
Incorporating International Human Rights: Selected ICESCR Rights and Their Impact on LGBT+ Matters

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EXECUTIVE SUMMARY

The Human Rights Bill which the Scottish Government seeks to introduce aims to incorporate several international human rights treaties into Scottish law, of which the International Covenant on Economic, Social and Cultural Rights (ICESCR) is one.

ICESCR rights are of particular relevance for LGBT+ (lesbian, gay, bisexual, transgender and related) matters, as the treaty's monitoring body, the Committee on Economic, Social and Cultural Rights (CESCR) has clarified in its General Comments and its Observations on individual State's compliance with ICESCR provisions. The relevant rights often concern issues of everyday concern (such as rights relating to housing and health), but also questions that go to the very identity of LGBT+ people (such as the need for efficient procedures for legal gender recognition).

This report considers various ICESCR rights that have particular relevance to LGBT+ people and to the Scottish context. These include:

- The right to enjoy ICESCR rights without discrimination (Article 2(2) ICESCR). Under this article, States that are party to the treaty must, for instance, repeal or amend laws that discriminate on the basis of sexual orientation or gender identity, and they also must take measures against de facto discrimination of LGBT+ people.
- The right to an adequate standard of living, including adequate housing (Article 11(1) ICESCR). In this context, States must, for example, make sure that there is no discrimination on grounds of sexual orientation or gender identity in access to social housing and that housing and rental agencies do not discriminate against LGBT+ persons.

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- The right to enjoyment of the highest attainable standard of physical and mental health (Article 12(1) ICESCR). It is, for instance, a violation of that right when individuals are, on the basis of their sexual orientation or gender identity, treated as mental or psychiatric patients or if regulations require LGBT+ persons to undergo so-called ‘conversion therapy’.
- The right to education (Article 13(1) ICESCR). States Parties must ensure that no one suffers discrimination in their access to education on the basis of sexual orientation or gender identity. States, for instance, have to provide effective protection for victims of bullying on LGBT+ grounds and their families.
- The right to take part in cultural life (Article 15(1)(a) ICESCR). That right is violated, when, for instance, participants in LGBT+ Pride parades face State interference or violence by private parties, and the right covers also access to sport events without discrimination (both as active participants and as spectators).

The report concludes with general reflections on the significance of ICESCR rights in these fields and suggests that the importance of the treaty for LGBT+ matters will increase in the future – both on the Scottish and the international level.

1. INTRODUCTION

1. In 2021, the Scottish Government declared its intention to incorporate four major human rights treaties into Scottish law: the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’ or ‘the Covenant’), the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on Rights of Persons with Disabilities.¹ In its 2021 report, the Scottish National Taskforce for Human Rights Leadership highlighted the importance of ensuring the ‘full and equal enjoyment of rights for LGBTI people’, a point which the Scottish Government likewise supports.²

2. ICESCR is a particularly important human rights treaty in this regard. For **lesbian, gay, bisexual, transgender and related (‘LGBT+’) matters**, the Covenant has that far been ‘underutilized’,³ and advocates of LGBT+ rights tend to rely, instead, on the International Covenant on Civil and Political Rights (‘ICCPR’) or regional treaties like the European Convention on Human Rights (‘ECHR’) to evaluate topics of LGBT+ concern in light of applicable human rights. But ICESCR contains important rights that relate to fields in which discrimination on grounds of sexual orientation and gender identity exists. This report discusses certain areas in which the impact of ICESCR rights on LGBT+ matters is particularly apparent.

3. The Covenant was concluded in 1966 and entered into force in 1976. To date, 171 States have accepted to be bound by this treaty (the ‘States Parties’);⁴ the United Kingdom became State Party in 1976. The intention of the Scottish government with regard to the implementation of ICESCR relates to the incorporation of ‘specific rights’ of that treaty, ‘subject to devolved competence’, in its new Human Rights Bill.⁵

4. For an understanding of human rights and State duties under the Covenant, the work of the Committee on Economic, Social and Cultural Rights (‘CESCR’), a body of 18 independent experts that monitors the implementation of the treaty,⁶ is instrumental. There are two materials in particular that need to be considered in that regard: CESCR’s Concluding Observations and its General Comments.

1.1 Concluding Observations

5. Under Article 16(1),⁷ States Parties must submit **reports on their progress** with regard to rights of the treaty. CESCR reviews their implementation of ICESCR rights in intervals of about five years and then release their own views – the ‘Concluding Observations’ – with recommendations for the State Party. The latest UK review is ongoing, but Concluding Observations are not expected before 2024,⁸ and possibly later than that.⁹

6. The **Concluding Observations** are helpful in understanding the impact

that ICESCR has on LGBT+ matters;¹⁰ and while most conclusions are phrased as ‘recommendations’, they often provide helpful insight into CESCR’s interpretation of the relevant rights. Many of the LGBT+ matters on which CESCR has raised concerns – such as homelessness among young LGBT+ people or discrimination on the basis of sexual orientation or gender identity – are of relevance to a wide range of jurisdictions and of interest to the situation of LGBT+ persons in Scotland as well.

1.2 General Comments

7. CESCR has also published 26 ‘**General Comments**’. These deal with thematic issues, often addressing particular rights (such as General Comment No 12 on the right to sexual and reproductive health).¹¹ Some are of considerable relevance to LGBT+ matters, and reference will be made to them where this is indicated.

8. States Parties commit themselves to taking steps, ‘to the maximum of [their] available resources, with a view to **achieving progressively** the full realization’ of ICESCR rights.¹² While that wording seems to indicate something less than the obligation to fully guarantee the rights,¹³ CESCR’s Concluding Observations and General Comments have given the relevant rights and State obligations a much more precise shape, and the option of individual communications¹⁴ has demonstrated their enforceable nature.¹⁵

CESCR has also not shied away from calling on States to ‘mobiliz[e]’ their resources¹⁶ or ‘invest [...] more heavily in infrastructure, equipment and trained personnel’¹⁷ where it felt that that was necessary, and such calls are not exclusively directed at affluent States.¹⁸ In affluent States, it will be even more difficult for governments to seek to escape their obligations by reference to a lack of resources.

9. The focus of this report is on ICESCR provisions that are of particular significance to the **Scottish context**. These include the general right to non-discrimination (Art 2(2)), the right to an adequate standard of housing (Art 11(1)), the right to the ‘highest attainable standard of physical and mental health’ (Art 12(1)), the right to education (Art 13) and the right to take part in cultural life (Art 15(1)(a)), in as far as they relate to LGBT+ matters.

10. The cut-off point for the consideration of legal and factual developments was 1 September 2023.

2. FREEDOM FROM DISCRIMINATION (ART 2(2) ICESCR)

11. Under Article 2(2), States Parties guarantee that ICESCR rights will be exercised ‘**without discrimination of any kind**’. The Article does not expressly mention discrimination on LGBT+ grounds, but General Comment 20 (dealing with the right to non-discrimination) made clear that

both sexual orientation and gender identity are covered by it.¹⁹

12. Article 2(2) ICESCR has been described as a ‘dependent provision’:²⁰ it can, according to General Comment 20, ‘only be applied **in conjunction with**’ **individual ICESCR rights**.²¹ In practice, however, CESCR frequently provides a general section on ‘Non-discrimination’ in its Concluding Observations,²² and it has also, especially in recent reports, dedicated standalone sections to ‘[l]esbian, gay, bisexual, transgender and intersex persons’.²³

13. Where States have not yet adopted comprehensive **legislation against discrimination**, CESCR has often called on them to do so.²⁴ Such laws must extend to ‘all spheres relevant to economic, social and cultural rights’.²⁵ They must also extend to all prohibited grounds of discrimination, including sexual orientation and gender identity,²⁶ and CESCR has, on several occasions, called on States to **explicitly include sexual orientation and gender identity** in them.²⁷

14. Laws and measures against discrimination must address discrimination in the **public and the private sphere** alike,²⁸ and laws which can have a discriminatory effect on the basis of sexual orientation or gender identity have to be repealed or amended.²⁹

15. State Parties also must take measures against **de facto discrimination** targeted at

LGBT+ persons;³⁰ and such measures must provide effective protection against the relevant discrimination.³¹ On occasion, CESCR has outlined particular forms of discrimination which it calls on the State party to address, such as violence against LGBT+ persons³² and the promulgation of negative stereotypes and stigmatisation of LGBT+ persons.³³

16. In its Concluding Observations on Serbia, CESCR also identified a positive duty to **'promote equality'** with regard to LGBT+ persons.³⁴ Where institutions already exist that are tasked with that purpose, the State has to ensure that they receive appropriate resources to allow them to carry out their work effectively.³⁵ It is also important that NGOs working for LGBT+ rights do not suffer undue restrictions;³⁶ States must 'guarantee an enabling environment' for NGOs seeking to promote and protect the enjoyment of ICESCR rights by LGBT+ persons.³⁷

17. CESCR has also on numerous occasions recommended **awareness-raising campaigns** to address stigmatisation and discrimination of LGBT+ persons.³⁸

18. States Parties to ICESCR must also provide for 'effective remedies' for victims of discrimination;³⁹ relating to both judicial and administrative means.⁴⁰ The Committee has also pointed out that anti-discrimination laws should allow for reparation in cases of discrimination⁴¹ and that **'effective remedies'** should include psychological support.⁴²

19. In cases of **hate speech and hate crimes** against LGBTI persons, CESCR has recommended the criminalisation of the relevant acts;⁴³ in the case of Monaco, it noted as a positive aspect that the State had criminalised 'insults based on real or supposed sexual orientation'.⁴⁴

20. The question may arise whether there are **limitations to the freedom from discrimination**. CESCR has interpreted that point narrowly: any such limitation must be 'legitimate [and] compatible with the nature of the Covenant rights' and can only be adopted 'for the purpose of promoting the general welfare in a democratic society'.⁴⁵ References to 'morals' and cultural values do not seem by themselves sufficient for a limitation: in the case of Yemen, CESCR, '[w]hile acknowledging the diversity of morality and cultures', noted that 'national laws and practices must always adhere to the principles of universality of human rights and non-discrimination' and called on the State to ensure effective protection from discrimination based on sexual orientation and gender identity.⁴⁶ Reference to a 'lack of available resources' is not, by itself, an objective and reasonable justification for differential treatment: every effort has to be made to use all resources at the State's disposal to 'address and eliminate the discrimination, as a matter of priority'.⁴⁷

3. HOUSING (ARTICLE 11)

21. Housing is an area in which LGBT+ persons have experienced significant difficulties caused both by private persons⁴⁸ and State authorities.⁴⁹ In a 2017 report, based on a survey carried out in England, Scotland and Wales, 10% of LGBT people who were looking for a house or flat to rent or buy faced discrimination on the basis of sexual orientation and/or gender identity, with the rate rising to 25% of trans people who faced discrimination when looking for a new home.⁵⁰ Under ICESCR, State Parties 'recognize the right of everyone to an adequate standard of living for himself and his family', referring expressly to '**housing, and to the continuous improvement of living conditions**'.⁵¹ Enjoyment of these rights must be granted free from discrimination.⁵²

22. Where **social housing** is concerned, States Parties have to avoid 'segregation and social exclusion' relating to discrimination on any ground protected under ICESCR.⁵³ For the provision of social housing to families, that also means that same-sex couples need to have the same access to social housing as different-sex couples.⁵⁴

23. In several jurisdictions, situations have arisen where tenants faced, on the basis of their sexual orientation or gender identity, **evictions**⁵⁵ and other unfair treatment by landlords.⁵⁶ Following the adoption of the Anti-Homosexuality Act in Uganda in 2014,

CESCR expressed its concern about reports of 'many incidents of eviction of tenants' in Uganda⁵⁷ and urged the State to investigate all reported cases of illegal evictions of LGBTI persons and to ensure that they were compensated.⁵⁸

24. A matter that has obtained significance for LGBT+ persons concerns **succession in tenancies** of same-sex partners following the death of the other partner. Where this right is established for persons in a different-sex partnership or marriage but not for same-sex couples, the latter's enjoyment of their right under Article 11 in conjunction with Article 2 (freedom from discrimination) is violated: CESCR has noted the need for States Parties to recognise 'the rights of same-sex couples'⁵⁹ and has pointed out that same-sex couples have to be given the same advantages as different-sex couples.⁶⁰

25. The right to 'adequate' housing also involves a notion of **safety and privacy** in this context.⁶¹ That applies to 'legal security of tenure', a right which CESCR understands as including legal protection also 'against harassment and other threats'.⁶²

26. In its Observations on Finland, CESCR also called on the State Party to ensure that 'housing and **rental agencies**' did not engage in discriminatory practices against LGBTI persons.⁶³ Problems can also arise due to **harassment by neighbours**,⁶⁴ and the positive obligation of the State to protect against all kinds of discrimination on

grounds of LGBT+ characteristics⁶⁵ extends to this field as well.

27. **Homelessness** is a problem of particular concern to the LGBT+ community. The UN High Commissioner for Human Rights highlighted this when noting that '[m]any LGBT-identifying adolescents and young adults are thrown out of home by disapproving parents and end up on the streets, resulting in disproportionately high rates of homelessness among this group.'⁶⁶ In the case of Finland, CESCR recommended that the State prevent homelessness, including by increasing its shelter capacity.⁶⁷ At the same time, CESCR has in the past taken note when States made progress in this field: regarding Finland, it also noted as a positive aspect that the State had reduced long-term homelessness 'by nearly 50 per cent' over the course of two years.⁶⁸

4. HEALTH (ARTICLE 12)

28. States Parties recognise every person's right to 'to the enjoyment of the highest attainable standard of physical and mental health' (Art 12(1)). It is a right which is of particular relevance to LGBT+ individuals and the LGBT+ community: a Stonewall/YouGov study found that 13% of LGBT people in England, Scotland and Wales experienced unequal treatment from healthcare staff 'because they're LGBT'; the figure increased to 32% among trans people.⁶⁹ CESCR has called on States to ensure that LGBT+ persons have **access to healthcare without discrimination**⁷⁰ – lack

of resources is not a legitimate justification for discrimination,⁷¹ and CESCR has indeed recommended that States increase their investment in the health sector⁷² to allow the relevant access. Access to healthcare must be 'timely and appropriate'; it must extend to health facilities, goods and services.⁷³ CESCR has called on States to monitor discrimination and to ensure that health professionals who obstruct any person's access to healthcare are 'duly sanctioned'.⁷⁴

29. In 2019, the Special Rapporteur on the right to everyone to the enjoyment of the highest attainable standard of physical and mental health ('Special Rapporteur on Health') and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity ('Independent Expert') highlighted the link between the **pathologisation** of LGBT characteristics and the creation of stigma and discrimination and of obstacles to access to health services⁷⁵ and called on States to 'eradicate the conception of some forms of sexual orientation or gender identities as pathologies'.⁷⁶ CESCR, too, has emphasised that treating LGBTI persons as 'mental or psychiatric patients' is a clear violation of their rights.⁷⁷

30. There is a link also between the pathologisation of LGBT+ characteristics and so-called '**conversion therapy**' – practices which seek to change, suppress or eliminate a person's sexual orientation,

gender identity, gender expression or expression of sexual orientation.⁷⁸ Such practices can cause considerable harm and have received widespread condemnation.⁷⁹ CESCR notes that regulations requiring that LGBTI persons ‘be “cured” by so-called “treatment”, are a clear violation of their right to sexual and reproductive health’.⁸⁰

31. CESCR has also called on States to carry out ‘**awareness campaigns’ addressed at health-care providers** in an effort to ‘eliminate negative stereotypes and stigma’ with regard to LGBTI persons,⁸¹ and to improve their knowledge on the rights of LGBT+ persons.⁸²

32. States Parties must also address **health concerns that may be of particular relevance to LGBT+ persons**. That may include the adoption of guidelines to ensure they have access to health services,⁸³ but also of measures to address particular challenges that they face.⁸⁴

33. A matter of particular concern in this regard is the occurrence of **depression** among LGBT+ persons⁸⁵ as well as the fact that, in many parts of the world, the **suicide rate** among LGBT+ persons is comparatively high.⁸⁶ The relevant figures in Britain are worrying – in its 2018 study, Stonewall/YouGov found that more than half of LGBT people (52%) said they had experienced depression in the preceding year; 31% of lesbian, gay and bisexual people who were not trans had thought about taking their own life – among trans

people were, the figure rose to 46%.⁸⁷ CESCR has in this regard outlined the need for State Parties to engage in efforts to prevent suicide⁸⁸ and to address ‘its societal root causes’ which may include ‘discrimination and hate speech’ as experienced by LGBTI persons.⁸⁹

34. With regard to **intersex persons**, the Committee called on States Parties to ensure that, in the absence of medical necessity, surgical procedures are not performed on the sex characteristics of intersex children, until they are able to give informed consent.⁹⁰ It recommended that healthcare personnel are trained on health needs and human rights of intersex persons,⁹¹ and that intersex persons and their families are given ‘adequate counselling and support, including from peers’.⁹²

35. Pathologisation on the basis of a person’s transgender status is likewise a violation of the right to sexual and reproductive health.⁹³ Difficulties can also arise with regard to the legal **recognition of gender identity**, with CESCR calling for the adoption of ‘efficient procedure[s] for legal gender recognition’.⁹⁴ Concerns exist where procedures are required for the change of name, legal sex or gender which can further impact on human rights.⁹⁵ The UN High Commissioner for Human Rights observed that the relevant procedure should take self-identification as its basis, permit the recognition of non-binary identities, ‘be a simple administrative process’ and ‘give

minors access to recognition of their gender identity'.⁹⁶ It should also 'not require applicants to present medical certification, undergo surgery, sterilization or divorce'.⁹⁷

36. In several jurisdictions, **HIV/AIDS** remains a significant concern of the LGBT+ community.⁹⁸ CESCR has called on States to ensure that persons affected by HIV/AIDS enjoy their right to the highest attainable standard of health without discrimination.⁹⁹ Persons affected by HIV/AIDS must have access to 'adequately and timely treatment',¹⁰⁰ and State obligations extend also to preventive measures,¹⁰¹ including in the field of school education: CESCR has thus encouraged States 'to include in the school curricula sex education among the adolescents', in an effort to control sexually transmitted diseases, 'including HIV/AIDS'.¹⁰²

5. EDUCATION (ART 13)

37. Under Art 13, States Parties recognise every person's **right to education**, and CESCR has called on States Parties to ensure that no one is discriminated against in their access to education on the basis of their sexual orientation or gender identity.¹⁰³

38. CESCR has also voiced its concern about legislation which allowed the **refusal of schooling** to children on the basis of their sexual orientation and called for the repeal of provisions that could lead to the discrimination of individuals on the basis of their sexual orientation or gender identity.¹⁰⁴ Measures against discrimination also

include awareness-raising campaigns for teachers, in order to eliminate negative stereotyping and stigmatisation of LGBTI persons.¹⁰⁵

39. Recent years have seen the increased adoption of laws that seek to restrict or ban the **discussion of LGBT+ subjects in schools**.¹⁰⁶ In *Bayev*, the European Court of Human Rights ('ECtHR') found that the adoption of certain legal provisions which sought to 'outlaw the promotion of homosexuality and non-traditional sexual relations among minors' helped to promote prejudice and homophobia, which it found 'incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society'.¹⁰⁷ CESCR, similarly, expressed concerns with regard to a Guatemalan bill which would have outlawed the provision of information about transgender identity in school sex education.¹⁰⁸

40. **Stereotyping or stigmatising portrayals** of LGBT+ persons can exist in university environments, too: in its Concluding Observations on Macedonia, CESCR voiced its concern about the fact that Macedonian university textbooks conveyed 'negative stereotypes' of LGBTI persons and called for a revision of textbooks in light of this.¹⁰⁹

41. In its General Comment No 20, the Committee on the Rights of the Child ('CRC') also noted that **bullying** was a problem commonly faced by LGBTI

adolescents'.¹¹⁰ The consequences can be grave: the relevant experiences have been 'linked to low self-esteem, higher rates of depression, suicide and homelessness.'¹¹¹ In its Observations on Russia, CESCR called on the State to '[i]mplement a zero-tolerance policy against harassment in schools,' paying attention in particular to LGBT children and children from LGBT families and 'ensure effective protection of victims of bullying and their families'.¹¹² Inclusive education is one of the measures recommended as an instrument against bullying,¹¹³ as is 'raising public awareness'.¹¹⁴ Both CESCR and CRC have also highlighted the particular danger posed by cyberbullying.¹¹⁵

6. CULTURAL RIGHTS (ART 15)

42. Under Article 15 ICESCR, States Parties recognise every person's right to **take part in cultural life**. CESCR has noted that States have to refrain from interference 'with the exercise of cultural practices and with access to cultural goods and services', but also had the positive duty of 'ensuring preconditions for participation, facilitation and promotion of cultural life, and access to [...] cultural goods'.¹¹⁶ Interference with cultural rights can also intersect with violations of rights addressed by other treaties (such as freedom of expression or freedom of assembly).¹¹⁷ As Mitchell, Webster and Camps recently noted, it would be useful, for the purposes of the new human rights framework in Scotland, to 'draw out current

challenges for [...] LGBTI people in securing the right to take part in cultural life in Scotland', including an examination of 'disadvantage in relation to cultural life'.¹¹⁸

43. CESCR has clarified that cultural rights may be exercised by a person **as an individual, in association with others** or within a community or group,¹¹⁹ a point that is of relevance eg for LGBT+ groups organising cultural events.¹²⁰ Cultural rights must be granted 'on the basis of equality and non-discrimination'.¹²¹

44. The relevance of the right to participate in cultural life becomes particularly apparent in relation to LGBT+ themed events. In some jurisdictions, State interference with **Pride parades** and demonstrations in favour of LGBT+ rights in particular has given rise to concerns. CESCR, however, has emphasised the obligation of States to 'respect and protect' the cultures of minorities and found that minorities have the right 'to their cultural diversity, traditions, customs [...] and other manifestations of their cultural identity and membership'.¹²² States also have the obligation to ensure preconditions for participation in cultural life and access to cultural goods;¹²³ a duty which has to extend to the protection of participants in LGBT+ rights demonstrations from violence by private parties.¹²⁴

45. Restrictions in relation to cultural life also have relevance to LGBT+ matters where **State censorship** is concerned –

including bans and limitations on children's books with LGBT+ content and movies that deal with LGBT+ subjects or are, by the State, deemed to 'promote homosexuality'.¹²⁵ In General Comment 21, CESCR observed that 'States parties must abolish censorship of cultural activities in the arts and other forms of expression'.¹²⁶

46. '**Sport and games**' are mentioned in General Comment No 21 as aspects embraced by the concept of 'culture'.¹²⁷ To LGBT+ individuals, this has particular relevance, not least because of discrimination that they experience in this field on a global level.¹²⁸ Difficulties for LGBT+ individuals can arise in relation to their active participation in sports,¹²⁹ but also when seeking to access sports events as spectators.¹³⁰ Both aspects, however, are covered by the right to take part in cultural life¹³¹ in conjunction with the prohibition of discrimination on grounds of sexual orientation and gender identity.¹³² Article 15 includes the enjoyment of cultural events even if the beneficiaries are not those that create them: General Comment 21 refers in that regard to 'access' to culture, including the right 'to know and understand' one's culture 'through education and information',¹³³ which indicates that passive enjoyment is included.¹³⁴

7. CONCLUDING REMARKS

47. It is regrettable that, that far, not more use has been made of ICESCR to analyse the impact of human rights on LGBT+

matters.¹³⁵ It is, however, likely that this situation will change. The Concluding Observations already reflect on LGBT+ issues more frequently,¹³⁶ and CESCR has not shied away from elaborating on the way in which the impact of ICESCR rights in this field materialises. That opens opportunities for the realisation of LGBT+ rights by individuals in Scotland under the envisaged Human Rights Bill as well. The Scottish government has made clear that it wants to ensure that courts and tribunals can apply and interpret the relevant rights 'in line with international human rights law, materials and mechanisms' and noted that General Comments and Concluding Observations would be included in that.¹³⁷ It is a welcome, but also necessary step for efforts to provide effective implementation of the relevant rights and the opportunity for individuals living under Scottish jurisdiction to rely on them in court and tribunal proceedings.

48. On the international level, the option of individual communications, which was relatively recently introduced, can also be expected to strengthen the realisation of LGBT+ rights.¹³⁸ Individual communications are complaints which individuals can submit to CESCR, relating to claims that they have become victim of a violation of their rights under the Covenant.¹³⁹ Such communications must comply with certain conditions to be admissible (for instance, domestic remedies must have been exhausted).¹⁴⁰ Following their examination of the communication, the Committee then transmits its views, together with

recommendations, to the relevant parties.¹⁴¹ It is a procedure which allows CESCR to engage in more detail with the interpretation of specific aspects of ICESCR rights. However, in order to receive an individual communication, the relevant State has to be party to the Optional Protocol of ICESCR,¹⁴² and to date, the Protocol has only 27 States Parties.¹⁴³ The United Kingdom has, that far, declined to become party to the Optional Protocol, expressing the view that ‘the benefits of the communication procedure remain unclear, especially for the applicant’.¹⁴⁴

49. The impact of non-governmental organisations (NGOs) is also likely to be instrumental in that process and helps to clarify the interpretation of ICESCR rights in LGBT+ matters. NGOs can participate in various stages of a State’s review process: they can thus submit a ‘parallel report’ which engages with the relevant State’s compliance with its ICESCR obligations, with a view to having some of the matters included in the Committee’s ‘List of Issues’ (questions which CESCR asks the State to answer in advance of the review).¹⁴⁵ They can also submit a parallel report for the actual Review Session of the Committee, which can provide information in relation to matters raised in the List of Issues.¹⁴⁶ NGOs have in this context, for instance, drawn attention to LGBT+ concerns in the UK on specific matters.¹⁴⁷ In that way, they assist in promoting a process in which challenges to LGBT+ rights may be reflected in the considerations of the Committee.¹⁴⁸

50. In light of these considerations, two points appear clear. For one, questions that are sometimes raised about the strength of ICESCR rights (in view of the reference to their ‘progressive realization’)¹⁴⁹ have, in light of CESCR’s work, lost a good part of their justification. The Committee’s formulation of State duties has often meant that the corresponding rights have been given a more precise shape, and the Committee is prepared to voice concerns where their realisation has not been granted.

51. And secondly, ICESCR, as interpreted through its Committee, carries particular significance for LGBT+ matters due to the fact that it often addresses matters of everyday concern, ranging from the provision of social housing without discrimination to the need to protect children from homophobic bullying. In other fields, it is ICESCR’s protection of some of the most important and intimate aspects of the bearers of these rights, such as the need for a ‘quick, transparent and accessible procedure for legal gender recognition’ and the protection against conversion practices, that emphasises its relevance in this context. It is for that reason that the Covenant, especially with its Optional Protocol and thus the acceptance of individual communications by an increasing number of States, may well emerge as one of the most significant international instruments for the protection of LGBT+ rights around the world.

Footnotes

1. Scottish Government, 'New Human Rights Bill' (12 March 2021), at <https://www.gov.scot/news/new-human-rights-bill/>. See also Scottish Government, 'A Human Rights Bill for Scotland: Consultation (June 2023)', at <https://www.gov.scot/publications/human-rights-bill-scotland-consultation/documents/>
2. *Ibid.*, and National Taskforce for Human Rights Leadership, 'Report and Recommendations' (2021) 30.
3. P Gerber, PI Lindner, C Grover, 'The International Covenant on Economic, Social and Cultural Rights: A Tool to Advance LGB Rights?' in P Gerber (ed), *Worldwide Perspectives on Lesbians, Gays and Bisexuals. Volume 2: Law* (Praeger, Santa Barbara 2021) 192.
4. United Nations Treaty Collections, 'International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)', at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4#:~:text=The%20Covenant%20was%20opened%20for,York%20on%2019%20December%201966.
5. Scottish Government, 'New Human Rights Bill' (12 March 2021), at <https://www.gov.scot/news/new-human-rights-bill/>
6. See United Nations, Office of the High Commissioner for Human Rights, 'Committee on Economic, Social and Cultural Rights', at <https://www.ohchr.org/en/treaty-bodies/cescr>
7. For the purposes of this report, articles without a reference to a treaty are those of ICESCR.
8. Equality and Human Rights Commission (UK), 'International Covenant on Civil and Political Rights (ICESCR)', <https://humanrightstracker.com/en/un-treaty/icescr/>
9. See CESCR, Annotated Provisional Agenda, 27 July 2003, E/C.12/74/1, 7(a).
10. Not least because of the standalone sections on LGBTI issues that are sometimes included. See, eg, CESCR, 'Observations finales concernant le troisième rapport périodique du Panama', E/C.12/PAN/CO/3 (31 March 2023), before para 18. CESCR review reports in this report are abbreviated as 'Concluding Observations [country name] [(year)]'.
11. See, eg, CESCR, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22 (2 May 2016).
12. Art 2(1) ICESCR.
13. See on this Scott Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 Hum Rts Q 81, 94.
14. See on this below at nn 138–144.
15. See also Gerber et al (n 3) 194–195.
16. Concluding Observations Switzerland (2019), E/C.12/CHE/CO/4, para 49.
17. Concluding Observations Bolivia (2021), E/C.12/BOL/3, para 51.
18. See, eg, Concluding Observations Central African Republic (2018), E/C.12/CAF/CO/1, para 38(a).
19. CESCR, General Comment No. 20. Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/G.20 (2 July 2009), para 32.
20. C-A Ivanus, 'Prohibition of Gender Discrimination in Some International Regulations' (2014) 8 *AGORA Int'l J Jurid Sci* 59.
21. General Comment 20 (n 19), para 7.
22. See, eg, Concluding Observations Portugal (2023), E/C.12/PRT/CO/5, para 12.
23. Concluding Observations (Tajikistan) (2022), E/C.12/TJK/CO/4 (10 November 2022), paras 20–21; Concluding Observations Mongolia (2022), E/C.12/MNG/CO/5, paras 18–19.
24. See, eg, Concluding Observations China (2023), E/C.12/CHN/CO/3, para 34; Concluding Observations Italy (2022), E/C.12/ITA/CO/6, para 28; Concluding Observations Belarus (2022), E/C.12/BLR/CO/7, para 10(b).
25. Concluding Observations Estonia (2019), E/C.12/EST/CO/3, para 11.
26. See Concluding Observations Kazakhstan (2019), E/C.12/KAZ/CO/2, para 11(a); Concluding Observations Slovakia (2019), E/C.12/SVK/CO/3, para 15; Concluding Observations Russia, (2017), E/C.12/RUS/CO/6, para 23.
27. Concluding Observations China (n 24), para 105(a); Concluding Observations Ukraine (2020), E/C.12/UKR/CO/7, para 11(a); Concluding Observations Senegal (2019), E/C.12/SEN/CO/3, para 13(b).

28. Concluding Observations Guatemala (2022), E/C.12/GTM/CO/4, para 19(a); Concluding Observations Honduras (2016), E/C.12/HND/CO/2, para 22(d); Concluding Observations Paraguay (2015), E/C.12/PRY/CO/4, para 13(c).
29. See Concluding Observations Senegal (n 27), para 13; Concluding Observations Cameroon (2019), E/C.12/CMR/CO/4, para 24; Concluding Observations Russia (n 26), para 23(a).
30. See Concluding Observations Poland (2009), E/C.12/POL/CO/5, para 12.
31. See Concluding Observations Tajikistan (n 23), para 21; Concluding Observations Guyana (2015), E/C.12/GUY/CO/2-4, para 25.
32. See Concluding Observations Sri Lanka (2017), E/C.12/LKA/CO/5, para 18; Concluding Observations North Macedonia (2016), E/C.12/MKD/CO/2-4, para 26.
33. See Concluding Observations North Macedonia (n 32), para 26.
34. Concluding Observations Serbia (2022), E/C.12/SRB/CO/3, para 29.
35. See, eg, Concluding Observations Estonia (n 25), para 11; Concluding Observations Uganda (2015), E/C.12/UGA/1, para 15(c).
36. Concluding Observations Tajikistan (n 23), para 11.
37. See Concluding Observations Kazakhstan (n 26), para 9, in conjunction with para 8.
38. See eg Concluding Observations Lithuania (2023), E/C.12/LTU/CO/3, para 15(b); Concluding Observations China (n 24), para 104(b); Concluding Observations Bahrain (2022), E/C.12/BHR/1, para 15(e);
39. Concluding Observations Estonia (n 25), para 11 (b); Concluding Observations Bangladesh (2018), E/C.12/BGD/CO/1, para 24.
40. See Concluding Observations Guatemala (n 28), para 19(a)(iv); Concluding Observations Estonia (n 25), para 11(b); Concluding Observations Bangladesh (n 39), para 24.
41. Concluding Observations Guatemala (n 28), para 19(a)(iv); Concluding Observations Honduras (n 28), para 22(e).
42. Concluding Observations Belarus (n 24), para 10(b).
43. See Concluding Observations China (n 24), paras 34, 105; see also Concluding Observations Bolivia (n 17), para 21(a).
44. Concluding Observations Monaco (2006), E/C.12/MCO/1, B. Positive aspects, at 3.
45. General Comment No 20 (n 19), para 13.
46. Concluding Observations Yemen (2023), E/C.12/YEM/CO/3, para 30.
47. General Comment 20 (n 19), para 13.
48. See, for instance, P Behrens, S Becker, 'Changing Science and the Science of Change', in P Behrens and S Becker, *Justice After Stonewall: LGBT Life Between Challenge and Change* (Routledge 2023) 239.
49. On contemporary concerns relating to discrimination in access to this right by LGBTI persons, see Concluding Observations Peru (2012), E/C.12/PER/CO/2-4, para 5; Concluding Observations Uruguay (2010), E/C.12/URY/CO/3-4, para 7.
50. CL Bachmann, B Gooch, 'LGBT in Britain. Hate Crime and Discrimination', Stonewall/YouGov (2017) 24.
51. Art 11(1) ICESCR. The use of the male pronoun ('for himself and his family') does not mean that the right is denied to individuals and households headed by women; and the concept of 'family' has to be understood 'in a wide sense', CESCR, General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant), 13 December 1991, E/1992/23, para 6.
52. *Ibid*, para 6. See also Concluding Observations Democratic Republic of Congo (2022), E/C.12/COD/CO/6, para 29; Concluding Observations Sri Lanka (n 32), para 18.
53. Concluding Observations Mexico (2018), E/C.12/MEX/CO/5-6, para 51(c).
54. See on this also Kaleidoscope Australia, 'Using the ICESCR to Protect the Economic, Social and Cultural Rights of LGBTI People' (2018) 18.
55. See, for instance, Special Rapporteur on Adequate Housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Mission to Indonesia (26 December 2013) A/HRC/25/54/Add.1, para 69; Gerber et al (n 3) 200.
56. See High Commissioner of Human Rights ('OHCHR'), Discrimination and violence against individuals based on their sexual orientation and gender identity (4 May 2015), A/HRC/29/23, para 59.
57. Concluding Observations Uganda (n 35), para 30.
58. *Ibid*, para 30(c)–(d). See also General Comment 4 (n 51), paras 17(a) and (b).
59. Concluding Observations Costa Rica (2016), E/C.12/CRI/CO/5, para 21.

60. See Concluding Observations North Macedonia (n 32), para 26; Concluding Observations Bolivia (n 17), para 21(c). See also ECtHR, *Karner v Austria* (Application no 40016/98), Judgment, 24 July 2003, in particular at paras 37–43 (in light of the relevant ECHR rights).
61. See on this Gerber et al (n 3) 198.
62. General Comment 4 (n 51), para 8(a).
63. Concluding Observations Finland (2021), E/C.12/FIN/CO/7, para 39(b).
64. See OHCHR (2015) (n 56), para 59.
65. See above at nn 19, 30.
66. OHCHR (2015) (n 56), para 59. See also C Tunåker, 'LGBT+ Youth Homelessness as a Consequence of Progress', in Behrens and Becker (n 48) 28–29.
67. Concluding Observations Finland (n 63), para 39(a).
68. *Ibid*, para 38.
69. CL Bachmann, B Gooch, 'LGBT in Britain. Health Report' YouGov/Stonewall (2018) 11.
70. See, eg, Concluding Observations El Salvador (2022), E/C.12/SLV/CO/6, para 27(c); Concluding Observations DR Congo (n 52), para 29.
71. See above at n 47.
72. See Concluding Observations Kyrgyzstan (2015), E/C.12/KGZ/CO/2-3, para 22; Concluding Observations Bolivia (n 17), para 51(a).
73. CESCR, General Comment No 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2000, E/C.12/2000/4, paras 11, 43(a).
74. Concluding Observations Kyrgyzstan (n 72), para 22, Recommendations (a).
75. Special Rapporteur on Health and Independent Expert, 'Call for the effective implementation of SDG Goal 3: Removing barriers and closing the gap of health disparities for lesbian, gay, bisexual, trans and gender-diverse people' (11 October 2019), at <https://www.ohchr.org/en/statements-and-speeches/2019/10/call-effective-implementation-sdg-goal-3-removing-barriers-and>
76. *Ibid* after n 13.
77. General Comment 22 (n 11), para 23. See also Concluding Observations Mongolia (n 23), para 19(c); Concluding Observations Guatemala (n 28), para 18.
78. Expert Advisory Group on Ending Conversion Practices (Scotland), Report and Recommendations (October 2022) 17.
79. Independent Expert, 'Practices of So-Called "Conversion Therapy"', Report to the Human Rights Council, 1 May 2020, A/HRC/44/53, paras 55 and 62 with further references. See also P Behrens, 'False Therapy, Real Harm', in Behrens and Becker (n 48), 248–264.
80. General Comment 22 (n 11) para 23.
81. Concluding Observations El Salvador (n 70), para 27(b); and see also Concluding Observations Mongolia (n 23), para 19(a).
82. Concluding Observations Bolivia (n 17) para 51(d).
83. Concluding Observations Ecuador (2013), E/C.12/EQU/CO/3, para 30.
84. Concluding Observations Uganda (n 35), para 32.
85. See C Lee et al., 'Depression and Suicidality in Gay Men: Implications for Health Care Providers' (2017) 11:4 *American Journal of Men's Health* 911–912.
86. See Kaleidoscope (n 54) 26 and fn 87, with further references.
87. Bachmann/Gooch (2018) (n 69) 5
88. Concluding Observations France (2008), E/C.12/FRA/CO/3, para 48; Concluding Observations Switzerland (n 16), para 49.
89. Concluding Observations Republic of Korea (2017), E/C.12/KOR/CO/4, para 56.
90. Concluding Observations Luxembourg (2022), E/C.12/LUX/CO/4, para 37(b); Concluding Observations Czechia (2022), E/C.12/CZE/CO/3, para 39(d); Concluding Observations Denmark (2019), E/C.12/DNK/CO/6, para 65(b).
91. Concluding Observations Denmark (n 90), para 65(c); Concluding Observations Belgium (2020), E/C.12/BEL/CO/5, para 55(b).
92. Concluding Observations Denmark (n 90), para 65(d).
93. See above at n 77 and General Comment 22 (n 11). See also Concluding Observations Germany (2018), E/C.12/DEU/CO/6, paras 24–25; Council of Europe, Parliamentary Assembly, Resolution 2048 (2015), para 6.3.3.

94. Concluding Observations Azerbaijan (2021), E/C.12/AZE/CO/4, para 19(d).
95. See Independent Expert, 'Protection against violence and discrimination based on sexual orientation and gender identity' (12 July 2018), A/73/152, in particular paras 28–29, 81(b); see also Concluding Observations Azerbaijan (n 94), para 19(d) and Concluding Observations Russia (n 26), para 23(b).
96. OHCHR, *Living Free and Equal* (New York and Geneva 2016), HR/PUB/16/3, at 6.1, 95; see also Independent Expert (n 95), para 39.
97. OHCHR (2016) (n 96) 95. See also Concluding Observations Azerbaijan (n 94), para 19(d).
98. See, eg, Concluding Observations Uganda (n 35), para 32; Concluding Observations Jamaica (2013), E/C.12/JAM/CO/3-4, para 28(b).
99. See, eg, Concluding Observations Cabo Verde (2018), E/C.12/CPV/CO/1, para 55; Concluding Observations Republic of Korea (n 89) para 62; Concluding Observations Uganda (n 35), para 32; Concluding Observations Poland (n 30), para 30.
100. Concluding Observations Guyana (n 31), para 51(d).
101. Concluding Observations Belarus (2013), E/C.12/BLR/CO/4-6, paras 24(a) and 40; Concluding Observations Mongolia (n 23), para 27.
102. Concluding Observations Russia (2011), E/C.12/RUS/CO/5, para 30; see also Concluding Observations Moldova (2017), E/C.12/MDA/CO/3, para 62.
103. Concluding Observations DR Congo (n 52), para 29; see also Concluding Observations Latvia (2021), E/C.12/LVA/CO/2, para 13(b); Concluding Observations Paraguay (n 28), para 13(e).
104. Concluding Observations Burundi (2015), E/C.12/BDI/CO/1, paras 17–18.
105. Concluding Observations Azerbaijan (n 94), para 19(c); Concluding Observations Bahrain (n 38), para 15(e); Concluding Observations Mongolia (n 23), para 19(a).
106. P Behrens and S Becker, 'From Stonewall to the World: The Difficult Path to Recognition' in Behrens and Becker (n 48) 6–7.
107. ECtHR, *Bayev and Ors v Russia* (Application nos 67667/09; 44092/12; 56717/12), Judgment, 20 June 2017, paras 63, 83.
108. Concluding Observations Guatemala (n 28), para 18; Human Rights Watch, 'Guatemala: Anti-Trans Bill Threatens Rights' (24 January 2022) <https://www.hrw.org/news/2022/01/24/guatemala-anti-trans-bill-threatens-rights>.
109. Concluding Observations North Macedonia (n 32), paras 25–26. See also Gerber et al (n 3) 208.
110. Committee on the Rights of the Child, General Comment No. 20 (6 December 2016), CRC/C/GC/20 on the implementation of the rights of the child during adolescence, para 33.
111. CRC (n 110), para 33 and see Kaleidoscope (n 54) 29.
112. Concluding Observations Russia (n 26), para 57(b). See also CRC (n 110), para 34.
113. See on this Concluding Observations Finland (n 63), para 47; UNESCO, 'Review of Homophobic Bullying in Educational Institutions' (Paris, 2012) 25.
114. CRC (n 110), para 34; see also Concluding Observations Poland (n 30), para 32.
115. CO Argentina (2018), E/C.12/ARG/CO/4, para 25(e), and see CRC (n 110), para 48.
116. CESCR, General Comment No 21, 'Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)' (21 December 2009), E/C.12/GC/21, para 6.
117. See on this Arts 19, 21 ICCPR; Art 10 and 11 ECHR; Arts 13, 15 ACHR.
118. L Mitchell, E Webster, D Camps, 'Incorporating International Human Rights: The Right to Cultural Life in Scotland', Briefing Paper (Human Rights Consortium Scotland, 2023).
119. General Comment 21 (n 116).
120. See also Gerber et al (n 3) 210.
121. See General Comment 21 (n 116), para 16. See also Concluding Observations Iraq (2015), E/C.12/IRQ/CO/4, para 20; Concluding Observations Kyrgyzstan (n 72), para 5, Recommendations, (c).
122. General Comment 21 (n 116), para 32. See also ECtHR, *Alekseyev v Russia* (Applications nos. 4916/07, 25924/08, 14599/09), Judgment, 21 October 2010, para 88.
123. See above at n 116.
124. See also ECtHR, *Identoba v Georgia* (Application No 73235/12), Judgment, 12 May 2015, para 94–95 (discussed under ECHR rights).

125. See eg Guardian/Reuters, 'Lebanon in move to ban Barbie film for "promoting homosexuality"', 9 August 2023.
126. General Comment 21 (n 116), para 49(c). See also ECtHR, *Macatė v Lithuania* (Application No 61435/19), Judgment, 23 January 2023, in particular paras 16–17, 210–211, 218.
127. General Comment 21 (n 116), para 13.
128. See on this Kaleidoscope (n 54) 33. For the UK, see also House of Commons, Culture, Media and Sport Committee, 7th Report of Session 2016–17, HC 113 (12 February 2017), para 1.
129. See HC 113 (n 128) para 26.
130. See E Denison, A Kitchen, *Out on the Fields* (Sydney 2015) 50, 53.
131. See General Comment 21 (n 116) para 16, in particular at (c).
132. See above at n 19.
133. General Comment 21 (n 116) para 15.
134. See also Kaleidoscope (n 54) 33.
135. See also Gerber et al (n 3) 192.
136. See above at n 23.
137. Scottish Government (2023) (n 1) 14–15.
138. This possibility is available under the Optional Protocol to ICESCR, see Optional Protocol (10 Dec 2008) ['Optional Protocol'] Art 2.
139. Art 2 Optional Protocol.
140. See *ibid*, Art 3(2).
141. *Ibid*, Art 9(1).
142. *Ibid*, Art 1(2).
143. United Nations Treaty Collection, IV.3.a, 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (New York, 10 December 2008)', https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3-a&chapter=4&clang=_en
144. United Kingdom, 7th periodic report under the United Nations Convention on Economic, Social and Cultural Rights (ICESCR) (4 May 2022), para 179, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1076698/icescr-uk-7-periodic-report-may-2022.pdf
145. For an example of a 'List of Issues', see CESCR, List of issues in relation to the seventh periodic report of United Kingdom of Great Britain and Northern Ireland (23 March 2023), E/C.12/GBR/Q/7.
146. See, for an overview, Kaleidoscope (n 54) 38–47.
147. See, for instance, Human Rights Consortium (coordinating) et al, 'Joint Northern Ireland Civil Society submission to the United Nations Committee on Economic, Social and Cultural Rights (CESCR)' (January 2023), in particular at paras 60–62; Engender et al, 'United Nations International Covenant on Economic, Social and Cultural Rights: Shadow Report' (December 2022) 1, 6.
148. On helpful input by NGOs in that regard, see Kaleidoscope (n 54) 47.
149. See Leckie (n 13) 94 and above at nn 12–18.

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