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**'An analysis of the added value of the human right to adequate housing in
Scots law'**

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Table of Abbreviations

CESCR	Committee on Economic, Social and Cultural Rights
CRPD	UN Convention on the Rights of Persons with Disabilities
CRC	Committee on the Rights of the Child
EA 2010	Equality Act 2010
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GCC	Glasgow City Council
GP	General Practitioner
HA 1987	Housing (Scotland) Act 1987
HRA 1998	Human Rights Act 1998
ICESCR	International Covenant on Economic, Social and Cultural Rights
Shelter	Shelter Scotland
SHRC	Scottish Human Rights Commission
UAO	Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2014
UK	United Kingdom
UNCRC	UN Convention on the Rights of the Child

Executive Summary

- The Scottish Government is consulting on the incorporation of various international human rights treaties, including ICESCR and the CRPD. Both contain provisions on the right to adequate housing.
- The National Taskforce for Human Rights Leadership has recommended the establishment of a human rights statutory framework for the direct and maximalist incorporation of the international treaties.
- Scots law currently requires that local authorities have an interim duty to accommodate under the HA 1987 in circumstances where they have reason to believe that someone may be homeless.
- The UAO requires that temporary accommodation provided under s29 must meet specific basic standards.
- Despite having to meet these standards, local authorities frequently fail to provide suitable temporary accommodation.
- The recent decision, *X v GCC*, considered whether the HA 1987 duty to provide interim accommodation, with the UAO, constituted an absolute duty to provide temporary accommodation, suitable for the petitioner's household. It was held that local authorities are under an absolute duty to provide accommodation that is suitable for the household's support needs. Local authorities must find a way to comply and allocate appropriate resources to do so.
- There are various gaps and issues in the domestic legislative framework that would benefit from a human rights lens. This has been highlighted by international institutions such as CESCR.

Key Recommendations

The key policy recommendations are:

- 1. Interpretation clause:** Ensure that an interpretation clause is included within the Incorporation Bill so that the most robust interpretation of human rights stands, in the event of a conflict between international and national standards.
- 2. Accountability:** Require a programme of identification of groups that are frequently denied the minimum standard of temporary housing provision and allocate resources accordingly. Bolster accountability mechanisms so that breaches of the UAO are minimised.
- 3. Human rights budgeting:** Establish a legal obligation on public bodies to make a statement of compatibility as to whether their budget assists with the realisation of human rights under the Incorporation Bill.
- 4. Access to justice:** Strengthen judicial routes of challenge by ensuring that civil society organisations can bring cases for structural and systemic issues. Feasible alternative routes to the court system should also be established.
- 5. Social model of disability:** Identify areas where legislation, policy and practice should be updated to reflect the social model of disability and keep this in the forefront of considerations. Needs assessments should be carried out at the earliest opportunity (i.e. when accommodation is offered), with a standard process for assessing needs, including intervention by a specialist, such as an occupational therapist, when required and without delaying the accommodation offered.
- 6. Transparency:** Greater transparency should be required of local authorities in providing details of the housing that is available, continuous assessment of the housing needs in the area and how they plan to address any shortfalls.

- 7. Participation:** The Incorporation Bill should come with a national campaign of awareness to encourage greater understanding of people's rights.

- 8. Data collection:** The Scottish Government should undertake an audit of their data collection practices for homelessness statistics and consider whether improvements can be made by disaggregating data to a greater degree.

- 9. Dignity:** Judicial bodies should be under an obligation to take into account the underpinning principle of human dignity when adjudicating on decisions concerning the allocation of temporary accommodation.

1. Introduction

Adequate housing is essential to human survival and housing is internationally recognised as a human right. The right goes beyond simply comprising four walls and a roof¹ and is acknowledged as the right to live in “security, peace and dignity”², central to the enjoyment of all other economic and social rights³. Scots law stipulates that where someone is believed to be homeless, a local authority is required to provide temporary accommodation. Despite being termed as “temporary”, the length of time that households can spend in this accommodation is often significant. However, regardless of temporality, everyone should be entitled to accommodation that is suitable to their needs.

The focus of this paper is on the impact that a direct and maximalist incorporation of ICESCR⁴ and the CRPD⁵ into Scots law might make on disabled people seeking temporary accommodation. This approach means that the rights and obligations contained in the treaties are fully incorporated into domestic law and requires that public bodies use international standards and interpretations to adhere with the obligations. This is the proposal used by the National Taskforce for Human Rights Leadership (“National Taskforce”), which was established to provide recommendations to the Scottish Government for the creation of a statutory framework for human rights. The approach aims to provide the widest possible protection within the Scottish Parliament’s devolved competence⁶.

The current legal framework in Scotland for the provision of temporary accommodation is considered in Section 2, with gaps in the framework identified, including criticisms from international bodies such as CESCR and CRC.

¹ UN Habitat, ‘The Right to Adequate Housing for Persons with Disabilities Living in Cities – Towards Inclusive Cities’ (*United Nations Human Rights Office of the High Commissioner*, 2015).

² Committee on Economic, Social and Cultural Rights, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11(1))’, 6th session, UN Doc E/1992/23 (13 December 1991), para 7.

³ *Ibid.*

⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁵ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UN Doc A/RES/61/106 (CRPD).

⁶ National Taskforce for Human Rights Leadership, ‘National Taskforce for Human Rights Leadership Report’ (*Scottish Government*, 2021).

International obligations regarding the right to adequate housing are expanded in Section 3. Discussion of what “adequate housing” encompasses and how international bodies have elaborated this in practice, follows. The Special Rapporteur on the right to adequate housing has considered what the right means for disabled people and the dialogue between ICESCR and the CRPD. This is due to the recognition that homelessness often disproportionately impacts disabled people and the vicious circle that disability often leads to homelessness and homelessness exacerbates disabilities.

Whilst the incorporation of ICESCR and the CRPD is anticipated to have far reaching benefits across all applicants seeking temporary accommodation, this paper focuses on disabled people as they have specifically been recognised as at risk of being provided with unsuitable temporary accommodation. Nonetheless, incorporation alone will not be a silver bullet that will resolve the current housing crisis and the suitability of housing provided. Section 4 considers the differences that an incorporated right to adequate housing might make for disabled people. The section culminates with various policy recommendations for the Scottish Parliament and Government to ensure that incorporation of the treaties goes beyond rhetoric and instead guarantees that the right is effectively realised and continually improved.

2. Current Scots law

2.1 Current statutory framework

In Scotland, where a local authority has reason to believe someone may be homeless, the local authority is required to provide temporary accommodation for the applicant, under s29 and s31 HA 1987⁷. This encompasses various types of housing including council housing, private flats, housing association accommodation and, in emergency circumstances or where there is no other accommodation available, B&Bs/hostels. Temporary accommodation must be available while the local authority makes inquiries as to whether the applicant is homeless⁸, where the applicant has requested a review of the local authority's decision up until the review decision is reached⁹ and where a review decision determines that the local authority has a duty to provide accommodation¹⁰, temporary accommodation is to be provided until permanent accommodation becomes available¹¹.

Temporary accommodation must meet specific basic standards, in accordance with the UAO. Accommodation is deemed unsuitable if it is not wind and watertight¹², not suitable for occupation by a homeless household, taking into account the household's needs¹³ or where it does not meet minimum safety standards¹⁴. There is additionally a Code of Guidance from the Scottish Government containing advisory standards for temporary accommodation. The Code states that physical standards of temporary accommodation should be "accessible and able to meet the needs of any disabled person within the household"¹⁵. While the Code aims to reflect "best working practice"¹⁶, it has not been updated since 2019, despite legislative changes to the

⁷ Housing (Scotland) Act 1987, ss29 and 31.

⁸ *Ibid*, s29(1)(a).

⁹ *Ibid*, s29(1)(b).

¹⁰ *Ibid*, s31.

¹¹ *Ibid*, s29(1)(c).

The local authority is also required to provide temporary accommodation where the applicant is found to be homeless but the local authority is satisfied that they are intentionally homeless under s31(3).

¹² The Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2014, SSI 2014/243 (as amended by Homeless Persons (Unsuitable Accommodation) (Scotland) Amendment Order 2020, SSI 2020/139), Art 4(a).

¹³ *Ibid*, Art 4(b).

¹⁴ *Ibid*, Art 4(c).

¹⁵ Scottish Government, 'Code of Guidance on Homelessness: Guidance on Legislation, Policies and Practices to Prevent and resolve Homelessness (Interim Update)' (*Scottish Government*, November 2019).

¹⁶ *Ibid*, 2.

UAO. There is also a current Government working group on the creation of a Temporary Standards Framework¹⁷.

Although the provision of this type of housing is termed “temporary accommodation”, the length of time that applicants spend in this system is often significant, with an average stay of 199 days across Scotland¹⁸. The longest average time in temporary accommodation was in Midlothian at 614 days for all cases closed in 2020 to 2021¹⁹. It is crucial, regardless of the length of time spent in temporary accommodation, that the housing provided by local authorities is suitable, taking into account the needs of the household. Where the accommodation provided is unsuitable, the main route of challenge is judicial review.

2.2 Case law

The case of *X v GCC*²⁰ concerned the petitioner, her husband and four children, one of whom had autism and was considered disabled within the definition under Section 6 of the EA 2010²¹. The Homeless Occupational Therapist Service had assessed the household’s needs and recommended that the family needed a five bedroom apartment property with a garden, to accommodate the autistic son’s support needs. Despite this, the family had been provided with temporary accommodation by GCC, consisting of a four bedroom apartment which the Council stated was due to a lack of five bedroom properties in the area.

The central question considered by the Court of Session was whether the s29 HA 1987 duty to provide interim accommodation, together with Article 4(1)(b) of the UAO constituted an absolute duty on GCC to provide temporary accommodation that is suitable for the petitioner’s household, taking into account the support needs of the petitioner’s son, or whether GCC had the freedom to not give effect to the provisions due to its limited resources. Lord Ericht held that local authorities are under an absolute duty to provide temporary accommodation which is suitable for occupation,

¹⁷ Homeless Network Scotland, ‘Temporary Accommodation Standards – a Draft Framework’ (*Homeless Network Scotland*, 2 June 2022) <<https://homelessnetwork.scot/2022/06/02/temporary-accommodation-standards-a-draft-framework/>> accessed 6 August 2022.

¹⁸ Scottish Government, ‘Homelessness in Scotland: 2020 to 2021’ (*Scottish Government*, 29 June 2021) <<https://www.gov.scot/publications/homelessness-scotland-2020-2021/documents/>> accessed 6 August 2022.

¹⁹ *Ibid.*

²⁰ *X v Glasgow City Council* [2022] CSOH 35.

²¹ Equality Act 2010, s6.

in light of the support needs of the household, stating: “to put it another way, the respondent is under an absolute duty to provide a five [bedroom] apartment property”²² and that the local authority is obliged to comply, regardless of whether it would prefer to spend its money and finite resources otherwise²³.

As GCC does not hold its own housing stock, it generally sources accommodation from registered social landlords. The Court considered the situation where a local authority cannot obtain accommodation from its normal sources, holding that locating from other sources such as the private sector would be a reasonable adjustment. Lord Ericht stated that, “it is not up to the court to decide the precise way in which an authority complies with its statutory duty. The authority must find a way and must allocate appropriate resources to do so”²⁴. The decision places a high bar on local authorities sourcing temporary accommodation and provides significant rights for homeless people. As Govan Law Centre states, the decision “is one of the most significant reported homelessness decisions in the last twenty years”²⁵.

The EA 2010 was also argued in the *X v GCC* decision and can be a useful legal tool in judicial reviews to protect individuals from unfair treatment, placing a duty of non-discrimination against a person with protected characteristics, including disability²⁶. The Act contains a “public sector equality duty”²⁷ which requires due regard by public bodies to the need to “eliminate discrimination”²⁸, “advance equality”²⁹ and “foster good relations”³⁰. On this, the Court in *X v GCC* was satisfied that notwithstanding the practice of only getting temporary accommodation from registered social landlords, the local authority were aware of the needs of the disabled child and tried, albeit unsuccessfully, to provide accommodation suitable for the child’s disability³¹. Despite

²² *X v GCC* (n20) [31] (Lord Ericht).

²³ *Ibid*.

²⁴ *Ibid*, [46] (Lord Ericht).

²⁵ Kat McInnes and Mike Dailly, ‘Councils have a legal duty to provide temporary accommodation, taking into account needs of the household’ (*Govan Law Centre*, 26 May 2022) <https://govanlawcentre.org/2022/05/26/councils-have-a-legal-duty-to-provide-temporary-accommodation-taking-into-account-needs-of-the-household/?utm_source=e-shot&utm_medium=email&utm_campaign=ScotlandEqualityLawbulletin-May2022> accessed 6 August 2022.

²⁶ Equality Act (n21), s6.

²⁷ *Ibid*, s149.

²⁸ *Ibid*, s149(1)(a).

²⁹ *Ibid*, s149(1)(b).

³⁰ *Ibid*, s149(1)(c).

³¹ *X v GCC* (n20), [42].

this, the Court did not make a finding as to whether GCC had complied with its public sector duty under the EA 2010³².

2.3 European Court of Human Rights

Article 8 of the ECHR³³ provides a right to respect for private and family life, home and correspondence. The ECHR was incorporated into domestic law by the HRA 1998 and is currently the closest international provision for a right to adequate housing that is incorporated into Scots law. The decision of *Marzari v Italy*³⁴ concerned a disabled applicant who was allocated inadequate accommodation. They had ceased paying rent on the basis that they required specific works to be carried out to make the apartment accessible to live in. Due to the failure to pay rent, the applicant was evicted and a breach of Article 8 was claimed. The ECtHR did not find that there had been an Article 8 breach as the ECHR does not guarantee a right for individuals to have their housing problems resolved by the State³⁵. Article 8 is therefore of limited use within the context of providing suitable temporary accommodation for disabled people, especially given that the domestic framework through *X v GCC* provides a more robust approach in holding local authorities to account.

2.4 Current status of ICESCR and CRPD in Scotland

ICESCR and the CRPD have not been incorporated into domestic law; neither the provisions of the treaties nor the general principles that underpin them are enforceable in the domestic courts. However, there are some rights contained within the treaties that are given indirect effect through pieces of national legislation. Therefore, where a public body or the Government in the UK has violated the rights guaranteed under the treaties, individuals are unable to hold them to account and seek compliance or compensation for a breach, unless they are able to indirectly enforce them through relevant national legislation.

2.5 National Taskforce recommendations

The National Taskforce was established to make recommendations on how to progress human rights in Scotland. In March 2021, the Taskforce set out the

³² *Ibid.*

³³ Convention for the protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 8.

³⁴ *Marzari v Italy* (1999) App no 36448/97 (ECHR, 4 May 1999).

³⁵ *Ibid.*

recommendations for the establishment of a human rights statutory framework³⁶. The report recommended that a direct and maximalist approach to incorporation is required to ensure that the most comprehensive incorporation of international standards is integrated into Scots law³⁷. Of particular relevance for disabled people seeking temporary accommodation is Recommendation 1(b) which endorsed the incorporation of ICESCR and specifically, the right to an adequate standard of living and the continuous improvement of living conditions (including the right to adequate housing)³⁸, as well as incorporation of the CRPD under Recommendation 5³⁹.

2.6 Gaps in current framework

Despite Scotland's frequent praise as a bastion for housing rights⁴⁰, there are still many issues with the current housing framework. In 2016, CESCR flagged concerns about the "persistent critical situation in terms of the availability, affordability and accessibility of adequate housing"⁴¹, particularly for the "most disadvantaged and marginalized individuals including... persons with disabilities"⁴². CESCR also highlighted in 2009, the chronic shortage of housing for disabled people in Scotland and recommended an intensification of efforts to ensure that everyone has access to housing⁴³. The CRC has also identified the increased number of homeless households staying in temporary accommodation and recommended a UK wide legal prohibition of prolonged placement of children in temporary accommodation by local authorities⁴⁴. The CRC proposed that the UK undertake measures that reduce homelessness and progressively guarantee accessibility for disabled children⁴⁵. Criticisms have also arisen from the CRPD Committee in 2017, stating that anti-discrimination legislation does not provide a comprehensive and appropriate protection in access to housing

³⁶ National Taskforce for Human Rights Leadership (n6).

³⁷ *Ibid*, 20.

³⁸ *Ibid*, 27.

³⁹ *Ibid*, 30.

⁴⁰ Prevention Review Group, 'Preventing Homelessness in Scotland – Recommendations for legal duties to prevent homelessness: A report from the Prevention Review Group' (*Prevention Review Group*, February 2021), 5.

⁴¹ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland' (14 July 2016) E/C.12/GBR/CO/6, para 49.

⁴² *Ibid*.

⁴³ Committee on Economic, Social and Cultural Rights, 'Concluding observations of the Committee on Economic, Social and Cultural Rights – United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories' (12 June 2009) E/C.12/GBR/CO/5.

⁴⁴ Committee on the Rights of the Child, 'Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland' (12 July 2016) CRC/C/GBR/CO/5.

⁴⁵ *Ibid*, para 71(f).

and that there is a low level of redress in rulings by the UK judiciary when adjudicating on cases of discrimination against disabled people⁴⁶.

2.6.1 Access to justice

The main method of bringing a challenge to a local authority's failure to provide accommodation under the HA 1987 and of the UAO standard, is by bringing judicial proceedings. The grounds for bringing a judicial review are relatively limited in scope⁴⁷. Where accommodation has been provided, but the period that an applicant has spent in unsuitable accommodation has a detrimental impact upon someone's health, the applicant may have a further claim for damages under the EA 2010.

Alternatively, an appeal can be made to the Scottish Public Services Ombudsman if it is believed that the local authority did not follow the correct procedure when allocating housing. However, the Ombudsman is limited in terms of the outcomes that it may provide. Following its review, it can recommend that the local authority pays compensation or takes steps to put matters right. Despite this, local authorities are not legally bound to comply with the Ombudsman's recommendations.

Judicial review is therefore most often used due to the obligation on local authorities to comply with the decision (or else be found in contempt of court) and the range of available remedies. However, disabled people are statistically more likely to be in poverty⁴⁸ and unable to afford costly processes like judicial review. While legal aid can be claimed, it is dependent on eligibility criteria and does not always cover all legal costs. The estimated average cost of a judicial review is otherwise between £25,000-£40,000⁴⁹. Where legal aid cannot be provided, judicial review is an extraordinarily expensive procedure. The adversarial system can also be intimidating and there is a

⁴⁶ Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of the United Kingdom of Britain and Northern Ireland' (3 October 2017) CRPD/C/GBR/CO/1, para 14.

⁴⁷ Shelter Scotland, 'Grounds for judicial review' (*Shelter Scotland*, 2022) <https://scotland.shelter.org.uk/professional_resources/legal/courts_and_legal_action/judicial_review/grounds_for_judicial_review> accessed 6 August 2022.

⁴⁸ General Assembly, 'Report of the 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' (12 July 2017) UN Doc A/72/128.

⁴⁹ The National Council for Voluntary Organisations, 'How to work out if you should apply for judicial review' (*The National Council for Voluntary Organisations*, June 2018) <<https://knowhow.ncvo.org.uk/how-to/how-to-work-out-if-you-should-apply-for-judicial-review>> accessed 6 August 2022.

risk that where a claim is unsuccessful, the individual may be ordered to pay the local authority's legal fees.

In addition to the financial barrier, there is a lack of housing solicitors. Boyle⁵⁰ notes that there is an increasing "likelihood of advice deserts both geographically and in the sufficiency of the numbers of solicitors providing a particular service within a specialist field of law"⁵¹. This is tied into the availability of legal aid funding which has been subject to budgetary cuts which now does not cover all the costs in providing legal advice⁵². Statistics show that where someone has legal advice they tend to do better than people who do not⁵³, thus those without legal advice are at a significant disadvantage.

2.6.2 Assessment of needs

The process of assessment of the needs of a household for the interim duty to accommodate is not clearly stipulated in the current legal framework, including what the assessment should entail and who should be carrying out the assessment or what evidence should be considered. However, practitioner guidance⁵⁴ states "in assessing whether accommodation is unsuitable for a homeless household, a local authority must take account of the needs of each member... including any protected characteristics, equality considerations or vulnerability around psychological informed service delivery and childhood trauma"⁵⁵.

There is also no specified timescale for the assessment. In *X v GCC*, the assessment was made by an occupational therapist in July 2021. However, from the facts of the case, the family were granted refugee status in February 2020 which meant that the petitioner and her family were no longer entitled to Home Office accommodation and instead became homeless, with the obligation to house them passed to the local authority⁵⁶. Assuming the local authority became aware of the family in February 2020, the assessment of needs was not taken out for a period of seventeen months. This is a substantial length of time before an assessment was taken out and raises questions

⁵⁰ Katie Boyle, 'The access to justice journey' (*Access to Justice for Social Rights*, May 2022).

⁵¹ *Ibid*, 5.

⁵² *Ibid*.

⁵³ *Ibid*, 6.

⁵⁴ Scottish Government, 'Practitioners guidance for the Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2014 (as amended)' (*Scottish Government*, 2020).

⁵⁵ *Ibid*, para 2.11.

⁵⁶ *X v GCC* (n20) [3].

of how local authorities can carry out their duty under the UAO to provide accommodation that meets the household's needs, if they have not undertaken a needs assessment.

2.6.3 Rapid Rehousing Transition Plans

Local authorities in Scotland publish 'Rapid Rehousing Transition Plans' ("RRTPs"). These provide an overview of the housing needs in their area and include an assessment of the support needs within their localities and can comprise the number of people with learning and physical disabilities. However, there is no legal obligation on local authorities to provide RRTPs, nor to comply with the housing provision outlined.

Crisis⁵⁷ reviewed RRTPs and highlighted various shortfalls in the current provision of temporary accommodation under the plans. Notably, Crisis highlighted that authorities were asked to provide "details on the capacity, nature, average stays and costs of temporary accommodation in their area, and analyse trends in demand since 2003"⁵⁸. In light of this, local authorities were asked to show their five year vision for "transforming temporary provision"⁵⁹ and provide a "locally agreed target for the *maximum* (as opposed to average) time households should spend in temporary accommodation"⁶⁰. However, authorities are not required to provide current data on the "longer or longest stays, nor total time spent in temporary accommodation before rehousing currently"⁶¹. This is, in part, because the Scottish Government publishes data on the cases that are closed and therefore this does not represent the longer periods where people are still in temporary accommodation. The impact of this is that there is no "clear picture of what customer journeys look like now, and which households get "stuck" in the system"⁶².

2.6.4 Data collection

The method of data collection for the monitoring of households in temporary accommodation is undertaken through two core data returns.

⁵⁷ Crisis Scotland, 'Rapid Rehousing Transition Plans: A Scottish Overview' (*Crisis Scotland*, 2020).

⁵⁸ *Ibid*, 58.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *Ibid*, 59.

⁶² *Ibid*.

The HL1 requires information about the household, including whether any member of the household has support needs (including mental health, learning disability, physical disability or medical condition). Reporting guidance stipulates that this “is to be answered according to the judgment of the homelessness officer. It is recognised that, at this stage of the application, a full support needs assessment will not necessarily have been completed”⁶³.

The HL3 provides monitoring of the placement of households in temporary accommodation, including details of the type and date accommodation was offered. The HL3 also requires a determination of whether the accommodation offered is unsuitable, as defined by the UAO.

Under the HL1 return, it is a homelessness officer that is determining whether any of the household has support needs, not a specialist such as an occupational therapist. The return does not require any further details other than a “yes” or “no” response. It is therefore difficult to determine how a homelessness officer proceeds to establish suitable temporary accommodation for the household, in light of their specific needs.

In the data subsequently published by the Scottish Government, the numbers of breaches of the UAO are provided but are not particularised into groups to show which groups have been subject to the most breaches. It is therefore not known how many disabled people have been provided with accommodation that does not comply with the UAO. However, these statistics should be available given that an assessment is made under the HL1 return on whether the household has support needs.

Data provision is therefore crucial to determining whether there are structural and systemic issues in the provision of temporary accommodation.

2.7 Conclusion

Despite the flaws in the current framework, there is nonetheless a strong ground to build upon in Scotland but at present, the framework lacks a human rights lens in considering housing rights. The next sections consider what difference incorporation of ICESCR and the CRPD might make in the provision of temporary accommodation to disabled people.

⁶³ Scottish Government, ‘Provision of HL1 case based data from 1 April 2007 Guidance Notes’ (*Scottish Government*, December 2010), 25.

3. International obligations

The human rights treaties that the Scottish Government are consulting on, contain valuable provisions that would assist with the promotion of the right to adequate housing for disabled people seeking temporary accommodation. Of particular focus is ICESCR and the CRPD, with both noting that the right to housing is intrinsically linked with other human rights and is central to living a life with dignity.

3.1 ICESCR

Article 11 of ICESCR is the key provision in guaranteeing the right to adequate housing, requiring that States must take “appropriate steps to ensure the realization of this right”⁶⁴. General Comment 4 of CESCR requires that the right should not be interpreted in a narrow sense, for example as “shelter provided by merely having a roof over one’s head”⁶⁵. Instead, it is the right to live somewhere in “security, peace and dignity”⁶⁶.

A number of factors must be considered to determine whether housing is “adequate” for the purposes of the Covenant. Of particular note, is the requirement of accessibility. CESCR has stated that housing must be accessible to those entitled to it and that particularly disadvantaged groups such as “the elderly, children, the physically disabled, the terminally ill, HIV positive individuals, persons with persistent medical problems [and] the mentally ill”⁶⁷ should be ensured a degree of priority within the housing realm⁶⁸.

CESCR has stated that to ensure compliance with Article 11, States must have effective monitoring of housing⁶⁹. This includes an obligation to show that it has taken the necessary steps to determine the full extent of homelessness and inadequate housing within its borders⁷⁰.

3.2 CRPD

The CRPD builds upon the above right to adequate housing, specifically for disabled people. Articles 9 and 19 require that disabled people should be enabled to live

⁶⁴ ICESCR (n4), art 11(1).

⁶⁵ CESCR (n2), para 7.

⁶⁶ *Ibid.*

⁶⁷ *Ibid*, para 8(e).

⁶⁸ *Ibid.*

⁶⁹ *Ibid*, para 13.

⁷⁰ *Ibid.*

independently and participate fully in all aspects of life with States required to take appropriate measures to ensure access, on an equal basis with others, to the physical environment. This means that measures must identify and eliminate “obstacles and barriers to accessibility”⁷¹ of infrastructure, including housing⁷². The CRPD Committee required that States must ensure that all housing available to the public (including private rental and social housing) must “take into account all aspects of accessibility for persons with disabilities”⁷³.

Article 28 stipulates that States must recognise the right of disabled people to an adequate standard of living for themselves and their families. This encompasses housing and the continuous improvement of living conditions. States must take appropriate steps to safeguard and promote the right without discrimination on the basis of disability⁷⁴ and take measures, to the maximum of available resources, to address systemic homelessness that disproportionately impacts disabled people⁷⁵.

3.3 Special Rapporteur report on adequate housing for disabled people

In 2017, the Special Rapporteur on the Right to Adequate Housing considered the right to housing for disabled people⁷⁶, acknowledging the “dialogue”⁷⁷ between ICESCR and the CRPD. The CRPD notably rejects the medical approach to disability, instead recognising that discrimination and disadvantage are “socially constructed responses to diversity and difference”⁷⁸. The CRPD acknowledges that “dignity, autonomy, independence and participation”⁷⁹ are reliant on “positive measures by Governments to support the right to live in the community as one chooses”⁸⁰. To facilitate this, all States are required to take positive action to reduce structural disadvantage⁸¹.

⁷¹ CRPD (n5), art 9.

⁷² *Ibid*, art 9(1)(a).

⁷³ Committee on the Rights of Persons with Disabilities, ‘General comment on Article 9: Accessibility’, 11th session, UN Doc CRPD/C/11/3.

⁷⁴ CRPD (n5), art 28 (1).

⁷⁵ General Assembly (n48) para 20.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*, para 2.

⁷⁸ *Ibid*, para 3.

⁷⁹ *Ibid*.

⁸⁰ *Ibid*.

⁸¹ *Ibid*, para 5.

The report recognises that homelessness disproportionately impacts disabled people and that there is a “vicious circle”⁸² in which “disability often leads to homelessness and homelessness, in turn, creates or exacerbates impairments and additional barriers linked to stigma and isolation”⁸³. Despite this, it is common for housing programmes to be designed without incorporating accessibility designs, “as if persons with disabilities do not exist, will not live there or deserve no consideration”⁸⁴.

The Special Rapporteur commented that the right to non-discrimination under the CRPD is a positive obligation which requires States to take measures to ensure that the right to housing is enjoyed⁸⁵. States should consider adopting accessibility requirements that apply to new housing and implement a clear time frame for ensuring accessibility within its existing housing stock⁸⁶. Where the positive obligation is not complied with, the report recommends that civil society should take forward legal challenges to structural violations of the right and seek systemic remedies⁸⁷.

3.4 What does adequate housing encompass under ICESCR and CRPD?

General Comment 4 of CESCR and the Special Rapporteur report set out the factors to be considered when determining whether housing is adequate. The following are the most relevant in the context of temporary accommodation.

Security of tenure

Security of tenure requires that eviction should not be permitted where it would cause a loss of housing. The Special Rapporteur has stated that where relocation of a disabled person is unavoidable or where all parties are in agreement, then the alternative housing that is provided must meet “all requirements for accommodation of disability and ensures access to community support”⁸⁸. When being relocated, disabled people must not be forced to leave areas where there are services, employment and opportunities for participation in society⁸⁹.

Habitability

⁸² *Ibid*, para 20.

⁸³ *Ibid*.

⁸⁴ *Ibid*, para 28.

⁸⁵ *Ibid*, para 47.

⁸⁶ *Ibid*, para 80.

⁸⁷ *Ibid*.

⁸⁸ *Ibid*, para 51.

⁸⁹ *Ibid*.

Housing must be habitable and the standard of habitability can be dependent upon the impairments of the individual⁹⁰. The Special Rapporteur noted that to ensure habitability, physical modifications to housing may be necessary and that this may include, for example, sound proofing accommodation for people with autism⁹¹.

Accessibility

For housing to be adequate, it must be accessible. CESCR has stated that “disadvantaged groups must be accorded full and sustainable access to adequate housing resources”⁹². Housing law is also required to take into account the special housing needs of particularly disadvantaged groups which includes disabled people.

3.5 Conclusion

ICESCR and the CRPD provide strong rights for disabled people within the right to adequate housing. Most importantly, they aim to embolden disabled people so that they have greater autonomy, dignity and awareness of their rights and the obligations owed to them by public bodies.

⁹⁰ *Ibid*, para 55.

⁹¹ *Ibid*.

⁹² CESCR (n2), para 8(e).

4. What difference might an incorporated right to adequate housing make?

There are various issues and gaps in the current Scottish legislative framework. This section considers the differences that a full and maximalist incorporated right to adequate housing in Scots law⁹³ might make to disabled people, seeking temporary accommodation.

4.1 Maximum available resources

Article 2 of ICESCR requires that States take steps for the progressive realisation of social and economic rights, to the “maximum of its available resources”⁹⁴. In the context of the right to adequate housing, this means that the obligations on the State are balanced against economic restraints in complying with the requirement of progressive realisation of the right.

Frequently, local authorities justify failures to provide accessible temporary accommodation due to a lack of resources or available accommodation. As seen in *X v GCC*, the Homeless Occupational Therapy Service recommended a five bedroom apartment with a garden to accommodate the petitioner’s autistic son’s support needs. Despite this, the local authority housed the family in a four bedroom apartment, arguing that they have the discretion to balance the needs of the household against other demands on their finite resources⁹⁵. However, the Court of Session held that the local authority is under an absolute duty to provide temporary accommodation which is suitable for occupation by the petitioner’s household, regardless of whether or not the local authority would prefer to spend its money otherwise.

In contrast, communications have been brought in similar circumstances under the Optional Protocol to ICESCR⁹⁶. While the UK has not ratified the Optional Protocol, the decisions are nonetheless useful to consider to see how the right to adequate housing might be interpreted in practice in Scotland. *El Goumari and Tidli v Spain*⁹⁷ concerned a family with two disabled children who had been evicted and placed by Madrid City Council in a hostel for ten days, in an area where there were no shops,

⁹³ As outlined by the National Taskforce’s recommendations.

⁹⁴ ICESCR (n4), art 2(1).

⁹⁵ *X v GCC* (n20) para 15.

⁹⁶ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008) A/RES/63/117.

⁹⁷ Committee on Economic, Social and Cultural Rights, ‘Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 85/2018’ (16 March 2021) UN Doc E/C.12/69/D/85/2018 (*El Goumari*).

playgrounds, health centres or train stations. The family were relocated to a shelter where again, there were poor conditions including cockroaches and was next to a centre for drug addicts, with people seen taking drugs in the vicinity. The applicants argued that the alternative accommodation could not be considered adequate housing for a family, particularly in light of the children and their needs. CESCR held that the obligation to provide alternative housing requires States to “take whatever measures are necessary to achieve the full realization of [the right to adequate housing] to the maximum of their available resources”⁹⁸. Moreover, policies on alternative housing must “respect the dignity of the person”⁹⁹ as well as taking “consistent and coordinated measures to resolve institutional shortcomings and structural causes of the lack of housing”¹⁰⁰. Despite this, CESCR acknowledged that there may be circumstances where States “may be able to demonstrate that despite having made every effort, to the maximum of available resources, it has been impossible to offer... alternative accommodation”¹⁰¹. In these cases, temporary accommodation may be used that does not meet all the requirements of adequate housing but, States must endeavour to ensure that the accommodation used “protects the human dignity of the persons evicted, meets all safety and security requirements and does not become a permanent solution, but is a step towards obtaining adequate housing”¹⁰².

Similarly, *El Ayoudi and El Azouan Azouz v Spain*¹⁰³ concerned the eviction of a family with a son with severe disabilities. The decision reiterated the same stance, holding that where a State has made every effort to source adequate alternative accommodation but it has been impossible to do so, the temporary accommodation used must still protect the human dignity of the individuals involved¹⁰⁴.

Whilst the contexts of *X v GCC* and the *El Ayoudi* and *El Goumari* decisions are similar, there are significant differences in outcomes. *X v GCC* did not stipulate what would happen if GCC took every step to source the requisite accommodation but were still unable to find a suitable property; it was only stated that GCC “must find a way to

⁹⁸ *Ibid*, para 9.2.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid*, para 9.4.

¹⁰² *Ibid*.

¹⁰³ Committee on Economic, Social and Cultural Rights, ‘Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 54/2018’ (23 March 2021) UN Doc E/C.12/69/D/54/2018 (*El Ayoudi*).

¹⁰⁴ *Ibid*, para 12.4.

comply with its duty”¹⁰⁵. CESCR however, did consider that a State may be able to show that “every effort, to the maximum of available resources”¹⁰⁶ had been taken but that nonetheless, “it has been impossible to offer... alternative accommodation”¹⁰⁷. Where this is the case, “temporary accommodation that does not meet all the requirements of an adequate alternative dwelling may be used”¹⁰⁸. It remains to be seen what additional steps must be taken to discharge the “absolute duty” under the HA 1987 and UAO, where GCC cannot source alternatives from third party providers and the private sector. This may include going so far as to construct additional dwellings to accessible standards.

Arguably, the Scottish approach goes further than CESCR. However, under the proposals from the National Taskforce, the Incorporation Bill would include an “interpretation clause” which would mean that nothing in the Scottish human rights framework shall affect provisions in domestic law or international law which are “more conducive to the realisation of the rights within the framework”¹⁰⁹. Therefore, should the obligations placed following *X v GCC* be considered more robust than those under the incorporated international treaties, the interpretation of *X* would stand.

Under the Optional Protocol, CESCR requires that States take measures to resolve “institutional shortcomings and structural causes of the lack of housing”¹¹⁰. Incorporation may embolden a widespread review of the housing issues faced, the groups that are most at risk and the steps that are to be taken to address this in order to comply with treaty obligations.

Policy recommendation: *Ensure that an interpretation clause is included so that the most robust interpretation of human rights stands where there is a conflict between international and national standards.*

The Scottish Government should undertake a review of the housing sector, focusing on groups most at risk and the steps that are being taken to comply with treaty obligations.

¹⁰⁵ *X v GCC* (n20), para 46.

¹⁰⁶ *El Ayoudi* (n103), para 12.4.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ National Taskforce (n6), 34.

¹¹⁰ *El Goumari* (n110).

4.2 Minimum core

ICESCR requires that states must, regardless of the level of resources, ensure that people enjoy minimum levels of protection of their social and economic rights, and not breach lower limits of the provision. For the right to adequate housing, CESCR requires that the right to adequate housing must be accessible and meet the needs of the disabled person¹¹¹.

Statistics published by the Scottish Government show that there were 375 breaches of the UAO across 8 local authorities between April and September 2021¹¹². However, the Scottish Government has identified that these statistics are not accurate and are likely to understate the number of breaches¹¹³. Despite this, few cases reach court, with *X v GCC* being one of the rare occasions that a challenge has been brought to a local authority's allocation of temporary accommodation. This is partly due to a lack of public awareness of the right to challenge offers, in addition to most cases settling before reaching court. Adding a human rights framework to the current obligations might encourage greater accountability where local authorities fail to achieve the minimum core obligation. Reputationally, it may generate greater negative publicity on local authorities where they are in breach as it would not only be a breach of domestic standards, but also a breach of internationally recognised human rights obligations. Disabled people may also be more empowered to challenge decisions where the minimum core has not been achieved and provide them with the knowledge of the basic level of provision to which they are legally entitled.

A minimum core obligation might require a demographic analysis of homeless need, identifying groups and allocating resources accordingly¹¹⁴. Moreover, statistics are not particularised into groups to show which groups have been subject to breaches. It is therefore not known how many disabled people have been provided with

¹¹¹ CESCR (n2), para 8(e).

¹¹² Scottish Government (n18).

¹¹³ Scottish Government, 'Homelessness in Scotland: Bi-annual update to 30 September 2021' (*Scottish Government*, February 2022) <<https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2022/02/homelessness-scotland-update-30-september-2021/documents/homelessness-scotland-bi-annual-update-30-september-2021/homelessness-scotland-bi-annual-update-30-september-2021/govscot%3Adocument/homelessness-scotland-bi-annual-update-30-september-2021.pdf>> accessed 6 August 2022.

¹¹⁴ Tatora Mukushi, *Housing as a Human Right: Realising the Human Right to Housing in Scotland* (Shelter Scotland, 2021).

accommodation that is not UAO compliant. A minimum core requirement might encourage greater analysis.

Policy recommendation: *Require a programme of identifying groups and allocating resources to those frequently denied the minimum standard of temporary housing provision.*

Bolster accountability mechanisms so that breaches of the UAO are minimised.

4.3 Human rights budgeting

Tied into the maximalisation of resources is human rights budgeting. This requires a budgeting approach that distributes resources “in a way that puts people first”¹¹⁵. ICESCR requires that States respect, protect and fulfil human rights. As the SHRC notes, the way the Government generates, allocates and spends money “plays a key role in this”¹¹⁶, helping to “sort the reality from the rhetoric about its commitment to rights”¹¹⁷. The benefits from the Incorporation Bill will be unachievable if they are inappropriately resourced. Once laws and policies are shaped by the Scottish Government, budgets need to directly realise these laws and policies in practice. Incorporation alone is insufficient; human rights must be central to the budget and expenditure of public resources.

Moreover, human rights budgeting is particularly useful with regard to the implementation of a minimum core level for the right to adequate housing. The obligation to provide interim accommodation is on public authorities and therefore budgetary allocation is of essential importance in achieving the minimum core level of protection. As the Human Rights Budgeting Group notes, human rights budgeting “challenges those making budgetary decisions on the delivery of goods and services, to ensure that they are acceptable by all, not a one size fits all”¹¹⁸.

When public bodies are setting their budgets, a similar process to that of s19 of the HRA1998 could be used to consider whether the budget is compatible with the

¹¹⁵ Scottish Human Rights Commission, ‘Human Rights Budget Work: What, Why, How?’ (*Scottish Human Rights Commission*, September 2019), 19.

¹¹⁶ Scottish Human Rights Commission, ‘Human Rights Budget Work: Briefing Paper 1’ (*Scottish Human Rights Commission*, September 2019), 2.

¹¹⁷ *Ibid.*

¹¹⁸ Human Rights Budgeting Group, Aidan Flegg and Jo Ferrie, ‘Introduction to Human Rights Budgeting’ (*Together Scotland*, 21 October 2021) <<https://www.togetherscotland.org.uk/media/2150/introduction-to-human-rights-budgeting.pdf>> accessed 6 August 2022.

treaties. This would require the relevant body to ascertain compliance and fulfilment of the international obligations, in practical terms rather than simply being a consideration or guidance point. This could take the form of issuing a statement of compatibility for each budget. Moreover, in the same way that UK legislation contains explanatory notes to accompany Bills detailing how the legislation is compatible with the HRA 1998, explanatory notes could be provided with budgets to explain how they assist with the obligations to protect, respect and fulfil human rights. This may encourage greater transparency of public spending, particularly for the provision of temporary accommodation by local authorities.

Policy recommendation: *Establish a legal obligation on Scottish public bodies to make a statement of compatibility as to whether their budget assists with the realisation of human rights.*

4.4 Access to justice

There are various issues with the judicial review route of challenging temporary accommodation allocations, namely, costs, lack of housing lawyers and the adversarial court system. The National Taskforce made various recommendations on methods of enforcement. This included the provision of additional powers to the SHRC to conduct investigations¹¹⁹. This would provide a feasible alternative to judicial review. The Taskforce has also recommended that strengthened access to justice includes non-judicial routes. For example, a process of internal investigation in local authorities with forms of redress provided to comply with the human rights framework in place¹²⁰.

The Taskforce further recommended that civil society organisations that have a “sufficient interest”¹²¹ are able to bring cases, enabling them to support victims or bring cases challenging structural and systemic issues that are in the public interest. This may serve to reduce the financial liability on individuals¹²². As the Taskforce notes, “this is particularly important in the context of economic... cases where the issues can often be systemic and affecting numerous individuals”¹²³. Currently, the system relies on individuals bringing claims. The ability to collectively challenge empowers groups to bring challenges with the support of others reporting the same systemic issues.

¹¹⁹ National Taskforce (n6), 35.

¹²⁰ *Ibid*, 49.

¹²¹ *Ibid*, 50.

¹²² *Ibid*.

¹²³ *Ibid*.

Often, the current individuality of bringing claims causes significant emotional toll on claimants; bringing challenges in a group encourages “power in numbers”. Furthermore, it may also mean that civil society groups do not need to bring a “live case”; where there is a systemic issue, they may be able to bring a claim in the absence of individual victims¹²⁴.

An incorporated right to adequate housing may provide a legal alternative to challenging local authority decisions which may be cheaper, quicker and more easily accessible. Currently, bringing a claim that involves economic and social rights, such as the right to adequate housing, can be difficult as judges can be reluctant to rule on matters that are considered to be the remit of the executive and legislative. Arguments often have to be shoehorned into the legal framework in a way that is not as appropriate. As Boyle¹²⁵ notes, under a judicial review claim, one ground of challenge is by arguing that a decision/policy is *Wednesbury* unreasonable¹²⁶, requiring a very high threshold of unreasonableness to achieve a successful claim. Boyle argues in favour of the incorporation of a “broader reasonableness test”¹²⁷ where compliance is assessed in terms of whether the measures taken were “deliberate, concrete and targeted towards the fulfilment of social rights”¹²⁸, undertaken within a reasonable timeframe, whether allocation of resources is in accordance with the treaty standards and whether the situation for disadvantaged and marginalised individuals/groups are addressed¹²⁹.

Article 13 of CRPD requires that disabled people have access to justice in all legal proceedings that is effective and on an equal basis with others¹³⁰. The Special Rapporteur noted this requires that States “establish complaints and accountability mechanisms and ensure that courts are authorized and adequately resourced to hear and adjudicate claims relating to the right to adequate housing of persons with disabilities”¹³¹. It was also recognised that national human rights institutions must facilitate “participation and effective monitoring by providing independent

¹²⁴ *Ibid.*

¹²⁵ Boyle (n50).

¹²⁶ *Ibid.*, 10.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ CRPD (n5), art 13; General Assembly (n48) para 43.

¹³¹ General Assembly (n48), para 43.

accountability mechanisms and in facilitating access to justice through complaints procedures or by supporting or initiating systemic claims before courts or tribunals”¹³²

The effectiveness of ensuring the right’s realisation, post-incorporation, is dependent upon a living interpretation by Scottish courts and bodies. A framework that is stagnant will not ensure continual improvement of the right. Courts and other enforcement bodies need to be engaged and not give a wide breadth of deference to public bodies in their discretion to introduce legislation and policies. Moreover, strong legislation alone is not sufficient to fulfil the right to adequate housing, especially given that in Scotland, housing matters are often within the delegated power of local authorities. Scrutiny of policy and practice must be undertaken at the Scottish Parliament level and Ministers must be robust in their commitment to ensuring that a human rights approach is delivered.

Policy recommendation: *Strengthen judicial routes of challenge by ensuring that civil society organisations can bring cases for structural and systemic issues and create feasible alternative routes to the court system to hold public bodies to account.*

4.5 Medical vs social disability models

The incorporation of CRPD may assist with a shift in focus from the medical to social model of disability. The medical model has been the common approach for decades and looks to the individual’s impairment first and foremost, focusing on what a disabled person is unable to do. This approach is seen in parts of the EA 2010, particularly the definition of disability¹³³. A social model would instead consider the way that society is organised rather than focusing on the individual’s disability, looking at ways of removing barriers that restrict disabled people’s choices and recognising that proactive steps need to be taken to remove these barriers. Incorporation of the CRPD would provide a shift, enabling an alternative route of challenge with the CRPD which uses a social model of disability.

Under the current framework, it is unclear when a local authority assesses the needs of a person seeking temporary accommodation. Article 4(b) of the UAO requires local authorities to take into account the “needs of the household”¹³⁴. However, there is no

¹³² *Ibid.*

¹³³ Equality Act (n21), s6.

¹³⁴ Unsuited Accommodation Order (n12), art 4(b).

elaboration of what this entails, when the assessment should be carried out and by whom. Where the assessment is carried out, the local authority's focus is often on a GP medical assessment, rather than a more holistic approach taken by occupational therapists which aim to assist individuals with what they "need, want and have to do"¹³⁵. Needs assessments should be taken out at the earliest opportunity, with a standard process of assessment, including specialist intervention (where required), and without delaying the offer of accommodation.

While there is currently a draft proposal for new build homes that are delivered directly by Registered Social Landlords and local authorities with grant funding to "meet, as a minimum "basic" design criteria" in ensuring accessibility¹³⁶, the social model might offer more options such as accessible homes as the standard, with housing designed with accessibility in the forefront so that adaptations are not required¹³⁷. For disabled people seeking temporary accommodation, it might encourage that this shift places greater focus on local authorities to ensure that all temporary accommodation is accessible. Furthermore, the adaptations referred to predominantly relate to physical disabilities. Other disabilities such as autism may necessitate additional requirements such as access to a garden. This is frequently overlooked. It is hoped that with a greater awareness of disability under the social model, greater consideration of a variety of circumstances might follow.

Policy recommendation: *Identify areas where legislation and policy practice should be updated to reflect the social model of disability and keep this in the forefront of considerations. Needs assessments should be taken out at the earliest opportunity (i.e. when accommodation is offered), with a standard process for assessing needs, including specialist intervention (e.g. by an occupational therapist), when required and without delaying the accommodation offered.*

4.6 Dignity and participation

¹³⁵ Royal College of Occupational Therapists, 'About RCOT: Stepping up for occupational therapy' (Royal College of Occupational Therapists, 2022) <<https://www.rcot.co.uk/node/4926>> accessed 13 June 2022.

¹³⁶ Scottish Government, 'A New Deal for Tenants: Draft Strategy Consultation Paper' (Scottish Government, December 2021), 100.

¹³⁷ Parliamentary and Health Service Ombudsman, 'Introduction to the Social and Medical Models of Disability' (Parliamentary and Health Service Ombudsman) <https://www.ombudsman.org.uk/sites/default/files/FDN-218144_Introduction_to_the_Social_and_Medical_Models_of_Disability.pdf> accessed 13 June 2022.

The concept of dignity under both ICESCR and the CRPD allows rights to be understood for their practical benefit, in non-technical language, enabling the rights holder to better participate in ensuring that their rights are complied with. ICESCR and the CRPD both recognise that the right to adequate housing is the right to live in dignity¹³⁸. As noted in the above *El Ayoudi* decision of CESCR, even where a State has made every effort to find alternative accommodation but is unable to do so, a State may show that the temporary accommodation used protects the dignity of the individual.

Despite frequent references to dignity in human rights treaties, there is no one singular definition of what “dignity” encapsulates. Using the definition proposed by McCrudden¹³⁹, the basic minimum content of dignity has three elements. Firstly, “every human being possesses an intrinsic worth, merely by being human”¹⁴⁰. Secondly, the intrinsic worth “should be recognized and respected by others and some forms of treatment by others are inconsistent with... this intrinsic worth”¹⁴¹. Finally, there is a relationship between the State and the individual as the State must recognise the individual’s intrinsic worth and requires “that the state should be seen to exist for the sake of the individual human being and not vice versa”¹⁴². Applying this to disabled people seeking temporary accommodation might mean greater recognition of disabled people as rights holders, encouraging development of “a sense of self and of self-esteem, providing a foundation for self-determination”¹⁴³ which Basser¹⁴⁴ states, is “an integrated sense of self, coupled with an appreciation of one’s inherent worth, allows an individual to see him or herself as more than simply the sum of his or her limitations”, becoming a great tool of empowerment¹⁴⁵.

The benefit of using the concept of dignity is that it empowers disabled people to utilise their rights and challenge decisions of public bodies, including local authorities where they have previously felt compelled to accept often inappropriate accommodation

¹³⁸ UN Habitat (n1).

¹³⁹ Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) *EJIL* 655.

¹⁴⁰ *Ibid*, 679.

¹⁴¹ *Ibid*.

¹⁴² *Ibid*.

¹⁴³ *Ibid*

¹⁴⁴ Lee Ann Basser, ‘Human Dignity’ in Marcia Rioux, Lee Ann Basser and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff Publishers, 2011), 18.

¹⁴⁵ *Ibid*.

initially allocated. When considering decisions taken by a local authority, judicial bodies should take into account the underpinning principle of human dignity and determine whether the measures taken adheres to the principle.

Policy recommendation: *Judicial bodies should be under an obligation to take into account the underpinning principle of human dignity when adjudicating on decisions concerning the allocation of temporary accommodation.*

4.7 Transparency

CESCR identified that in determining whether a State has complied with its obligations, markers include whether decision making was transparent¹⁴⁶. An incorporated right to adequate housing may require local authorities and housing providers to carry out housing services, including the provision of temporary accommodation, with transparency.

There are often conflicting decisions by local authorities in their allocations of temporary accommodation¹⁴⁷. Incorporation might encourage greater transparency by local authorities in disclosing their available housing and the steps that they are taking where they do not have the requisite housing. As noted, local authorities publish RRTPs which provide a plan for how to address the “balance of housing options for homeless households and realign these to the preferred housing-led approach”¹⁴⁸. However, there is no legal obligation on local authorities to provide RRTPs, nor to comply with the housing provision outlined. As RRTPs are not legally binding, there is no mechanism for challenge and no ability to hold local authorities to account.

An incorporated right to adequate housing might require that public bodies are accountable and transparent in their decisions and in their “planning and reporting” of “how they will fulfil the rights and obligations”¹⁴⁹ in practice. In the context of temporary accommodation, this may mean that local authorities are required to show their plans of how they provide temporary accommodation for disabled people and provide reports on their practical realisation. It may also mean that where a local authority has

¹⁴⁶ Committee on Economic, Social and Cultural Rights, ‘General Comment No. 9: The Domestic Application of the Covenant’ (3 December 1998) UN Doc E/C. 12/1998/24.

¹⁴⁷ *X v GCC* (n20) [7].

¹⁴⁸ Homelessness & Rough Sleeping Action Group, ‘Scotland’s Transition to Rapid Rehousing – Rapid Rehousing Transition Plans: Guidance for Local Authorities and Partners’ (*Homelessness Network*, June 2018) < <https://homelessnessnetwork.scot/wp-content/uploads/2019/11/rapid-rehousing-guidance.pdf>> accessed 6 August 2022.

¹⁴⁹ National Taskforce (n6), 38.

published their plans and not complied with them, there may be an accountability mechanism that could be used to ensure that they observe their proposals.

Policy recommendation: *Greater transparency should be required of local authorities in providing details of the housing that they currently have available, continuous assessment of the housing needs in the area and how they plan to address any shortfalls, with an effective accountability mechanism to assess the success of local authorities' plans and the extent of the progress being made.*

4.8 Data collection

As outlined in Section 2, there are various issues with the current method of data collection. International standards frequently call for the collection of “disaggregated data”¹⁵⁰ which involves the breaking down of data into specific sub-groups “with the same identifiable criteria”¹⁵¹. This is to ensure compliance with legal obligations and “to ensure equality and non-discrimination in progressively realising economic [and] social rights”¹⁵².

Article 31(1) of the CRPD requires that States collect “appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the... Convention”¹⁵³. The CRPD further requires that the data collected is disaggregated and “used to help assess the implementation of... obligations under the Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights”¹⁵⁴

The UN High Commissioner reported in 2011 on the use of “indicators” in realising economic and social rights under ICESCR. The report noted that where data is collected, it must be “based on objective and reliable data-collection methodologies”¹⁵⁵. The Scottish Government have reported that the statistics on the number of UAO breaches are inaccurate, and the reporting of data for disabled homeless people is lacking¹⁵⁶.

¹⁵⁰ CRPD (n5) art 31.

¹⁵¹ Human Rights Centre Clinic, ‘Disaggregated Data and Human Rights’ (*University of Essex*, October 2013), 7.

¹⁵² *Ibid*, 5.

¹⁵³ CRPD (n5) art 31(1).

¹⁵⁴ *Ibid*, art 31(2).

¹⁵⁵ United Nations High Commissioner for Human Rights, ‘Report of the United Nations High Commissioner for Human Rights’ (26 April 2011) UN Doc E/2011/90, 3.

¹⁵⁶ Scottish Government (n113).

It is hoped that the incorporation of ICESCR and the CRPD encourages an audit by the Scottish Government of their current methods of data collection and how it can be improved. The disaggregation of statistics for breaches of the UAO might involve specifying the numbers of breaches into identifiable sub-groups, including households with a member that has a disability. This may assist with identifying the barriers that disabled people face when seeking temporary accommodation.

Policy recommendation: *The Scottish Government should consider undertaking an audit and review of their data collection practices for homelessness statistics and consider whether improvements can be made by disaggregating data to a greater degree, specifically when determining breaches under the UAO.*

4.9 Human rights culture

Incorporation of the treaties may assist with the creation of a greater culture of human rights. Many of the legal obligations that come with incorporation are already provided for under housing and equality legislation and yet, public bodies still frequently break the law. Arguably, the greatest benefit to incorporation will be the facilitation of a human rights culture with both public bodies and the public being aware of the rights and individuals being empowered to claim them.

The Scottish Social Housing Charter is currently being reviewed with an aim to improve the quality of services provided, in line with “human rights which describe the kind of Scotland we want to see”¹⁵⁷. While the treaties have not yet been incorporated, it is interesting to note that it has encouraged a greater awareness of human rights and their practical realities within the standards to be expected from social housing landlords.

It is hoped that incorporation will assist with the meaningful participation of disabled people and the wider public in decision making processes, directly influencing governmental bodies in decisions that impact specific groups in society. However, as the Human Rights Budget Working Group state, to ensure a greater culture of human rights, “the Scottish Government must invest time and resources and develop mechanisms that celebrate diversity”¹⁵⁸.

¹⁵⁷ Scottish Government, ‘Draft Scottish Social Housing Charter’ (*Scottish Government*, April 2022).

¹⁵⁸ Human Rights Budget Working Group, ‘A Human Rights Based Approach to improving “how government works”’ (*Scottish Government*, 21 June 2021) < <https://www.ideas.gov.scot/help-us->

Policy recommendation: *Following incorporation, the Scottish Government should undertake a campaign of awareness for both the public and for public bodies to ensure greater awareness of people’s rights, how to enforce them and how this impacts their day to day lives.*

[change-the-ways-scottish-government-works/a-human-rights-based-approach-to-improving-201chow-government-works201d>](#) accessed 6 August 2022.

5. Conclusion

This paper has aimed to assess the added value of the incorporated right to adequate housing in Scots law and the particular impact this might have on disabled people seeking temporary accommodation. As discussed, the incorporation would have a drastic impact in Scotland socially, politically and economically. The potential benefits cannot be overstated but they are dependent on a number of factors.

Firstly, a considerable amount of time, money and resources will be required. Incorporation alone will be insufficient in ensuring the occurrence of positive outcomes. This paper has recommended a number of mechanisms and audits that need to take place which require proactive measures and human rights budgeting to ensure that duty bearers are adequately resourced to fulfil treaty obligations.

Secondly, the usefulness of an incorporated right is dependent on the enforcement mechanisms that are used to ensure compliance with the right and the methods of redress in the event of a breach. The UK has not ratified the Optional Protocol to ICESCR which contains international enforcement mechanisms. Claimants will therefore be dependent on the Scottish courts taking a rigorous approach in holding public bodies to account. It is therefore crucial that a living interpretation of the treaties is undertaken to ensure that Scots law is interpreted in line with the most up to date international guidance.

While not discussed in this paper, the recent Supreme Court decision¹⁵⁹ concerning the incorporation of the UNCRC into Scots law has highlighted the devolution issues in incorporation. The Scottish Parliament will need to be careful to ensure that the Incorporation Bill does not overstep devolved competence but still ensures practical and tangible effect to the rights.

Despite these obstacles, the greatest benefit that an incorporated right to adequate housing could have in Scotland is the creation of a greater culture of human rights. Scotland already has relatively progressive housing rights but despite this, there are still frequent breaches of the law by public bodies.

¹⁵⁹ *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill; Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42.

It is hoped that incorporation will generate more awareness for both the general public and for public bodies, of every person that presents as homeless as a rights holder and the public body, a duty bearer. With a greater culture of human rights we may see people being more willing to hold authorities to account, stand up for their rights and be more empowered.

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