
Incorporation of International Human Rights Briefing Series:

The International Covenant on Economic, Social and Cultural Rights

by Dr Kasey McCall-Smith*

BACKGROUND

In March 2021 the Scottish Government [announced its intention](#) to introduce a Human Rights Bill to the Scottish Parliament. This world-leading legislation will include directly incorporation of four key United Nations Human Rights treaties into Scots law, subject to devolved competence. This will provide a new human rights framework for Scotland and is the result of a process which started with the [2018 Report of the First Minister's Advisory Group on Human Rights](#) and culminated with the [National Taskforce for Human Rights Leadership Report](#), (also available in [easy read format](#)). The process was informed by extensive engagement with a wide range of representatives from the public sector, civil society and human rights experts. A public consultation process was conducted which resulted in the [All Our Rights in Law Report](#).

The relevant treaties are:

- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- The Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- The Convention on the Rights of Persons with Disabilities (CRPD).

The overriding aim of the new framework is to protect and advance the realisation of human rights for everyone in Scotland.

This Briefing series provides an overview of each of the treaties as well as some of the related rights and is intended to aid civil society's knowledge and understanding of the new framework and its potential future application.

OVERVIEW OF THE COVENANT

The [International Covenant on Economic, Social and Cultural Rights](#)¹ (ICESCR) was negotiated and agreed by states on 16 December 1966. The UK consented to give effect to the rights outlined in ICESCR in 1976. This is an international legal obligation. The [Scotland Act 1998](#) requires that Scotland give effect to the UK's international obligations in areas that are its responsibility, including many policy areas covered by ICESCR.

The rights included in ICESCR are referred to as economic, social and cultural rights or 'ESC rights'. When states respect, protect and fulfil these rights, then all people are able to live a full, free, safe, secure and healthy life because access to basic necessities is secure.

ICESCR is distinct from its twin treaty, the [International Covenant on Civil and Political Rights](#)² (ICCPR), which focuses on civil and political rights. Civil and political rights include the right to life, the right to assemble, the right to a fair trial and the right to be free from torture, among many

others. In other words, those rights that define people's potential interactions, or lack of interactions, with the government and its variable agencies, like the police, courts or local authorities. In the UK, civil and political rights are protected through the Human Rights Act 1998.³

While there are different categories of human rights, they are all interrelated, indivisible and interdependent, and all rights must be secured in order for individuals to be able to fully engage and make use of their rights.⁴

KEY PROVISIONS

ICESCR sets out those human rights that form the essence of what it means for all individuals to live their lives with dignity, including:

- the [right to social security](#);⁵
- the right to an adequate standard of living, including the rights to [food](#), [water](#), clothing and [adequate housing](#) and the continuous improvement of living conditions;
- the [right to take part in cultural life](#);⁶
- the [right to health](#);⁷
- the [right to work](#);⁸
- the right to education⁹ and many others.

1. <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

2. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

3. The Human Rights Act 1998 incorporates the European Convention on Human Rights into UK law. See, Equality and Human Rights Commission, [The Human Rights Act](#)

4. See [Vienna Declaration and Programme of Action \(1993\)](#), Part 1, para. 5.

5. CESCR, [General Comment No. 19: The right to social security \(art. 9\)](#).

6. CESCR, [General Comment No. 21, The right of everyone to take part in cultural life](#), UN Doc E/C.12/GC/21 (2009).

7. OHCHR/WHO, [The Right to Health, Fact Sheet No. 31](#); CESCR, [General Comment No. 14, The right to the highest attainable standard of health \(article 12 of ICESCR\)](#).

8. CESCR, [General Comment No. 18, The right to work](#), UN Doc E/C.12/GC/18 (2006); CESCR, [General Comment No. 23, The right to just and favourable conditions of work \(art. 7\)](#), UN Doc E/C.12/GC/23 (2016).

9. OHCHR, [About the right to education and human rights](#).

Respect, protect and fulfil

In joining ICESCR, states commit to respect, protect and fulfil the human rights set out in the treaty. This [tripartite framework](#) means:

- Respect – the state must not interfere with a person’s right unnecessarily;
- Protect – the state must guard against human rights abuse;
- Fulfil – the state must take positive steps to ensure all people can access and enjoy their human rights as well as ensure that human rights can be enforced through the courts if necessary.¹⁰

International monitoring

A key commitment in joining ICESCR is the collective monitoring of how ESC rights are given effect across all of the [171 states](#) that have agreed to follow the treaty. The [Committee on Economic, Social and Cultural Rights](#)¹¹ (CESCR) is the international monitoring body that oversees how countries implement ICESCR. In signing up to the treaty, the UK agreed to the CESCR’s monitoring function, which includes reviewing reports every 5 years, explaining how the UK is giving effect to the treaty provisions and the Committee giving its views on where the UK could do better. The Scottish Government contributes to the UK level reporting process.

Progressive realisation to the maximum of available resources

As soon as a state agrees to give effect to ICESCR, **there is an obligation to progressively realise the rights to the maximum of the state’s available resources.**¹² This is a unique feature of ESC rights and reflects that varying levels of resource may be required to deliver these rights. Progressive realisation can be achieved through different approaches such as adopting new policies or legislation designed to respect, protect, promote and fulfil these rights.¹³ This feature of ICESCR was intended to recognise that the wide range of states across the globe have different levels of available resources. In this sense, resources include economic, human, technical, natural and organisational resources. However, it is important to note that many ESC rights do not require extensive resourcing. In most cases, it is more a matter of ensuring that available ESC rights are accessible to all members of society on an equal basis (non-discrimination).

Minimum core

As implied by the concept of progressive realisation, ESC rights exist along a spectrum in the respect, protect, fulfil framework of human rights. The starting point or baseline is referred to as the ‘minimum core’ and must be delivered without discrimination. The minimum core is established in line with the AAAQ

10. <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>

11. <https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>

12. This obligation is outlined in ICESCR article 2(1). The same obligation can be found in UNCRC article 4, and CRPD article 4(2)

13. ICESCR article 2. See CESCR, Factsheet No.16 (Rev.1), p 4; CESCR, General Comment No. 9: The domestic application of the Covenant, paras 3, 9

Framework: availability, accessibility, acceptability and quality.¹⁴ In delivering each ESC right under the [AAAQ Framework](#), the state should be guided by evidence-based human rights impact assessments.

KEY POTENTIAL IMPACTS OF INCORPORATION

Following on from the [First Minister's Advisory Group on Human Rights Leadership's recommendation](#) for a new human rights statutory framework for Scotland which includes ESC rights,¹⁵ the National Taskforce for Human Rights Leadership recommended incorporation of ICESCR into Scots law, which was accepted by the Scottish Government.¹⁶ [Direct incorporation](#) means that the provisions of an international agreement, such as the ICESCR, become part of the national law.¹⁷ It is the first legal step towards making human rights enforceable in the national legal system. Enforceability means that there are institutions and procedures available to provide a remedy when a human right is abused or violated. Incorporation will encourage stronger implementation, which includes all of the law, policy and other measures taken to ensure that human rights are respected, protected and fulfilled.

The UK Government has long maintained that incorporation of ICESCR is not necessary to give effect to its international obligations. Instead, it [argues](#) that implementation of ESC rights is best achieved through different sectoral legislative measures and policies.¹⁸ Despite the range of existing laws and policies designed to reduce discrimination and general social inequalities, such as the [Equality Act 2010](#), social inequality has continued to rise.¹⁹ Research and the lived experiences of many people across the country demonstrate that people in Britain are consistently unable to access or engage their ESC rights.²⁰ Individuals identifying with multiple protected characteristics under the Equality Act or marginalised in other ways, such as those living in poverty, experience even greater barriers to accessing these rights. Incorporation of ICESCR should result in a stronger obligation on government to go further in exploring how different policies impact the lived experiences of all people in Scotland, including those whose voices are often unheard.

The UN Committee on ESCR (CESCR) has consistently voiced its concern regarding the inability of individuals to enforce their ESC

14. See, for example, Danish Institute of Human Rights, [The AAAQ Framework and the Right to Water – international indicators](#) (2014); Danish Institute for Human Rights, [The AAAQ Toolbox, Developing Indicators on the Right to Health](#); Medical Human Rights Network, [AAAQ Framework for the Right to Health](#)

15. First Minister's Advisory Group on Human Rights Leadership, [Final Report](#) (2018)

16. National Taskforce for Human Rights Leadership, [Leadership Report](#), 12 March 2021

17. [What is Incorporation?](#), Incorporating Human Rights in Scotland, project website

18. See, for example, CESCR, [Sixth periodic report of the United Kingdom of Great Britain and Northern Ireland](#), UN Doc E/C.12/GBR/6 (2014), para 11.

19. CESCR, [Concluding Observations on the 6th periodic report of the United Kingdom](#), UN Doc E/C.12/GBR/CO/6 (2016), paras 18-19

20 Philip Alston, [Visit to the United Kingdom of Great Britain and Northern Ireland, Report of the UN Special Rapporteur on extreme poverty and human rights](#), UN Doc A/HRC/41/39/Add.1 (2019); HRCS, [Submission to Scottish Parliament Equalities and Human Rights Committee Draft Budget Scrutiny 2020-2021: Delivery of national equalities and human rights priorities in partnership with the third sector](#), August 2019; Engender, [A Woman's Place: Gender, Housing and Homelessness in Scotland](#), February 2020

rights in UK courts, including those in Scotland.²¹ Barriers to enforcement include the lack of a clear path to justice in law, such as the absence of the right in law, and a lack of resources to claim the right. Even where legal channels are available, rights-holders' access to justice and remedy is contingent on their ability to secure advice about navigating policy or legal representation.²² The incorporation process should identify and address improvements to access to justice to enforce ESC rights – without the potential to enforce these rights, there will be little opportunity to impact the lived experiences of people in accessing and engaging ESC rights. Legalising ESC rights will push the government to address these inequalities proactively, rather than continue the status quo.

Many policy areas necessary to support and give effect to ESC rights are devolved to Scotland, such as education, the environment, health and housing. Other areas are reserved to the UK Government but may have delivery decisions taken at the Scottish rather than UK level, such as different aspects of social security. While repeated changes to the devolution powers in Scotland have opened up opportunities for the Scottish Government to provide stronger ESC protections, extensive gaps continue between the delivery of the international minimum core of ESC rights and their fulfilment in terms of both law and policy. Despite the complexities of

devolution, incorporation would place an obligation on the Scottish government to maximise the enjoyment of rights for all people in Scotland, no matter their status, and to work creatively to support those who might currently be unable to access different ESC rights, such as people affected by the immigration system.

NEXT STEPS

In line with the Human Rights Taskforce recommendations, the establishment of a new statutory human rights framework will be a multistep process. The aim of the new framework is to incorporate a range of internationally recognised human rights, including those set out in ICESCR, as well as civil and political rights and special attention to individuals or groups of individuals who have often been given the least attention by society. To accomplish this, further consultation on the approach to be taken is necessary, particularly with rights-holders. Extensive law and policy guidance will be developed so that all people, public authorities and government understand what respecting, protecting and fulfilling human rights means in law, policy and practice. Together, everyone can play a part in making rights real in Scotland.

Kasey McCall-Smith
September 2021

21. CESCR, Concluding Observations on the 6th periodic report of the United Kingdom, UN Doc E/C.12/GBR/CO/6, 14 July 2016, paras 5-6

22. See reports by Human Rights Consortium Scotland (HRCS) and others, [Overcoming Barriers to Public Interest Litigation](#), October 2018

USEFUL RESOURCES

Academic Advisory Panel to the National Taskforce on Human Rights Leadership,
<https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/>

Alston, Philip, Visit to the United Kingdom of Great Britain and Northern Ireland, Report of the UN Special Rapporteur on extreme poverty and human rights, UN Doc A/HRC/41/39/Add.1, 23 April 2019,
https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/39/Add.1

Boyle, Katie, 'Models of Incorporation and Justiciability for Economic, Social and Cultural Rights' (2018),
https://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_no_v18.pdf

Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations on the sixth periodic report of the United Kingdom, UN Doc E/C.12/GBR/CO/6, 14 July 2016,
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/GBR/CO/6&Lang=En

--- General Comment No. 9: The domestic application of the Covenant, paras 3, 9,
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1998%2f24&Lang=en

--- General Comment No. 14, The right to the highest attainable standard of health (article 12 of ICESCR), UN Doc E/C.12/2000/4, 11 August 2000,
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en

--- General Comment No. 18, The right to work, UN Doc E/C.12/GC/186 (2006),
<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQfUKxXVisd7Dae%2FCu%2B13J25Nha7l9NlwYZ%2FTmK570%2FSr7TB2hbCAidyVu5x7XcqjNXn44LZ52C%2BikX8AGQrVylc>

--- General Comment No. 19, The right to social security (art. 9), UN Doc E/C.12/GC/19 (2008),
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f19&Lang=en

--- General Comment No. 21, The right of everyone to take part in cultural life, UN Doc E/C.12/GC/21 (2009),
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang=en

--- General Comment No. 23, The right to just and favourable conditions of work (art. 7), UN Doc E/C.12/GC/23 (2016),
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f23&Lang=en

--- Sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc E/C.12/GBR/6 (2014),
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2f6&Lang=en

Danish Institute of Human Rights, The AAAQ Framework and the Right to Water – international indicators, 8 July 2014,
<https://www.humanrights.dk/publications/aaaq-framework-right-water-international-indicators>

Engender, A Woman's Place: Gender, Housing and Homelessness in Scotland, February 2020,
<https://www.engender.org.uk/content/publications/A-WOMANS-PLACE---GENDER-HOUSING-AND-HOMELESSNESS-IN-SCOTLAND.pdf>

Equality and Human Rights Commission, The Human Rights Act,
<https://www.equalityhumanrights.com/en/human-rights/human-rights-act#:~:text=The%20Human%20Rights%20Act%201998%20sets%20out%20the,What%20human%20rights%20are%20covered%20by%20the%20Act%3F>

First Minister's Advisory Group on Human Rights Leadership, Final Report, 10 December 2018,
<https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

Human Rights Consortium Scotland, Submission to Scottish Parliament Equalities and Human Rights Committee Draft Budget Scrutiny 2020-2021: Delivery of national equalities and human rights priorities in partnership with the third sector, August 2019,
<https://hrcscotland.org/wp-content/uploads/2019/10/final-submission-ehric-public-sector-funding-eq-hr-aug-2019.pdf>

Human Rights Consortium Scotland, resources for civil society around human rights incorporation, available at:

<https://hrcscotland.org/incorporating-human-rights/incorporation-general/>

Incorporating Human Rights in Scotland, project website, including infographics, easy-read, and other resources,

<https://www.law.ed.ac.uk/research/research-projects/incorporating-human-rights-in-scotland>

National Taskforce for Human Rights Leadership, Leadership Report, 12 March 2021,

<https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/>

Office of the High Commissioner for Human Rights (OHCHR), The right to education and human rights,

<https://www.ohchr.org/EN/Issues/Education/SREducation/Pages/EducationAndHR.aspx>

--- Fact Sheet No. 21, The Right to Adequate Housing,

https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf

--- Right to Food, Factsheet No. 34, p 10.

<https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>

--- 'What are human rights?'

<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>

Scottish Human Rights Commission (SHRC), Scotland's National Action Plan for Human Rights, SNAP 2: Proposal for Scotland's Second National Action Plan for Human Rights, September 2019,

http://www.snaprights.info/wp-content/uploads/2019/09/SNAP-2_Online.pdf

This briefing is published as part of a partnership project between the Human Rights Consortium Scotland and the Scottish Universities Legal Network on Europe (SULNE), funded by The Legal Education Foundation
