

Incorporation of International Human Rights Briefing Series:

The Right to Social Security

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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 RIGHT TO SOCIAL SECURITY

The right to social security demands that all individuals have access to a social security scheme that provides a baseline or minimum level – known as the minimum core – of benefits enabling them to access and enjoy the basic level of other economic, social and cultural or ‘ESC rights’, such as the rights to health, housing, water, food and education. Delivery of the right to social security reinforces the interrelated nature of ESC rights.

ICESCR – Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

The right to social security is found in Article 9 of the [International Covenant on Economic, Social and Cultural Rights](#)¹ (ICESCR). The ICESCR became binding on the UK when it agreed to give effect to the treaty in 1976. The UK has agreed to give effect to four additional international treaties that include a general right to social security. These include:

- the [International Convention on the Elimination of all forms of Racial Discrimination](#)² (CERD, Article 5(e));
- the [Convention on the Elimination of Discrimination against Women](#)³ (CEDAW,

Article 11(e) and 14(c));

- the [UN Convention on the Rights of the Child](#)⁴ (UNCRC, Article 26); and
- the [UN Convention on the Rights of Persons with Disabilities](#)⁵ (CRPD, Article 28).

KEY PROVISIONS

Minimum core

The minimum core, or baseline, of the right to social security requires that government ensure:

- **Availability.** Social security systems, however designed, must be available to address impacts on people’s livelihoods, must be administered or regulated by the state and continued over generations.
- **Social risks and contingencies.** Social security systems must at a minimum provide for: health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability, survivors and orphans.
- **Adequacy.** The minimum level must be adequate in amount and length of time available to ensure that recipients of the benefits are able to realise their human rights, in particular the rights to family life, adequate standard of living and health.
- **Accessibility.** Access to social security programmes must be ensured on five accounts: coverage, eligibility, affordability, participation and information, and

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

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

3. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>.

4. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

5. <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>.

physical access. Schemes must be non-contributory to ensure universality.⁶

Guiding principles

In all cases, the following principles should also guide government as it **respects, protects and fulfils** the right to social security:

- **Non-discrimination.** Ensure access to social security systems on a non-discriminatory basis, including when national social security schemes are administered by private actors.
- **Non-retrogression and non-interference.** Respect existing social security schemes by not interfering directly or indirectly with access to such schemes. Protect against reductions in existing levels of protection. Guard against arbitrary or unreasonable interference with access to institutions or traditional arrangements for social security.
- **Transparent strategy.** Adopt and implement a national social security strategy and plan of action that is available to the public and easily accessed.
- **Progressive realisation.** Take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalised individuals and groups and continuously monitor progressive realisation of the right to social security.⁷

The right to social security underpins other rights, such as the right to food, in that social programmes must acknowledge the accessibility and minimum market costs of nutritious food. To fulfil the right to social security government must identify specific measures it will take to ensure the minimum core of the right in line with these guiding principles.

Relationship to poverty

The legal dimension of human rights is often overlooked in the course of addressing the practical realities of different lived experiences. Poverty, for example, offers a clear illustration of the links between ESC rights and variable aspects of the human condition.

*'[P]overty may be defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.'*⁸

None of the international human rights treaties explicitly protect against poverty yet it often prevents people from engaging their ESC rights.⁹ For example, where people in poverty do not have the means or the resources to access adequate housing they are also unlikely to be able to access safe,

6. CESCR, General Comment No. 19: The right to social security (art. 9), para 59.

7. CESCR, General Comment No. 19: The right to social security (art. 9), paras 45-51, 59.

8. Office of the High Commissioner for Human Rights (OHCHR), Right to Food, Factsheet No. 34, p 10.

9. CESCR, General Comment No. 14, The right to the highest attainable standard of health (article 12 of ICESCR), UN Doc E/C.12/2000/4 (2000), para 5.

potable water for the purpose of cooking (right to adequate food and water, ICESCR article 11) or maintaining hygiene, both of which will have knock-on effects for the right to health (ICESCR article 12). In fulfilling ESC rights, the mutually reinforcing nature of these rights increases the capacity of an individual to guard against poverty.

KEY POTENTIAL IMPACTS OF INCORPORATION

Incorporation¹⁰ of the right to social security presents the opportunity to secure a minimum standard of living across the poorest members of the population and to progressively realise a higher standard of living for the entire population. Almost one-fifth of the entire UK population lives in poverty.¹¹ In Scotland 26% of children, 20% of working age people and 13% of pensioners live in poverty.¹² Across those statistics, Minority Ethnic people, lone parents and families with a disabled adult make up a larger percentage of those in poverty than of their percentage of the Scottish population. The Children and Young People's Commissioner Scotland has explained that 'historically, the key cause of increases in number of children in poverty [relative child poverty rates estimated to be 34.5% in 2020/21] has been changes to the UK-wide tax and benefit system,'¹³ which are

key features of the social security system. As the fifth largest economy in the world, the failure of the UK to respect, protect and fulfil the right to social security has been a frequent source of international criticism. The 2019 report by the UN Special Rapporteur painted a clear picture of how cuts to social programming have increased inequality and poverty in the broader UK as well as in Scotland.¹⁴

Guarding against poverty and social exclusion is necessary to ensure other ESC rights, including the right to an adequate standard of living. **Incorporation** of the right to social security will require the Scottish Government think more holistically and sustainably about the role of social security programmes. In particular, it means that the government will need to consider how adjustments to various social and health programmes might impact individuals with multiple protected characteristics, as identified either through the **Equality Act 2010** or other protected status, such as individuals with precarious migration status or historically marginalised groups, such as women, children and disabled people.

While social security is a primarily reserved area, a number of powers in this area were transferred to the Scottish government in 2016.¹⁵ **The Social Security (Scotland) Act**

10. What and Why of Incorporation?, Incorporating Human Rights in Scotland, project website (2020).

11. 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).

12. <https://povertyinequality.scot/poverty-scotland/>.

13. Children and Young People's Commissioner Scotland, Submission to the United Nations Special Rapporteur on Extreme Poverty and Human Rights, 2018, pp. 3 and 6.

14. Alston (2019). See also, CESCR, Concluding Observations on the 6th periodic report of the United Kingdom, UN Doc E/C.12/GBR/CO/6 (2016), paras 18-19.

2018 sets out the Scottish government's powers to regulate certain benefits in accordance with the most recently devolved powers. These powers relate to the allocation of payments relating to disability, industrial injuries, carers, maternity benefits, funeral expenses, heating expenses and discretionary housing payments. This Act states that one of the principles of Scottish social security is that 'social security is itself a human right and essential to the realisation of other human rights.'¹⁶ However, it does not provide people with the ability to enforce social security as a right. Incorporation aims to ensure that the right can be enforced through administrative or judicial procedures.

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 the right to social security and ICESCR, as well as civil and political rights and special attention to those 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.

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15. Scotland Act 2016

16. Social Security (Scotland) Act 2018, s 19(b).

USEFUL RESOURCES

Academic Advisory Panel to the National Taskforce on Human Rights Leadership, Briefing Papers, <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 (2019), https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/39/Add.1

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

--- General Comment No. 19. The right to social security, 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. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2), UN Doc. E/C.12/GC/20 (2009), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en

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, resources for civil society around human rights incorporation in Scotland, [Incorporating International Human Rights](#)

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), '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, 2013, <http://www.snaprights.info/>

--- 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

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