities into Scots Law, highlighting the possibilities for a more inclusive, equitable culture in Scotland is a synonymous benefit.

### 1.3 Scope of the Topic

This paper will look specifically at non-binary and gender-fluid identities, excluding transgender and intersex identities as they are separate communities in their own right. Although some transgender and intersex people do identify under the umbrella of non-binary, this paper will maintain its cohesivity with a focus being placed on non-binary and genderfluid individuals. The paper will also only look at non-binary identities in a Scottish context, examining Scottish law and policy, with reference to external cases and legislation.
As Scotland is a devolved nation, their devolved powers and the influence of the UK Government will be considered.

### 1.4 Structure of the Paper

The following paper is divided into chapters that address different issues relating to the proposed topic. Chapter two will define and explain non-binary identities, their background and history, and then discuss their current legal status within Scots Law. Chapter three will examine calls for and against legal recognition, with reference to past legislation. Chapter four will examine two possible incorporation models and other essential considerations when designing a new system, and finally, chapter five will address the impact of devolution and Scotland's limited legislative powers will be explored. A conclusion will summarise the themes of the paper and each chapter's conclusion, and produce recommendations. To progress succinctly through the paper, an introduction and conclusion will begin and end each chapter, and will address then analyse the entire section.

## Chapter Two: Non-Binary Identities and their Legal Status

### 2.1 Introduction

This chapter outlines the context necessary to understand and address the main calls of the paper. First, an introduction to non-binary identities will be provided, giving background on

[23] Scottish Government 'Non-binary Equality Action Plan: Equality Impact Assessment' [https://www.gov.scot/publications/non-binary-equality-action-plan-equality-impact-assessment/pages/4/]
[24] Scottish Government 'Non-Binary Equality Action Plan 2023' [https://www.gov.scot/publications/non-binary-equality-action-plan/]

the history and current status of the community. Then the status of non-binary identities in law will be explained, highlighting acts and relevant case law, followed finally by current policy provisions.

### 2.1.1 Validity of Gender Identities

In the context of the following paper, the validity of any gender identities will not be called into question, only their current status in Scots law. Even though some individuals do not understand or recognise non-binary people, it is inappropriate to question the lived experiences of others and limit this community to a political construct.

## 2.2 What are Non-binary Gender Identities?

To better understand the concept of gender, it is important to think of it as a spectrum. In the traditional gender binary, a person either identifies as a 'man' or 'woman,' or 'male' or 'female. ' Let's imagine that 'man' is on one end, and 'woman' on the other. Many people identify at one end or the other, reflecting the 'traditional' gender binary whereas some people will identify somewhere in the middle, they will fluctuate in between or will feel more comfortable rejecting the concept entirely. Gender identity and people's relationship with their gender can often be something that evolves as people grow more comfortable within themselves. People who do not align with the binary of male or female use many different terms to describe their gender identity, with 'non-binary' being one the most common but other terms including 'genderqueer', 'agender', 'bigender', and 'genderfluid' which all have their separate generalised definitions, but also could carry a separate meaning to the individual.[25] Non-binary is often used as an 'umbrella term' that speaks to an experience of gender that lies outwith or somewhere in between the binary. For the purpose of this paper, the term non-binary will be used to describe all gender identities that correlate with the above definition and that are not simply male or female.

It is also important to clarify the difference between non-binary and transgender people. Transgender is another ambiguous term that describes people whose gender identity is different from the gender they were assigned at birth.[26] This can include non-binary people, as they no longer resonate with their assigned gender, but most commonly is used to refer to individuals who have previously identified as a man and now identify as a woman, or vice versa. Although the communities will intersect, there are key differences, for example, transgender people are currently recognised in legislation in the UK.[27] Another important distinction is the difference

[25] National Centre for Transgender Equality Website 'Understanding Non-binary People: How to be respectful and supportive'[https://transequality.org/issues/resources/understanding-nonbinary-people-how-to-be-respectful-and-supportive]

[26] Translate Equality Website 'Understanding Transgender People: The Basics' [https://transequality.org/issues/resources/understanding-transgender-people-the-basics]

[27] Gender Recognition Act 2004

between non-binary people and 'intersex'[28] people, who are born with reproductive anatomy that does not match the social confines of 'male' and 'female'. Intersex people are a separate community in their own right, and where some may identify as non-binary, many intersex people are raised in accordance with their dominant sex traits.[29]Conventionally, individuals will align gender with their biological sex, which should not be confused with gender. Sex is a 'multidimensional biological construct based on anatomy, physiology, genetics and hormones'[30], set out in *Corbett v Corbett*,[29] whereas gender is thought to be a social construct, established through an individual's upbringing and culture, and typically reinforced by societal norms, behaviours and relationships.[31] Intersex, Transgender and Non-binary communities are battling for recognition, all in their own way with some overlap, but should be separated to give their voices equal stead, and to adhere to this paper's focus on non-binary and gender-fluid people.

Though many will deny it, non-binary and gender-fluid people are not a new phenomenon and have their own place in the rich tapestry of history. In fact, records of individuals identifying or acting outwith or in between the 'traditional' gender binary can be found as early as Ancient Greece, in Native American tribes and Indian cultures around the time of the *Kama Sutra* (400-300 BC).[32] Even though non-binary or gender-fluid people have been accepted, included and even celebrated in many cultures across the globe, there is a significant lack of acknowledgement in law. Only 16 countries, out of 197, legally recognise non-binary or 'third gender' identities.[33]

### 2.3 Non-binary Identities in Law

As previously alluded to, non-binary identities are currently not recognised by the UK, and therefore in Scots Law.[34] Different pieces of legislation form a picture of gender equality in the UK, for example, the Equality Act 2010.[35] The Equality Act prohibits discrimination against people with 'protected characteristics' which includes sex and gender reassignment, in the workplace and wider society. Although not stated in the original act, *Taylor vs Jaguar*

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[28] See Glossary

[29] Hines S 'Is Gender Fluid? : A Primer for the 21st Century' Page 39

[30] National Institute of Health Website 'Sex & Gender' [https://orwh.od.nih.gov/sex-gender] [29] *Corbett v Corbett [1971] P 83*

[31] World Health Organisation Website 'Gender and Health' [https://www.who.int/health-topics/gender#tab=tab_1]

[32] Skyler Brown 'A Brief History of Nonbinary Gender: From Ancient Times to the Early Modern Period' Paragraph 6 [https://clouddancers.org/a-brief-history-of-nonbinary-gender-from-ancient-times-to-the-early-modern-period/]

[33] Equaldex Website 'Legal recognition of non-binary gender' [https://www.equaldex.com/issue/non-binary-gender-recognition]

[34] Scottish Government 'Non-Binary Equality Action Plan 2023' 'Section Three: Setting the Scene' [https://www.gov.scot/publications/non-binary-equality-action-plan/]

[35] Equality Act 2010

*Land Rover Ltd* [36] affirmed that this protection extended to non-binary and genderfluid people too, under section 7(1)[37], 'gender reassignment', establishing that 'gender reassignment need never be a medical process'[38], implying individuals can change their gender without a physical transition.

The Gender Recognition Act (GRA) of 2004[38] brought in a new wave of rights for transgender people, enabling an individual to change the sex listed on their birth certificate, either from female to male, or vice versa, but not to any other gender identity. The individual can apply to a Gender Recognition Panel (GRP) for a Gender Recognition Certificate (GRC), after living as their preferred gender for two years and having medical reports that confirm gender dysphoria.[3940] The GRA[41] was introduced after two key cases which implied the lack of legal gender reassignment recognition infringed on rights outlined by the European Convention of Human Rights (ECHR)[42] and the Human Rights Act 1998.[43] In *Goodwin v United (2002)*[44], the European Court of Human Rights (ECtHR) held that the UK were in violation of Article 8, Right to Freedom of Private and Family life [45], and Article 12, right to Marry[46] of the ECHR, due to their lack of legal gender recognition. The second case was heard in the House of Lords, where it was affirmed that Section 11(c) of the Matrimonial Causes Act 1973[47] was incompatible with Section 4 of the Human Rights Act 1998[48], 'Declaration of Compatibility', as there were no provisions for 'transsexual'[48] people to marry as their acquired gender. [49]

Another case was raised to the Divisional Court, where it was confirmed that the GRP did not have the authority to issue a GRC that records an applicant's gender as non-binary.[50] The claimant, Ryan Castellucii, did not identify with their assigned gender at birth and successfully applied to the state of California to be recognised as non-binary, signified by an X on a passport. Ryan then relocated to the UK, where they applied to a GRP for GRC that aligned with their

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[36] *Taylor vs Jaguar Land Rover Ltd*

[37] Equality Act 2010 s.7(1)

[38] Sex Matters website 'Taylor vs Jaguar Land Rover'[https://sex-matters.org/posts/case-law/taylor-v-jaguar-land-rover/] [38] Gender Recognition Act 2004

[39] See glossary

[40] Gender Recognition Act 2004 s.2(1)(a)

[41] Gender Recognition Act 2004

[42] *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)*

[43] Human Rights Act 1998

[44] *Goodwin v United Kingdom* (2002) 35 EHRR 18

[45] *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)* Article 8

[46] Ibid Article 12

[47] Matrimonial Causes Act 1973 s.11(c) [48] Human Rights Act 1998 s.4

[48] See Glossary

[49] *Bellinger v Bellinger [2003] UKHL 21; [2003] 2 AC 467*

[50] *R (Castellucii) v The Gender Recognition Panel and the Minister for Women and Equalities* [2024] EWHC 54

acquired gender, which was unsuccessful. The claimant then applied to the court where it was also held that the claimant's rights under Article 14 of the ECHR had not been breached.[51] Although the court held that non-binary identities were not applicable to the GRC structure, the claimant is referred to with their preferred pronouns, they/them, which demonstrates an openness and a more progressive attitude from the court.[52] *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [53] challenged the UK Government on their decision to not issue gender-neutral documentation using an X, specifically passports, to non-binary, intersex, trans or non-gendered people. This case also used Article 8[54] and 12[56] of the ECHR to apply to the Supreme Court, but was denied on
appeal.

The latest proposed changes to the landscape of gender came in the form of the Gender Recognition Reform (Scotland) Bill (GRR).[55] After five years of consultation, the Bill was introduced to Parliament by Cabinet Secretary for Social Justice, Housing and Local Government, Shona Robinson, who stated that ‘‘Under the Equality Act 2010, we have a legal duty to address discrimination against people with the protected characteristic of gender reassignment and Scotland must have a system of gender recognition in order to comply with international human rights law.”[56] This was said in March 2022, after the decision in *Taylor vs Jaguar Land Rover Ltd*[57], that non-binary people are protected under the characteristic of gender reassignment, but did not make any provision nor mention of non-binary identities, even though it was a central question highlighted in the consultation analysis.[58] The impact of this Bill will be elaborated further in Chapter Five.

### 2.4 Current Provisions for Non-binary Inclusion

Calls for non-binary inclusion have been present in Scotland for years, referred to in the consultation for the GRR Bill[59], raised in the 2021-22[60] and 2023-24[61] Programmes for Government and present in the current coalition government (Scottish Greens and the

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[51] UK Human Rights Blog ‘Either not Neither: further consideration of non-binary identity by the High Court’[https://ukhumanrightsblog.com/2024/02/05/either-not-neither-further-consideration-of-non-binary-identity-by-the-hig h-court/]

[52] Ibid

[53] *R (on the application of Elan-Cane) v Secretary of State for the Home Department*

[54] *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)* Article 8 [56] Ibid Article 12

[55] Gender Recognition Reform (Scotland) Bill

[56] Scottish Parliament Official Report: ‘Meeting of the Parliament (Hybrid), Thursday 3rd March 2022’ [https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13611]

[57] *Taylor vs Jaguar Land Rover Ltd 2020*

[58] Scottish Government Website ‘Gender Recognition Reform (Scotland) Bill: consultation analysis’ Chapter 6 (6.4-6.8) [??

[59] Ibid Chapter 6.6

[60] Scottish Government ‘Programme for Government 2021 to 2022’ [https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/]

[61] Scottish Government ‘Programme for Government 2023 to 2024’ [https://www.gov.scot/publications/programme-government-2023-24/]

Scottish National Party) joint policy agreement.[62] The first step that the government took towards progress was the Non-Binary Equality Working Group (NBEWG) that was formed and first met in the spring of 2021. The working group that had oversight and responsibility over the plan was composed of various government officials, a secretariat from the Equality unit and representatives from the Scottish Trans Alliance, LGBT Youth Scotland, Stonewall Scotland, LGBT Health and Wellbeing, Engender and academics from universities across Scotland, to ensure that the voices of non-binary people were meaningfully included in the highest level of policy-making.[63] The working group produced a report that highlighted 35 recommendations, on topics ranging from healthcare, data, access to services, support and education, and most relevant here, legal recognition.[64] It is evident from the minutes and papers from the working group that legal gender recognition was an overarching theme of discussion, so integral that an entire subgroup was dedicated to the topic.[65]

In November 2023, the Scottish Government introduced a Non-Binary Equality Action Plan (NBEAP)[66] which "aims to improve the lives of non-binary people in Scotland by taking steps to address inequalities and barriers faced by non-binary people."[67] The NBEAP addresses the recommendations from the NBEWG's 2022 report and outlines how and when accepted/partially accepted recommendations will be taken forward and implemented. The action plan was cross-developed across many governmental departments such as Health and Social Care, Education, Justice and Communities, as it covers a variety of ministerial portfolios.[70]

The plan can be broken down into four key headings; vision, values, national outcomes and objectives. The vision and values are clear, describing a society and Scotland where everyone's identities are respected, they are treated with compassion and dignity, and where they can access rights and opportunities, and meaningfully participate.[68] The national outcomes are divided into four further categories, Human Rights, Equalities, Communities and Children and Young People, the descriptions of which essentially summarise the vision and values.[69] The objectives pose a more detailed angle, with six separate headings with thorough actions and

[62] Scottish Government 'Scottish Government and Scottish Green Party draft shared policy programme' https://www.gov.scot/publications/scottish-government-and-scottish-green-party-shared-policy-programme/documents/

[63] Scottish Government 'Non-Binary Working Group: Terms of Reference, Membership'

[64] Scottish Government 'Non-Binary Equality Working Group: report and recommendations - March 2022' [https://www.gov.scot/publications/non-binary-working-group-report-recommendations-march-2022//10/]

[65] Scottish Government 'Non-Binary Working Group - legal recognition and gendered law subgroup minutes: October 202' [https://www.gov.scot/publications/non-binary-working-group-legal-recognition-and-gendered-law-subgroup-minutes-octob er-2021/]

[66] Scottish Government 'Non-Binary Equality Action Plan 2023' [https://www.gov.scot/publications/non-binary-equality-action-plan/]

[67] Ibid Section 1: Context [70] Ibid

[68] Ibid Section 5

[69] Ibid

commitments,[70] which are specific, measurable and time-scaled, but only time will tell if they are achievable.

### 2.5 Conclusions

To summarise, non-binary individuals, those who identify outwith the confines of the gender binary have been present in society throughout time, but are only recently getting the political and societal recognition they deserve. Scotland's legislation and policy provide a positive foundation on which to build towards the legal incorporation of non-binary identities, with the government becoming more willing to investigate the possibilities. However, to class this willingness as a positive political landscape would be preemptive but this will be discussed further in Chapter Three.

## Chapter Three: Balancing Opinions

### 3.1 Introduction

In this chapter, the calls for and against incorporating non-binary identities will be examined and contrasted. It is also fitting to explore a potential barrier, gender equality's relationship with the patriarchy. It is important at this point to reiterate the lack of data and evidence on almost every aspect of non-binary identities, with no clear picture being given as to what percentage of the population identify outwith the binary. This lack of evidence does not correlate with the amount of discourse surrounding gender identities in politics, as the issue has become sensationalised without a proper grounding, used both positively and negatively. This sensationalism has also made it increasingly difficult to accurately capture the authetic opinions of the general public, with most media outlets leaning radically one way or the other.

### 3.2 Calls for Incorporating Non-binary Identities

Alongside the aforementioned support from the current Scottish Government, there have been many calls for wider recognition of non-binary identities from third-sector organisations, academics and individual campaigners. In the third sector, Zero Tolerance Scotland, Young Women's Movement and Scottish Women's Rights Centre, charities that empower and help women in relation to Violence Against Women and Girls (VAWG), participation and accessing legal advice, respectively, all support and advocate on behalf of non-binary voices.[71][75][72] They recognise that the experiences of women and non-binary people often interlink and that gendered experiences, such as sexism and gender-based violence can negatively impact both

[70] Ibid Section 6

[71] Zero Tolerance Website 'Position Statements' [https://www.zerotolerance.org.uk/vaw-position-statements/] [75] Young Women's Movement 'YWM Strategic Plan - Reimagining Scotland for Young Women and Girls 2023 - 2027' Page 5 ??

[72] Scottish Women's Rights Centre Website 'Inclusion Statement' [https://www.scottishwomensrightscentre.org.uk/inclusion-statement/]

groups.[73] The Scottish Youth Parliament, a national charity that democratically represents the views of young people, has a policy that states "The Scottish Government should allow non-binary gender identities to be recognised by law",[74] which was part of their 2021-2026 Manifesto 'From Scotland's Young People' that consulted around 10,000 young people. Age UK, a charity with a large Scottish presence that advocates for older people, also has policies and well-being advice for older LGBTQ+ and trans people about healthcare, gender-affirming support and even support with name changing.[75]

In academia, feminism and gender have become well-documented topics and have begun to branch out to include and cross-examine other theories in conjunction. Recently a greater importance has been placed on the theory of Intersectionality[76], developed by legal feminist and academic, Kimberlé Crenshaw. Having also helped develop ideas of critical race theory, Crenshaw has empowered academics to use their lived experience to analyse how systems of oppression overlap, and how gender is interconnected to other structural positions in society such as social class, race and sexuality.[77] This exploration of gender and gender fluidity in particular has popularised the topic of non-binary identities and allowed for further research to be written. Dr Peter Dunne, an Irish legal scholar, has authored and edited a myriad of papers on gender recognition, intersectionality and legalities of identity, and has used his research to advocate for the rights of the LGBTQ community, trans and non-binary people particularly.[82]

### 3.3 Arguments Against Incorporating Non-Binary Identities

It was stated in the first chapter that the validity of any gender identities would not be called into question. This remains true but to provide balance and an analytical discussion, the voices of those who do question non-binary identities must be heard. There are many charities, activists, academics and journalists that have provided their stance on Scotland's gender legislation and inclusion policies. This section will focus specifically on attitudes within Scotland and the UK, to remain in scope, but it is important to regard the current state of affairs

[73] Ibid

[74] Scottish Youth Parliament 'From Scotland's Young People 2021-26 Manifesto' Equalities and Human Rights [https://syp.org.uk/wp-content/uploads/2020/11/SYPS-11.pdf]

[75] Age UK Website 'Trans Information and Advice' [https://www.ageuk.org.uk/information-advice/health-wellbeing/relationships-family/lgbt/transgender-information-and-advic e/]

[76] See Glossary

[77] Kimberlé Crenshaw 'On Intersectionality: Essential Writings' [82] University of Bristol Website 'Dr Peter Dunne, Research Outputs' [https://research-information.bris.ac.uk/en/persons/peter-r-dunne/publications/]

globally where changing your gender is illegal in 102 countries[78] and homosexuality is punishable by death in 8 as of 2024.[79]

In the campaigner and activist space, TERF, an abbreviation of Trans Exclusionary Radical Feminists, has gained traction and become a shorthand term for women who believe that women's rights are being impacted by trans inclusion, sometimes known as 'gender critical feminists.'[80] A key issue in relation to this is the preservation of single-sex spaces, such as bathrooms and changing rooms, and For Women Scotland (FWS), a grassroots women's group that is outspoken against the GRR Bill, the process of self-declaration and are 'pro-women', have been at the forefront of this issue. They raised two cases in response to the GRR Bill; the first to the Lord Advocate,[81] and the second to the Scottish local authorities and Scottish Ministers.[82] Both cases intended to clarify the meaning of 'woman', one in the *Gender Representation on Public Boards (Scotland) Act 2018,*[83] and the other at the intersection of the GRR Bill and the Equality Act.[89] FWS argued that "the reassignment was the common factor of the protected characteristic, not the sex into which the person reassigned."[84] and they concluded that single-sex spaces could legally exclude trans women as they were not women as defined by the Equality Act 2010.[91] However, Lady Haldane concluded that "for the purposes of the 2010 Act, "sex" is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 Act stating their acquired gender, and thus their sex."[85] This clarified that trasngender people, in possession of a GRC, are allowed in single-sex spaces. It should be noted that FWS do not represent all feminists, they act as an organisation that advocate for cisgendered[93] women and are usually composed of gender critical feminists.

However, the loudest voice that shouts against non-binary and gender fluidity is often that of the media, which is hard to quantify and evidence. A new phenomenon that has been damaging the face of LGBTQ+ equality is a 'culture war' that is currently taking place in Scottish and UK politics. The 'culture war' could be defined as a growing wedge between two sides of a political debate, but the connotations of the phrase currently denote a fierce battle between left

[78] Equaldex Website 'Changing Gender' [https://www.equaldex.com/issue/changing-gender]

[79] Equaldex Website 'Homosexual activity' [https://www.equaldex.com/issue/homosexuality]

[80] See Glossary

[81] *For Women Scotland v Lord Advocate CSIH 4 (2020) (For Women Scotland 1)*

[82] *For Women Scotland v The Scottish Ministers CSOH 90 [2022] (For Women Scotland 2)*

[83] Gender Representation on Public Boards (Scotland) Act 2018 [89] Equality Act 2010

[84] Judiciary of Scotland Website 'For Women Scotland v the LA & the Scottish Ministers' [https://judiciary.scot/home/sentences-judgments/judgments/2022/02/18/for-women-scotland-v-the-la-the-scottish-ministers#:~:text=Gender%20reassignment%20was%20defined%20as,into%20which%20the%20person%20reassigned.] [91] Equality Act 2010

[85] *For Women Scotland v The Scottish Ministers CSOH 90 [2022] (For Women Scotland 2)* [93] See Glossary

and right-wing politics. There are many contentious topics on the chopping block but gender identity and the LGBTQ+ community are some of the most polarising. Many articles have outlined the detriments of the 'culture war' on democracy, on the reputation of politicians and on the standard of political debate but the biggest impact has been felt in the community, as many transgender and non-binary feel unsafe, uncomfortable and unable to speak out in such a heated political climate.

The number of LGBTQ+ hate crimes has been increasing year on year, jumping from 729 in

2012-13 to over double that, 1884 crimes, reported in 2022-23,[86] with 55 specifically targeted towards transgender people.[87] In particular, the number of LGBTQ+ people who have been subjected to online abuse has always been an issue, with a Stonewall UK Report from 2017 highlighting that 1 in 10 LGBTQ+ and 1 in 4 trans people have experienced homophobic or transphobic discrimination online,[96] with non-binary people (26%) more likely to be targeted directly than women (8%) and men (10%).[88] The prevalence of identity-based discrimination, stoked by the 'culture war', has been significant enough that legislation is to be introduced that criminalises "offences relating to stirring up hatred against a group of persons"[89] which is constituted of 'threatening or abusive behaviour'[90] towards those possessing specific protected characteristics including age, disability, religion, sexual orientation or gender identity.[91] This was intended to be implemented in 2021 but has been delayed, set to be enacted on April 1st 2024.[92]

### 3.4 A Barrier called the Patriarchy

The patriarchy is an imperative theme in the discussion of gender. The term 'patriarchy' has evolved over time, typically 'a social formation of male-gendered power'[93] but nowadays it is entangled among other systems of oppression, such as ableism, heteronormativity, and white supremacy. 'Gender and sex are manipulated by, and help to maintain, hierarchical systems of power and privilege'[94] but this is not to be confused with individual men. Men often don't see gender as something that is central to their identity[95], as it is not something that disadvantages

[86] Statista Website 'Number of sexual orientation hate crime charges reported in Scotland from 2012/13 to 2022/23'
[https://www.statista.com/statistics/626037/sexual-orientation-hate-crimes-in-scotland/]

[87] Statista Website 'Number of transgender hate crime charges reported in Scotland from 2012/13 to 2022/23' [https://www.statista.com/statistics/626050/transgender-hate-crimes-in-scotland/] [96] Stonewall 'LGBT in Britain Hate Crime' Page 18 ??

[88] Ibid Page 18-19

[89] Hate Crime and Public Order (Scotland) Act 2021, Introductory Text

[90] Ibid Part 3 s.4(1) and s.4(2)

[91] Ibid Part 3 s.4(3)

[92] Equality Network Website 'Hate Crime in Scotland'
[https://www.equality-network.org/our-work/policy-team/hate-crime-in-scotland/]

[93] Sherry B. Ortner 'Patriarchy' Page 307

[94] Esme Rodriguez 'Gender Outlaws : The Next Generation; Glitter, Glitter on the wall, Who's the Queerest of Them All?'

[95] Craig Donnellan and Lisa Firth 'Women, Men and Equality' Page 32

them. Patriarchal systems are bigger than anyone one person or group,[96]but can be perpetuated by our actions, words and our performance of gender.

Feminist writer, Sylvia Walby, has outlined six connecting characteristics of the patriarchy;

*"one) The State, women have less formal power and representation in government two) The Household, women are more likely to have to do the housework and raise the children three) Violence, women are more prone to being abused four) Paid Work, women are likely to be paid less than men. 5) Sexuality, women's sexuality, is more likely to be treated negatively 6) Culture, Women are more misrepresented in the media and popular culture."*[97]

All of these issues, the same issues that affect women, often affect non-binary people. Even though someone can come to realise they identify a different way, it is important to recognise their gendered upbringing and lived experience within the gender binary, often exposing them negatively to the patriarchy. The patriarchy is a barrier that will come between non-binary people and equitable incorporation. However, 'the more we intellectually interrogate oppressive systems, the better chance we have to promote optimistic changes toward equality and acceptance of all people, regardless of sex, gender identity, gender expression, sexual preference, race, class, ability, age, and religion.'[98]

### 3.5 Conclusions

There are substantive calls on both sides of the debate, for and against legal recognition of non-binary identities. Even though the governmental policy is primed for the next step of incorporation, the judicial landscape is very divisive and even more so in the political sphere. Patriarchal systems also overlap the existing challenges of legalities, social and political conflict and meaningful participation. Chapter Three has aided in unpacking both the calls for and against legal recognition for non-binary people. The support from charities and campaigners is undeniable, and similarly from academics and legal professionals, there is a strong discussion on the merits of incorporation. However, the scholars, activists and third-sector organisations on the opposing side have equally as strong views against legal recognition, and they often have the overwhelming influence of the media on their side. This chapter has also introduced the concept of 'culture wars' which will be expanded on further in the paper.

## Chapter Four: Potential Incorporation Models

### 4.1 Introduction

[96] Sherry B. Ortner 'Patriarchy' Page 307

[97] Hines S 'Is Gender Fluid? : A Primer for the 21st Century' Page 16

[98] Esme Rodriguez 'Gender Outlaws : The Next Generation; Glitter, Glitter on the wall, Who's the Queerest of Them All?'

As the current gender equality landscape, the calls for and against, and the barriers to equitable incorporation of non-binary identities have all been explored, the next step is to analyse potential models for the incorporation of non-binary identities. This chapter outlines the criteria necessary for a non-binary inclusive model, and what ties this to equitability. Two potential models will also be explained with a brief appraisal of their merits, and a conclusion will be drawn, indicating a preferred incorporation model. In this chapter, it also felt fitting to discuss which should come first, social or legal change.

### 4.2 What could an equitable system look like?

Fortunately, there are 16 examples of legal recognition of non-binary identities across the globe.[99] Each has unique features and are tailored to the legal system, culture and political context of their country, but there are commonalities. A prevalent reoccurrence is the use of X's to denote non-binary or third identities on documents. 12 countries use X's on passports, 7 use them on all official documents and in New Zealand, non-binary and transgender people can reapply for a birth certificate with their acquired gender.[100] The remaining countries use a combination of 'O' for other,[101] 'T' for transgender and 'TG' for Third Gender[102], and Chile has a special 'I' option for children born intersex.[103] Other countries that use the 'Third Gender' model often have different cultural relationships with gender identities, which will be elaborated further in the next section. The USA[104] and Mexico[114] have legal recognition at a national level but differing levels of recognition at state level. All of these characteristics have merit but when hypothesising a Scottish system, it is important to acknowledge the existing process for legal recognition. When looking at the current provisions for transgender recognition, the same principles are likely to be utilised, for example, the process of self-declaration. The Netherlands also uses a self-declaration system for non-binary people, after judges in Arnhem district court have ruled in favour of the process.[105] The NBEWG's recommendations touch on state-issued IDs and documentation, therefore suggesting the use of X's on documents seems logical.

There are also some basic principles that must be integral to any system that wishes to call itself equitable. An objective outlined in the NBEAP[106] is participation in decision-making, and

[99] Equaldex Website 'Legal Recognition of Non-Binary Genders' https://www.equaldex.com/issue/non-binary-gender-recognition (Also there are technically 17 countries on the website as they have included Antarctica, but as it doesn't have a human population, it has been omitted)

[100] Equaldex Website 'LGBT Rights in New Zealand' [https://www.equaldex.com/region/new-zealand]

[101] Equaldex Website 'LGBT Rights in Nepal' [https://www.equaldex.com/region/nepal]

[102] Equaldex Website 'LGBT Rights in India' [https://www.equaldex.com/region/india]

[103] Equaldex Website 'LGBT Rights in Chile' [https://www.equaldex.com/region/chile]

[104] Equaldex Website 'LGBT Rights in United States' [https://www.equaldex.com/region/united-states] [114] Equaldex Website 'LGBT Rights in Mexico' [https://www.equaldex.com/region/mexico]

[105] Equaldex Website 'LGBT Rights in the Netherlands' [https://www.equaldex.com/region/netherlands]

[106] Scottish Government 'Non-Binary Equality Action Plan 2023' [https://www.gov.scot/publications/non-binary-equality-action-plan/]

meaningful participation is best illustrated using the Lundy Model of Participation.[107] It was designed for children's and young people's participation but has been used globally as a benchmark in good practice. The model is split into four chronological categories; space, voice, audience and influence. Individuals must have (1) a safe space, (2) be well informed and supported, (3) views must be actively listened to and (4) acted upon, where appropriate. Another important aspect of an equitable system is non-tokenism, but this can be mitigated through meaningful co-design. A final tenet is review and feedback to ensure ongoing improvement. It was highlighted in the NBEWG report and recommendations that after publication, 'proper research' into how to recognise non-binary and genderfluid identities should begin.[108] This was continued as a theme in the NBEAP, and hopefully will lead to a thorough, compassionate system. To ensure this, non-binary and gender-nonconforming people should be involved in every step of consultation, consideration, implementation and review. A system should be designed with those who will use it in mind, but ideally designed with them in partnership, to help make sure that it is equitable, respectful and fair to those who will use it. This is what happened with existing gender legislation, the GRA, as the transgender people who were consulted stated weren't happy with the legal requirement for a medical diagnosis, therefore the GRR bill took this into account and proposed a change.

### 4.3 A 'Third Gender' Model

'Third Gender' is a legal or social gender category that is neither male nor female. It exists in societies that historically have had a traditional gender role of this kind, and in societies that have recognized the rights of some of their members to identify as neither male nor female.[109]It is the most common method of legal recognition for non-binary people, with most countries that have legal recognition utilising some form of 'third gender' system. In the western world, third gender is most often associated with non-binary and genderfluid people in a very modern, progressive sense, but in other places, third gender can recognise identities that are more spiritual or cultural. One example of this is the Hijra, who have legal recognition as a third gender in Bangladesh and India.

Another example is the Mahu in Hawaiian and Tahitian cultures. Mahu, translating to 'in the middle' have been respected in their cultures for their masculine and feminine traits, and are valued members of their societies.[110] This is similar to the 'two-spirit' identities, indigenous to North America and Canada, who hold many mixed gender roles and can be found in many different tribes.[111] These cultural third-gender models would differ from the implementation model suited to Scotland, as each system should be tailored for its population. A third-gender

[107] Danielle Kennan, Bernadine Brady & Cormac Forkan (2019) 'Space, Voice, Audience and Influence: The Lundy Model of Participation (2007 ???) in Child Welfare Practice' Introduction???

[108] Scottish Government 'Non-Binary Equality Working Group: report and recommendations - March 2022' [https://www.gov.scot/publications/non-binary-working-group-report-recommendations-march-2022/pages/10/]

[109] Hines S 'Is Gender Fluid? : A Primer for the 21st Century' Page 79

[110] Ibid Page 80

[111] Ibid Page 81

model that would be suited to Scotland would most likely mimic traits of other European and Western nations and the current legal recognition system for transgender people, by applying for a GRC but using an X or O on offical documents.

### 4.4 A Genderless System

The European Institute for Gender Equality defines 'gender-neutral' as "something that is not associated with either women or men" [112] It is a well-known term but its compatibility will modern day society poses an interesting question. Any concrete examples of a gender-neutral society are currently unknown, however as the utopian standard to which hypothetical journal articles aspire to, it should be included. It also provides a helpful contrast to the realism of a third gender model. In the NBEWG's report, they stated 'We're not asking for everything to be gender neutral, but we do know that lots of things are gendered when they don't need to be, and that changing that will improve all our lives.'[113]

Moving towards gender neutrality hypothetically seems positive and more progressive, but a gender neutral model of incorporation is open to interpretation. This could resemble something as subtle as a lack of gender on formal ID's, to something more bold like strictly co-ed primary and secondary schools and gender-neutral toilets and changing rooms. However, any positives that could come from a genderless system are greatly outweighed by the potential abuses of power that the patriarchy could retain. A lack of proper safe-guards for people who experience misogyny is implicit in a system devoid of gender, which gives weight to the divisive arguments from organisations like FWS.

Many academics have equated gender to an unnecessary hurdle or a burden that society has to shoulder, furthered by the patriarchy and some have even theorised about what life would be like without it. Perhaps equitable incorporation of gender diverse and non-conforming people will lead to overall shift away from the binary and towards a more gender-neutral society, as we have seen that the more accepted something is, the more likely it is to become commonplace.

### 4.5 Social vs Legal

It should be of note that social and legal change often work hand in hand, one following the other. However, due to the recent reform of gender identity balanced with an ongoing 'culture war', if implementing any legal recognition reform, Scotland should consider which should come first, legal or social change? The Government has already made significant progress

[112] European Institute for Gender Equality Website 'Gender-Neutral' [https://eige.europa.eu/publications-resources/thesaurus/terms/1321?language_content_entity=en]

[113] Scottish Government 'Non-Binary Equality Working Group: report and recommendations - March 2022' [https://www.gov.scot/publications/non-binary-working-group-report-recommendations-march-2022/pages/10/]

towards meaningful inclusion of non-binary voices and they have demonstrated a dedication to the non-binary community, through their commitments in the last two Plans for Government.

A commonly used example to demonstrate the effectiveness of judicial change before social change is the banning of smoking indoors in public places in the Smoking, Health and Social Care (Scotland) Act 2005.[114] Today, it would be a social taboo to smoke in public places, like bars, restaurants and even the office. However, before the ban came into place this was normalised. If the transformation of an indoor smoker from normal to social pariah in a few years is not enough evidence of the effects of legal change, then the decline in number of smokers after the ban should cement the success. [115]

On balance, equal weight should be given to both social and legal change in this case. Even though a smoking ban has been used as an example as to what legal change can achieve, it is not an appropriate comparison to the legal rights of an entire community. It is certainly a more delicate and nuanced issue, that requires the scales to balance in order for progress to be made. To alter the legal process, the social and political landscape must be willing to accept changes, and vice versa.

### 4.6 Conclusions

On balance, a 'third gender' model seems most realistic, addressing the calls from activists and could be tailored to adapt to Scotland. Evidence and experience from other western countries suggests that a similar model with meaningful and informed participation of stakeholders is most appropriate. The Scottish Government must take heed of suggestions from the NBEWG and NBEAP and should learn from other third gender models, particularly those that employ self-declaration. Perhaps Scotland will gradually phase towards a more gender-neutral society, but given the arguments outlined above and in the previous chapter, it is very unlikely to happen in the near future.

This chapter also examined the question of which should come first, social or legal change? It was concluded that in this case, both are integral to balance the complex calls from both sides of the gender debate. Other important aspects of incorporation to consider are the principles that should be implemented in the consultation and co-design stages. By implementing affective models of particpation, allowing non-binary people to be involved at every stage of the process and allowing for continuous feedback are all essential factors alongside non-tokenism.

## Chapter Five: Impacts of Devolution

[114] Smoking, Health and Social Care (Scotland) Act 2005

[115] Cancer Research Website 'British smokers down by 1.9 million since the ban' [https://news.cancerresearchuk.org/2017/07/01/british-smokers-down-by-19million-since-the-ban/]

## 5.1 Introduction

In 1998, the Scotland Act[116] created the Scottish Parliament and Scottish Government, and outlined specifically what issues are reserved to the UK Parliament and which are devolved to the Scottish Parliament. Some aspects of equality legislation are devolved, however most aspects remain reserved to the UK[117]. Other reserved matters have also impacted the perception, inclusion and day-to-day life of non-binary people, such as broadcasting and telecommunications, employment law and nationality and citizenship.

## 5.2 Equalities in the Devolved Law

On the 22nd of December 2022, the Gender Recognition (Scotland) Bill was passed by the Scottish Parliament. The Bill aimed to alter the process of obtaining a GRC in Scotland and set out who can make an application, how to apply and the appeals and reviews process, among other things.[118] The purpose of the Bill according to the Scottish Government was to simplify and improve the system that allows individuals to apply for a GRC in their acquired gender. However, the Bill was blocked from receiving Royal Assent by the Secretary of State for Scotland invoking Section 35 of the Scotland Act.[129] This is the first time that Section 35 has been used since the Scotland Act's inception in 1998. This blatant disregard for transgender equality is important to highlight in the context of incorporating non-binary identities. If a Bill that merely simplifies the GRC process for transgender people was blocked by the UK Government, a bill introducing non-binary identities is assuredly going to face similar treatment. Even though the coalition parties, the SNP and the Scottish greens, are ardent supporters, it is unlikely that other political parties would be eager to repeat the heated debates, lengthy consultation and countless hours of work that would be needed for a legal recognition bill for it to pass just to be shot down again by another section 35 order.

## 5.3 Devolution's Impact on Gender Identities

Devolution is widely acknowledged as a positive thing, giving the Scottish Parliament and

Government the power and authority to debate, legislate and create policy on certain issues. However, like all political systems it isn't perfect and has its limitations. The concept of devolved and reserved powers are a constant reminder of the hierarchical structure in place, very similar to the structure that imposes a barrier to gender equality. The section 35[119] order also cast a shadow over Scottish policy makers, darkening hopes of reintroducing the Gender Recognition Reform (Scotland) Bill or pushing equalities legislation even further.

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[116] Scotland Act 1998

[117] Scottish Parliament 'Devolved vs Reserved Powers' [https://www.parliament.scot/about/how-parliament-works/devolved-and-reserved-powers]

[118] Scottish Parliament 'Gender Recognition Reform (Scotland) Bill' [https://www.parliament.scot/bills-and-laws/bills/gender-recognition-reform-scotland-bill] *[129]* Scotland Act 1998

[119] Scotland Act 1998 s.35

There have also been links drawn between the conservative's control of government and government's reserved power over national media. Referring to the aforementioned toxic political landscape, according to a study by King's College London, the public finding that politicians are increasingly stoking culture wars.[120] This can only be worsened when the party in charge of Westminster, the conservatives, are fuelling the anti-transgender and gender non-conformity narrative.[121] Perhaps a slanderous conclusion to draw, but one that should be acknowledged in a discussion on devolutions impact, particularly with the media's influence in society.

### 5.4 Conclusions

Even though devolution has provided Scotland with power to legislate, to create policy and uplift their own local government systems, it has limitations that have seriously impeded Scotland's autonomy in relation to gender reform. The system of devolution is not unique to Scotland, but our relationship with it could certainly be described that way.

## Chapter Six: Conclusion and Recommendations

### 6.1 Brief

In this article, the possibilities surrounding the equitable incorporation of non-binary identities through legal recognition have been examined, debated and analysed. It is important at this point to reiterate the inherent lack of data and evidence on non-binary identities, therefore conclusions can only be drawn on what has been presented above. There is no conclusive number of non-binary people in Scotland, therefore it is unclear as to how many people have been affected or will be affected by any proposed legislation. This is very recent and topical issue within government, parliament and wider society, with heavily politicised media derailing factual and substantive conversation about the crux of the debate.

### 6.2 Conclusions

Though non-binary identities are not currently recognised in Scots Law, there are foundations on which a system for legal gender recognition could be built in Scotland. Given the limited case law relating to gender identity, non-binary identities in particular, the precedent set by existing cases paints a positive picture, having provided for protection under the Equality Act[122] for non-binary and gender fluid people.[123] However with the courts ultimately having ruled unfavourably towards a third gender option on official documentation, it falls to the Scottish

[120] Kings College London 'Public Increasingly Finds Politicians are stoking culture wars' [https://www.kcl.ac.uk/news/public-increasingly-see-politicians-as-stoking-culture-wars-study-finds]

[121] The Independent 'Rise in hate crimes against trans people could be fuelled by politicians, Home Office admits' [https://www.independent.co.uk/news/uk/home-news/home-office-transgender-sunak-hate-crimes-b2424505.html]

[122] Equality Act 2010

[123] *Taylor v Jaguar Land Rover Ltd 2020*

Government to take that next step. The current policy landscape is even more progressive, with commitments in two separate Programmes for Government, a Non-Binary
Equality Working Group and subsequent Action Plan, and an active third-sector to hold the

Government to account on its promises. The tangible actions of the Government, in cooperation with integral third sector organisations and charities, has produced a framework with objectives, deliverables and time-scales that are primed to be achieved.

Chapter Three aided in unpacking both the calls for and against legal recognition for non-binary people. The support from charities and campaigners is undeniable, and similarly from academics and legal professionals, there is a strong discussion on the merits of incorporation. However, the scholars, activists and third-sector organisations on the opposing side have equally as strong views against legal recognition, and they often have the overwhelming influence of the media on their side. Multiple chapters alluded to a 'culture war' in the UK, where both sides of the political spectrum are engaged in heated debate, with rights for gender non-conforming people somehow becoming a focal point, despite being a small percentage of society Throughout the paper, the themes of intersectionality, patriarchal structures and LGBTQ+ rights more broadly emerged recurrently.

Chapter Four introduced the paradigm of social vs legal change, and asked which should come first, and it was concluded that in this case, a balance of both is essential to equitable incorporation. It also provided a brief examination of legal recognition models for non-binary identities in other parts of the world, and outlined two potential models, with the merits (and realism) of one outweighing the other. A 'third gender' system, where non-binary people are legally recognised outside of the binary of male and female on legal documents, in legal settings and in their day-to-day lives should be preferred. The importance of self-declaration and meaningful participation/co-design was also stressed.

Though mentioned continuously throughout, Chapter Five faced the complexities of the

Gender Recognition Reform (Scotland) Bill 2022 head-on, in regard to devolution.

Devolution provides a different lens to look at gender legislation, particularly in the case of the GRR Bill with the first use of section 35 of the Scotland Act 1998[124], which blocks a bill from receiving Royal Assent. This unique situation brought to the forefront the impact of devolution on equality more widely. Other reserved matters such as national media oversight were referenced and tied back to the negative consequences of a 'culture war.'

To address the article's posed question, can non-binary identities be equitably incorporated into Scots Law? Overall the outlook is positive. The policy landscape is primed. The Scottish

[124] Scotland Act 1998 s.35

Government has made commitments to uplift and support non-binary people in society, and have recognised that legal recognition is one of the main calls from the community. The case law is sparse but the precedent set from *Taylor v Jaguar Land Rover Ltd 2020*[125] sets an indicative tone of more inclusive rulings to come. Protection under the characteristic of 'gender reassignment' the Human Rights Act[126] is a landmark victory for non-binary people and could be used in other areas of law, such as family, criminal and immigration to help advocate further for equal rights. The political landscape is a harder barrier to conquer, with divisive politics at the forefront of debates and the news. Moreover, another legal challenge under the Scotland Act[138] could arise, which would impede progress towards incoproration. However, the LGBTQ+ allies, activists, campaigners, charities, academics and the community themselves have shown a great deal of support legal recognition of non-binary identities, and are the grassroots voice behind the social change necessary to provide a platform for legal recognition to be considered. If a bill that would incorporate non-binary identities into the current system in Scots Law were to pass, this would allow and lead to non-binary and gender non-conforming people to receive tailored support and access services that fit their needs, to see themselves represented in the high levels of decision making, to not have to worry when obtaining legal documents about chosen names or not looking like their picture, all while be recognised as their authenic self.

### 6.3 Recommendations

The NBEWG recommendations provide an excellent base on which to build towards a society that is accepting of legal recognition. There are 35 recommendations outlined in the paper all of which should be given equal merit and deeply considered by govrenment, and by any future working groups or policy makers. The 35 recommendations are very broad and cover a spectrum of issues that affect the non-binary community, some of which don't reflect the focus of the paper. The following two headings will provide short relevant contributions to the existing recommendations to conclude the paper.

#### 1) Data and Law

As previously mentioned, there is a significant lack in data relating to non-binary and gender-fluid identities. Thorough research into the lived experience, opinions and barriers facing the community has been proposed by the NBEWG and NBEAP, working collaboratively with non-binary individuals to collect it. However, the community or representatives from it, should be the ones out there collecting this data and feeding it back directly to decision-makers, to ensure accountability. This will ensure that non-binary people are meaningfully involved in the process from beginning to end, will ensure higher levels of accuracy in reports, and will allow

[125] *Taylor v Jaguar Land Rover Ltd 2020*

[126] Human Rights Act 1998

[138] Scotland Act 1998 s.35

those giving their opinions to speak directly to someone who understands and is in the same position as them.

### 2) Legal Recognition and Gendered Law

As explored above, a 'third gender' model is preferred as it is most compatible with Scotland's current policy, legal and judicial systems, and also with our Western ideas of gender. The third gender model will denote an identity outwith the gender binary, signified by an X or an O on official documents, such as passports and ID's. However, this view might not be shared by the non-binary community, therefore consultation and codesign is essential. One of the main recommendations that came from the NBEWG is that non-binary people should be trated the same as cisgendered people, which should be a primary consideration when developing a system for legal recognition.[127] Legal recognition must be made equitable to non-binary and gender non-confroming people, and this can be achieved through meaningful particpation when consulting for, designing, implementing and reviewing the system, building trust with the community.

The NBEWG report finished with one final recommendation that should underpin all the others:

*'Future work the Government does to improve non-binary people's lives needs to empower people who are marginalised in multiple ways.'*[128]

They highlight this work should enable communities to design their own ways of working, compensating people for their time, and allowing non-binary people to participate in co-design.[129] The report and action plan are a brilliant start, and have started the Government on the path towards legal incorporation, but they also need to empower non-binary people to join them on the journey.

[127] Scottish Government 'Non-Binary Equality Working Group: report and recommendations - March 2022' >https://www.gov.scot/publications/non-binary-working-group-report-recommendations-march-2022//10/<
[128] Ibid
[129] Ibid

# Gary Lineker Media 1-0 HMRC: A critical examination on whether IR35 rules on taxation of personal service companies and partnerships are fairly and consistently applied.[1]

Hannah Rhodes. MA. LLB.

## Introduction

The Intermediaries Legislation (known as "IR35") is found in the Income Tax (Earnings and Pensions) Act 2003[2] and prevents individuals utilising Personal Service Companies ("PSCs") and partnerships to avoid paying income tax and National Insurance Contributions by claiming they are self-employed.[3] There has been an influx of IR35 tribunal cases against television presenters and media personalities[4] such as Lorraine Kelly,[5] Christa Ackroyd,[6] Gary Lineker,[7] and Eamonn Holmes.[8] Although there has been much case law regarding the subject, cases with similar facts have produced contrasting decisions and consequently, IR35 rules remain unclear for taxpayers and advisers. This essay will demonstrate that IR35 rules appear inconsistent, arbitrary, and unfair. First, it will clarify what the rules are. Second, it will analyse the outcomes of Lorraine Kelly and Christa Ackroyd to demonstrate how challenging it is to distinguish when IR35 rules apply for PSCs. Lastly, this essay will examine *Lineker* and compare it with Holmes' case to exhibit that IR35 rules can be applied inconsistently and unfairly in the context of partnerships.

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[1] [DOI]: https://doi.org/10.20933/100001337

[2] Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003) s.48-61.

[3] House of Commons Committee of Public Accounts *BBC and Personal Services Companies* (HC 2017-19).

[4] Stuart MacLennan, 'Daybreak a leg! Television presenters, IR35 and theatrical performances' (2019) Coventry Law Journal 118, 119.

[5] *Albatel Ltd v HMRC* [2019] UKFTT 195 (TC).

[6] *Christa Ackroyd Media Ltd v HMRC* [2019] UKUT 326 (TCC).

[7] *Lineker (t/a Gary Lineker Media) v HMRC* [2023] UKFTT 340 (TC).

[8] *Red, White, and Green Ltd v HMRC* [2023] UKUT 83 (TCC).

## When is IR35 applied?

The IR35 rules were introduced to prevent individuals utilising limited companies, such as PSCs,[9] or partnerships,[10] to appear as 'disguised employees'.[11] The rules apply when an individual (known as "the worker") provides their services to the "client(s)".[12] Rather than rely on a direct contractual relationship between the worker and the client, the worker operates through a limited company or a partnership ("the intermediary") to provide their services to the client.[13] If the intermediary body did not exist, and it can be demonstrated that there is a direct contractual relationship between the worker and client, or that the contract is of services rather than for services,[14] then the worker will be subject to pay income tax and National Insurance Contributions.[15]

## IR35 and Personal Service Companies

HMRC claimed that there was mass non-compliance with IR35 between 2000-2017[16] with some organisations, such as the BBC,[17] encouraging freelancers to use PSCs and other intermediary bodies to provide their services.[18] HMRC was particularly concerned with the employment status of freelancers in the entertainment industry.[19] Subsequently, the employment status of various media personalities has been challenged in Tribunals by HMRC

[9] These individuals are often the sole director or the main shareholder – House of Commons Committee of Public Accounts (n 2) p4.

[10] ITEPA 2003, s.49 (3).

[11] Anthony Seely 'Personal Service Companies and IR35' (Briefing Paper No.5976, House of Commons Library, 10 March 2021) https://researchbriefings.files.parliament.uk/documents/SN05976/SN05976.pdf Accessed: 28/10/23 p.3.

[12] ITEPA 2003, s.49(1)(a).

[13] ibid, s.49(1)(b).

[14] ibid, s.49(4).

[15] ibid, s.49(1)(c)(i).

[16] House of Commons Committee of Public Accounts (n 2) p5.

[17] ibid, p8 [3].

[18] *Christa Ackroyd Media Ltd v HMRC* [2018] UKFTT 69 (TC) [180].

[19] MacLennan (n 3) p4. [you need to change the footnote numbers so they start at 1 for each new article- or all cross-references will need to be renumbered]

over the last 5 years.

Chris Smith compared the facts of *Christa Ackroyd* to Lorraine Kelly's case.[20] He explained there were several similar overall facts including that s.49(1)(a) and (b) were satisfied within both cases.[21] Neither of the presenters had any work benefits such as sick pay or holiday pay and it was not possible for either of them to bring in a substitute to carry out their services.[22] Despite these various similarities, it was held that the IR35 rules did apply to Ms Ackroyd but not to Ms Kelly.

The main determining factor which produced the differing results in each case was based on the tribunal's findings of whether there was a direct contractual relationship between the worker and the client.[23] To determine whether a contract of employment existed, the courts examined the test laid out in *Ready Mixed Concrete* which considered (1) mutuality of obligation, (2) client's control over the worker, and (3) provisions within a contract indicating a contract of services.[24] The test of sufficient control by the client was significant in each case. In *Christa Ackroyd,* it was held that the BBC did have sufficient control over Ms Ackroyd's work[25] particularly regarding the fact that she followed the BBC's Editorial Guidelines when producing content and presenting on *Look North.*[26] Therefore, her hypothetical contract was one of employment rather than for services.[27]

Conversely, it was held in *Albatel* that there was an absence of sufficient control over Lorraine Kelly by ITV. Kelly was in control of the running order of 'Lorraine' and 'Daybreak'[28] and decided who she would interview.[29] Consequently, her contract was one for services.

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[20] Chris Smith 'Spot the Difference: Ackroyd and Kelly' (*BKL*, 22 March 2019) https://www.bkl.co.uk/insights/christa-ackroyd-lorraine-kelly-ir35/ Accessed: 28/10/23.

[21] *Albatel* (n 4) [19]; *Christa* (n 5) [12].

[22] Smith (n 19).

[23] Dawn Register & Rob Woodward *Analysis - HMRC's defeat in Albatel: the IR35 Puzzle* (2019) 1440 Tax Journal 14.

[24] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968) 2 QB 497, 515.

25 Christa (n 3) [179].

[26] ibid [162].

[27] Richard Curtis 'IR35 does not apply to presenter's personal service company' (2019) Taxation 6(1).

[28] *Albatel* (n 4) [169].

[29] ibid [170].

When comparing the results of the two cases, Andrew Hubbard explained that "the decision here [in the Ackroyd appeal] emphasises… that there is no generic answer to any IR35 dispute and that every case depends entirely on its own facts".[30] The most common criticism of IR35 is its incapability to be applied generally[31] and the fact that case outcomes are determined primarily on the specific facts of each case.[32]

Adam Smith contended that one of the key ideals for a just tax system is that "the tax each individual is bound to pay ought to be certain, and not arbitrary".[33] Courts, when considering whether IR35 applies in cases, rely greatly on the evaluation of specific facts and consequently, different courts and tribunals can legitimately come to different conclusions from the same facts.[34] Even the most minor factors can have a
profound effect on the results of the case[35] and consequently, cases may appear to produce inconsistent results. Taxpayers cannot expect a specific outcome in their IR35 cases as it will be based principally on the circumstances of their specific case. Therefore, it can be contended that the application of the IR35 rules in the context of PSCs is unclear and therefore, unfair to taxpayers.

**IR35 and Partnerships**

Tribunals until 2023 have only considered the application of IR35 rules within the context of a limited company. However, in *Lineker,* Brooks J had to consider, for the first time, whether there was a direct contract between Lineker and the end clients. If not, then his partnership (Gary Lineker Media) would be an intermediary body.[36]

First, Brooks J established that the IR35 rules do apply to partnerships and highlighted that

[30] Curtis (n 26).

[31] Tolley et al 'HMRC's Win on IR35 Over Television Presenter's Services' 1478 Tax Journal 4; Curtis (n 26); MacLennan (n 4) p4; Smith (n 19).

[32] Keith Gordon 'A yellow card for IR35? What the Lineker case means for HMRC' (*Tax Adviser,* 19 April 2023) https://www.taxadvisermagazine.com/article/yellow-card-ir35-what-lineker-case-means-hmrc Accessed: 29/10/23.

[33] Adam Smith, *Wealth of the Nations – Book V* (Generic NL Freebook Publisher 2000) p263.

[34] Gordon (n 31).

[35] Cathya Djanogly 'Albatel v HMRC' (2019) 1437 Tax Journal 4.

[36] *Lineker* (n 6) [85].

“Parliament made provision in s49(3) ITEPA 2003 for a partnership to be a ‘third party’ and therefore an ‘intermediary’”.[37] Second, he established that Gary Lineker Media possessed the characteristics of a partnership. Unless it was held that there was a direct contract between Lineker and the end clients, Gary Lineker Media would be subject to IR35.[38] However, Brooks J found that Mr Lineker did, in fact, have a direct contractual relationship with BBC Sport and BT Sport.[39]

Brooks contended unlike limited companies, which are separate legal entities[40], partnerships are not. As Mr Lineker had personally signed the 2013 BBC contract and the 2015 BT Sport contract, he had acted as both a principal and agent and therefore, personally bound himself to provide services to the end clients.[41] As Lineker had personally signed the respective contracts to BBC and BT Sport, he had created a direct contractual relationship with the respective end clients to provide his presenting services.[42] Therefore, s.49(1)(b) ITEPA could not apply and IR35 did not apply. Mr Lineker was successful in his case.

Brooks J clarified that his findings did not prevent s.49(1)(b) from ever being applied to partnerships. He contended that should a different partner sign the contract; a non-signatory partner would be considered an agent. In these circumstances, there would not be a direct contractual relationship between the worker and the client. The partnership would be an intermediary.[43]

Holmes received his appeal’s decision barely 2 days after Lineker’s success. Holmes had provided his presenting services for ‘This Morning’ through a series of contracts with ITV via his PSC, Red, White, and Green Limited.[44] Although it appeared that Lineker and Holmes operated in a similar fashion when providing their presenting services[45], Holmes lost his

[37] ibid [70].

[38] ibid [83].

[39] ibid [90].

[40] *Salomon v Salomon & Company Ltd* (1897) AC 2 (HL).

[41] Partnership Act 1890, s.5.

[42] *Lineker* (n 6) [92].

[43] *Lineker* (n 6) [94].

[44] *Red, White, Green Limited* (n 7) [3].

[45] Tom Wallace 'IR35: Two Media Cases with Different Outcomes' (2023) 1616 Tax Journal 22.

appeal. There was no dispute that s.49(1)(a) and (b) ITEPA 2003 applied to Holmes' case - Red, White, and Green Limited acted as an intermediary. Therefore, the court considered whether there was sufficient evidence of a direct contractual relationship between Holmes and ITV, ultimately determining that there was.[46]

*Lineker* and *Red, White, Green Limited* outcomes have caused controversy particularly regarding the fairness of applying IR35 to a partnership. Gordon argues Parliament intended for IR35 rules to be applicable to
partnerships.
However, if the Lineker decision is upheld, then there will be a blaring gap in the legislation.[47] Limited companies and liability partnerships act as separate legal entities and therefore, there will never be a direct contractual relationship between the worker and the end clients. It cannot be considered fair that a simple signature by a partner on a contract with the end client prevents IR35 rules from being applicable.[48] HMRC also does not agree with this view and have arranged an appeal against Mr Lineker to take place in 2024.[49] If HMRC are successful in their appeal, it will perhaps resolve this loophole. If not, then Parliament will have to legislate against it.

**Conclusion**

The application of IR35 in recent cases involving PSCs and partnerships has caused major confusion and uncertainty for taxpayers and their advisers. Courts apply evaluative exercises when determining whether IR35 applies in each case, but different courts can legitimately arrive to completely different conclusions despite similar facts in each case. Consequently, cases appear as if they are producing inconsistent results, and the rules look somewhat arbitrary.[50]

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[46] *Red, White, Green Limited* (n 7) [138].

[47] Gordon (n 31).

[48] Alistair Kendrick 'No end in sight' (2023) 191 Taxation 10.

[49] UK Government, ' Upper Tribunal (Tax and Chancery) Hearings and Register 2019 to date' *(UK Government,* 26 October 2023

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1164870/LIVE_Upper-Tribunal-Tax-Hearings-Register_13.11.18.csv/preview Accessed: 29/10/23.

[50] Gordon (n 31).

Partnerships were always intended to be within the scope of IR35 rules, but *Lineker* has potentially uncovered a loophole. If left open, it could allow some 'disguised employees' in partnerships to avoid paying income tax and NICs. In the words of Chris Smith "such a lottery is no way to run a tax system"[51]and IR35 rules should be reformed so that all 'disguised employees' are encompassed within its remit to ensure a fair and consistent procedure for all taxpayers.

[51] Smith (n 19).

# Post-War Gaza: The Suitability of Interim Trusteeship Administration[1]

Sebastien Richardson and the editors of the St Andrews Law Review

## 1. Introduction

From the outset of Israel's military response to the atrocities committed by Hamas terrorists on October 7th, a clear and singular goal has been at the forefront of the country's military and political leadership. From the beginning of the most recent war, Prime Minister Netanyahu has reiterated the same aim: to eradicate Hamas.[2] Not just an Israeli aim, the notion of eradicating Hamas from the Gaza Strip has become a goal shared by the state's global allies, garnering support from political leaders throughout the United States, Canada, the UK, and Australia.[3] Whilst negotiations for a ceasefire have been ongoing for months, it may still be some time before we see an eventual end to hostilities and a potential capitulation of Hamas. When that fateful day comes when Hamas is dismantled or Israeli forces declare success, what will the political and legal future be for Gaza's remaining two million residents and their Israeli neighbours?[4]

Drawing from the recent history of Israel's unilateral 2005 disengagement and building from decades of United Nations Security Council precedent, this article explores the viability of an international trusteeship-style government to administer the Gaza Strip until the time comes when self-government is deemed sufficient. Having, for almost two decades, been governed by the ideologically extremist Hamas that has consistently placed its hatred for Israel above the lives of its own residents, the group's destruction is indeed a noble aim. This aim, however, will take considerably more than merely military intervention and instead entails a complete overhaul of Gaza's political, legal, and educational institutions and a restructuring of its civil

[1] [DOI]: https://doi.org/10.20933/100001338

[2] VOA News, 'Netanyahu says the war will not end until Hamas is destroyed' (1 June 2024)<https://www.voanews.com/a/netanyahu-says-the-war-will-not-end-till-hamas-is-destroyed-/7639063.html>accessed 27 June 2024.

[3] Bose Nandita, 'Biden says Hamas must be eliminated, US officials warn of escalation' (*Reuters*, 8 March 2019)<https://www.reuters.com/world/middle-east/conflict-middle-east-could-escalate-us-national-security-adviser-warns-2023-10-15/ (Accessed: 30 June 2024). > accessed 17 October 2023.

[4] Central intelligence agency, 'Gaza Strip' ( *The World Factbook*, 13 June 2024) <https://www.cia.gov/the-world-factbook/countries/gaza-strip/> accessed 27 June 2024.

society. Before embarking on this discussion, it bears disclaiming to readers that this article is by no means an exhaustive research paper into the history, pitfalls, and merits of trusteeship government, but rather is intended to spur further discussion around the viability of such a measure for the near future of Gaza's political administration.

## 1. Origins of the Present Conflict - Lessons from 2005 Disengagement

### 2-1. Clarification

Before discussing the mechanisms for international administration of Gaza, it is pertinent to establish a clear understanding of the origins to the present conflict. In doing so, an important distinction must be drawn between the Israel-Palestine and Israel-Hamas conflicts, with the latter the subject of this article. Whilst there exists academic discourse which would argue that these two conflicts are inseparable, this article firmly posits an important differential. Whilst the broader conflict between Israel and Palestine finds its modern origins in the creation of a Jewish state in May 1948, the conflict with Hamas traces its origins to Israel Prime Minister Ariel Sharon's disengagement plan of 2005, providing the vacuum for Hamas' rise to power, and has been a war egged-on by that party's leadership from its first foray into national government.[5]

### 2-2. 2005 Disengagement Plan

Known for most of his parliamentary career as a key figure on the hawkish side of Israeli politics, spearheading decisive military action in the 1982 Lebanon War and laying fierce opposition to the 1990s peace process, Sharon's decision to pull out of Gaza and the West Bank in 2005, as Kesgin argues, bucked all prevailing wisdom[6]. Largely the result of Sharon's desire to escape international criticism and avoiding violent opposition, disengagement was born of

[5] Center for Preventive Action, 'Israel-Palestinian Conflict'(*Council on Foreign Relations*, 10 June 2024)<https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict> accessed 21 June 2024.

[6] Baris Kesgin, 'Uncharacteristic foreign policy behavior: Sharon's decision to withdraw from Gaza' [2019] 22(1)International Area Studies Review 76-92.

the Rabin-Arafat Oslo Accords of 1993 and saw the expulsion of IDF forces alongside over 9,000 Israeli settlers across both the West Bank and Gaza, ending a 38 year occupation.[7]

Having agreed to a gradual devolution of authority to the Palestinian Authority (PA), Israel's Rabin government promptly signed the 1994 Gaza-Jericho Agreement, solidifying Palestinian self-government.[8] This swift move from Israeli to Palestinian government however proved fatally idealistic. Pursuant to Article III, the Palestinian Authority (PA) was established under the leadership of Yasser Arafat, and was conferred complete judicial, executive, and legislative powers, with weak international oversight.[9]

As such, when Gaza's Palestinian Legislative Council elections were held in 2006, Hamas came out on top with a minority win of 44.45% of the assembly.[10] This was by no means a win for a political party concerned with governing for its citizens, but rather an extremist organisation bent on mobilising its civilian population to the destruction of Israel's sovereignty. Thus, by mid-2007 Hamas had launched a full-scale civil war against its main rival in Gaza, Fatah, gaining total de facto authority over the territory after its victory in the Battle of Gaza. As we look forward to a postwar Gaza from 2024, we should heed the primary lesson from 2005: that granting self-government without sufficient oversight is a recipe for chaos. Even more so in 2024 than 2005, Gaza is a devastated territory, both physically but also emotionally and ideologically. A Gaza which is built upon the rule of law and within which extremist politics cannot take hold will be the only linchpin by which regional peace and stability can be found.

## 3. Trusteeship Government

### 3-1. Assumptions

[7] 'Why is Israel pulling out settlers from Gaza, West Bank?' (*Relief Web*, 15 August 2005)<https://reliefweb.int/report/israel/why-israel-pulling-out-settlers-gaza-west-bank> accessed 19 June 2024.

[8] US Department of State, 'The Oslo Accords and the Arab-Israeli Peace Process' (*Office of The Historian*, 1999)<https://history.state.gov/milestones/1993-2000/oslo>accessed 19 June 2024.

[9] Agreement on the Gaza Strip and the Jericho Area (Jericho Agreement) 1994 <http://main.knesset.gov.il/About/History/Documents/GazaJerichoAgreement_eng.pdf/>.

[10] European Council on Foreign Relations, 'Legislative Elections (2006)' (*Mapping Palestinian Politics*, 2006) <https://ecfr.eu/special/mapping_palestinian_politics/legislative-elections-2006/> accessed 25 June 2024.

This article's proposal for an international trusteeship for postwar Gaza is based upon a number of key assumptions. Fundamentall~~y~~ is the presupposition that Israel's political leaders either do not desire or will not acquire unilateral control of the Gaza Strip in a following peace process. If post-conflict negotiations reach a point where international administration is feasible, this proposal also rests upon the assumption of sufficient regional and international goodwill for partnership agreements between Israel, Palestinian leaders, Egypt, and the United States. Lastly, and crucially, this plan assumes a postwar population both willing and able, to assist in the political and infrastructure reconstruction of Gaza without undue resistance.

### 3-2. The Necessity of an International Regime

Imposing trusteeship is not an easy decision to make and, as such, it is pertinent to identify a number of factors precluding self-government at-present. Aside from the obvious need to physically rebuild Gaza, the most fundamental of these is that there exists no political alternative to Hamas across the Palestinian territories which can provide the requisite measured government. The group's main rival in the PLC for instance, Fatah, harbours equally hostile and threatening views toward Israel alongside eliciting strong support from the al-Aqsa Martyrs Brigade paramilitary group.[11] Lacking the political maturity and infrastructure for responsible self-government, international trusteeship is a necessary stage toward an eventual two-state settlement.

Another bulwark precluding meaningful progress has been the mutual suspicion between Israel and Palestine. For Israel's policymakers, having lived alongside a territory whose leaders profess their absolute opposition to the country's existence and have launched a barrage of attacks to that end, guarantees against extremist actors and government in Gaza is a non-negotiable prerequisite for any international settlement. For the residents of Gaza, having been both subjected to extremist leadership, civil war, and widespread bloodshed, a belief in an apathetic international legal environment continues to be the impasse to effective international

[11] Khaled Abu Toameh, 'Top Fatah official to 'Post': PA is very weak; Fatah 'proud' of its armed wing' (*The Jerusalem Post*, 12 February 2022)<https://www.jpost.com/arab-israeli-conflict/article-696272#google_vignette> accessed 25 June 2024.

cooperation.[12] A lasting settlement cannot be brokered upon a shaky foundation of deep-seated suspicion.

### 3-2. A History of Trusteeship Government

The notion of interim trusteeship has become, since its emergence at the initial stages of the post-war international order, one of the most significant reconstruction tools of the United Nations system. Whilst such administration, in some form or another, has been employed in Kosovo, Iraq, Rwanda, Haiti, and Argentina, its roots lay precisely within the Israel-Palestine conflict. Facing a British withdrawal and partition of the Palestine Mandate in 1948, a cautious President Harry Truman proposed a temporary trusteeship to be administered by the Security Council.[13] Although this initial plan failed to garner sufficient UN support, the concept lived on through the special status granted to Jerusalem as a corpus separatum under UN Resolution 181.

The provision of international government stems from Chapter VII of the UN Charter 1945, which grants the Council power to; a) "determine the existence of any threat to the peace, breach of the peace, or act of aggression, and b) to take "military or non-military action to restore international peace and security".[14] Today, although the UN Trusteeship Council remains effectively defunct, after __ years of suspended status, the underlying concept of trusteeship in post-war reconstruction remains viable and attractive. Of all its invocations, perhaps the one most illustrative of contemporary international trusteeship is the United Nations Transitional Administration in East Timor (UNTAET).

Established in the aftermath of a twenty four-year Indonesian military occupation of the South-East Asian territory, UNTAET was given the task of rebuilding East Timor's institutions and legal system from the ground-up. Brought into effect under UNSC Resolution 1272, the Administration exercised legislative, judicial, and executive power over East Timor, and was

[12] Taylor Luck, 'Gaza: Why distrust of UN has deepened at a moment of greatest need' ( *Christian Science Monitor*,15 February 2024)<https://www.csmonitor.com/World/Middle-East/2024/0215/Gaza-Why-distrust-of-UN-has-deepened-at-a-moment-of-greatest-need> accessed 27 June 2024.

[13] Economic Cooperation Foundation, 'Truman Proposal for Temporary UN Trusteeship for Palestine (1948)' (*ECF Maps & Data*, 2015) <https://ecf.org.il/issues/issue/1415>accessed 25 June 2024.

[14] United Nations, 'Charter', art. 39.

responsible for crafting the future independent nation's constitution and the basic structure of its government and ministerial portfolios.[15] Composed of public, humanitarian, and financial divisions, with police forces provided under the direction of UN Peacekeepers, UNTAET's authority began to give way for increased devolution shortly after its first year of operations, establishing a National Council (NC) made up of 36 East Timorese members responsible for heading portfolios under overarching UN direction, forming the "nucleus" of the country's future parliament.[16] Perhaps the most important lesson to learn for the case of Gazan administration is that, having acknowledged East Timorese proclamation of independence in May 2002, international oversight and support did not simply dissolve. Rather, UNMAET was replaced by the United Nations Mission of Support to East Timor (UNMISET) to safeguard its fledgling democracy, political institutions, and rule of law[17].

Applying a similar scheme to Gaza in 2024 could provide the necessary stability to usher in the preliminary stage to an eventual realisation of a stable two-state solution, though differing in critical ways from past experiences. The most fundamental of these differences is that, traditionally, trusteeship regimes have been enacted in the aftermath of routing an external belligerent or threat. In the case of Gaza, the enemy comes largely from within. Not in the same sense as belligerents in non-international armed conflicts, but rather the very state in Gaza and its terrorist captors present the deepest challenge to a stable Gaza which can govern in the best interest of its residents and maintain cool regional relations..

Creating a stable regime which hedges against the risks of Gaza becoming a geopolitical bargaining chip, the creation of an ad hoc Security Council committee of a coalition of states; Israel, Egypt, the United States, European Union, Qatar, and Saudi Arabia could provide a forum for reconciling global players' competing interests, whilst providing ally backing for concerned Gazans and Israelis. Under such leadership, as Security Council precedent dictates, the international trusteeship would exert total administrative control though the formation of judiciary, legislative, and executive branches. Mirroring the ideal future structure of government in the territory, the legislative branch would comprise a number of core portfolios;

[15] UNSC Res 1272 (25 October 1999), UN Doc S/RES/1272.

[16] UN Peacekeeping, 'UNTAET Background' (*East Timor* ,2002)<https://peacekeeping.un.org/mission/past/etimor/UntaetB.htm>accessed 18 June 2024.

[17] ibid.

education, finance, infrastructure, health, and the economy and would be headed by a consortium of relevant international experts and policymakers from across the above-mentioned committee states, under the overhaul watch of the Security Council.

Whilst the noble objective of eradicating Hamas has become the central focus of Israel's 'war cabinet' and its international partners, achieving this cannot be done purely through military means. Hamas, as IDF spokesperson Daniel Haggari and others have rightly identified as an 'ideological' as well as an institutional issue, means that under a trusteeship government, special emphasis must be placed on two portfolios; education and finance.[18]

With UNICEF figures indicating 47% of Gaza's population are children, interrupting the trend of youth populations growing up to enter extremist revolutionary organisations and instead emphasising their continued education and entry into the workforce will be the backbone of creating a vibrant meaningful civil society in Gaza for decades to come.[19] Destroying the ideology upon which Hamas and similar organisations are based will not be easy, but must involve a complete restructuring of civil society, beginning with education. Alongside education, the other critical aspect of routing extremism from the strip comes in the form of Counter-Terrorism Financing (CTF).

As recent analysis has indicated, Hamas' success, at least in part, rests upon its sprawling international financial empire, estimated to rake in over USD $1bn in yearly turnover.[20] Whilst an estimated $ [dollars?] 360m comes from import taxes the governing party places on goods brought into Gaza from both the West Bank and Egypt, the bulk of revenue comes from further afield. American intelligence, for instance, estimates Iranian financiers provide approximately USD $100m a year to Palestine's Islamist groups, with the Treasury pointing to Redin, a

[18] ABC News, 'IDF's Daniel Hagari appears to question stated goal of destroying Hamas, in political rift with Benjamin Netanyahu' (20 June 2024)<https://www.abc.net.au/news/2024-06-20/idf-daniel-hagari-hamas-cannot-be-eliminated-gaza-netanyahu/104001430> accessed 30 June 2024.

[19] ACAPS, 'Impact of the conflict on children in the Gaza Strip' (*Palestine*, 1 February 2024)<https://www.acaps.org/fileadmin/Data_Product/Main_media/20240201_ACAPS_thematic_report_Palestine_-_impact_of_conflict_on_children_in_the_Gaza_strip.pdf> accessed 26 June 2024.

[20] The Economist, 'Inside Hamas's sprawling financial empire' ( , 20 November 2023)<https://www.economist.com/finance-and-economics/2023/11/20/inside-hamass-sprawling-financial-empire> accessed 26 June 2024.

currency exchange in Istanbul, as a key means of circumventing sanctions.[21] Another considerable portion of its money is gained through Hamas-led investments, littered across firms registered throughout the Middle East, including a firm which has built the Afra Mall in Sudan and another with mines just outside Khartoum.[22]

Creating a robust financial administration for Gaza would include significant international partnership work, central would be integration within the premier AML and CTF body, the Financial Action Task Force (FATF). Additionally, constructing stringent AML agreements with Istanbul will prove central to any prospect of keeping militant groups out of control in Gaza. With regards to the provision of police forces, the appropriate solution would be to place such authority under the jurisdiction of UN Peacekeeping forces, and in doing so skirting claims of exclusion from Chinese foreign policy leaders and interference in the Security Council.

Having outlined the legislative powers of the interim government, constructing an adequate judiciary, re-establishing the rule of law in Gaza would be an onerous undertaking requiring the establishment of a special tribunal to take precedence over local courts. Operating within a much broader jurisdiction than previous internationally-imposed courts, notable of these being the 2009 Special Tribunal for Lebanon, a trusteeship judiciary would act as the sole legal authority in Gaza. Allaying international criticism of the lack of international legal oversight in the region, an internationally administered judiciary would resolve to restore domestic rule of law, uphold international trade and peace agreements, and provide the foundations for a future Gazan legal system. Crucially, at the point at which the initial stages of devolution are deemed viable, this should remain limited, with local policy-making dependent upon UN committee oversight as previously explored in the case of East Timor.

**Conclusion**

Constructing an interim government for the administration of Gaza is an undertaking of gargantuan proportion and complexity. However, it is a necessary undertaking for the international political system to ensure regional stability and future peace for both Israel and

[21] ibid.

[22] ibid.

the residents of Gaza. The necessity stems from one undeniable truth, that Gaza cannot govern itself securely at the present time, and likely not for many years to come, something demonstrated by the history of unilateral withdrawal in 2005. As such, an international influence-sharing trusteeship-style government presents a potentially attractive and viable means of rebuilding the Gaza Strip within the longer-term view to constructing durable and lasting stability. If a two-state solution retains any prospects of viability, a comprehensive overhaul of the Gazan state must be the first step on this long path.

# '*Aiseirigh*': Minority Language Rights and the Resurrection of Scottish Gaelic.[1]

*How can the proposed Scottish Languages Bill promote the linguistic rights of Scottish Gaels effectively? And how much promotion is this linguistic minority entitled to under international human rights law?*

Christiana Heather Cameron, LLB[2]

Runner Up, Williamson Prize, University of Aberdeen.

**Table of Abbreviations:**

| | |
|---|---|
| ALS | Areas of Linguistic Significance |
| *Am Bòrd* | *Bòrd na Gàidhlig* |
| *An Comunn* | *An Comunn Gàidhealach* |
| *An tÚdarás* | *Údarás na Gaeltachta* |
| CPPDCE | Convention on the Protection and Promotion of the Diversity of Cultural Expressions |
| CSICH | Convention on the Safeguarding of the Intangible Cultural Heritage |
| CVCHS | Framework Convention on the Value of Cultural Heritage for Society |
| ECHR | European Convention on Human Rights |
| ECRML | European Charter for Regional or Minority Language |
| FCPNM | Framework Convention for the Protection of National Minorities |
| *Foras* | *Foras na Gaeilge* |
| GLE | Gaelic Learners' Education |
| GME | Gaelic Medium Education |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| IM | Irish Medium |
| The Commissioner | *An Coimisinéir Teanga* |
| UNESCO | The United Nations Educational, Scientific and Cultural Organization |
| UNDLM | Declaration on the Rights of Person Belonging to National or Ethnic, Religious and Linguistic Minorities |
| UDHR | UDHR Universal Declaration of Human rights |

[1] [DOI]: https://doi.org/10.20933/100001339
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**Introduction:**

*Aiseirigh*: resurrection, resurgence, revival.[3]

Once the language of the majority in Scotland, and the longest-established language in Scotland's history, Scottish Gaelic ('Gaelic') is now described as 'definitely endangered'.[4] The majority of speakers remain in the highlands, the *Gàidhealtachd,* but account for only 2.5 percent of Scotland's population.[5] Despite the Gaelic Language (Scotland) Act 2005, Gaelic remains in decline.[6] The Scottish Language Bill ('the Bill'), introduced in November 2023, presents a new opportunity for Gaelic, proposing Gaelic official status and introducing measures for Gaelic promotion.[7]

This paper will analyse the Bill, examining the extent to which it enhances Gaels' linguistic rights. It will consider the amount of promotion linguistic minorities are entitled to under international law, by examining obligations and recommendations on cultural and linguistic rights. The Bill will be compared to the existing linguistic frameworks in Wales and Ireland, both jurisdictions having established policy and legislation promoting their minority languages. Through consideration of international, regional and comparator perspectives we will demonstrate where the Bill makes positive steps to promote Gaelic and propose further recommendations on how this Bill may promote the linguistic rights of Gaels effectively.

Chapter One presents an overview of the history of Gaelic, its situation today, and a description of the Bill's most relevant provisions, whilst considering how much Gaelic is entitled to promotion conceptually. Chapter Two examines the international framework of minority rights protection, demonstrating the extent to which international law covers minority protection, followed by an overview of Wales and Ireland. Finally, Chapter Three analyses the attributes

[3] Boyd Robertson and Ian MacDonald, 'Aiseirigh', *Essential Gaelic Dictionary* (Hodder Education 2015) 5.
[4] Council of Europe (Committee of Experts) 'European Charter for Regional or Minority Languages: Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts' fifth evaluation report on the United Kingdom and Isle of Man' (Council of Europe 22 March 2021) MIN-LANG (2021) 3; Andy Hancock, 'Language Education Policy in Multilingual Scotland: Opportunities, Imbalances and Debates' (2014) 38 Language Problems and Language Planning 167, 170.
[5] Scotland's Census, 'Scotland's Census 2022 - Ethnic Group, National Identity, Language and Religion' (*Scotland's Census*, 21 May 2024) <https://www.scotlandscensus.gov.uk/2022-results/scotland-s-census-2022-ethnic-group-national-identity-language-and-religion/> accessed 22 August 2024.
[6] Gaelic Language (Scotland) Act 2005 (asp 7) (GL(S)A 2005); Education (Scotland) Act 2016 (asp 8) (E(S)A 2016); ibid.
[7] SP Bill 39 Scottish Languages Bill [as introduced] Session 6 (2023) (SLB).

and deficiencies of the Bill and proposes improvements. This articles hypothesises that although the Bill presents a considerable improvement to Gaelic promotion, it could be strengthened through addressing economic and social utility.

## Chapter 1: Scots Law, Scottish Gaelic, and Entitlement to Promotion

Before addressing the future of Gaelic in Scotland, one must first consider its historic decline and the current relevant domestic framework. This chapter will discuss the Scottish Languages Bill's creation, contextualised by the foregoing, and consider Gaelic promotion as justified by cultural rights rationales.

### 1.1 Historical background:

Prior to the 1500s, Gaelic flourished as the predominant language across Scotland, serving as the primary language in government, church, nobility, and literati.[8] With the emergence of new mediaeval feudal structures introducing new languages Gaelic retreated to the *Gàidhealtachd*, while power centres were dominated by non-Gaels.[9]

Four key factors contributed to Gaelic's recession. Firstly, the Reformation influenced legislation from the 1500s onwards, aiming to 'promote civility' through legislation such as the 1616 Act of the Privy Council which required that, 'the youth may be taught at the least to write and to read and be catechised and instructed in the grounds of religion'; the 1696 Act for the Settling of Schools which provided for rural English school establishment; and the Education (Scotland) Act 1872 which provided for English-medium instruction only, implicitly excluding Gaelic.[10] Secondly, the aftermath of Culloden (1746), led to the suppression of Gaelic institutions and culture. This was exacerbated by the 1747 Acts of Proscription, which

[8] Wilson McLeod, 'Historical and Sociolinguistic Background', *Gaelic in Scotland: Policies, Movements, Ideologies* (Edinburgh University Press 2020) 9.
[9] ibid 8–9; Derick S Thomson, 'Gaelic (General Survey)' in Derick S Thomson (ed), *The Companion to Gaelic Scotland* (Gairm Publications 1994) 89–90.
[10] Stephen Mark Holmes, 'Education in the Century of Reformation' in Robert Anderson, Mark Freeman and Lindsay Paterson (eds), *The Edinburgh History of Education in Scotland* (Edinburgh University Press 2015) 60; Euan A Cameron, 'Education in Rural Scotland, 1696–1872' in Robert Anderson, Mark Freeman and Lindsay Paterson (eds), *The Edinburgh History of Education in Scotland* (Edinburgh University Press 2015) 154; Fiona O'Hanlon and Lindsay Paterson, 'Gaelic Education since 1872' in Robert Anderson, Mark Freeman and Lindsay Paterson, *The Edinburgh History of Education in Scotland* (Edinburgh University Press 2015) 304.

contributed to the demoralisation of Gaels.[11] Thirdly, the Highland Clearances (*circa* 1780 to 1860) involved mass emigration, leading to a drastic decline in the population of Scottish Gaels, from roughly 50 percent in the 1500s to only 6.2 percent by 1881, and famine further impoverishing the remaining population.[12] Lastly, the Industrial Revolution in the Lowlands led many Gaels to migrate south in search of employment, where subsequent generations lost their Gaelic due to the utility of English.[13] Gaels internalised prejudices against their language, perceiving it as inferior in a homogenised Anglosphere.[14]

Efforts to preserve Gaelic have persisted, with *An Comunn Gàidhealach* established in the late 1800s promoting Gaelic language, literature, and culture.[15] Advocacy initiatives led to the Education (Scotland) Acts 1908 and 1918, which included the first provisions for Gaelic education.[16] Specific Gaelic legislation, like the Gaelic (Miscellaneous Provisions) Bill 1980, were unsuccessful.[17] The Education (Scotland) Act 1980 reiterated obligations upon local authorities to provide adequate Gaelic provision, whilst introducing options for parents to request their child's instruction in Gaelic.[18] The first Gaelic-medium education ('GME') primary schools came in 1985 and by 1993, forty-five GME primary schools existed, with a cumulative grant of £1.72 million in the 1992–3 academic year.[19] Broadcasting channels, including BBC *Alba* and *Radio nan Gàidheal*, reflect ongoing efforts to sustain Gaelic beyond education, with the Broadcasting Act 1990, mandating a Gaelic Television Committee with £8.5 million per annum.[20]

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[11] McLeod, 'Historical and Sociolinguistic Background' (n 6) 12; William Gillies, 'Gaelic Songs of the "Forty-Five"' (1991) 30 Scottish Studies 19, 40.
[12] Claire Nance, 'Scottish Gaelic Revitalisation: Progress and Aspiration' (2021) 25 Journal of Sociolinguistics 617, 623; Tom M Devine, *The Great Highland Famine: Hunger, Emigration and the Scottish Highlands in the Nineteenth Century* (John Donald 2004) 22; Marjory Harper, *Adventurers And Exiles: The Great Scottish Exodus* (Profile Books 2004) 1; McLeod, 'Historical and Sociolinguistic Background' (n 6) 20.
[13] McLeod, 'Historical and Sociolinguistic Background' (n 6) 12, 17; Charles WJ Withers, *Gaelic Scotland: The Transformation of a Culture Region* (Routledge 1988) 405.
[14] Withers (n 11) 153; McLeod, 'Historical and Sociolinguistic Background' (n 6) 20.
[15] Robert Dunbar, 'Language Legislation and Policy in the UK and Ireland: Different Aspects of Territoriality in a "Celtic" Context' (2016) 23 International Journal on Minority and Group Rights 454, 475; An Comunn Gàidhealach, 'Ar Cànan 's Ar Ceòl' (*An Comunn Gàidhealach*) <https://www.ancomunn.co.uk/> accessed 10 March 2024.
[16] Education (Scotland) Act 1908, ss 10, 17; Education (Scotland) Act 1918, s 6(1)(a); O'Hanlon and Paterson (n 8) 307.
[17] Gaelic (Miscellaneous Provisions) Bill HC Bill (1980-81) [24]; Dunbar, 'Language Legislation and Policy in the UK and Ireland' (n 14) 476.
[18] Education (Scotland) Act 1980, s 1, pt 2; O'Hanlon and Paterson (n 8) 313.
[19] ibid 313–314.
[20] Broadcasting Act 1990, ss 183-184; WH McDowell, *The History of BBC Broadcasting in Scotland 1923–1983* (Edinburgh University Press 1992) 257–258; Wilson McLeod, 'Mass Media in the Celtic Languages [2] Scottish Gaelic' in John T Koch (ed), *Celtic Culture: A Historical Encyclopedia* (ABC-CLIO 2006) 1265.

Despite the foregoing, the Gaelic population continued to fall from in 1891, from 6.3 percent in 1891, to 1.3 percent by 1991.[21] Many Gaelic-speaking parents were uninterested in transmitting Gaelic, viewing it as a hindrance to social mobility.[22] Commentators have often noted an 'inferiority complex' amongst Gaels.[23] To some extent such beliefs remain present.[24]

### 1.2 Gaelic today

The Gaelic Language (Scotland) Act 2005 ('the 2005 Act') is the primary statutory authority on Gaelic and remains the only legislation exclusively addressing Gaelic. The Act aims to '[secure] the status of Gaelic as an official language of Scotland commanding equal respect with the English language'.[25] It created a body, *Bòrd na Gàidhlig* ('*Am Bòrd*'), which is the chief authority for all Gaelic-related issues.[26] *Am Bòrd* must present a quinquennial National Gaelic Language Plan to Scottish Ministers and is responsible for requiring councils to produce localised Gaelic Language Plans.[27] The Education (Scotland) Act 2016 ('the 2016 Act') governs GME, imposing obligations upon authorities to promote and support Gaelic education and learning, and to assess, upon parental request, the need for such education in their catchment-area.[28]

At primary level, fourteen local authorities provided GME, with non-provision in eighteen areas.[29] Seven solely-GME primary schools have been created in five authority areas.[30] There is one exclusively GME secondary school.[31] Of the thirty-three secondary schools that provide GME, only fifteen provide instruction in subjects other than Gaelic language.[32] In 2019, twenty-nine secondaries facilitated Gaelic teaching for learners ('GLE'), with 80 percent of learners taking it only in their first two years.[33] Tertiary education opportunities are limited,

[21] McLeod, 'Historical and Sociolinguistic Background' (n 6) 20.
[22] O'Hanlon and Paterson (n 8) 312.
[23] McLeod, 'Historical and Sociolinguistic Background' (n 6) 18.
[24] Wilson McLeod, 'Policy, Ideology and Discourse', *Gaelic in Scotland: Policies, Movements, Ideologies* (Edinburgh Scholarship Online 2020) 24.
[25] ibid, preamble.
[26] ibid, s 1.
[27] ibid, s 3.
[28] E(S)A 2016, ss 7, 15.
[29] Wilson McLeod, 'Institutionalisation, 2006-20', *Gaelic in Scotland: Policies, Movements, Ideologies* (Edinburgh Scholarship Online 2020) 297.
[30] ibid.
[31] ibid 298.
[32] O'Hanlon and Paterson (n 8) 315.
[33] McLeod, 'Institutionalisation, 2006-20' (n 28) 299.

four universities provide Gaelic-related degrees; however, Gaelic's future at tertiary institutions is currently precarious.[34]

*BBC Alba* and *Radio nan Gàidheal* remain the predominant providers of Gaelic broadcasting, providing podcasts and learning resources on Spotify.[35] MG *Alba*, Scotland's Gaelic media service, has created the resources 'Speak Gaelic' and 'Learn Gaelic' which provide learning resources.[36] The Duolingo Gaelic course claims to have 548,000 learners, and BBC News provides daily Gaelic updates.[37] *An Commun Gàidhealach*'s local and national *Mòd* competitions and Glasgow's annual Celtic Connections, celebrate Gaelic and Celtic music, literature and art.[38]

The 2022 census indicates that speakers constitute 2.5 percent of the Scottish population.[39] Between 2011 and 2022, the younger population of Gaelic speakers has increased considerably due to GME's popularity.[40] 57 percent of the Gaelic population are aged over thirty-five-years-old, indicating potential further significant decline in the 21st-century if speaking does not increase in younger generations.[41] As of 2011, in the Western Isles, 52 percent of locals are Gaelic speakers, rising to 80 percent in remote areas.[42] Intergenerational transmission remains weak, with only 29.5 percent of under-fours speaking Gaelic within the Western Isles in 2011.[43] Demonstrably, despite the progress, Gaelic remains at risk.

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[34] O'Hanlon and Paterson (n 8) 318; Lennie Pennie, 'Aberdeen University Language Cuts: They Cannot Go Ahead' *The Herald* (9 December 2023) <https://www.heraldscotland.com/politics/viewpoint/23978331.aberdeen-university-language-cuts-cannot-go-ahead/> accessed 10 March 2024.

[35] McLeod, 'Institutionalisation, 2006-20' (n 28) 315; BBC Radio nan Gàidheal, 'SpeakGaelic' (*Spotify*) <https://open.spotify.com/show/0KrHv2TEK05wIk8Oi9Laz8> accessed 10 March 2024.

[36] LearnGaelic, 'Mu LearnGaelic' (*LearnGaelic*) <https://learngaelic.net/about.jsp> accessed 10 March 2024; MG Alba, 'About Us' (*MG ALBA*) <https://mgalba.com/about-us/?lang=en> accessed 28 March 2024.

[37] BBC, 'Naidheachdan' (*BBC Naidheachdan*) <https://www.bbc.co.uk/naidheachdan> accessed 10 March 2024; Duolingo, 'Scottish Gaelic for English Speakers' (*Duolingo*) <https://www.duolingo.com/course/gd/en/Learn-Scottish-Gaelic> accessed 10 March 2024.

[38] An Comunn Gàidhealach, 'ACG History' (*An Comunn Gàidhealach*) <https://www.ancomunn.co.uk/about/history> accessed 10 March 2024; Celtic Connections, 'About Celtic Connections' (*Celtic Connections*) <https://www.celticconnections.com/about-celtic-connections/> accessed 10 March 2024.

[39] Scotland's Census, 'Scotland's Census 2022 - Ethnic Group, National Identity, Language and Religion' (*Scotland's Census*, 21 May 2024) <https://www.scotlandscensus.gov.uk/2022-results/scotland-s-census-2022-ethnic-group-national-identity-language-and-religion/> accessed 22 August 2024.

[40] Scotland's Census, 'Country by Age by Gaelic Language Skills (2) by Individuals' (*Scotland's Census*, 2024) <https://www.scotlandscensus.gov.uk/webapi/jsf/tableView/tableView.xhtml> accessed 22 August 2024; Scotland's Census, '2011 Census - Gaelic Language Skills by Age' (*Scotland's Census*, 2011) <https://www.scotlandscensus.gov.uk/webapi/jsf/tableView/tableView.xhtml> accessed 22 August 2024.

[41] Scotland's Census, 'Country by Age by Gaelic Language Skills' (n 38).

[42] McLeod, 'Policy, Ideology and Discourse' (n 22) 22.

[43] ibid 24.

### 1.3 Potential Future: The Scottish Languages Bill

In 2023, the Scottish Language Bill was introduced, presenting a new opportunity for comprehensive minority language rights development. The first substantial proposition, aside from affording Gaelic official status, is strengthening the power of *Am Bòrd*, adding two further functions: monitoring and reporting to Scottish Ministers on public authorities' compliance with their Gaelic duties, and advising and assisting individuals on development matters for Gaelic language, education, and culture.[44] These functions add to the general obligation to promote and facilitate the use and understanding of Gaelic, education, culture, and advising public bodies on exercising public functions.[45] Primarily, Gaelic 'is [to be] treated with equal respect to the English language' by increasing access to learning and culture, increasing speakers, and supporting the use of Gaelic, focusing on areas of linguistic significance.[46] *Am Bòrd's* focus is altered to monitoring practice across the entire public sector, empowering it to report directly to the Scottish Parliament, thus increasing *Am Bòrd's* voice and leverage, impact and efficiency.[47]

'Areas of linguistic significance' ('ALS') constitute the second major proposition outlined in the Bill. An area may be an ALS if it possesses a Gaelic language population of at least 20 percent, or if it has Gaelic historical, educational, or cultural connections.[48] A local authority may designate all or part of its area as an ALS upon approval by Scottish Ministers, if it believes these criteria are met.[49]

Broadly, authorities hold the responsibility to consider the promotion and support of Gaelic in the exercising of all functions.[50] Authorities must also adhere to guidance issued by Ministers, ensuring compliance with any standards and requirements set forth by the government.[51] These standards include, *inter alia*, branding, signage, and resource allocation and authorities must provide information and cooperate with *Am Bòrd* when requested.[52]

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[44] SLB, s 2.
[45] s 1.
[46] GL(S)A 2005, s 1; SLB s 2(b).
[47] Explanatory Notes to the SP Bill 39 Scottish Languages Bill [as introduced] Session 6 (2023) (SLB Ex N), para 13.
[48] SLB s 4.
[49] ibid.
[50] SLB, s 7.
[51] ibid.
[52] SLB, s 9.

Section 5 of the Bill introduces Gaelic Language Strategies, replacing the present National Gaelic Language Plans, while section 9 alters the 2005 Act's sections on Gaelic Language Plans for local authorities. Ministers must formulate Strategies with due regard for the objectives of promoting, facilitating, and supporting the use of Gaelic.[53] The strategy must demonstrate how Ministers plan to prioritise objectives and specify monitoring mechanisms.[54] With periodic review, Ministers and public authorities are bound to consider strategies in policy-making, drafting legislation, and exercising their functions.[55] *Am Bòrd* is responsible for monitoring strategy compliance, alongside preparing and disseminating reports on Ministers' strategy progress.[56] Ministers also have the authority to establish Gaelic Language Standards, elaborating on the duties conferred upon public authorities under the strategy.[57] *Am Bòrd* may mandate public authorities to prepare regional Gaelic Language Plans, detailing the measures their Gaelic promotion measures.[58] The authorities must submit annual reports on implementation of their regional plans, with *Am Bòrd* monitoring their compliance and intervening when actions prove inadequate.[59]

Finally, there are amendments to the 2005 Act, the Education (Scotland) Act 1980, and the 2016 Act. The 1980 Act is modified to explicitly note the inclusion of GME and GLE within the definition of school education, expanding educational authorities' duties to include these provisions, regardless of whether they are an ALS.[60] Additionally, the 2016 Act is amended to impose a duty on education authorities to support local children in accessing GME provided by other authorities when their own provides none.[61] Ministers are duty bound to promote GME and GLE, and are empowered to issue mandatory standards and requirements on educational provisions within Language Plans with which education authorities must comply.[62] Under the 2016 Act, education authorities must publicise the right to request GME and GLE and provide necessary support, resources, and training for teachers and students.[63] The Bill extends these duties, requiring that authorities ensure the promotion of GME in early learning and childcare.[64]

[53] SLB, s 5.
[54] ibid.
[55] ibid.
[56] SLB, s 8.
[57] SLB, s 6.
[58] SLB, s 9.
[59] ibid.
[60] SLB, s 15.
[61] SLB, s 19.
[62] SLB, s 12.
[63] E(S)A 2016, s 15.
[64] SLB, s 23.

The Bill requires Ministerial support for the provision of tertiary GME and GLE, and powers to impose terms and conditions on resource offers for further education.[65]

### 1.4 Entitlement to Promotion?

Why is Gaelic entitled to promotion? Unlike other minority languages, there are no monoglots, thus access to healthcare, education, and access to justice are not concerns.[66] Donders argues that collective cultural rights, like minority language rights, directly promote and protect the cultural interests of communities, enabling them to develop, preserve, and change their cultural identity.[67] McDermott highlights that collective rights are essential to the proper functioning of equal and democratic societies, as they address the specific needs of minority communities.[68] Justifying language rights involves complex discussions of political theory, as noted by May.[69] To summarise an area of diverse debate, we can argue that language rights, as part of collective rights, are justified because they acknowledge that, 'we are all, to some extent, situated within wider communities that shape and influence who we are.'[70] Certain goods, such as language, cannot be experienced alone or promoted through solely individual rights; they are communal goods.[71] McDermott notes that the past actions of undemocratic power structures have often led to the minoritisation of particular languages.[72] Consequently, language rights may be justified as a form of reparation or redress for past inequitable processes such as colonisation and cultural imperialism.[73] Dignity is a primary consideration within human rights law, with Article 1 of the Universal Declaration of Human Rights, emphasising the equality of dignity between persons.[74] Relating this to linguistic rights, Paz posits that since language is central to

[65] SLB, s 25.
[66] Robert Dunbar, 'The ratification by the United Kingdom of the European Charter for Regional or Minority Languages' [2003] Mercator Working Papers 10 <https://web.archive.org/web/20070926100538/http://www.ciemen.org/mercator/pdf/WP10-def-ang.pdf> accessed 11 March 2024.
[67] Yvonne Donders, 'Foundations of Collective Cultural Rights in International Human Rights Law' in Andrzej Jakubowski (ed), *Cultural Rights as Collective Rights* (Brill | Nijhoff 2016) 90–94.
[68] Philip McDermott, 'Language Rights and the Council of Europe: A Failed Response to a Multilingual Continent?' (2017) 17 Ethnicities 603, 606.
[69] Stephen May, 'Language Rights: The "Cinderella" Human Right' (2011) 10 Journal of Human Rights 265, 267.
[70] ibid.
[71] ibid.
[72] McDermott (n 68) 606.
[73] ibid.
[74] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

our identity, our freedom to use our language must be seen as 'inherent in the dignity of the human person.'[75]

In the Gaelic context, one could argue that the promotion of Gaels' cultural identity is crucial for a contemporary understanding of Scottish history and societal contexts. If we are to understand why and how Scotland exists now, we must appreciate the cultural influences that inform said existence. If the individuals' advancement is a cornerstone of human rights, realising rights necessitates the advancement of communal interests such as Gaelic speaking, which form an integral part of an individual's identity and contribute to upholding their dignity. Lastly, Gaelic's tumultuous history of marginalisation suggests that Gaels are entitled to linguistic promotion, redressing past injustices.

## Chapter 2: The International Framework for Minority Language Promotion

To gauge the Bill's effectiveness in incorporating linguistic rights, we must examine relevant international legal instruments. This analysis will illustrate the extent to which Gaelic is entitled to promotion under international human rights law. Then, drawing from statutes and policies in Wales and Ireland, we can inform legislative approaches for comprehensive rights promotion.

### 2.1 Hard Law & minority languages

#### *2.1.1 Subscribed to by the United Kingdom*

The most relevant instruments are the Framework Convention for the Protection of National Minorities ('FCPNM') and the European Charter for Regional or Minority Languages ('ECRML').[76] Both documents belong to the Council of Europe's human rights framework.

Within the FCPNM, the primary provisions are Articles 5(1), 10(2), 11(3), 12 and 14. This Convention does not explicitly define a 'national minority', allowing signatories to determine the scope of the Convention's application.[77] The UK has notified the Convention's Advisory

[75] M Paz, 'The Tower of Babel: Human Rights and the Paradox of Language' (2014) 25 European Journal of International Law 473, 474.
[76] European Charter for Regional or Minority Languages (adopted 1 November 1992, entered into force 1 March 1998) ETS 148 (ECRML); Framework Convention for the protection of national minorities (adopted 1 February 1995, entered into force 1 February 1998) ETS 157 (FCPNM).
[77] Dunbar, 'Language Legislation and Policy in the UK and Ireland' (n 13) 459.

Committee that British Law does not possess a definition of 'national minority', thus, the application of the FCPNM would be determined by the definition of a racial group under the Race Relations Act 1976.[78] The UK noted that this includes persons possessing Scots, Irish and Welsh nationalities.[79] The government did not make a distinction between Gaelic and non-Gaelic speakers, but in following reports to the Advisory Committee continuous reference has been made to Gaelic speakers, implying that they are covered within the 'national minority' definition.[80]

Regarding the obligations placed upon parties surrounding acts of promotion, technical considerations concerning how certain obligations are to be acted upon appear to be left to individual States. Article 5(1) obliges parties to 'promote the conditions necessary' for minorities to 'maintain and develop their culture' and 'preserve the essential elements of their identity'.[81] There are no practical instructions on adherence, granting parties discretion in how and when these goals are achieved. Emphasis is placed upon 'areas traditionally inhabited' by relevant minorities or areas where they are 'in substantial numbers'.[82] In such areas, parties are obliged to ensure that administrative communication can be conducted in the language, topographical indicators are provided, and teaching of, or instruction in the language is available.[83] Within the area-specific provisions, there are caveats of 'a real need' and 'sufficient demand'; no definitions for these terms are provided. Article 12 requires the fostering of knowledge in culture, history, language, and religion by, *inter alia*, providing 'adequate teacher training'. Article 14 concerns the right to learn one's minority language, highlighting the need for 'adequate opportunities' for minorities to be taught in it. The Convention does not specify what constitutes 'adequate' training or opportunities. In the FCPNM's Explanatory Notes, provisions indicate that the Convention's drafters tend towards a flexible approach, allowing parties to determine their definitions.[84]

The ECRML is more specific, defining regional or minority languages as those 'traditionally used within a given territory of a State by nationals of that State who form a group numerically

[78] 'Report Submitted by The United Kingdom pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities' (ACFC/SR(1999)013, Council of Europe 26 July 1999) 4.
[79] ibid.
[80] s 3; 'Fourth Report Submitted by The United Kingdom pursuant to article 25, paragraph 2 of the Framework Convention for the Protection of National Minorities' (ACFC/SR/IV(2015)004 rev, Council of Europe 8 April 2015) 5.
[81] FCPNM art 5(1).
[82] FCPNM arts 10(2), 11(3), 14.
[83] ibid.
[84] Council of Europe, 'Explanatory Report to the Framework Convention for the Protection of National Minorities' (Council of Europe 1 February 1995).

smaller than the rest of the State's population'.[85] Under Articles 2 and 3, States are required to specify what languages they consider to fall under Article 1's definition and are thus protected under the Convention, and specify a minimum of thirty-five paragraphs or sub-paragraphs that will be applied to said language. The UK, upon ratification, specified that Gaelic fell under the definition of a regional or minority language, specifying the applicable provisions.[86] Portions of Articles 8, 10, 11, and 12, are most relevant to positive obligations which the UK has determined to apply to Gaelic. Article 8 relates to education, obliging States to provide instruction at pre-school, primary, and secondary school levels, and encouraging further education for adults. Article 10 addresses allowing and/or encouraging the use of the language within local authority business, such as debates and publications. Article 11 concerns encouraging or facilitating the regular production and publication of media in audio, video, and text format in the minority language, as well as the funding of media and the training of competent staff. Article 12 requires encouragement of modes of cultural expression and initiatives specific to the minority language and providing training or financing to ensure effective initiatives.

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions ('CPPDCE') Preamble acknowledges the innate link between linguistic diversity and cultural diversity.[87] Article 7 specifically regards promotion, requiring Parties to 'endeavour' to encourage individuals and groups to create, produce, disseminate, distribute, and have access to their cultural expressions. Articles 10 and 13 reiterate this point and require States to encourage education and awareness campaigns on the value of cultural heritage, whilst adopting sustainable development policies for the furtherance of the Convention's aims.

No articles in the European Convention on Human Rights ('ECHR') mention promotional efforts relating to cultural or linguistic rights.[88] However, Dunbar notes that *Cyprus v Turkey*, in connection with Article 2 of the First Optional Protocol, may provide a limited right to education in a minority language where children do not speak the required schooling

[85] ECRML art 1.
[86] European Charter for Regional or Minority Languages 'Reservations and Declarations for Treaty No.148' (adopted 1 November 1992, entered into force 1 March 1998) ETS 148.
[87] Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311 (CPPDCE).
[88] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS 005 (ECHR) art 14.

language.[89] This limited right would not extend to Gaelic as there are presently no monoglots.[90] The International Covenant on Civil and Political Rights ('ICCPR'), and the International Covenant on Economic, Social and Cultural Rights ('ICESCR') do not consider promotional measures.[91] Article 27 of the ICCPR references only a negative obligation for States to not interfere with the existence of linguistic communities, while the ICESCR Article 15 merely provides a general obligation upon States to recognise the right to cultural life.

The UN Convention on the Rights of the Child asserts a child's right to use their language and obliges States to direct children's education toward respect for their cultural identity, language, and values.[92] Dunbar contemplates that promoting education in children's minority languages significantly contributes to satisfying this obligation.[93] Consequently, this creates a general right to minority education, lacking specifics on the extent and routes for provision.

### *2.1.2 Not subscribed to by the United Kingdom*

Binding international instruments not subscribed to by the United Kingdom remain useful for understanding minority language rights, and policymakers may regard them, despite being unobligated. For example, the Convention on the Safeguarding of the Intangible Cultural Heritage ('CSICH') defines 'cultural heritage' as including oral traditions and expressions, including language as a vehicle for such heritage.[94] Regarding promotion, Articles 13 to 15 consider efforts related to, *inter alia*, adopting policy, creating bodies, encouraging education and awareness-raising, and ensuring community participation. Westminster has recently closed a consultation on the Convention's implementation, demonstrating the UK's intention for future ratification.[95] Incorporating relevant aspects pre-emptively into the Scottish Languages Bill may be useful.

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[89] App no 25781/94, ECHR 2001-IV; Robert Dunbar, 'Linguistic Human Rights in International Law' in Tove Skutnabb-Kangas and Robert Phillipson (eds), *The Handbook of Linguistic Human Rights* (1st edn, Wiley 2022) 29.
[90] Dunbar, 'The ratification by the United Kingdom of the ECRML' (n 64).
[91] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
[92] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC), arts 29(c), 30.
[93] Dunbar, 'Linguistic Human Rights in International Law' (n 89) 30.
[94] Convention on the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3, art 1.
[95] Department for Culture, Media and Sport, 'Consultation: 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage' (*GOV.UK*, 23 December 2023)

The Framework Convention on the Value of Cultural Heritage for Society ('CVCHS') remains unsubscribed to by the UK.[96] This Convention's Preamble highlights the value and potential posed by cultural heritage promotion for the furtherance of sustainable development and improved quality of life. Article 2 defines cultural heritage as 'a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge, and traditions'. Gaelic forms part of Scottish cultural heritage. In this case, if the UK were to ratify the Convention, obligations to promote the cultural heritage through, *inter alia*, education, policy, research, conservation efforts, and public authorities may apply to Gaelic.[97] In constructing the Bill, drafters may take account of the provisions within this Convention to enhance language promotion and anticipate potential ratification.

Other regional instruments provide reference to cultural rights which may extend to linguistic rights. It is unnecessary to consider them in detail, but acknowledging may provide further inspiration for the Bill. Arguably the most relevant instrument is the African Union's Charter for African Cultural Renaissance.[98] Part IV of the Charter relates to African languages, encouraging States to implement national language plans and requiring the introduction of African languages into educational curricula.[99] These presumably include minority languages, given that Article 4 explicitly requires respect for national and regional identities among the founding principles of the Charter. The general rationale behind Part IV is the extension of the use of African languages for cultural advancement and acceleration of their economic and social development. Whilst these provisions do not provide much detail on implementation, practice from African States' implementation could be utilised.

### *2.3 Soft Law & Minority Languages*

Perhaps the key soft law instrument to consider is the UN General Assembly's Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

<https://www.gov.uk/government/consultations/2003-unesco-convention-for-the-safeguarding-of-the-intangible-cultural-heritage> accessed 20 March 2024.

[96] Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) ETS 199.

[97] ibid arts 5, 7, 9-14.

[98] Charter for African Cultural Renaissance (adopted 24 January 2006, entered into force 16 December 2019) African Union 6th Ordinary Session of the Assembly (CACR).

[99] ibid, arts 18-19.

('UNDLM').[100] Articles 4 and 5 of the UNDLM are the most relevant to promotional rights. Article 4 encourages States to create favourable conditions, enabling minorities to express and develop their language and culture. In doing so, States are asked to provide opportunities for minorities to learn and have instruction in their native tongue, as well as endeavouring to encourage knowledge of their history, traditions, and culture. Article 5 requests that States produce and implement national policies and programmes with due regard for the legitimate minority interests. Whilst this Declaration is non-binding, it remains influential to minority rights, inspiring the FCPNM's Preamble, and referenced in regional jurisprudence.[101] A Special Rapporteur on minority issues has existed since 2005, mandated to promote the implementation of the UNDLM, further demonstrating the regard held for this non-binding Declaration as an influential guideline on minority rights.[102]

The Universal Declaration of Human Rights ('UDHR') does not mention language rights; however, Article 27 notes that entitlement realisation of cultural rights is indispensable to a person's dignity and free development of their personality.[103] This aligns with the assertions of individuals' inherent dignity under Article 1.[104] Despite being a declaration of the UN General Assembly, many commentators believe that the UDHR has reached the status of customary international law, thus further obligating States to consider upholding a person's dignity concerning their cultural rights.[105] Accepting this assertion, then Gaelic must be covered by the UDHR. Resultantly, promoting the dignity of Gaels is further cemented as an international obligation.

The Council of Europe has produced soft law documents on minority rights. Paragraph 6 of the Parliamentary Assembly's Recommendation 1383 encourages an approach to language education that focuses on teaching local minority languages if there is a demand and providing

[100] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135 (18 December 1992) UN Doc A/RES/47/135.
[101] Framework Convention for the protection of national minorities 'Explanatory Notes' (adopted 1 February 1995, entered into force 1 February 1998) ETS 157. See also, *Gorzelik and Others v Poland* ECHR 2004-I [67]; *Xákmok Kásek Indigenous Community. v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 214 (24 August 2010) [269]; African Court on Human and Peoples' Rights *African Commission on Human and Peoples' Rights v. Republic of Kenya* (2017) 56 ILM 726, 755.
[102] Heiner Bielefeldt and Michael Wiener, 'Introductory Note: Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' <https://legal.un.org/avl//ha/ga_47-135/ga_47-135.html> accessed 22 March 2024.
[103] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).
[104] ibid.
[105] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 Georgia Journal of International and Comparative Law 287, 323.

lifelong language learning.[106] The Recommendation invites member States to create regional language plans to develop language education, alongside developing school and college networks to promote language diversity.[107] It encourages States to ensure sufficient numbers of minority language teachers by creating recruitment plans and conducting studies.[108] Regarding the UK, a 2023 Committee of Ministers Resolution recommended 'immediate action' to 'intensify efforts to develop and increase the offer and support to […] Gaelic-medium education in areas traditionally inhabited by persons belonging to the Gaelic-speaking minority'.[109] It also highlighted that the UK could endeavour to promote further the socio-economic development of the *Gàidhealtachd* through a dedicated long-term plan.[110]

The Organisation for Security and Co-operation in Europe possesses several Recommendations addressing minority rights. The Hague Recommendations expand upon the educational recommendations listed above, encouraging curriculum development and routes for tertiary education.[111] The Lund Recommendations advise the promotion of participation by minorities in national, regional and local governance to ensure representation, and the creation of bodies serving as channels for dialogue between authorities and minorities.[112] Finally, the Oslo Recommendations urge States to facilitate the use of minority languages during administrative processes, the establishment of dedicated media productions, the promotion of community and non-governmental organisations, and the display of topographical indicators in regional languages.[113]

### *2.3 Comparative Jurisdictions – Illustrative Examples*

[106] Council of Europe (Parliamentary Assembly), 'Linguistic Diversification' (23 September 1998) Recommendation 1383, para 6.
[107] ibid para 8.
[108] ibid.
[109] Council of Europe (Committee of Ministers) 'Resolution on the implementation of the Framework Convention for the Protection of National Minorities by the United Kingdom' (12 July 2023) CM/ResCMN(2023)7 (CM Framework Resolution), para 5.
[110] ibid para 15.
[111] High Commissioner on National Minorities, *The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note* (Organisation for Security and Co-operation in Europe 1996) paras 4, 11–14, 17–18.
[112] High Commissioner on National Minorities, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note* (Organisation for Security and Co-operation in Europe 1999) paras 1, 6, 9, 11–13.
[113] High Commissioner on National Minorities, *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities & Explanatory Note* (Organisation for Security and Co-operation in Europe 1998) paras 3, 6–11, 13–15.

Existing minority language rights approaches in other jurisdictions may be used as comparators to assist those drafting legislation and policy within Scotland. Wales and Ireland both possess Celtic minority languages and majority English-speaking populations, providing excellent comparators to Scottish Gaelic's situation.[114]

### *2.3.1 Wales*

The 2021 UK census revealed that 17.8 percent of the Welsh population, 538,300 individuals aged three and above, reported speaking Welsh (*Cymraeg*).[115] This is the lowest recorded percentage, but not the lowest recorded number overall.[116] Nevertheless, the percentage of Welsh-speakers has been decreasing since 2001.[117] Dunbar acknowledges that Welsh legislation has already had a 'profound impact' on Scotland's approach, perhaps forming the 'prototype for a distinctively "Celtic" model of language legislation'.[118] Furthermore, as Scotland and Wales remain countries within the UK, they are covered by the same international obligations mentioned above. The only material difference is that Westminster has declared a different and larger set of obligations addressing Welsh under Articles 2 and 3 of the ECRML compared to Gaelic, choosing fifty-two paragraphs but only thirty-nine for Gaelic.[119]

The pivotal moment for Welsh language law was the Welsh Language Act 1967, which permitted the use of Welsh in courts and allowed administrative documents to be published in Welsh.[120] Twenty-years later, section 3 of the Education Reform Act 1988 made Welsh language mandatory for all children.[121] Following this, the Welsh Language Act 1993 established the Welsh Language Board (abolished in 2012), responsible for the promotion and facilitation of Welsh usage, and required that English and Welsh be treated equally.[122] The Welsh Assembly (*Senedd Cymru*) expanded and improved these requirements with the Welsh Language (Wales) Measures 2011, providing official status, establishing a Welsh Language

[114] McLeod, 'Historical and Sociolinguistic Background' (n 6) 24.
[115] Welsh Language Commissioner, '2021 Census' (*Welsh Language Commissioner*) <https://www.welshlanguagecommissioner.wales/policy-and-research/research/2021-census> accessed 22 March 2024.
[116] ibid.
[117] ibid.
[118] Dunbar, 'Language Legislation and Policy in the Uk and Ireland' (n 13) 469.
[119] European Charter for Regional or Minority Languages 'Reservations and Declarations for Treaty No.148' (adopted 1 November 1992, entered into force 1 March 1998) ETS 148.
[120] NW Barber, 'Wales' in NW Barber, *The United Kingdom Constitution* (Oxford University Press 2021) 235.
[121] ibid.
[122] Welsh Language Act 1993, ss 1, 3.

Commissioner, Partnership Council and Tribunal, and creating a series of duties and standards for public bodies.[123] Shortly afterwards, the National Assembly for Wales (Official Languages) Act 2012 designated Welsh as one of the Assembly's procedural languages.[124] *Senedd Cymru* conducted a consultation in 2023 for a Welsh Language Education Bill which would take further steps to encourage students' confidence in Welsh, reflecting the target of having one million Welsh speakers by 2050.[125]

The Welsh Language Commissioner's role is pivotal, having a primary responsibility to increase the provision of Welsh language services and other opportunities, through monitoring and recommendations.[126] The Commissioner's office states that its vision is to have 'a Wales where people can live their life in Welsh'.[127] Commissioners possess investigative and enforcement powers for breach of standards, and must create quinquennial reports on the status of Welsh to present to the *Senedd* alongside annual reports on all activity relating to her functions.[128] Bodies and persons are liable to comply with any Welsh language standards imposed upon them but have the right to challenge such impositions and any other acts of the Commissioner through the Welsh Language Tribunal.[129] Ministers must create regulations on standards for Welsh in the areas of service which the Commissioner is responsible for enforcing.[130] There are six approved standard regulations.[131]

Section 149 of the 2011 Welsh Measures also established the Welsh Language Partnership Council which is empowered to advise or make representations to Ministers on their Welsh language strategies. These strategies are written by Ministers, detailing how they propose to promote and facilitate the use of the Welsh language.[132] In the 2023-24 year, the language strategy focuses on three overarching themes: increasing the number of Welsh speakers,

[123] Welsh Language (Wales) Measure 2011 (nawm 1) (WL(W)M 2011), s 1, pts 2, 4, 7.
[124] National Assembly for Wales (Official Languages) Act 2012 (anaw 1), s 1.
[125] GOV.WALES, 'Welsh Language Education: White Paper' (*GOV.WALES*, 16 June 2023) <https://www.gov.wales/welsh-language-education-white-paper> accessed 23 March 2024.
[126] Welsh Language Commissioner, 'Our Strategic Objectives and Vision' (*Welsh Language Commissioner*) <https://www.welshlanguagecommissioner.wales/about-us/our-strategic-objectives-and-vision> accessed 23 March 2024.
[127] ibid.
[128] WL(W)M 2011, pt 2.
[129] ibid s 58.
[130] WL(W)M 2011, ss 25-32.
[131] Welsh Language Commissioner, 'The Imposition Process' (*Welsh Language Commissioner*) <https://www.welshlanguagecommissioner.wales/public-organisations/welsh-language-standards/the-imposition-process> accessed 23 March 2024.
[132] Government of Wales Act 2006, s 78.

increasing the use of Welsh, and creating favourable conditions.[133] Within these broader themes are focus areas which include, *inter alia*, intergenerational transmission, education at all levels, workplace and social use of Welsh, culture and media, linguistic infrastructure, community, and the economy.[134] This decade-long plan encompasses and considers all areas of Welsh public and private life, providing a comprehensive strategy for language promotion that reaches beyond educational policy and basic rights promotion. Such an all-encompassing ambitious strategy is noticeably missing in Scotland.

### *2.3.2 The Republic of Ireland*

The Republic of Ireland ('Ireland') also shares similar historical experiences and linguistic characteristics with Scottish Gaelic in terms of its minority language, Irish (*Gaeilge*).[135] There are differences between the nations; Ireland is an independent State within the European Union, whilst Scotland remains a devolved nation within the post-Brexit UK. Regarding international obligations, Ireland and the UK are bound by the same Treaties, with two exceptions: unlike the UK, Ireland has ratified the CSICH, but it has not ratified the ECRML, determining that recognising Irish as a 'regional or minority language' would be inconsistent with the Irish Constitution of 1937, which stipulates that Irish is the first official language of the State.[136] Despite this, Irish arguably remains a minority language in terms of its usage, with the UNESCO World Atlas of Languages classifying it as 'definitely endangered'.[137] In the 2022 census, Irish was spoken by nearly 37 percent of the population, however 55 percent of speakers reported that they could not speak the language well.[138] Encouragingly, there is a 6 percent increase in speakers since Ireland's 2016 census, and its 1.9 million speakers soars above Gaelic's approximate 57,000.[139] There are 258 Irish-medium ('IM') primary schools, 76

[133] Welsh Government, 'Cymraeg 2050: Welsh Language Strategy Action Plan 2023 to 2024' (Welsh Government 2023).
[134] ibid 5.
[135] Constitution of Ireland (enacted 1 July 1937, in operation since 29 December 1937), art 8(1); Dunbar, 'Language Legislation and Policy in the UK and Ireland' (n 13) 455.
[136] ibid 462.
[137] UNESCO, 'Irish' (*UNESCO World Atlas of Languages*) <https://en.wal.unesco.org/languages/irish> accessed 24 March 2024.
[138] Central Statistics Office, 'Press Statement Census 2022 Results Profile 8 - The Irish Language and Education' (*Central Statistics Office*, 19 December 2023) <https://www.cso.ie/en/csolatestnews/pressreleases/2023pressreleases/pressstatementcensus2022resultsprofile8-theirishlanguageandeducation/> accessed 24 March 2024.
[139] ibid; Scotland's Census (n 3).

post-primary schools, while 4 percent of students engage in post-primary IM education.[140] The Irish language is compulsory in all state schools.[141]

The key statutory features relating to Irish include the Official Languages Act 2003, the Official Languages (Amendment) Act 2021, the *Údarás na Gaeltachta* Act 1979, and the *Gaeltacht* Act 2012, alongside the aforementioned Irish Constitution, which requires that all legislation must be written and signed by the President in both Irish and English.[142] The Official Languages Act 2003 aims to improve provision of public services through Irish, while the 2021 Act endeavours to strengthen its predecessor.[143] The 2003 Act establishes an office, '*Oifig Choimisinéir na dTeangacha Oifigiúla'*, with an office-holder entitled, '*An Coimisinéir Teanga'* ('the Commissioner').[144] The Commissioner's functions are similar to that of Wales; monitoring compliance, conducting investigations, proffering advice, and providing an annual report on Irish's status.[145] Alongside the Commissioner's role, the 2003 Act grants individuals the right to choose which official language to speak before the House of the *Oireachtas* and the Courts, and the right of communication in their preferred language by public bodies which 'have a duty to ensure that their stationery, signage and recorded oral announcements are provided in Irish only, or in English and Irish'.[146] Under the 2003 Act, a Minister may request any public body to prepare a language scheme detailing the services they provide and through which language, with the goal of increasing the volume and standard of IM services.[147] The 2021 Act, increases such obligations, requiring all public services in the designated '*Gaeltacht*' area to be provided in Irish, all public offices in this area to be operated through IM and requiring a National Plan for Irish Language Public Service to be developed.[148] Additionally, the 2021 Act requires 20 percent of all public sector recruits to be competent in Irish by 2031.[149]

[140] Gaeloideachas, 'Statistics' (*Gaeloideachas*) <https://gaeloideachas.ie/i-am-a-researcher/statistics//> accessed 24 March 2024.
[141] Helen Ó Murchú, *The Irish Language in Education in the Republic of Ireland* (2nd edn, Mercator European Research Centre on Multilingualism and Language Learning 2016) 32.
[142] Constitution of Ireland, arts 8, 25; Údarás na Gaeltachta Act 1979 (Irl) (UGA 1979); Official Languages Act 2003 (Irl) (OLA 2003); Gaeltacht Act 2012 (Irl) (GAA 2012); Official Languages (Amendment) Act 2021 (Irl) (OL(A)A 2021).
[143] OLA 2003, preamble; OL(A)A 2021, preamble.
[144] OLA 2003, s 20.
[145] ibid s 21.
[146] ibid ss 5-9.
[147] ibid ss 11-18.
[148] OL(A)A 2021, ss 18C, 18E.
[149] ibid.

The *Gaeltacht* Act 2012 concerns the implementation of *Gaeltacht* Language Planning Areas, Service Towns, and Irish Language Networks.[150] A *Gaeltacht* area is an area with a substantially Irish-speaking population that is determined to be a focus area for Irish preservation and extending language use.[151] The Act also amends the functions of *Údarás na Gaeltachta* ('*An tÚdarás*'), the regional authority responsible for the economic, social and cultural development of the *Gaeltacht*.[152] In the *Údarás na Gaeltachta* Act 1979, *An tÚdarás* functions are noted as, 'preservation and extension of the use of the Irish language as the principal medium of communication in the *Gaeltacht'*.[153] *An tÚdarás* must promote the 'linguistic, cultural, social, physical and economic development of the *Gaeltacht*'.[154] Concurrently, *Gaeltacht* areas are designated as Language Planning Areas, within which exist *Gaeltacht* Service Towns; both are responsible for creating and implementing language plans.[155] The goal of said plans is to strengthen Irish as a community and family language through tailored objectives for, *inter alia*, families, young people, education, and businesses.[156] Irish Language Networks are for Irish communities outwith the *Gaeltacht,* who can apply to implement their own language plans.[157]

*Foras na Gaeilge* ('*Foras*') is the body responsible for Irish language monitoring and promotion in both the Republic and Northern Ireland.[158] Its functions include undertaking projects and research, administering grants, developing technology, advising public and private bodies, and supporting IM education.[159] *Foras* is responsible for monitoring Irish Language Networks and, alongside research and advice services, focuses primarily on funding initiatives such as Irish media, arts, and community projects.[160] Interestingly, *Foras* has a partnership programme with Scotland's *Am Bòrd*, *Colmcille*, which promotes the use of Irish and Gaelic in and between the two countries, and encourages debate on common social, cultural and economic concerns, aiming to build self-confidence within language communities.[161]

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[150] GAA 2012, s 6.
[151] Ministers and Secretaries (Amendment) Act 1956 (Irl), s 2.
[152] UGA 1979, pt 2.
[153] UGA 1979, s 8.
[154] GAA 2012, s 17.
[155] ibid.
[156] GAA 2012, ss. 8-9.
[157] GAA 2012, s 11.
[158] Foras na Gaeilge, 'Our Role Supporting You' (*Foras Na Gaeilge*) <https://www.forasnagaeilge.ie/about-foras-na-gaeilge/our-role-supporting-you/?lang=en> accessed 24 March 2024.
[159] ibid.
[160] ibid.
[161] ibid.

In comparison to Gaelic, Irish language policy and education is significantly more developed. The Irish-speaking population is significantly larger, enabling advocacy efforts to gain more traction than in the Scottish context. Nevertheless, the Bill may take inspiration from Ireland's approach.

## Chapter 3: Approaching the Scottish Languages Bill

The preceding chapters have provided a comprehensive overview of the legislative and policy landscapes governing linguistic rights on both international and regional scales, alongside an overview of two comparable jurisdictions. Here, we will scrutinise the Scottish Languages Bill in its current form, assessing its alignment with the UK's obligations and recommendations concerning Gaelic linguistic rights. Drawing inspiration from Irish and Welsh approaches, we will suggest recommendations for enhancing the Bill's future revisions.

### 3.1 Domestic law and the international framework

#### *3.1.1 Existing propositions*

We shall first consider the international obligations already covered in the Bill. Looking at the overarching sentiments behind the Bill's provisions, which regularly mention the obligations to promote Gaelic language, education, and culture, particularly through language strategies, standards, and plans, we can aver that the broad obligation to promote maintenance and cultural development and preserve the essential elements of a minority's identity are indeed considered, thus satisfying the commitments under FCPNM Article 5(1), as well as being consistent with advised measures under CPPDCE Article 6, and the sentiments of the ECRML's Preamble and the UNDLM's Article 4.

The FCPNM's provisions relating to specific measures for areas that are inhabited or traditionally inhabited by a minority are also accounted for to an extent.[162] There are no explicit sections in the Bill requiring public authorities to provide services in Gaelic 'in relations between those persons and administrative authorities'.[163] However, in implementing the proposed language strategies, plans, and standards, particularly for the designated ALS may

[162] FCPNM, arts 10(2), 14(2).
[163] ibid art 10(2).

potentially include the provision of services and communications in Gaelic for relations with speakers.[164] This conforms with the obligations to 'allow and/or encourage' communications in the minority language under ECRML Article 10(2). In relation to other area-specific requirements under the FCPNM, Article 11(3) requires that topographical indicators be displayed in both the minority and majority languages in areas where the minority population resides. Although the Bill does not provide any provisions on this, previous Gaelic advocacy efforts have resulted in The Traffic Signs Regulations and General Directions 2016, permitting bilingual signage on trunk roads, thus satisfying the requirement.[165]

Much of the Bill comprises provisions relating to GME and GLE, proposing amendments to the 2016 Act. The duty imposed on educational authorities to support GME and GLE regardless of their area's population demographic, alongside a duty to support children in accessing GME elsewhere when not provided locally, contributes considerably to the obligations provided under FCPNM Article 14, ECRML Article 8, and Article 29 of the UN Convention on the Rights of the Child.[166] The extension of duties to cover pre-school GME promotion and accommodation, and the requirement for Ministers to promote, fund, and facilitate tertiary GME education, demonstrates further adherence to ECRML Article 8.[167] Ministers being bound to promote GME and GLE, coupled with being empowered to issue mandatory standards and requirements on educational provision within Gaelic language plans improves adherence to these international standards.[168] These additions build upon sections within the 2005 Act and the 2016 Act, providing more robust support for GME and GLE that undoubtedly strengthens the adherence to international obligations.

The Bill does not address media considerations which the Broadcasting Acts of 1990 and 1996, and the Communications Act 2003, already provide for.[169] The Scottish Government provides considerable funding to MG Alba to produce and disseminate Gaelic productions in various forms; in 2021, the Scottish Government provided £12,980,000.[170] This fulfils the requirements under FCPNM Article 9, ECRML Article 11 and CPPDCE Article 6, which all require the facilitation and promotion of media productions and publications in minority languages. Thus,

[164] SLB, s 4.
[165] SI 2016/362, sch 11, pt 5.
[166] SLB ss 15, 19. See also UNDLM art 4; CM Framework Resolution paras 5, 15; CACR arts 18, 19.
[167] SLB ss 23, 25.
[168] SLB s 12.
[169] Broadcasting Act 1990, ss 183-184, sch 19; Broadcasting Act 1996, ss 32, 95; Communications Act 2003, ss 208-210.
[170] MG Alba, 'Annual Report and Statement of Accounts' (MG Alba 2020) 60.

provided that funding and promotion of Gaelic media continues, this is not an area with which the Bill need be concerned.

The Bill contains limited references to the promotion of cultural activities and facilities; requirements existing in many international instruments including, *inter alia*, ECRML Article 12, FCPNM Article 5, and CPPDCE Article 6 and 7.[171] The Bill mentions cultural promotion in various sections, with responsibilities placed on Ministers, public authorities, and *Am Bòrd*.[172] Moreover, the inclusion of ALS that would be subject to enhanced Gaelic promotion efforts, and the creation of language strategies, standards, and plans may present opportunities for development on what is meant by cultural promotion and facilitation, alongside detailing routes for increasing community participation.[173] However, the Bill does not provide specifics on how and where promotional efforts should be focused.

The final obligation the Bill comprehensively addresses is Language Plans and Policies; requirements stipulated in the binding CPPDCE Articles 5 and 13, as well as in the influential UNDLM Article 5, CVCHS Article 5, CSICH Article 13, and the African Cultural Renaissance Charter, Part IV. Sections 5, 6 and 9 of the Bill outline a comprehensive policy framework of national and regional strategies, plans, and standards to be implemented. The requirements for policies within the international framework do not elaborate on what they should consist of or the form they should take, providing a wide margin-of-appreciation for States to tailor language policies to their specific contexts. Thus, due to sparse guidance, the policy framework provided in the Bill most definitely conforms with international obligations and recommendations.

### *3.1.2 Further recommendations*

We now examine the current draft's deficiencies in realising its international obligations, positing recommendations for future drafts' more faithful adherence.

Although the ALS definitely provide closer adherence to Article 10(2) of the ECRML and FCPNM, there is room to expand on the accommodations provided in ALS in relations between Gaels and administrative authorities. The Bill does not provide explicit rights for Gaels, within or without ALS, to communicate with public bodies in Gaelic. Gaels are not among the

[171] See also, CVCHS art 5; UNDLM art 4; CSICH arts 13-15.
[172] SLB ss 6-9.
[173] SLB ss 4-6.

minorities who absolutely require communication in their language as all speak English.[174] Arguably, the rationale behind such obligations is not just to provide adequate access to justice and facilities, but also to promote the general use of minority languages. McLeod notes that even in circumstances where Gaels could use Gaelic, they tend to default to English.[175] This underlines the perception that Gaelic is for the home, not the language of social utility.[176] Baker highlights, 'Providing administrative services in a minority language serves to give status to that language. It also increases the usefulness of that minority language for communication.'[177] If the utility of Gaelic is increased through, *inter alia*, enabling its use in administrative settings, this may bolster people's motivation to speak Gaelic. Dunbar highlights that obligations under the Conventions only require that States 'endeavour' to support administrative accommodations, taking into account the financial and procedural constraints that might hinder comprehensive provisions.[178] Nevertheless, lack of reference to administrative communication is a noticeable omission, especially since this has been a source of criticism of the 2005 Act.[179] Resource constraints may mean an overarching accommodation is not yet possible, but a limited right to Gaelic-medium administrative communications, focused on ALS, will more appropriately conform to international guidance, and increase Gaelic's utility.

This leads us to a further criticism of the Bill; it does not sufficiently provide for Gaelic participation in economic processes, as required under FCPNM Article 15 and UNDLM Article 4. The 2023 Committee of Ministers' Resolution on the UK's implementation of the FCPNM also noted that further promotion of the socio-economic development of the *Gàidhealtachd* was needed.[180] Baker states,

> *Economic prescriptions are needed to provide a strong rationale for intergenerational transmission. Integrative motives and cultural sentiment may not be enough to persuade* [individuals] *to use the minority language. The*

[174] Dunbar, 'The ratification by the United Kingdom of the ECRML' (n 64).
[175] McLeod, 'Policy, Ideology and Discourse' (n 22) 26.
[176] Withers (n 11) 153.
[177] Colin Baker, 'Endangered Languages: Planning and Revitalization', *Foundations of bilingual education and bilingualism*, vol 79 (5th edn, Channel View Publications 2011) 74.
[178] Robert Dunbar, 'Minority Language Rights in International Law' (2001) 50 International and Comparative Law Quarterly 90, 113–114.
[179] Alessia Vacca, 'Protection of Minority Languages in the UK', *Rights to Use Minority Languages in the Public Administration and Public Institutions: Italy, Spain and the UK* (G Giappichelli 2017) 274.
[180] CM Framework Resolution paras 15.

> *economic base of the language community can be a vital safeguard to the maintenance of a threatened language*.[181]

In both the explanatory notes and policy memorandum for the Bill, there is sparse reference to economic development, demonstrating an oversight on the part of its drafters.[182] Revisiting utility, the failure to account for economic development leaves a marked gap in Gaelic promotion, as increasing its use in economic activity provides motivation to continue transmission. Baker notes a common sentiment, 'no local economy, no community; no community, no language'.[183]

The Bill also fails to address the promotion of cultural activities and facilities, as elaborated in ECRML Article 12, FCPNM Article 5, CPPDCE Article 7, and UNDLM Article 4. The ECRML notes that, *inter alia*, 'libraries, video libraries, cultural centres, museums, archives, academies, theatres and cinemas, [and] literary work and film production' form just some of the facilities and features that fall under this obligation.[184] Under the 2005 Act, Gaelic culture includes, 'traditions, ideas, customs, heritage and identity of those who speak or understand the Gaelic language'.[185] In section 7 of the Bill, public authorities have a duty to develop and encourage Gaelic culture, but this is not elaborated upon. Language strategies and plans may improve on this, nevertheless, obligations to promote Gaelic cultural activities and facilities could be strengthened. Similarly, obligations under FCPNM Article 15, ECRML Article 12, and CPPDCE Article 11, require States to encourage community participation in said cultural activities and facilities. The Bill is distinctly lacking in reference to community involvement, a factor that Baker has linked to not only cultural, but economic development.[186] *Am Bòrd* has authority to promote Gaelic culture, but references to encouraging participation are non-existent.[187] There is no reference to major Gaelic cultural bodies like *An Comunn* and *Fèisean*, with which *Am Bòrd* undoubtedly interacts. We could leave the promotion of culture and community participation to the proceeding policy, but failing to provide sufficient obligational references to them leaves open the potential for Ministers and authorities to overlook a key element in language revitalisation.

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[181] Baker (n 180) 79.
[182] SLB Ex N (n 45); Policy Memorandum for the SP Bill 39 Scottish Languages Bill [as introduced] Session 6 (2023) (Policy Memorandum).
[183] Baker (n 180) 69.
[184] art 12.
[185] s 10.
[186] Baker (n 180) 69.
[187] GL(S)A 2005, s 1.

In fairness to the Bill's drafters, the non-specificity of what is meant by cultural promotion is a criticism levied at the conventions themselves, with Parry criticising the FCPNM for being 'weak on detail and [specifying] few practical measures in the interests of linguistic minorities.[188] Regardless, this does not mean that the Bill cannot do more to oblige Ministers and authorities to promote culture and community participation. Language revitalisation necessitates Gaelic community institutions, where relationships are formed, and interpersonal networks are made.[189]

Cultural education is also unexplored, despite being an obligation under Article 8(1)(g) of the ECRML. In a report to *Am Bòrd* in 2021, 69 percent of respondents viewed Gaelic as not very important or unimportant to their personal cultural heritage.[190] This demonstrates a lack of cognitive connection between the abstract idea of protecting cultural heritage, and the practical benefits to promoting it in one's own life. As Islamoglu notes, conservation and education in cultural heritage is necessary as a means of strengthening inter-societal relationships, influencing respect for the environment in which one lives.[191] Thus, educating all ages on Gaelic history and culture will emphasise the historical importance of Gaelic to modern Scotland. Moreover, this may encourage participation in speaking and cultural activities. This demonstrates why failing to include provisions requiring cultural education limits the Bill's potential. Whilst attitudes have significantly improved toward Gaelic, as demonstrated by the 2021 Scottish Social Attitudes Survey, fostering cultural education may continue this upward trend.[192]

### 3.2 Inspiration from Comparative Jurisdictions

We shall consider the elements of the Bill that may already be inspired by language legislation and policy in Wales and Ireland, alongside further recommendations. Wales has provided inspiration for a considerable time, with McLeod noting that much of Scotland's existing Gaelic framework is an '[adaptation] of existing policy or provision for Wales, albeit smaller

[188] Gwynedd Parry, 'History, Human Rights and Multilingual Citizenship: Conceptualising the European Charter for Regional or Minority Languages' (2020) 61 Northern Ireland Legal Quarterly 329, 332.
[189] Baker (n 180) 78.
[190] Lucy Dean and others, 'Scottish Social Attitudes Survey 2021: Public Attitudes to Gaelic in Scotland – Main Report' (ScotCen Social Research 2023) 39.
[191] Özge Islamoglu, 'The Importance of Cultural Heritage Education in Early Ages' (2018) 22 International Journal of Educational Sciences 19, 19.
[192] Dean and others (n 193) 39.

in scale or more modest in scope'.[193] This is also true for Ireland, with both countries significantly influencing the 2005 Act.[194] This is unsurprising considering the success of Welsh and Irish language policy in increasing the number of speakers and rejuvenating cultural features.

Language plans and regionally specific provisions are elements that have inspired the Bill. In its consultation analysis, continuous reference to the Irish *Gaeltacht* and regionally specific Welsh policy was made by consultees, and in the Policy Memorandum the influence of their was acknowledged.[195] Consultees referenced the two countries when suggesting that Gaelic be granted status as an official language.[196] The principle that Gaelic and English must be accorded equal respect in the exercising of *Am Bòrd*'s functions may also be inspired by similar Welsh and Irish legislation.[197]

In Wales and Ireland we see an explicit designation of the minority language as a usable language in proceedings before the legislature and executive.[198] There are translators for Ministers who are unfamiliar with the languages.[199] If Gaelic is designated as an official language of Scotland, it seems rational to introduce it as one of the procedural languages of Parliament. Already, Ministers have spoken Gaelic in Parliament, and its website encourages Gaelic interaction by individuals.[200] Furthermore, the National Language Plan for 2023 to 2028 aims to improve translation services and increase staff's knowledge and awareness of Gaelic.[201] However, the most recent Standing Orders of the Scottish Parliament still require the Presiding-Officer's consent for speeches in Gaelic.[202] Requiring consent, coupled with no firm legislation, relegates Gaelic to a secondary consideration in Parliament. Introducing an explicit provision in the Bill allowing Gaelic to be spoken before Parliament, as in Wales and Ireland,

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[193] McLeod, 'The Influence of Wales on Gaelic Development Policy in Scotland' (n 118) 345.
[194] Dunbar, 'Language Legislation and Policy in the Uk and Ireland' (n 13) 478.
[195] Policy Memorandum (n 180) para 32; The Scottish Government, 'Analysis of Consultation Responses for the Gaelic and Scots Commitments Relative to the Scottish Languages Bill' (The Scottish Government 2023) para 34.
[196] Policy Memorandum (n 180) para 38.
[197] SLB, s 2; Welsh Language Act 1993, s 5; Constitution of Ireland, arts 8, 25.
[198] OLA 2003, ss 5-9; National Assembly for Wales (Official Languages) Act 2012 (anaw 1), s 1.
[199] Senedd Commission, 'Our People' (*Senedd Cymru*) <https://senedd.wales/commission/work-for-the-senedd-commission/our-people/> accessed 30 March 2024; Houses of the Oireachtas, 'Irish in the Oireachtas' (*Houses of the Oireachtas*, 9 May 2023) <https://www.oireachtas.ie/en/how-parliament-is-run/houses-of-the-oireachtas-service/rannog-an-aistriuchain/irish-in-the-oireachtas> accessed 30 March 2024.
[200] BBC, 'Scottish Parliament Oaths in Gaelic, Urdu and Sign Language' *BBC* (13 May 2021) <https://www.bbc.com/news/av/uk-scotland-57106868> accessed 30 March 2024; The Scottish Parliament, 'Gaelic' (*The Scottish Parliament*) <https://www.parliament.scot/get-involved/gaelic> accessed 30 March 2024.
[201] Scottish Parliamentary Corporate Body, 'Gaelic Language Plan 2023-2028' (The Scottish Parliament 2023) 24.
[202] Standing Orders of The Scottish Parliament (6th edn, 9th rev, 22 December 2023) rule 7.1.

emphasises Gaelic's status as an official language. Such provisions must take into account the availability of translators, but if achievable, this may contribute to affirming the utility of Gaelic. If similar extensions are made for use of Gaelic in courts and in official publications, this could further cement Gaelic as a language of utility.[203]

Welsh and Irish legislation also require children to be taught the language.[204] This undoubtedly contributes to the number of speakers. If Scotland were to do the same, this could significantly increase the number of Gaelic speakers. Alongside Gaelic cultural education, this could encourage appreciation for the language, stretching beyond formal schooling. Given teacher shortages, this could be established as a future legislative goal.[205] This requirement could be for ALS only.

It should also be noted that the Bill's drafters did consider introducing a language Commissioner, similar in function to those in Wales and Ireland.[206] Scottish Ministers chose not to include such a position, assessing that *Am Bòrd* would be made redundant.[207] Additionally, in Gaelic's current state, restructuring was not considered an advisable step.[208] This seems an oversight as a responsible person for Gaelic does not necessitate *Am Bòrd's* cessation. Since Scotland does not possess a Gaelic or languages minister, responsibilities fall upon the much wider portfolio of the education Minister.[209] If Gaelic is to receive appropriate attention in Parliament and to ensure Ministers comply with their duties on Gaelic, it can be argued that a responsible person should monitor compliance and promotion in collaboration with *Am Bòrd*. An explicit ministerial role for Gaelic seems advisable for ensuring overarching aims of Gaelic revitalisation.

## Conclusion

The Scottish Language Bill undoubtedly improves the landscape for Gaelic revival. Designating Gaelic as an official language, enhancing *Am Bòrd*'s functions, elaborating

[203] Welsh Language Act 1967, s 1; OLA 2003, ss 5-9.
[204] Education Reform Act 1988, s 3; Rules for National Schools 1965 (Irl), rule 70(3).
[205] BBC, 'Warning of Crisis in Gaelic Teacher Recruitment' *BBC News* (4 October 2022) <https://www.bbc.com/news/uk-scotland-highlands-islands-63130655> accessed 30 March 2024.
[206] Policy Memorandum (n 180) para 32.
[207] ibid.
[208] ibid.
[209] The Scottish Government, 'Cabinet Secretary for Education and Skills' (*The Scottish Government*) <http://www.gov.scot/about/who-runs-government/cabinet-and-ministers/cabinet-secretary-education-skills/> accessed 30 March 2024.

ministerial responsibilities, and increasing educational support, present laudable steps towards improving Gaelic's vitality. ALS, inspired by Ireland's *Gaeltacht,* presents new opportunities for revitalised efforts in Gaelic's heartland. The Bill and previous legislation incorporate international obligations on linguistic and cultural rights into Scots Law to a considerable extent, with the broad obligation to promote, maintain and develop culture and preserve the essential elements of a minority's identity undoubtedly being met. Improved education provisions, legislating different levels of language planning and accounting for regionally specific accommodations, all contribute to meeting international standards. Welsh and Irish influence on the Bill, demonstrates efforts made to incorporate promotional standards from other successful jurisdictions in Gaelic revival efforts.

However, to account for linguistic rights obligations and further inspiration from comparative countries to the fullest extent, more can be done. In future drafts, ministers could focus more on economic and social utility, incorporating a more holistic approach to Gaelic revitalisation that considers the necessity of cultural education and economic development in encouraging Gaelic. As Baker notes, 'the attitudes of individuals towards a particular minority language may affect language maintenance, language restoration, downward language shift or language death in society'.[210] Reflection on such elements for upcoming drafts, may ensure a future for Gaelic, where people can live their lives in Gaelic.

The promotion of Gaelic language and culture emerges as an indispensable component in the broader narrative of Scottish history and societal contexts. By embracing and supporting Gaelic language and culture through prioritising social and economic development, we ensure the individual identity and dignity is respected. In considering the aforementioned recommendations, the Bill may realise the resurrection, revitalisation, and resurgence of Gaelic.

[210] Colin Baker, 'Bilingualism: Definitions and Distinctions', *Foundations of bilingual education and bilingualism*, vol 79 (5th edn, Channel View Publications 2011) 15.

# Expanding the evidential value of distress evidence in sexual offences in Scotland[1]

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## Introduction

The Sexual Offences (Scotland) Act 2009 abolished the common law offence of rape.[3] The crime of rape is now defined as being committed where a person intentionally or recklessly penetrates another person's vagina, anus or mouth where that other person does not consent, and the accused did not have a reasonable belief that the other person was consenting.[4] It is submitted that the significance of the change in the definition of rape is that the offence is now largely gender neutral in regards to victims.[5] The maximum penalty for rape is life imprisonment, however, the penalties imposed in practice are far lower.[6]

According to the World Health Organisation, 1 in 3 women worldwide have been victims of physical and/or sexual violence.[7] The vast majority of rapes and other sexual offences are committed by a person known to the victim, with only 8.06% of rapes reported to Rape Crisis Scotland being committed by a stranger.[8] 37.58% of rapes take place in the victim's home, and 72.08% of victims suffer additional psychological injury.[9] The psychological trauma can manifest as depression (54.81% of victims), anxiety (79.76%), panic attacks (36.98%), lack of confidence (43.04%), negative self-image (36.47%), and suicidal thoughts (34.43%).[10]

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[1] [DOI]: https://doi.org/10.20933/100001340
[2] LLB (University of Aberdeen).
[3] Sexual Offences (Scotland) Act 2009 (asp 9), s 52.
[4] ibid s 1.
[5] See Graeme Brown, *Sentencing Rape: A Comparative Analysis* (Bloomsbury Publishing 2020) 104-106.
[6] Sexual Offences (Scotland) Act 2009 (asp 9), sch 2; Brown (n 3) [footnote cross-references are no longer correct-which is why each article must start the footnoting from 1] ch 4; for sentencing rape in practice see *HM Advocate v MG* [2023] HCJAC 3, 2023 JC 68.
[7] World Health Organisation, 'Violence against women' (March 2021) <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> accessed 20 March 2024.
[8] Rape Crisis Scotland, 'Annual Report (2021-2022)', <https://www.rapecrisisscotland.org.uk/resources/1678786569_RCS-Annual-report-2021-2022.pdf> accessed 15 March 2024, 30.
[9] ibid 31, 33.
[10] ibid 34.

The seriousness of rape is reflected in the fact that rape trials are always heard in the High Court.[11] Rape violates the autonomy of the victim, and the trauma incurred lasts for years afterwards, if not the victim's whole life.[12] As Liz Kelly observes:

> *'Unlike other forms of assault, rape violates personal, intimate and psychological boundaries – what in human rights language is designated human dignity and bodily integrity, and in feminist and critical theory is termed sexual autonomy or sexual sovereignty. The meaning of rape for women, within gender and generational relations and cultural contexts, underlies its emotional, psychological and social impacts and consequences'*.[13]

The purpose of this article is to analyse how the recent case of *Lord Advocate's Reference (No 1 of 2023)* changes the law of evidence in Scotland with regard to sexual offences. As a result of this judgement, distress evidence can corroborate the acts libelled, i.e., penetration when the charge is rape. However, it is arguable whether this change in the law can, in and of itself, have a practical effect on the prosecution of rape. Chapter 1 will provide an overview of the key case law on the treatment of distress evidence in sexual offences. Chapter 2 will then discuss the *Reference* in more detail, as well as its potential consequences for the requirement of corroboration and the potential for a rise in wrongful convictions. It is argued that this change in the law in expanding the role of distress evidence does not threaten the requirement of corroboration, and that it will not result in a rise in wrongful convictions. This is due to the prevalence of rape myths in the jury decision-making process in that lay participation in rape trials and jurors' belief in rape myths prevent the accused from being wrongfully convicted. Finally, chapter 3 addresses potential areas for further reform so that the changes in law introduced by the *Reference* have a practical effect on the prosecution of rape. Some changes have already been posited, such as including specific jury directions addressing rape myths and using expert witnesses to educate jurors. These amendments will be scrutinised, concluding

[11] Crown Office & Procurator Fiscal Service, 'Scotland's criminal justice system' (July 2023) <https://www.copfs.gov.uk/the-justice-process/scotland-s-criminal-justice-system/#where-cases-take-place> accessed 20 March 2024.

[12] Government Equalities Office and Home Office, 'The Stern Review: A report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales' (2010) <https://www.womensaid.org.uk/wp-content/uploads/2016/01/Stern_Review_of_Rape_Reporting_1FINAL.pdf> accessed 20 March 2024, 28; for a more detailed discussion see Brown (n 3) ch 2.

[13] Liz Kelly, 'Contradictions and Paradoxes: International Patterns of, and Responses to, Reported Rape Cases' in Letherby, G, Williams, K, Birch, P and Cain, M (eds), *Sex as Crime?* (Cullompton, Willan 2008), cited in Brown (n 3) 27.

that they are insufficient to ensure the adequate operation of changes in the law of evidence. Ultimately, this article concludes that while changes in the law regarding sexual offences are welcomed, their effective operation is hindered by false societal beliefs about rape. Allowing distress evidence to corroborate penetration settles the debate about what weight should be attributed to this kind of evidence in court. However, the intention of the judgement in the *Reference*, that is, achieving justice for complainers, cannot be realised in practice due to the prevalence of rape myths among jurors.

It should be noted that the reasons for changing the law in respect of sexual offences provided in this article are not centred around increasing conviction rates. Rather, the rationale is effectively achieving justice for victims of rape and other sexual offences. It is recognised that all people can be victims of sexual assault, however the focus in this article is on female complainers due to the fact that women are disproportionately affected by sexual violence, making up 86.44% of rape victims for 2021-22.[14]

**1. The role of distress evidence in sexual offences**

Before the redefinition of rape, the *facta probanda* of rape included the following elements: 1) penetration of the vagina, 2) by the penis, 3) forcibly and 4) without consent.[15] As a result of the *Lord Advocate's Reference (No 1 of 2001)*, the offence of rape was re-defined as sexual intercourse with a woman without her consent.[16] The change was later reflected in the Sexual Offences (Scotland) Act 2009, where section 1 now includes penetration of the vagina, anus or mouth.[17] The requirement of use of force is no longer part of the offence of rape, and victims can be either male and female.[18] This chapter will provide an overview of the relevant case law and the evolution of the treatment of distress evidence in relation to sexual offences. The effectiveness and challenges of the law pre-*Lord Advocate's Reference (No 1 of 2023)* will be

[14] Rape Crisis Scotland (n 6) 29.
[15] *HM Advocate v Sweenie* (1858) 3 Irvine 109, [1858] 6 WLUK 135.
[16] *Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466.
[17] 2009 Act (n 4) s 1.
[18] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Scot Law Com No 209, December 2007) 2.2; Brown (n 3) 104.

discussed by referring to the judgements in *Morton*, *Yates*, *Stobo*, *Smith v Lees*, *Fox*, and *Cinci*.[19]

Considering the private nature of sexual offences, some elements of the offence of rape are difficult to prove in court. As mentioned above, the *facta probanda* for rape is penetration of the vagina, anus or mouth without the victim's consent.[20] This means that since the redefinition of rape, the Crown would have to provide corroborated proof for penetration, lack of consent, and that the offence was committed by the accused without a reasonable belief that the victim consents.[21] Although the focus of this chapter is the *actus reus* of rape, it must be noted that before this change in law, the accused's *mens rea* could be reasonably inferred by the use of force to overcome the complainer's will.[22] Since the removal of the requirement of force in *Lord Advocate's Reference (No 1 of 2001)*, it is more difficult to provide corroboration for the accused's mental state.[23] It has been argued that if distress could be used to infer force, then it must also be able to infer lack of consent, which can then infer the presence of the requisite *mens rea*.[24] However, since the statutory definition of rape in the 2009 Act, the accused's actual state of mind, that is lack of reasonable belief that the complainer consented, can be inferred from proven facts in the circumstances as a whole.[25]

### 1.1. Key case law

*Early judicial analysis*

A case which shows the approach of the early judicial analysis on the relationship between distress and corroboration is *Morton v HMA*.[26] The significance of this case stems from the description of the rule of corroboration as 'an invaluable safeguard in the practice of our criminal Courts against unjust conviction' by a full bench, and therefore 'correcting' the judgement in *Scott v Jameson*.[27] To briefly outline the circumstances in *Morton*, the appellant

[19] *Morton v HM Advocate* 1938 JC 50; *Yates v HM Advocate* 1977 SLT (Notes) 42; *Stobo v HM Advocate* 1994 JC 28; *Smith v Lees* 1997 JC 73; *Fox v HM Advocate* 1998 JC 94; *Cinci v HM Advocate* 2004 JC 103.
[20] 2009 Act (n 4) s 1.
[21] Timothy Jones, Ian Taggart, *Criminal Law* (7th edn, W Green 2018) 9-103.
[22] Margaret Ross, James Chalmers, Isla Callander, *Walker and Walker: The Law of Evidence in Scotland* (5th end, Bloomsbury Professional 2020) 6.7.2.
[23] *McKearney v HM Advocate* 2004 JC 87 [16] (obiter); *Lord Advocate's Reference (No 1 of 2001)* (n 14).
[24] James Chalmers, 'Distress as corroboration of mens rea' (2004) 23 Scots Law Times 141, 144.
[25] *Graham v HM Advocate* [2017] HCJAC 71, 2017 SCCR 497 [23]; *Spendiff v HM Advocate* 2005 1 JC 338 [30]-[33].
[26] *Morton* (n 17).
[27] ibid [55]; *Scott v Jameson* 1914 SC (J) 187.

was charged with indecent assault.[28] A witness saw the assault but did not see the man's face and was not able to identify the appellant as the assailant.[29] Apart from the evidence of the complainer, the only other evidence available was that of her brother, who said that the complainer had returned home in a distressed state and had informed him of the assault.[30] The Crown argued that while the testimony of a single witness was not enough for a conviction, 'any single item in a series of facts leading to a conviction, including the identification of the accused, might be proved by the evidence of one witness'.[31] In relation to statements made *de recenti*, the court held that such evidence is accepted for the purposes of showing reliability of the testimony of the complainer.[32] While *de recenti* statements contribute to reliability, it was held that they could not amount to corroboration.[33] The requirement of corroboration was described as:

> '*the testimony of one witness, whether direct to the actual commission of the crime, or indirect to some circumstance implicating the panel in the commission of the crime, is enforced by the testimony, direct or indirect, of some other witness, so that there are concurrent testimonies, either to the same or to different facts, each pointing to the panel as the person by whom the crime was committed. It is this conjunction of separate and independent testimonies, each incriminating, that makes corroboration*'.[34]

In other words, there must be evidence from two separate witnesses to the same facts, but evidence of distress alone could not corroborate the commission of the offence. The appeal was allowed.[35]

Later, in *Gillespie v Macmillan*, the accused was convicted of driving over the speed limit.[36] In order to determine whether the speed limit had been exceeded, two police constables, each using a stopwatch with the second hand at zero, were stationed one at either end of the measured distance.[37] As the car entered the relevant distance, the constable at the entrance started his

[28] *Morton* (n 17) [50].
[29] ibid.
[30] ibid.
[31] ibid [51], citing *Strathern v Lambie* 1934 JC 137; *Scott v Jameson* (n 25); *Lees v Macdonald* (1893) 20 R (J) 55; *McCrindle v Macmillan* 1930 JC 56.
[32] *Morton* (n 17) [53].
[33] ibid.
[34] ibid.
[35] ibid [55].
[36] *Gillespie v Macmillan* 1957 JC 31.
[37] ibid 35.

watch and as the car emerged at the exit, the second constable started his watch.[38] The car was then stopped by a third police constable.[39] Both watches were stopped simultaneously in the presence of the accused and all policemen.[40] The difference in time was used to calculate that the speed limit had been exceeded at 52 mph in a 30 mph zone.[41]

On appeal, the appellant argued that there was insufficient evidence for a conviction because the moments when the car entered and exited the measured distance were spoken to by only one police constable.[42] Lord Clyde, referring to Hume, held that in order to establish the necessary degree of certainty, the evidence from a single witness may be corroborated by surrounding facts and circumstances, thereby disproving the judgement in *Morton*.[43] Although *Gillespie* concerned a road traffic offence, the High Court's dictum as to the effects of distress evidence on corroboration were relevant for other offences, including rape and other sexual offences.

The judgement in *Morton* clarified that while evidence of distress could support the reliability of the complainer's testimony, it alone could not constitute corroboration. However, subsequent cases, such as *Gillespie v Macmillan*, challenged and refined the reasoning in *Morton*, allowing for the corroboration of a single witness's testimony through immediate facts and circumstances.

*Following Morton – Yates, Stobo, Smith v Lees, and Fox*

In *Yates v HM Advocate*, the appellant had been charged with the rape of a 16-year-old girl by using threats and producing a knife.[44] The appellant had admitted intercourse but claimed that it was consensual.[45] A number of witnesses had spoken of the complainer's shocked condition shortly after the incident.[46] The court held that evidence as to the complainer's condition is capable of affording corroboration that she has been raped.[47] Additionally, the court referred to the private nature of the offence of rape, holding that in such circumstances achieving

[38] ibid.
[39] ibid.
[40] ibid.
[41] ibid.
[42] ibid.
[43] ibid 36.
[44] *Yates* (n 17) 42.
[45] ibid.
[46] ibid 43.
[47] ibid.

corroboration is difficult, and that the jury would be entitled to return a verdict of guilty even though there was no direct corroboration.[48]

In *Stobo v HM Advocate*, the appellant had been convicted of indecent assault.[49] He was a taxi driver and had assaulted the complainer who was a passenger.[50] The distress of the complainer was spoken to by the taxi firm's controller and the complainer's son.[51] Stobo appealed against conviction on the basis that the distress of the complainer was not sufficient to corroborate her testimony.[52] Refusing the appeal, the court held that distress could be used as circumstantial evidence – distress would not be capable of describing the event which occurred but was able to provide support for the evidence of the complainer.[53] Therefore, in situations where there may be other explanations for the distress, this evidence might be regarded as neutral rather than inculpatory.[54] For example, the identity of the perpetrator or penetration could not be corroborated by distress evidence because other acts and circumstances involved in rape to overcome the complainer's resistance could be sufficiently distressing in themselves to explain the complainer's distressed condition.[55]

Thus, according to *Yates* and *Stobo*, the extent to which distress can corroborate a complainer's account of the offence is a question of fact and degree.[56] Distress may be considered as circumstantial evidence but could not corroborate penetration.[57]

*Smith v Less* is the previous authority on distress evidence in the context of sexual offences until *Lord Advocate's Reference (No 1 of 2023)*.[58] *Smith v Lees* was a Full Bench judgement whose purpose was to clarify the law on the role of distress evidence established in *Yates* and *Stobo*.[59] The appellant had been convicted of using lewd, indecent and libidinous practices towards a 13-year-old girl contrary to section 5 of the Sexual Offences (Scotland) Act 1976.[60]

[48] ibid.
[49] *Stobo* (n 17) 30.
[50] ibid.
[51] ibid.
[52] *Stobo* (n 17) 29.
[53] ibid 33.
[54] ibid 34.
[55] ibid.
[56] ibid.
[57] *Stephen v HM Advocate* 1987 SCCR 570; *Stobo* (n 17).
[58] *Smith v Lees* (n 17); *Lord Advocate's Reference (No 1 of 2023)*, sub nom *HM Advocate v CLB* [2023] HCJAC 40, 2023 SLT 1115.
[59] *Smith v Lees* (n 17); *Yates* (n 17); *Stobo* (n 17).
[60] *Smith v Lees* (n 17) 74.

The complainer was observed leaving a tent distressed and with a tear in her eye.[61] The complainer later made *de recenti* statements about what had happened in the tent.[62] The appellant argued that the distress should be equated with a *de recenti* statement, and, as a result, could not corroborate the complainer's testimony.[63] While it was accepted that distress could corroborate the complainer's evidence that something distressing had occurred without her consent, it could not corroborate exactly what had happened.[64] The court held that '… evidence of distress cannot support or confirm the complainer's evidence that a particular form of sexual activity occurred because there is no basis upon which the jury can use the evidence of distress to draw the necessary inference that it did.'[65] The court held that *Yates* and *Stephen* had been correctly decided, but *Stobo* was overturned.[66] Ultimately, the court's judgement means that consistency between the complainer's testimony and the observed distress is not enough to provide corroboration for the *facta probanda*; where the evidence is in the form of *de recenti* statements – this evidence is only circumstantial. Lord Sutherland did recognise, however, that this limited use of distress would cause 'insuperable difficulties' for the prosecution in proving similar cases where there might be insufficient evidence to prove penetration.[67] Despite this, Lord Sutherland held that corroboration is a 'valuable safeguard' and could not be lost.[68]

A year after the judgement in *Smith v Lees*, a Full Bench was convened in *Fox v HM Advocate* to reconsider the reasoning in *Mackie v HM Advocate*, where the court had held that corroboration of the essential facts could only exists if the distress exhibited was more consistent with the complainer's testimony than the accused's.[69] The accused in *Fox* was convicted of clandestine injury.[70] The complainer was asleep and woke up by the appellant having sex with her.[71] The appellant admitted to the intercourse but claimed that the complainer had been awake and consenting.[72] The complainer's distress was relied upon to corroborate her evidence.[73] In this regard, the court held that the starting point was the direct evidence – '[s]o

[61] ibid 75.
[62] ibid 76.
[63] ibid.
[64] ibid 81.
[65] ibid 90.
[66] ibid 83, 90; *Yates* (n 17); *Stephen* (n 55); *Stobo* (n 17).
[67] *Smith v Lees* (n 17) 118.
[68] ibid.
[69] *Fox* (n 17) 106-107; *Mackie v HM Advocate* 1994 JC 132, 141.
[70] *Fox* (n 17) 95.
[71] ibid 94. After the 2009 Act came into force, the offence of clandestine injury was abolished; this would now constitute rape.
[72] ibid.
[73] ibid.

long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met.'[74] Thus, as long as the distress observed confirms or supports the complainer's evidence, it can provide corroboration. Unlike *Smith v Lees*, the appellant in *Fox* had admitted to having intercourse with the complainer, which is why the complainer's distress could corroborate her testimony. Although *Smith v Lees* did not involve penetration, the accused nevertheless had not admitted to the alleged conduct. *Smith v Lees*, therefore, shows the limitations of distress evidence where penetration has not been admitted – evidence of distress could be used to corroborate lack of consent but could not corroborate the acts libelled.[75]

Similarly, the accused in *HM Advocate v L* had admitted intercourse where the charge was rape.[76] The Crown submitted, penetration having been admitted to, that there were several facts corroborating the complainer's evidence: *inter alia*, the amount of alcohol consumed, the timing of the incident, the complainer's distress, lack of protection, the age gap between the accused and the complainer, and the lack of any prior sexual history between the parties.[77] Citing *Fox*, the court held that these facts *in combination* corroborated the complainer's testimony that she did not consent.[78]

*De recenti statements*

*De recenti* statements are discussed briefly due to their similar treatment and proximity to distress evidence in rape cases. The case authority demonstrating the way courts treat such evidence is *Cinci v HM Advocate*.[79] Here, the appellant appealed a conviction of rape.[80] The appellant and the complainer were part of a tourist group staying in a hostel where a considerable amount of alcohol was consumed.[81] The complainer was sick and was assisted to a shower cubicle.[82] The appellant appeared and tried to join the complainer in the shower cubicle but was rebuffed.[83] Members of the hostel staff then went to check on the complainer

[74] ibid 100.
[75] *Smith v Lees* (n 17) 100; Eamon Keane and Fraser Davidson (eds), *Raitt on Evidence: Principles, Policy and Practice* (3rd edn, W Green 2018) 8-57.
[76] *HM Advocate v L* [2007] HCJAC 16, 2008 SCCR 51 [1], [3].
[77] ibid [6].
[78] ibid [13].
[79] *Cinci* (n 17).
[80] ibid 103.
[81] ibid [16].
[82] ibid.
[83] ibid.

and heard mumbled voices.[84] A female voice asked for help, the door was opened from the outside and the complainer and the appellant were found in the cubicle naked.[85] The complainer was very distressed and immediately said, 'he raped me'.[86] She was described as being scrunched up in the corner of the shower, very upset and crying.[87] The complainer was examined and the appellant's semen was found in her vagina.[88] The appeal was allowed and the conviction quashed on the basis that, *inter alia*, the trial judge had misdirected the jury that the statement 'he raped me' was so closely related to the commission of the offence as to be considered part of the *res gestae*, and was therefore available as proof of fact.[89] The Lord Justice Clerk (Gill) held that:

> [t]*he misdirection was material, this being a case where there was no direct evidence at all that the complainer refused to consent to sexual intercourse; and the circumstantial evidence from which the jury were invited to infer rape was very thin indeed. To direct the jury to the effect that this evidence was admissible and could therefore be used to prove 'the truth' of its content was, in my opinion, a material error that led to a miscarriage of justice.*[90]

Respectfully, this judgement seems to lack any common sense. As highlighted by the Lord Justice General Carloway in *Lord Advocate's Reference (No 1 of 2023)*, holding that the complainer saying 'he raped me' as she is naked in an obviously distress condition, 'scrunched up' and crying, finding the accused's semen in her vagina, and the testimony of several separate witnesses as 'thin evidence' not sufficient to prove rape is inadequate and unfounded.[91] Rather, the evidence is overwhelming.

### 1.2. Recent legal developments

The recent case of *Fisher v HM Advocate* concerned an appellant who had been charged with two sexual assaults.[92] The Crown intended to corroborate these assaults by using evidence from

[84] ibid.
[85] ibid.
[86] ibid.
[87] ibid.
[88] ibid.
[89] ibid [21].
[90] ibid.
[91] *Lord Advocate's Reference (No 1 of 2023)* (n 56) [230].
[92] *Fisher v HM Advocate* [2022] HCJAC 43, 2023 JC 21 [1].

previous similar offences from which the appellant had been acquitted.[93] The Lord Justice General Carloway discussed the limitations in prosecuting sexual offences.[94] Firstly, there must be corroboration, which in these types of cases will consist of testimony from another person which confirms or supports the direct evidence of the complainer.[95] Secondly, *de recenti* statements can only be used to support the complainer's credibility but cannot corroborate the acts libelled.[96] Finally, the private nature of sexual offences means that they are often difficult to prove although the complainer may be regarded as credible and there may be *de recenti* statements supporting the complainer's testimony.[97]

Due to such limitations, effectively prosecuting sexual offences is challenging.[98] This, among other issues which are beyond the scope of this article,[99] have led to disproportionately low conviction rates for rape in Scotland in comparison to the high rate of reports to the police – for 2021-22 the number of sexual crimes reported to the police was 15,049, which is a 15% increase since 2020-21 and a 96% increase since 2012-13.[100] Furthermore, rape and sexual assault are the crime types with the highest acquittal rates in comparison to other offences despite the fact that the number of convictions has increased.[101] For rape, there were 160 convictions in 2021-22, a 105% increase since 2020-21.[102] However, the rise in convictions is less impressive when compared to the reports received for rape – 2,489 in 2021-22.[103] Moreover, rape is severely underreported, showing the problematic nature of the judgements

[93] ibid [1]-[2].
[94] ibid [20]-[21].
[95] ibid [20]; *Fox* (n 17) 100.
[96] *Fisher* (n 90) [20]; *Smith v Lees* (n 17) 81.
[97] *Fisher* (n 90) [21]; see *Cinci* (n 17).
[98] For an overview see Rape Crisis Scotland, 'Statistics and Key Information' <https://www.rapecrisisscotland.org.uk/resources-stats-key-info/#rlslider_3> accessed 9 March 2024.
[99] See e.g., Scottish Courts and Tribunal Service, 'Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group' (March 2021) <https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6> accessed 10 March 2024; Louise Ellison, Vanessa Munro, 'Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process' (2017) 21(3) The International Journal of Evidence & Proof 183; J Doak, 'Victims' rights in criminal trials: prospects for participation' (2005) 32 Journal of Law and Society 294.
[100] Scottish Government, 'Recorded Crime in Scotland, 2021-22' <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2022/06/recorded-crime-scotland-2021-2022/documents/recorded-crime-scotland-2021-22/recorded-crime-scotland-2021-22/govscot%3Adocument/recorded-crime-scotland-2021-22.pdf> accessed 9 March 2024, 24.
[101] Scottish Government, 'Criminal Proceedings in Scotland, 2021-22' (October 2023) <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2023/10/criminal-proceedings-scotland-2021-22/documents/criminal-proceedings-scotland-2021-22/criminal-proceedings-scotland-2021-22/govscot%3Adocument/criminal-proceedings-scotland-2021-22.pdf> accessed 9 March 2024, 19, 22.
[102] ibid 22.
[103] Scottish Government, 'Recorded Crime in Scotland' (n 98) 27.

above in deterring rape victims from reporting rape. Indeed, only 22% of participants in a survey who had experienced serious sexual assault since the age of 16 reported the incident to the police.[104] While expanding the evidential value of distress evidence would presumably ensure a more adequate examination of the evidence available during trial, it is submitted that the importance of allowing distress to corroborate penetration does not lie in improving conviction rates but improving the chances of rape victims receiving justice.

The evolution of the case law, from the decision in *Morton* to the more recent case of *Fisher*, demonstrates the continuous development of distress evidence in corroborating rape and other sexual offences. While early cases like *Morton* emphasised the need for further evidence beyond distress alone to corroborate the acts libelled, subsequent judgments such as *Yates*, *Stobo*, and *Fox* have recognised distress as circumstantial evidence. However, recent legal developments, including the limitations highlighted by Lord Justice General Carloway in *Fisher*, highlight the challenges in effectively prosecuting sexual offences. The inconsistency between the reports received and convictions, coupled with the significant underreporting of rape, illustrates the broader implications of legal judgments on victims' willingness to enter the criminal justice system

**2. Implications of expanding the evidential value of distress**

The previous chapter provided an overview of the main case law regarding distress evidence in sexual offences. This chapter analyses the *Lord Advocate's Reference (No 1 of 2023)* and how this judgement changes the law of evidence with regard to distress evidence. It is argued that the *Reference* does not pose a threat to the requirement of corroboration as a safeguard against miscarriages of justice, and that expanding the evidential value of distress evidence does not risk a rise in wrongful convictions. It is argued that corroboration has become a complex legal requirement, and allowing distress to corroborate penetration does not diminish the protections afforded to the accused. Furthermore, it is unlikely that the *Reference* would result in a rise of wrongful convictions due to the fact that, regardless of the nature of the evidence put forward, juries' negative attitudes towards rape affect their verdict – juries are

[104] Scottish Government, 'Scottish Crime and Justice Survey 2019/20: Main Findings' <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2021/03/scottish-crime-justice-survey-2019-20-main-findings/documents/scottish-crime-justice-survey-2019-20-main-findings/scottish-crime-justice-survey-2019-20-main-findings/govscot%3Adocument/scottish-crime-justice-survey-2019-20-main-findings.pdf> accessed 9 March 2024, 188-189.

often unable to remember and apply legal tests, misunderstand expert testimony, and hold inaccurate prejudicial beliefs which influence the result of rape trials. It is submitted that these attitudes towards the complainer and the widespread belief in rape myths would make little material difference in conviction rates. Therefore, allowing distress to corroborate the *actus reus* of rape will not result in more wrongful convictions.

### 2.1. Lord Advocate's Reference (No 1 of 2023) and the changes it brings

A recent change in the law of evidence is the *Lord Advocate's Reference (No 1 of 2023)*.[105] In this case the respondent was charged with the assault and rape of the intoxicated complainer.[106] The complainer was staying in the same block of flats as the respondent.[107] The respondent invited her and her boyfriend to his flat where they drank cans of lager which the complainer thought were spiked.[108] The complainer's boyfriend left the flat, and the complainer testified that the respondent had thrown her onto the bed, removed her clothing and had intercourse without her consent.[109] The complainer's boyfriend gave evidence that when he returned to the flat the respondent slightly opened the door and did not seem to be wearing any clothes.[110] The complainer then came out of the flat in a distressed condition, screaming that she had been raped.[111] Another witness spoke to the complainer saying that she had been raped.[112] She was observed to have been 'devastated, shaken up and scared', screaming and crying, and her hair and make-up were dishevelled.[113] She had pointed at the respondent's door and said that he was the one who did it.[114] The respondent denied having had ~~alcohol or~~ intercourse with the complainer.[115]

The trial judge directed the jury that they had to be satisfied that the respondent had had intercourse with the complainer and that the intercourse had been without the complainer's consent to convict.[116] The jury were directed on distress as corroboration, explaining that the

[105] *Lord Advocate's Reference (No 1 of 2023)* (n 56).
[106] ibid [17].
[107] ibid [18].
[108] ibid.
[109] ibid.
[110] ibid [19].
[111] ibid.
[112] ibid.
[113] ibid.
[114] ibid.
[115] ibid [20].
[116] ibid [21].

complainer's distress could corroborate her testimony and support her credibility but could not of itself corroborate penetration – they had to rely on additional circumstantial evidence, such as the fact that the respondent appeared to be naked when he opened the door.[117] The complainer's statements that she had been raped were *de recenti* and as such could not corroborate what had happened.[118] The respondent was acquitted based on a verdict of not proven.[119]

The case was referred to the High Court on two questions: 1) '[d]id the trial judge err in directing the jury that distress of itself cannot corroborate the direct testimony of the complainer that penetration has occurred', and 2) '[i]s independent evidence of distress sufficient to corroborate a complainer's direct testimony that penetration has taken place'.[120] The Crown argued, referring to the judgement in *Smith v Lees*, that while the complainer's distress could not reveal exactly what had happened to her, that should not prevent it from being able to corroborate – the jury should be able to draw inferences from the distress about what had happened.[121] In other words, the jury should be able to infer penetration from the distress, and that the penetration was non-consensual.

Answering both questions in the affirmative, with regard to sufficiency in general the High Court held that while more than the testimony of one witness is required, there did not need to be two witnesses 'speaking to the case against the accused' – sufficiency can be achieved through a combination of facts and circumstances confirmed by another witness.[122] With regard to sufficiency in sexual offences specifically, it was held that what needed to be corroborated was the acts libelled and the identity of the perpetrator, the latter of which could be corroborated by distress or *de recenti* statements.[123] In the current case, the complainer's statements that she had been raped could be viewed as so closely related to what had occurred in the flat, that they had to be considered part of the *res gestae*, and therefore corroborative.[124] The concept that evidence which supports or confirms the complainer's evidence, as in the case of *de recenti* statements, could not provide corroboration was erroneous.[125] Additionally, distress and

[117] ibid [22].
[118] ibid [23].
[119] ibid [24].
[120] ibid [152].
[121] ibid [154]; *Smith v Lees* (n 17).
[122] *Lord Advocate's Reference (No 1 of 2023)* (n 56) [191].
[123] ibid [207].
[124] ibid [231]-[232].
[125] ibid [231].

spontaneous statements made after the event were generally considered corroborative in the Commonwealth; in that regard Scotland was 'out of step' with the Commonwealth.[126] What needed to be proved was that the offence was committed, and that it was committed by the accused.[127] As such, there was no requirement for each separate element to be proved by corroborated evidence.[128]

Importantly, distress observed by a third party could corroborate penetration; both after-the-fact spontaneous statements and distress were real evidence and available as proof of fact.[129] This judgement is significant – it overruled the previous authority on the role of distress evidence in sexual offences, *Smith v Lees*, and established that distress could corroborate not only the lack of consent of the complainer, but also penetration.[130]

### 2.2. Potential consequences of the Lord Advocate's Reference (No 1 of 2023)

*Corroboration*

Corroboration has been considered an essential safeguard in Scots law protecting the accused from wrongful convictions.[131] The requirement of corroboration has been argued to reduce the chances of miscarriages of justice resulting from the accused being convicted on the basis of a single piece of evidence.[132] However, it is submitted that the *Reference* does not pose a threat to corroboration as a safeguard against wrongful convictions. As Professor Duff has argued, due to its many 'fiddles', the requirement of corroboration has evolved into a complex field of law, which makes corroboration not as strong a safeguard as many people believe.[133] The *Moorov* doctrine and the *Howden* principle are two examples of such fiddles.

The *Moorov* doctrine provides mutual corroboration where an accused is on trial for two or more offences which are so closely connected in time, character and circumstance as to support the inference that the series of offences are part of one course of conduct.[134] Under this doctrine,

[126] ibid [233].
[127] ibid [235].
[128] ibid.
[129] ibid [236]-[237].
[130] *Smith v Lees* (n 17).
[131] Peter Duff, 'The requirement for corroboration in Scottish criminal cases: one argument against retention' (2012) 7 Criminal Law Review 513, 516; *Cadder v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601.
[132] The Carloway Review: Report and Recommendations (November 2011) 7.2.36.
[133] Duff (n 129) 514.
[134] Keane and Davidson (n 73) 8-38; *Moorov v HM Advocate* 1930 JC 68.

the testimony of one complainer can be corroborated by the testimony of a witness from one of the other offences.[135] The scope of this doctrine has gradually expanded over time in order to 'keep pace with modern societal understanding of sexual and other conduct' and so as to 'not proceed on outdated perceptions'.[136] With the *Howden* principle, the similarities relate to the identification of the accused.[137] In *Howden*, two crimes were committed within a short space of time and, while there was sufficient identification evidence for the first offence, there was no direct identification in regard to the second offence.[138] It was held that the jury were entitled to convict the accused of the second offence if they were convinced that the same person had committed both offences.[139] These 'fiddles' have already significantly expanded the application of corroboration.

Lord Carloway has stressed that corroboration does not prevent miscarriages of justice in practice – this is done by the standard of proof for criminal cases beyond reasonable doubt.[140] With regard to circumstantial cases, for example, since evidential facts do not have to be corroborated, 'two pieces of circumstantial evidence, each testified to by one witness, are sufficient to provide corroboration of the essential facts if one can infer the essential fact from the combined testimony of the two witnesses'.[141] In other words, it is possible for an accused to be convicted based on a single piece of evidence as long as it is spoken to by two witnesses.[142] The developments and expansion of the requirement of corroboration have been regarded as 'a necessary development' without which certain crimes, such as sexual offences and domestic abuse, are effectively 'beyond the reach of the criminal law'.[143] It is the fact that these types of offences disproportionately affect women that necessitates that the law of evidence provide a tailored response.[144]

It is therefore incorrect to equate the judgement in the *Lord Advocate's Reference* to effectively abolishing of the requirement of corroboration. Rather, allowing distress to corroborate penetration is a 'fiddle' to accommodate the law to the difficulties that corroboration imposed

[135] Ross, Chalmers, Callander (n 20) 5.10.1.
[136] *MR v HM Advocate* [2013] HCJAC 8, 2013 JC 212 [17].
[137] Ross, Chalmers, Callander (n 20) 5.10.5.
[138] *Howden v HM Advocate* 1994 SCCR 19.
[139] ibid 24.
[140] The Carloway Review (n 130) para 7.2.41.
[141] Duff (n 129) 515.
[142] Ross, Chalmers, Callander (n 20) 5.8.1.; *Norval v HM Advocate* 1978 JC 70.
[143] Fiona Raitt, 'Corroboration in cases of gender violence' (2014) 18(1) Edinburgh Law Review 93, 94.
[144] See Raitt (n 141); Ilona Cairns, 'Does the abolition of corroboration in Scotland hold promise for victims of gender-based crimes? Some feminist insights' (2013) 8 Criminal Law Review 640.

for the prosecution of sexual offences. In jurisdictions such as England and Wales which do not require corroboration, the standard practice is to still provide additional evidence in order to achieve the standard of proof beyond reasonable doubt.[145] Additionally, the trial judge will nevertheless not allow a case to go to the jury unless satisfied that there is sufficiency evidence, after which it is for the jury to evaluate the evidence.[146] Therefore, the presence of the requirement of corroboration does not of itself protect the accused from miscarriages of justice.

*Wrongful convictions and rape myths*

Regardless of what the actual evidence presented to the jury is, the attitude of the jury towards the evidence makes sexual offences difficult to prosecute.[147] In order to illustrate the dangers of these prevalent beliefs during jury deliberations, a few examples will be discussed. The following examples of how rape myths influence jurors' perceptions threaten the effective operation of the law demonstrate why the *Lord Advocate's Reference* will not significantly change the verdicts juries give.

There is overwhelming evidence that jurors often hold false prejudicial beliefs about rape which affect their decision making, and consequently, the verdict.[148] These beliefs can be distinguished into four types.[149] The first category are beliefs which place blame on the victim for being raped.[150] These include opinions that people who are voluntarily intoxicated or wear specific clothing are responsible for being raped because they are 'asking for it', and beliefs that if the victim did not actively resist their attacker by screaming and fighting, then it is not rape.[151] Secondly, beliefs which express doubt about allegations of rape and involve incorrect

[145] James Chalmers, Fiona Leverick, Alasdair Shaw, 'Post-Corroboration Safeguards Review Report of the Academic Expert Group' (August 2014) 6.
[146] Duff (n 129) 515.
[147] See Jennifer Temkin, Barbara Krahé, *The Justice Gap in Sexual Assault Cases: A Question of Attitude* (Bloomsbury Publishing 2008) 50-51; Isla Callander, 'Jury Directions in Rape Trials in Scotland' (2016) 20 Edinburgh Law Review 76, 78.
[148] James Chalmers, Fiona Leverick, Vanessa Munro, 'The provenance of what is proven: exploring (mock) jury deliberation in Scottish rape trials' (2021) 48(2) Journal of Law and Society 226; Louise Ellison, Vanessa Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) British Journal of Criminology 202; Fiona Leverick, 'What do we know about rape myths and juror decision making?' (2020) 24(3) The International Journal of Evidence & Proof 255; Regina Schuller and others, 'Judgements of Sexual Assault: The Impact of Complainant Emotional Demeanour, Gender, and Victim Stereotypes' (2010) 13(4) New Criminal Law Review 759.
[149] See Leverick (n 146) 257.
[150] ibid.
[151] See Isla Callander, 'The jury is an inappropriate decision-making body in rape trials in Scotland: Not Guilty, Not Proven, Guilty?' (LLM(R) thesis, University of Glasgow 2013) 14.

views that women often lie about being raped and that a substantial amount of rape allegations are fabricated because women either regret consensual intercourse or seek revenge.[152] These beliefs are very prevalent despite the fact that data suggests that false reporting for rape does not occur at a higher rate than other offences and that false allegations occur in only 3-4% of reports.[153] Considering the fact that approximately 47.95% of rapes go unreported, it is peculiar that beliefs in frequent false allegations have remained so consistent and strongly supported.[154] The third type are beliefs which excuse the accused, such as beliefs that the victim's behaviour could have sent 'mixed signals' to the accused, and about 'uncontrollable' male sexuality.[155] The idea that men are easily confused is not hard to believe, however these myths tend to justify the accused's predatory behaviour and re-affirm dangerous stereotypes. Lastly, the fourth type are 'real rape' myths, such as the belief that rape is always committed by a stranger and that it incurs both external and internal physical injuries on the victim.[156] This is in contrast with actual data showing that only 8.06% of rapes are committed by someone unknown to the victim.[157]

There have been several studies exploring mock jurors' rape myth acceptance and the extent to which jurors relied on these beliefs to determine their verdict.[158] According to their findings, despite the fact that the requirement of force was removed from the *actus reus* of rape in 2001, jurors continue to regard claims of rape where the accused did not use extensive force to overcome the victim as short of rape.[159] In instances where there was a lack of physical injuries to the complainer, mock jurors frequently relied on this for their not guilty or not proven verdicts.[160] While some jurors accept the fact that freezing is a normal reaction to rape, it is common that this reaction is mainly associated with stranger rape and tends to be disbelieved if the perpetrator was known to the victim.[161] In one of these studies, mock jurors indicated a

[152] Chalmers, Leverick, Munro (n 146).
[152] Ellison, Munro, 'Reacting to Rape' (n 146) 245.
[153] Liz Kelly, 'The (in) credible words of women: false allegations in European rape research' (2010) 16(12) Violence Against Women 1345, 1352; M Burman, L Lovett and L Kelly, 'Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries: Country briefing Scotland' (2009) <https://www.sccjr.ac.uk/wp-content/uploads/2012/11/Daphne_Scotland_Briefing-__Different_Systems,_similar_outcomes(3).pdf> accessed 15 March 2024; see also Rape Crisis Scotland, 'Briefing: False Allegations' (2021) <https://www.rapecrisisscotland.org.uk/resources/False-allegations-briefing-2021.pdf> accessed 15 March 2024.
[154] Rape Crisis Scotland, 'Annual Report' (n 6) 35
[155] Chalmers, Leverick, Munro (n 146) 242; Leverick (n 146) 270.
[156] Ellison, Munro, 'Reacting to Rape' (n 146) 206-208.
[157] Rape Crisis Scotland, 'Annual Report' (n 6) 30.
[158] See n 146.
[159] Ellison, Munro, 'Reacting to Rape' (n 146) 206; Chalmers, Leverick, Munro (n 146) 236.
[160] Ellison Munro, 'Reacting to Rape' (n 146) 206.
[161] ibid 207; Chalmers, Leverick, Munro (n 146) 239.

strong belief that intercourse without internal injury is inconsistent with rape due to medically incorrect presumptions that vaginal tissue is easily torn and that sexual intercourse without internal trauma only occurs when the woman is aroused.[162] In cases where the victim did sustain external physical injuries, mock jurors frequently suggested alternative ways that the victim could have sustained them, going as far as to suggest that the injuries could have been self-inflicted.[163] Furthermore, in one of the studies where the complainer had sustained bruising and scratching to her thighs and chest, jurors still expected more severe injury.[164] With regard to reporting rape, mock jurors perceive a delay in contacting the police as suspicious.[165] Where a complainer in a mock study phoned her sister before contacting the police, this caused criticism by jurors who considered this as indicating planning to fabricate allegations.[166] At the same time, however, jurors also regarded a complainer's quick response as ingenuine and questioned whether a more natural response would have been for her to contact a friend or a family member.[167]

Ultimately, as a result of the wide acceptance of rape myths, jurors are less likely to convict than acquit.[168] Therefore, even if distress can prove rape according to the law, jurors will still disbelief the complainer's account of events.

*Complainer's demeanour*

It can be questioned, however, whether expanding the evidential value of distress would have the effect of perpetuating the myth that all victims would be emotional after being raped.[169] As a result, juries might expect complainers to react in a particular way during trial. Indeed, mock jury research shows that a complainer who appears calm negatively impacts the inferences jurors draw and may therefore fail to convince jurors of their victimisation.[170] The hypothesis that 'paradoxically, the complainant's distress is not seen as corroborative, but absence of distress can be used against her' is therefore still compelling despite the change in the law

[162] Ellison, Munro, 'Reacting to Rape' (n 146) 207.
[163] ibid 208.
[164] Chalmers, Leverick, Munro (n 146) 236; see also Ellison, Munro, 'Reacting to Rape' (n 146) 208.
[165] Chalmers, Leverick, Munro (n 146) 244.
[166] ibid.
[167] Ellison, Munro, 'Reacting to Rape' (n 146) 210.
[168] Scottish Government, 'Criminal Proceedings in Scotland, 2021-22' (n 99) 19, 22.
[169] See Sharon Cowan, Chloë Kennedy, Vanessa E Munro, *Scottish Feminist Judgements: (Re)Creating Law from the Outside In* (Bloomsbury Publishing 2021) 46.
[170] Ellison, Munro, 'Reacting to Rape' (n 146) 210.

introduced by the *Lord Advocate's Reference*.[171] Studies highlight that rape victims who come forward have their victimisation 'measured against the current rape mythologies'.[172] The jury may be less likely to convict if a victim in a rape case is not visibly distressed and crying.[173] A complainer's calm demeanour as often regarded as suspicious, less sympathetic and less deserving.[174] Mock jurors in a study viewed a victim's 'emotionally flat' demeanour as perplexing, using descriptions implying negative connotations, such as 'cold', 'calculating' and 'too precise', implying dishonesty and pre-planning.[175] Additional studies confirm the results from the study by Ellison and Munro by determining that a victim's emotional response to rape is perceived as normal and appropriate and a victim who responds in a way which diverts from this 'norm' is believed less.[176] In other words, jurors tend to attribute more blame to the complainer where her behaviour contrasts traditional gender norms and 'appropriate female behaviour'.[177] However, where a complainer was indeed emotional while giving testimony, several mock jurors cautioned that this could have been a 'performance' and that the complainer could have been 'a good actress'.[178] Therefore, even if the complainer had exhibited distress *de recenti*, her demeanour *at trial* will be scrutinised and her testimony disbelieved. This may contradict efforts to achieve justice for complainers by expanding the distress doctrine. A proposal for how this may be overcome is provided in Chapter 3.

The strategies employed by the defence to cast doubt on the complainer's credibility have been described as 'oppressive and invidious'.[179] These strategies often include using the complainer's sexual history to undermine her credibility by taking advantage of jurors' belief in rape myths.[180] Defence counsel frequently submit applications under section 275 of the Criminal Procedure (Scotland) Act 1995 to introduce sexual history or character evidence.[181] Section 275 applications have been included in 72% of trials, the majority of which were made

[171] Sue Lees, *Carnal Knowledge: Rape on Trial* (London: Women's Press 2002) 119; *Lord Advocate's Reference (No 1 of 2023)* (n 56).
[172] Schuller and others (n 146) 760.
[173] Ellison, Munro, 'Reacting to Rape' (n 146) 211.
[174] Mary Rose, Janice Nadler, Jim Clark, 'Appropriately Upset? Emotion Norms and Perceptions of Crime Victims' (2006) 30(2) Law and Human Behaviour 203; Ellison, Munro (n 146) 210-211.
[175] Ellison, Munro, 'Reacting to Rape' (n 146) 211-212.
[176] Schuller and others (n 146) 768.
[177] ibid 764.
[178] Ellison, Munro, 'Reacting to Rape' (n 146) 213.
[179] Jennifer Temkin, *Rape and the Legal Process* (Oxford Publishing 2002) 9; Michele Burman, 'Evidencing Sexual Assault: Women in the Witness Box' 56(4) Probation Journal 379, 383.
[180] Jennifer Temkin, Barbara Krahé, *The Justice Gap in Sexual Assault Cases: A Question of Attitude* (Bloomsbury Publishing 2008) 129; Michele Burman and others, 'Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study' (Research Findings No 2/2007) 2.
[181] Burman and others (n 178) 2.

by the defence on the basis of relevance to complainer's consent, credibility and character (in particular dishonesty, alcohol consumption, and motive for false allegations).[182] Indeed, where a complainer testified that she had not consented to sexual activity and had sustained injuries during the incident, defence counsel repeatedly suggested that she was lying because she did not want her boyfriend to find out what had happened and had in fact initiated the sexual activity.[183] This demonstrates that in spite of changes in the law of evidence regarding rape, the existence of these stereotypes will continue to be exploited by defence counsel. As a result, a rape trial has been regarded as a form of secondary victimisation of complainers.[184]

Another cause for concern is the fact that jurors often misunderstand the law.[185] The reason this is concerning is because misinterpreting the law leads to jurors, perhaps subconsciously, relying on their pre-existing views to determine a verdict.[186] As discussed above, these preconceptions are grossly incorrect. When the evidence presented to the jury diverges from jurors' previous perceptions of real rape stereotypes, it results in jurors voting for either not proven or not guilty, both of which result in acquittal.[187] Research evidence shows that rather than understanding the evidence presented at rape trials, jurors 'settle on a story' or a narrative early in the proceedings and attempt to fit the evidence into the story instead of looking at the evidence independently.[188] The focus on the complainer throughout the trial comes about due to firstly the fact that the complainer is more likely to be extensively examined while the accused cannot be compelled to testify, and secondly because of defence questioning strategies aiming to use the jury's prejudicial attitudes against the complainer.[189] An example of the way jurors misinterpret the law is evident from a study by Chalmers, Leverick and Munro, where a medical expert testified that although the complainer did not exhibit any internal vaginal injuries, internal trauma was not necessary for rape.[190] Despite the testimony of a medical professional, mock jurors completely misunderstood the evidence, claiming that '[e]ven though the doctor said that it doesn't necessarily have to be internal trauma, if it had been sort of a

[182] ibid 1.
[183] *MacDonald v HM Advocate* [2020] HCJAC 21, 2020 SCCR 251.
[184] Burman, 'Evidencing Sexual Assault' (n 177) 383.
[185] See Louise Ellison and Vanessa E Munro, 'Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of a mock rape trial' (2010) 30(1) Legal Studies 74.
[186] Callander (n 149) 22-23.
[187] Ellison, Munro, 'Getting to (not) guilty' (n 183) 94.
[188] Leverick (n 146) 273.
[189] Temkin, Krahé (n 177) 129; B Brown, M Burman and L Jamieson, *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts* (Edinburgh University Press 1993), cited in Callander (n 149) 24.
[190] Chalmers, Leverick, Munro (n 146) 236.

violent rape like she was making [out], […] there would have been internal trauma as well'.[191] As a result, it is argued that despite changes in the substantive law or procedure, juries are unlikely to apply the law as directed by the judge. Rather, jurors have been shown to misunderstand legal tests and principles, relying on their own (incorrect) beliefs about rape. Due to the prevalence of these beliefs, defence counsel often leans into those pre-existing views, and uses them to discredit the complainer's testimony. The combination of misunderstanding of the law, the acceptance of rape myths, and defence counsel strategies leads to jurors voting for a verdict of not proven or not guilty, both of which result in acquittal.

While concerns have been raised about the requirement of corroboration as a result of the *Reference* judgement, it is argued that corroboration does not, in and of itself, protect the rights of the accused or prevent wrongful convictions. Prevailing rape myths and misconceptions of the law among jurors pose an obstacle to an increase in wrongful convictions. Research indicates that jurors often rely on rape myths to assess the complainer's credibility, potentially leading to biased verdicts. While the *Lord Advocate's Reference* introduces a significant legal precedent, its practical implications remain dependent on broader negative societal attitudes.

## 3. Potential areas for reform

Chapter 2 argued that rape myth acceptance hinders effective changes in law and procedure. This chapter discusses potential areas for further reform, which would allow sexual offences to be prosecuted more effectively as an addition to ongoing modifications in the law of evidence. Expanding the evidential value of distress evidence alone will not be sufficient for the effective prosecution of rape. Applying the suggested reforms in practice would ensure that useful changes in the law attain a meaningful outcome. Introducing jury directions or expert witnesses will be explored first and their potential to dispel prevalent rape myths from the decision-making process, and whether educating jurors about the realities of rape is likely to be effective in achieving unbiased verdicts. Secondly, it will be discussed whether juryless trials would be a more appropriate alternative. Ultimately, this chapter argues that although targeted jury directions and expert evidence may be successful in certain instances, they alone are insufficient to entirely eliminate harmful rape stereotypes from jury deliberations. Removing

[191] ibid 236.

lay participation from rape trials holds promise for complainers in sexual offence trials representing a more appropriate form of decision making.

### 3.1. Jury directions and expert witnesses

*Jury directions*

Juries in sexual offence trials in Scotland are instructed that 'there can be good reasons why a person against whom a sexual offence is committed may not tell others about it or report it or may delay in doing either of those things, and this failure or delay does not, therefore, necessarily indicate that an allegation is false.'[192] However, there is a substantial amount of evidence from mock jury studies indicating that jurors do not adequately take into account jury directions. In one of these studies, there was a delay of 40 minutes between the rape taking place and the complainer phoning the police.[193] In 13 of the 32 juries (approx. 40%), mock jurors expressed doubt about the truth of the complainer's allegations due to this delay.[194] This was despite the jury directions instructing the mock jurors that there may have been good reasons why a victim might delay reporting the incident.[195] In another study, which aimed to educate jurors on rape myths relating specifically to the complainer's demeanour, the percentage of jurors who stated that the timing of the complainer's report to the police would impact their decision decreased from 58% to 23%.[196] However, the number of mock jurors who believed that rape victims will always resist the assailant and as a result obtain injuries varied only slightly – from 88% to 80% after hearing judicial directions.[197] This study shows that although jury directions aiming to educate jurors on rape myths appear promising, mock jurors' prejudices regarding the complainer's lack of resistance and injuries remained effectively unchanged. These results are in line with further research conducted in England, which used real jurors to determine the fairness of the jury decision making process.[198] It found that only

[192] Judicial Institute for Scotland, 'Jury Manual' (8 April 2021) <https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/jury_manual.pdf?sfvrsn=8c9918e4_12> accessed 17 March 2024, 107.7.
[193] Chalmers, Leverick, Munro (n 146) 232-233.
[194] ibid 243-244.
[195] ibid.
[196] Louise Ellison and Vanessa E Munro, 'Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials' (2009) 49(3) British Journal of Criminology 363, 371.
[197] ibid 373.
[198] Cheryl Thomas, 'Are Juries Fair?' (Ministry of Justice Research Series 1/10, February 2010) <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf> accessed 18 March 2024.

31% of jurors fully understood the directions given in the terms used by the judge, with the percentage increasing to 48% if jurors were given written instructions.[199] With Scottish juries consisting of 15 jurors, that would translate to between 4 and 5 jurors being able to recall the directions they were given.[200] Misunderstanding of the law leads to a legal paradox – not being able to apply the law correctly, juries revert back to their existing views on rape, which as established above is often incorrect, leading them to a verdict of acquittal; consequently, verdicts of acquittal further reinforce rape stereotypes as correct in the eyes of potential jurors, who will thereafter apply the stereotypes to come to a verdict.[201]

It has been suggested that jurors should be pre-screened in order to ascertain whether they support rape myths.[202] However, this will be difficult to implement in practice.[203] And more importantly, research shows that even in situations where a juror appears to have low levels of rape myth acceptance during preliminary screenings, they are still likely to be either convinced by others' problematic views during jury deliberations, or nevertheless analyse evidence through the lens of rape myths.[204]

Only using targeted jury directions would be insufficient to supplement the changes in the law. Expanding the evidential value of distress will not have the desired effect due to the fact that juries do not adequately understand and apply the legal principles given in jury directions.

*Expert testimony*

A further option may be the use of expert evidence aiming to educate jurors about rape myths. An experiment exposed mock jurors to either general expert testimony, or case-specific expert testimony.[205] The general expert testimony involved directions that, *inter alia*, few women falsely accuse men of rape, a large proportion of rapes involve people known to the victim

[199] ibid 35-36.
[200] See Callander (n 149) 22.
[201] ibid 60.
[202] Dominic Willmott, 'Rape on trial: The influence of jury bias on verdict outcome' (*The Justice Gap*, September 2016) <https://www.thejusticegap.com/rape-trial-influence-jury-bias-verdict-outcome/> accessed 18 March 2024.
[203] See Fiona Leverick, 'Addressing the problem of rape myths in jury decision making: lessons from the UK jurisdictions' in Rahime Erbaş (ed), *European Perspectives on Attrition in Sexual Offenses* (Lexington Books 2023) 9.
[204] Chalmers, Leverick, Munro (n 146) 231.
[205] Nancy Brekke, Eugene Borgida, 'Expert Psychological Testimony in Rape Trials: A Social-Cognitive Analysis' (1988) 55(3) Journal of personality and social psychology 372, 377.

rather than strangers, and that it is often better for a woman to submit than to risk additional violence that could result from attempts to fight her attacker, while the case-specific testimony related the same facts but applied to the case in question.[206] According to their findings, case-specific testimony had a bigger impact on juror judgements, which seemed to be unaffected by the expert evidence when the testimony was more abstract.[207] When exposed to concrete testimony, jurors were more willing to view the victim as more credible, and the defendant as being more responsible.[208] Another study found that from 60% of jurors who said that it would have made a difference to their decision if the complainer had appeared more distressed, the percentage decreased to 35% after hearing expert testimony.[209] Still, the effect was reversed when the complainer had not exhibited visible physical injuries as a result of the rape – the percentage rose from 88% to 92% after hearing expert evidence.[210] Expert testimony may be beneficial in combating certain rape myths, but is inefficient in dispelling all rape myths among jurors.

However, the issue here is that expert witnesses are not allowed to 'usurp the function of the jury'.[211] The purpose of expert witnesses is to provide the jury with the necessary facts so that the jury can independently form their own opinion.[212] If case-specific expert testimony were applied in practice, this would come very close to giving an opinion which may be prejudicial to the accused. This could result in successful appeals, which would consequently have a deterrent effect on victims reporting rape.

While there are some positive effects observed from the use of expert testimony, this method of educating jurors seemed ineffectual in combating certain rape myths. In order for the changes in law following *Lord Advocate's Reference (No 1 of 2023)* to have a practical effect, rape myths must be eliminated from the decision-making process. As seen above, educating jurors about the realities of rape does not achieve this objective effectively. Recognising the limitations of using lay participation in the decision-making process, the Dorrian Review introduced a proposal for judge-only trials for sexual offences.[213]

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[206] ibid 374.
[207] ibid 378.
[208] ibid.
[209] Ellison and Munro, 'Turning mirrors into windows' (n 194) 369.
[210] ibid 373.
[211] *Davie v Magistrates of Edinburgh* 1953 SC 34, 40.
[212] ibid.
[213] Scottish Courts and Tribunal Service, 'Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group' (March 2021) ('Dorrian Review')

### 3.2. Juryless trials

As admitted in the Dorrian Review, juryless trials are a controversial topic.[214] However, it is submitted that this controversy arises from clinging onto outdated norms not workable in today's society. A jury is by no means necessary for a fair trial.

Firstly, the 'right to trial by peers' is conceptually speaking not a right. The term 'right' implies that there is a choice.[215] Unlike other rights, such as the right to legal assistance for example, an accused in Scotland does not have the right to waive their right to a trial by jury, as is the case in other jurisdictions.[216] Additionally, 'trial by peers' is claimed to have originated from the Magna Carta, however legal historians have emphasised that this claim is widely misunderstood.[217] Indeed, according to Forsyth, the relevant phrase 'judicium parium' implies a decision by a judge, not a jury.[218] Secondly, although the retention of a jury may represent the public's contribution to the justice system, the randomness of jury selection does not equate to representation. Although a jury is assumed to represent a cross-section drawn at random from the public, a random selection is unlikely to produce a true cross-section.[219] From the studies discussed above, it is obvious that regardless of randomness, rape myth prevalence trumps 'representation'. Finally, it has been argued that the notion that jurors are easily influenced by improper pressures by other jurors shows little faith in the jurors' powers of objective reasoning and ability.[220] However, this is exactly what several mock jury studies have shown – jurors cannot understand legal principles and apply them and are often influenced by rape myths despite hearing expert testimony about their falsehood.

While it cannot be ruled out that there may be some judges who are still biased, this is alleviated by firstly the requirement that they give written reasoning for their judgements, and secondly by the fact that judges who sit in sexual offence courts will have to go through special

<https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6> accessed 10 March 2024, 5.8-5.23.
[214] ibid 5.3.
[215] Penny Darbyshire, 'The lamp that shows that freedom lives – is it worth the candle?' (1991) Criminal Law Review 740, 743.
[216] ibid 744.
[217] ibid 743.
[218] William Forsyth, *History of Trial by Jury* (1852) 108-110, cited in Darbyshire (n 213).
[219] Darbyshire (n 213) 746.
[220] See Peter Duff, Mark Findlay, 'Jury vetting – The jury under attack' (1983) 3(2) Legal studies (Society of Legal Scholars) 159, 165.

training.[221] Juries do not usually give reasons for their decisions, while a judge must do so – judgements by a judge are capable of being logically justified and afford greater clarity if the accused wishes to appeal.[222] Jury verdicts, on the other hand, are rarely overturned on the basis of being unreasonable.[223]

Furthermore, having a judge-only trial for sexual offences could avoid the secondary victimisation of the complainer.[224] Unlike jury trials, the cross-examination of the complainer in judge-only trials will be conducted in a calm and respectful manner.[225] Additionally, while juries are influenced by the prevalence of rape myths, professional judges are expected to 'apply the law dispassionately to the evidence'.[226] This is important because it would allow distress evidence to be examined objectively, which would consequently allow the adequate operation of the changes in law aimed at improving the prosecution of sexual offence.

The new Victims, Witnesses, and Justice Reform (Scotland) Bill builds on the recommendations of the Dorrian Review and aims to introduce a separate court for sexual offences, as well as a pilot for judge-only rape trials.[227] The substantive content of the Bill is beyond the scope of this article, however if the Bill is enacted as law, the resulting changes would allow distress evidence to operate effectively.

The limitations of the effort to educate jurors are evident from the results of multiple studies – rape myths continue to influence verdicts. In light of this, it is argued that juryless trials for sexual offences are to be preferred – they could diminish the influence of incorrect rape stereotypes and ensure the correct application of legal principles ensuring that changes in the law are effective.

[221] Dorrian Review (n 211) p 12.
[222] ibid para 5.10; Callander (n 149) 65.
[223] See *Goldie v HM Advocate* 2020 HCJAC 9, 2020 JC 164; *White v HM Advocate* 1990 JC 33; *Whyte v HM Advocate* 2000 SLT 544.
[224] Dorrian Review (n 211) 1.24-1.26.
[225] ibid 2.17-2.19.
[226] ibid 5.17.
[227] SP Bill 26 Victims, Witnesses, and Justice Reform (Scotland) Bill [as introduced] session 6 (2023) <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/victims-witnesses-and-justice-reform-scotland-bill/introduced/bill-as-introduced.pdf> accessed 20 March 2024.

## Conclusion

This article has analysed the *Lord Advocate's Reference (No 1 of 2023)* and whether the changes it introduces to the law of evidence in Scotland are enough to address the negative social attitudes towards rape. It has argued that reforming the rules of evidence for rape is not sufficient of itself to address these attitudes and the reliance on rape myths in decision making. While expanding the evidential value of distress evidence is a step in the right direction, it is unlikely that there will be a material difference in conviction rates. This is largely due to lay participation in the decision-making process. Therefore, introducing judge-only trials for sexual offences is the appropriate response for making a practical difference in rape trials and achieving justice for complainers.

Early case law, as illustrated by *Morton*, established that distress alone was not sufficient to corroborate the acts libelled. However, subsequent judgments such as *Yates*, *Stobo*, and *Fox* recognised distress as circumstantial evidence which could support the reliability of a complainer's testimony. Recent legal developments, such as *Fisher*, have highlighted the ongoing challenges in prosecuting sexual offences, including the limitations imposed by the requirement for corroboration and the restricted use of *de recenti* statements.

The *Reference* marks a departure from previous treatment of distress evidence in sexual offences, allowing distress to corroborate penetration. While concerns have been raised about the requirement of corroboration, it is argued that the requirement itself has evolved into a complex legal construct, with doctrines like *Moorov* and the *Howden* principle expanding its application. Furthermore, research indicates that jurors often rely on rape myths to assess the complainer's credibility, potentially leading to biased verdicts. While the *Lord Advocate's Reference* introduces a significant legal precedent, its practical implications remain dependent on broader societal attitudes.

Jury directions aimed at dispelling rape myths among jurors have been somewhat successful. However, research indicates persistent challenges in jurors' understanding and application of the law. Despite efforts to educate jurors, rape myths continue to influence verdicts, highlighting the limitations of this approach. Similarly, research suggests that the use of expert testimony to address rape myths can enhance juror perceptions of credibility. However, concerns remain regarding its limited impact on deeply ingrained misconceptions about rape. In light of this, it is argued that juryless trials for sexual offences are to be preferred. Judge-

only trials have the potential to diminish the influence of incorrect rape stereotypes and ensure the correct application of legal principles ensuring that changes in the law are effective

# The Pari Passu Principle: Paramount or Pointless?[1]

*A critical analysis of the extent to which the "pari passu principle" constitutes a fundamental feature of corporate insolvency law in the UK.*

Erin Lewis[2]

## INTRODUCTION

'Many a challenge to the different priorities of conflicting claims arising in a corporate insolvency begin with the incantation of the *pari passu* principle', the rule enshrined in UK insolvency legislation, generally establishing equal distribution to all creditors.[3] However, this literal translation is very much an oversimplification of the principle in practice, with multiple versions and similar principles further complicating its role. With regard to its importance, academic analysis has marked a division between two schools of thought– those who view the principle as 'fundamental', and those who suggest it is merely one of a number of distributional rules. Upon examining whether the principle warrants greater significance, provoking a similar degree of contention, the argument for its abolishment or replacement requires consideration.

## 1. EXPLAINING THE *PARI PASSU* PRINCIPLE

With its origins in the Bankrupts Act 1542, the *pari passu* principle is 'one of the main tenets of insolvency law'.[4] The principle constitutes 'the normal rule in a corporate insolvency that all creditors are treated on an equal footing – *pari passu* – and share in insolvency assets pro rata according to their pre-insolvency entitlements'.[5] In a liquidation, or administration in

[1] [DOI]: https://doi.org/10.20933/100001341
[2] Level 4, LLB.
[3] R J Mokal, 'Priority as Pathology: The Pari Passu Myth' (2001) CLJ 581, 581 (*Mokal*).
[4] Richard Calnan, *Proprietary Rights and Insolvency* (2nd edn, OUP 2016) 3.
[5] Vanessa Finch, 'Security, Insolvency and Risk' (1999) 62 MLR 633, 634.

which a distribution is made, the principle means that unsecured creditors 'shall share ratably in the insolvent company's assets that are available for residual distribution'.[6]

### 1.1 'Strong' *pari passu* versus 'weak' *pari passu*

Two distinct versions of the principle seek to explain its meaning: the 'strong, orthodox' version, and the 'weak, multi-layered' version.[7] The former, enshrined in the 1986 Act, means 'all pre-insolvency 'unsecured' creditors are to be treated equally post-insolvency so that they share the insolvents' assets pro rata'.[8] As explained in *ex p Ashbury,* insolvency law takes claimants 'exactly as it finds them', thus where statute suggests creditors shall be paid *pari passu*, 'creditors' refers to those classed as such 'after the winding up commences'.[9] Upon a 'weak' interpretation, 'similarly situated creditors are satisfied proportionately to their claim, out of the assets available for distribution to creditors of their rank'.[10] This multi-layered version is evident in section 175 of the 1986 Act, providing that preferential claims are to rank equally among themselves and shall abate in equal proportions where the company's assets are insufficient. Put simply, in the strong version 'ratably' means 'unsecured creditors are paid collectively to the extent of their *pre-insolvency claims'*, whereas in the weak version, 'creditors share ratably within their particular insolvency *ranking*'.[11]

### 1.2 The principle in practice

The *pari passu* rule is less absolute than its definitions suggest, and in practice the principle is subject to a statutory ladder of priorities, broadly descending: liquidation expenses, preferential debts, ordinary unsecured creditors, deferred debts, non-provable liabilities, and finally

[6] V Finch and D Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, CUP 2017) 511 (*Perspectives*).

[7] L C Ho, 'Goode's' Swan Song to Corporate Insolvency Law' (2006) EBLR 1727, 1735-1744 (*Swan Song*).

[8] L C Ho, 'Pari Passu Distribution and Post-Petition Disposition: A Rationalisation of Re Tain Construction' (2005) SSRN 6 (*Post-Petition*) < http://dx.doi.org/10.2139/ssrn.852804> accessed 18 April 2024.

[9] *Re Smith, Knight & Co, ex p Ashbury* (1868) LR 5 Eq 223 [226] (Lord Romilly MR).

[10] *Post-Petition* (n 6).

[11] *Perspectives* (n 4).

shareholders.[12] Whilst, prima facie, ordinary unsecured creditors do not rank particularly low on the ladder, the orthodox principle is engaged only after the extinguishment of security rights, payment of liquidation expenses, and satisfaction of ordinary and secondary preferential claims through remaining available assets, thus frequently, the rule is not invoked at all.[13]

*British Eagle International Airlines Ltd* is frequently cited as authority for the *pari passu* principle. In this case, the House of Lords held that by agreeing unsecured contract debts were to be satisfied in a particular way, the parties were 'contracting out' of *pari passu*. Thus, the general principle is that a contractual arrangement which would have the effect of increasing a creditor's rights above those provided for in the legislation is void, as contrary to public policy.[14] Two important qualifications of the rule were also noted in *Football League Ltd*, confirming that the rule is confined to distributive proceedings, and is only engaged as regards assets forming part of the estate upon a winding-up.[15]

### 1.3 *Pari passu* versus anti-deprivation

To fully explain the meaning of *pari passu*, its distinction from the anti-deprivation principle is also noteworthy. Whilst the two constitute sub-rules of the general principle in *British Eagle*, in *Belmont Park Investments,* Lord Collins confirmed the anti-deprivation rule applies where 'attempts to withdraw an asset reduces the value of the estate, whilst the pari passu principle means statutory provisions for pro rata distribution cannot be contractually excluded to give one creditor more than its proper share'.[16]

The distinction, and thus the meaning of pari passu, can be further clarified by at least three marked differences.[17] Whilst the principle against divestiture applies where deprivation is triggered by bankruptcy, for pari passu 'it is enough that the *effect* of the relevant provision is

[12] *Re Nortel GmbH* [2013] UKSC 52; [2014] AC 209 [39] (Lord Neuberger); Insolvency (Scotland) (Receivership and Winding Up) Rules 2018 (SSI 2018/347) r 7.27.

[13] Insolvency Act 1986, s 107.

[14] *British Eagle International Airlines Ltd v Cie Nationale Air France* [1975] 1 WLR 758.

[15] *Revenue and Customs Commissioners v Football League Ltd* [2012] EWHC 1372 (Ch); [2012] Bus LR 1539 [65].

[16] *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] UKSC 38 [2].

[17] K van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, 2019) 7-04 (*Zwieten*).

to apply an asset in a non-*pari passu* way'.[18] Secondly, the parties' intention is irrelevant to the operation of *pari passu*, whereas 'good faith, commercial sensibility, and intention' are at the heart of the anti-deprivation principle.[19] Finally, the anti-deprivation principle applies from the outset in liquidation and administration, whereas the *pari passu* rule applies in liquidation, and only from the point of a proposed distribution in administration.

## 2. A FUNDAMENTAL FEATURE OF UK CORPORATE INSOLVENCY LAW

### 2.1 *Pari passu* as undoubtedly fundamental

The *pari passu* principle is frequently said 'to constitute a fundamental rule of corporate insolvency law', amounting to the 'foremost principle in the law of insolvency around the world'.[20] According to Goode, upon commencement of a winding-up, the principle is 'all-pervasive', supported by the fact the mere *effect* of an impugned non-*pari passu* provision is sufficient to warrant a 'striking down' by the Court.[21] Until recently, it was argued that the principle's application was entirely confined to liquidation, being the only collective insolvency process for distributing assets among creditors. However, as a result of the Insolvency Rules 2016, administration is frequently used as a liquidation substitute.[22] Thus, the argument that the principle is a fundamental feature of liquidation, rather than of corporate insolvency law generally, is weakened by its application to other insolvency processes.

The Cork Committee also reiterated the principle's importance for orderly distribution and fairness in insolvency.[23] It is suggested in the absence of *pari passu*, distribution under insolvency law 'would return to the "first come, first served" policy of mediaeval times'.[24] The

[18] *Football League* (n 13).

[19] *Belmont* (n 14).

[20] A Keay and P Walton, 'The Preferential Debts Regime in Liquidation Law: In the Public Interest?' [1999] CFILR 84, 85 (*Preferential Debts*).

[21] Roy Goode, *Principles of Corporate Insolvency Law* (2nd edn, Sweet & Maxwell 1997) 142 (*Goode*).

[22] Insolvency (England and Wales) Rules 2016 (SI 2016/1024) r 14.12; Insolvency (Scotland) (CVA and Administration) (SSI 2018/1082) r 3.115.

[23] *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) para 1220 (*Cork Report*).

[24] *Preferential Debts* (n 18) 95.

principle simultaneously ensures fairness in the procedural and substantive senses, as 'treating every creditor in the same way' prevents an unjust race to the debtor's assets on insolvency, destined to be won by the strongest, swiftest, and wealthiest creditors.[25] Furthermore, the principle constitutes a fundamentally efficient regime, conducing an orderly, collective means of dealing with unsecured creditor claims, resulting in lower distribution costs. According to Jackson's theory of insolvency law, such collectivity is importantly productive of a greater aggregate pool of assets for distribution.[26] On a similar vein, legal costs and uncertainties are reduced by a *pari passu* rule. In the absence of legislative differentiation between unsecured claims, the rule mitigates the need for procedurally expensive and difficult choices for the court.[27]

However, the theory of insolvency law, which defines the principle as fundamental and all-pervasive, has not passed unchallenged. In fact, it has been suggested 'the orthodox *pari passu* principle is not, by any standard, a fundamental principle in any legal system'.[28]

### 2.2 The effect of priority

'Even the most cursory examination of bankruptcy shows the *pari passu* rule is honoured nowhere', creditors are paid according to the ladder of priorities.[29] Mokal suggests 'as long as all relevant creditors participated in a collective distribution regime, how their claims were ranked relative to each other would be irrelevant', thus the 'unjust race' is prevented by priority, not *pari passu* distribution.[30] Dalhuisen suggests the very nature of 'bankruptcy proceedings attract competing claims with divergent rights' which *pari passu* 'papers over by imposing an iron-clad idea of equity as equality'.[31] In virtually every asset distribution system, rules resolve

[25] Vanessa Finch, *Is pari passu passe?* (1350-5211, Sweet & Maxwell 2000) 194 (*Finch*).

[26] T H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986).

[27] *Finch* (n 23).

[28] *Swan Song* (n 5).

[29] Phillip R Wood, 'The Bankruptcy Ladder of Priorities' 14 (2013) BLI 209.

[30] *Mokal* (n 1).

[31] H Dalhuisen, *Transnational and Comparative Commercial, Financial and Trade Law* (5th edn, Hart Publishing 2019).

conflicts by favouring one claimant over another, thus the 'equality' rule is 'nothing more than a convenient default principle'.[32]

### 2.3 Exceptions and by-passing mechanisms

In his review on Goode's approach, Ho notes 'losing count of how many times Goode uses the word 'fundamental' to describe the *pari passu* principle', despite acknowledging its multifarious exceptions.[33] However, not all exceptions can be used to legitimately attack the principle's importance, and a distinction may be drawn between 'true' and 'false' exceptions.

Regarding the latter, whilst liquidation expenses, including post-liquidation contracts, and proprietary rights enjoy super-priority, they fall outwith the *pari passu* rule, concerned only with 'assets available for residual distribution'.[34] Liquidation costs are incurred in the later conduct of liquidation, and assets of secured creditors, under trust, or reservation of title agreements, do not enter the estate and are not distributable.[35] Such mechanisms, however, provide a legitimate, albeit potentially unjust, means of by-passing *pari passu*, arguably weakening the importance of the principle.

'True' exceptions, however, invite the argument that the orthodox *pari passu* rule cannot constitute a fundamental feature of insolvency law where it is so frequently departed from. The most significant deviation from the principle is caused by legislative provisions granting priority of payment to certain unsecured creditors, 'preferential creditors', who have no priority under general law.[36] The operation of *pari passu* relating to these debts, which abate 'ratably amongst themselves', suggests that *pari passu* constitutes 'both a rule of, and an exception' to equal distribution.[37] Additionally, the right of set-off on insolvency enables a creditor who owes money to a debtor, resulting from mutual debts prior to liquidation, to obtain priority over those who do not.[38] This exception has been regarded 'at the highest judicial level, as itself necessary

[32] *Preferential Debts* (n 18) 94.

[33] *Swan Song* (n 5).

[34] *Perspectives* (n 4).

[35] Insolvency Act 1986, s115.

[36] Insolvency Act 1986, s 175; s 386.

[37] *Mokal* (n 1) 584.

[38] Insolvency Act 1986, s 323.

for ‘orderly administration of insolvent companies’, arguably compelling a breach of *pari passu*.[39] However, set-off on insolvency is self-executing, and better regarded as a means of identifying the insolvent’s estate or quantifying the company’s liabilities, rather than a genuine exception to *pari passu* distribution. Contractual subordination makes effective agreements that one’s own debt will rank behind other unsecured debts of a company, and on this basis, in *Re Maxwell Communications Corporation plc,* bondholders were permitted to ‘contract out’ of the *pari passu* principle.[40] Whilst this exception appears contrary to *Natwest v Halesowen*, in which the House of Lords concluded that ‘one is not allowed to change one’s place in the queue’, it is noteworthy that the law does not readily countenance creditors contracting out of *pari passu*, rather it prohibits ‘contracting to gain some advantage in a winding-up’.[41] Finally, the 1986 Act provides, upon a declaration, the court may defer the whole or part of certain claims, directing that ‘any interest thereon shall rank in priority after all other debts owed by the company and after interest on those debts’.[42]

### 2.4 Misinterpretation in case law

Acknowledging that the orthodox *pari passu* principle bears ‘little resemblance to reality’, commentators have sought to salvage the principle by resorting to its multi-layered understanding, and a significant amount of case law cited in support of the principle rather undermines its importance.[43]

*British Eagle* is claimed to be ‘the leading modern authority on the pre-eminence of the p*ari passu* principle’, yet the decision is widely criticised.[44] It was held by the bare majority that the netting arrangements captured an asset, for the benefit of members of a clearing house scheme, which would otherwise have been available for distribution amongst British Eagle’s general creditors. During its solvency, clearing house members could not have solely sued British Eagle for any debt, and correspondingly British Eagle could not have proceeded directly against Air France, yet the decision allowed the liquidator to do exactly that. Pre-insolvency unequals were

[39] *National Westminster Bank Ltd v Halesowen Presswork Ltd* [1972] AC 785, 809A.

[40] *(No 2)* [1994] 1 All ER 737.

[41] *Natwest* (n 36); ibid [750] (Vinelott J).

[42] Insolvency Act 1986, s74(2)(f); Insolvency (Scotland) (Receivership and Winding up) Rules 2018, r 7.27.

[43] *Swan Song* (n 5).

[44] *British Eagle* (n 12); Fidelis Oditah, ‘Assets and the Treatment of Claims in Insolvency’ (1992) 108 LQR 459, 465.

'equalised' in insolvency, yet preferential and pre-preferential debts would have undoubtedly been extinguished first. The *pari passu* red herring served only to confuse this issue, and in failing to consider the principle clearly, the decision has been criticised as unsatisfactory.[45]

For the proposition that '*pari passu* may not be excluded by contract', Goode cites *Mackay* as authority, whereby Lord Justice Mellish re-iterated that 'a person cannot contract upon bankruptcy to get some additional advantage which prevents distribution under bankruptcy laws'.[46] The case, however, makes no reference to *pari passu*, and at the time of the judgement, distribution under bankruptcy laws was not distribution *pari passu*.

*Pari passu* distribution is said to underpin many insolvency provisions under the 1986 Act and Insolvency Rules 2016. Whilst section 107 and Rule 4.181 manifest the orthodox *pari passu* principle, in *Re Tain Construction*, the court insisted 'the *pari passu* principle underpins section 127.[47] On application of the facts, however, priority given to the bank over two major creditors violated the policy of insolvency distribution, not the *pari passu* principle. Section 127 governs the avoidance of property dispositions, preserves the insolvent's estate, sustains the order of priority distribution, and enables the insolvent company to continue during the period between a winding-up petition and the making of an order, none of which concern the *pari passu* principle.[48] Therefore, cases cited in support of the 'equality' principle frequently demonstrate nothing except the law's intolerance towards attempts to gain immunity from the collective liquidation regime.

## 3. GREATER SIGNIFICANCE?

### 3.1 Increasing the principle's significance

There is force in the argument that the role of *pari passu* has shrunk to insignificance, as by the time the principle comes into play, many of the difficult insolvency questions have been posed

[45] *Goode* (n 19) 181.

[46] *Ex parte Mackay* (1873) 8 Ch App 643 [648].

[47] *Re Tain Construction* [2003] EWHC 1737 (Ch); [2013] 1 WLR 2791.

[48] Insolvency Act 1986, s 127.

and answered.[49] However, significance ought to be measured, not by reference to the little amount left for distribution to unsecured creditors upon liquidation, but by its application to invalidate and discourage hundreds of transactions. This improves the prospects of payment to unsecured creditors, even where the initial benefits of invalidation are reaped by preferential creditors.[50] The *pari passu* principle constitutes the 'normal' rule, and the importance of its observance has been stressed in countless decisions by eminent judges. In the very recent appeal case concerning the Adler Restructuring Plan, the Court confirmed that adherence to a sequential payment of different series of loan notes constituted a departure without justification from the scheme of *pari passu* distribution.[51]

It can be argued, therefore, that the principle warrants greater significance, and as the Cork Report suggests, 'public dissatisfaction has led to widespread demand for a reduction of categories of debts accorded priority in insolvency'.[52] In New Zealand, it was suggested there is 'no justifiable need for any other preferential payments' other than administration costs.[53] It may be concluded, therefore, that reducing priority would increase the significance of *pari passu*. The Harmer Report noted that the *pari passu* principle directly guided the abolition of the priority given to the Commissioner of Taxation in Australia.[54]

### 3.2 Abolition or replacement?

However, if one were to adopt Goode's extreme view that 'we must jettison, without the slightest tinge of regret, that hackneyed, and misleading phrase' that *pari passu* distribution 'is the most fundamental of insolvency law', one might, not only oppose greater significance, but advocate for the principle's abolishment or replacement.[55]

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[49] *Finch* (n 23) 207.

[50] *Zwieten* (n 15).

[51] *Re AGPS Bondco Plc* [2024] EWCA Civ 24.

[52] *Cork Report* (n 21) para 1397.

[53] General Insolvency Inquiry; Report No 45 of the Australian Law Reform Commission 1988 (Harmer Report) para 717.

[54] ibid 713.

[55] *Goode* (n 19) 413.

Mokal argues that *pari passu* is a 'rule of non-distribution', therefore it is worth considering distributional alternatives suggested by Finch, including ranking debts chronologically, ethically, or based on policy grounds.[56] These alternatives, however, are not without their respective limitations. Chronological ranking would not in itself address the issue of exceptions and by-passes and would likely result in an overreliance on security or trust devices to ensure receipt of payment. Ethical ranking would be subject to the standard criticisms of utilitarianism, thus defining such classes would prove difficult. Finally, to constitute a genuine alternative to *pari passu*, distribution of the residual estate would involve paying different ordinary creditors at different rates. Whilst this might prove beneficial to a consumer creditor, for example, who is arguably more deserving of special treatment, would again be difficult to implement. Considering these limitations, it might then be appropriate to conclude, as Mokal does, that the *pari passu* principle is a cost-effective 'fall-back provision' for later claims, warranting neither abolition, nor greater significance.[57]

## CONCLUSION

The *pari passu* principle is unduly complex, yet religiously referred to in corporate insolvency legislation and proceedings. The rule is justified by its prevention of a destructive race between various creditors, yet in actuality the principle has a rather limited effect in distributions of the insolvent's estate. Not only do various types of secured claim fall beyond its ambit, but even unsecured claims, the only class to which the principle truly appertains, are often exempt from its application. Having considered opposing views on its importance, the principle constitutes a fundamental feature of UK corporate insolvency law to the extent that it operates to invalidate unjust transactions, and any further importance is skewed by a multiplicity of exceptions. The purpose of the principle itself, in a normative sense, is fundamentally important. Thus, a reduction of the rungs on the ladder of priority which limit its pertinence should effectually increase the principle's significance.

[56] *Mokal* (n 1) 611; *Finch* (n 23) 208.

[57] *Mokal* (n 1) 611.

**Closing Remarks & The Future of the DSLR:**

We celebrate the DSLR's decade of success, and eagerly anticipate how the Journal will reflect, critique, and comment on forthcoming legal developments and current affairs in light of its change of direction.

It has been our pleasure to spearhead this change to The Journals direction and celebrate its decennial edition; we wish DSLR continued success; plans for *Volume XI* are already in motion.

We thank again all those involved in Issue X's development and facilitation.

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