

SHELTER SCOTLAND RESPONSE TO NATIONAL TASKFORCE FOR HUMAN RIGHTS LEADERSHIP

**The case for incorporation of
the Right to Adequate
Housing into Scots Law**

January 2021

Shelter Scotland has long advocated for housing to be a human right, for example, our [Are You With Us?](#) campaign fully supports the recommendation to incorporate the Right to Adequate housing, amongst other economic, social and cultural rights into our domestic legislation. This is particularly important as we continue to come to terms with the consequences of a global health pandemic. As has been noted by UNCHR ‘Housing has become the frontline defence against the coronavirus’.¹ Now more than ever, the right to adequate housing is a life or death matter.

With the rising presence of poverty and inequality there is an urgent need for economic, social and cultural rights to fully protect those most in need. Scotland faced a housing crisis prior to the outbreak of covid-19 and this pandemic will only exacerbate these pre-existing inequalities unless concrete measures are taken. A human rights-based approach to recovery from the pandemic is necessary if we want to start tackling the root causes of our housing crisis.

Shelter Scotland is calling for incorporation of the Right to Adequate Housing into Scots Law.

The remainder of this submission summarises and provides further details on our position:

- 1. We must incorporate the Right to Adequate Housing now to reflect the indivisibility of human rights and to ensure that all of Scotland’s housing law and practice meets the minimum standards required.**
- 2. Incorporating the Right to Adequate Housing into domestic law would be an important step in recognising housing issues as human rights issues.**
- 3. Incorporation of the Right to Adequate Housing is necessary to address the accountability gap which exists between our existing domestic legal framework and human rights international standards.**
- 4. The incorporation of the Right to Adequate Housing, with robust access to justice processes and budgeting to ensure the delivery of such processes, could significantly reduce access to justice issues across housing and homelessness.**

¹ <https://www.ohchr.org/EN/Issues/Housing/Pages/COVID19RightToHousing.aspx>

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- 5. The incorporation of the Right to Adequate Housing would reinforce that a human rights compliant approach requires necessary measures to be taken to address a shortfall in housing.**

(1) It is the natural next step in implementation of ICESCR

There is a common misconception that economic, social and cultural rights are unaffordable and therefore can be no more than aspirational. Taking homelessness as only one aspect of housing, there is evidence that the human and economic cost of ignoring homelessness is far greater than the cost of preventing it². There is obviously a cost associated with the realisation of rights. However, when we assess the longer-term economic impact of not resourcing rights – factoring in their interdependency with other fundamental rights relating to, for example, health, education and employment; the economic argument against ESCR becomes untenable.

There has been a strong commitment shown to human rights both at the UK-level through the signing and ratification of the ICESCR, as well in Scotland through the establishment of the National Taskforce for Human Rights Leadership, where a full panoply of rights is being considered for incorporation. Given the indivisibility of rights, and the central importance of housing in relation to successfully achieving positive outcomes we argue that to incorporate some but not all, would result in a patchwork and much less effective approach to the realisation of ESCR rights. Housing has for example been pivotal in the public health response to the pandemic and underlines the role it plays in realising positive outcomes and rights relating to health, education and anti-poverty, to name a few. Therefore, **we must incorporate the Right to Adequate Housing now to reflect the indivisibility of human rights and to ensure that all of Scotland's housing law and practice meets the minimum standards required.**

(2) Human Rights-based approach to housing issues

Incorporating the Right to Adequate Housing into domestic law would be an important step in recognising housing issues as human rights issues.

For example, we currently see through our housing support and legal services that actions for eviction and repossession of people's homes through the Courts are framed in the language of property rights i.e. 'repossession of heritable

² https://www.crisis.org.uk/media/237022/costsofhomelessness_finalweb.pdf

property'. Contrastingly, the Right to Adequate Housing is more broadly defined as the right to live somewhere in security, peace and dignity³. In practice, when our judicial authorities are considering housing issues, they are also required to factor in the property rights of the landlord or the resources of local authorities. This can and does result in housing-related rights being defined in narrow terms. Consequently, incorporating the Right to Adequate Housing would be a significant symbolic and practical step through recognising the fundamental role a safe, secure home has in everyone's lives, as well as strengthening the legal avenues of protecting individuals' rights and expanding the means of accountability.

(3) The Accountability Gap

Whilst we have some of the strongest homeless legislation in the world⁴, and have for example recently strengthened the rights of private renters through the creation of a private residential tenancy, we believe that **incorporation of the Right to Adequate Housing is necessary to address the accountability gap which exists between our existing domestic legal framework and the international standards** laid out in Article 11 ICESCR.

What follows in the remainder of this section are some examples of our existing legislation benchmarked against the Right to Adequate Housing, as detailed in General Comment No. 4⁵:

Currently, the majority of eviction actions in Scotland across both the social and private rented sector concern rent arrears where the tenant is unrepresented. This raises questions both as to the affordability of housing and the ability of tenants to secure access to legal aid and legal representation, both of which are crucial when such a fundamental right to a home is at risk of being taken away.

Moreover, jurisprudence developed by the European Court of Human Rights and the Supreme Courts of United Kingdom confirms that Article 8 ECHR is engaged in all eviction actions by public authorities. However, the Court of Session's finding that Serco Ltd were not a body 'whose functions are functions of a public nature' as required by Section 6(3) Human Rights Act 1998, demonstrates some of the shortfalls in our existing legal framework⁶. That case concerned the proposed eviction by way of lock change of destitute asylum seekers who would

³ OHCHR CESCR General Comment No.4 : The Right to Adequate Housing, para 7.

⁴ As a result of the abolishment of priority need, any homeless person who is eligible is entitled to at the very least temporary homeless accommodation. This is tantamount to an enforceable right to housing, albeit temporary housing.

⁵ OHCHR CESCR General Comment No. 4: The Right to Adequate Housing (Art.11 of the Covenant)

⁶ *Ali v Serco Ltd & Ors* [2019] CSIH 54, para 52-57

be ineligible for homeless services and therefore evicted on to the streets of Glasgow. We would agree with the Scottish Human Rights Commission that the **incorporation of international economic, social and cultural rights provides an opportunity to strengthen the definition of public function and services, to ensure that where public services are contracted out to the private sector human rights are not comprised**⁷.

Shelter Scotland welcomed the extension of emergency Covid19 legislation which postpones the commencement of any new eviction actions and a ban on the enforcement of eviction orders was also introduced. Such measures do not however assist homeless persons nor destitute asylum seekers residing in hostel accommodation, both vulnerable groups with very little security of tenure. Homeless persons temporarily accommodated in hotels & B&Bs can find themselves there for weeks, if not months. Despite these timescales and them having no other place to stay, there is no statutory protection requiring a court order or that a minimum amount of notice be given in writing together with reasons and a right of review when these persons are asked to leave. In our experience a homeless person can be asked to leave on the basis of disputed facts, and with only several hours or a day's notice. Section 7 of Housing (Scotland) Act 2001 empowers Scottish Ministers to make regulations protecting hostel dwellers and other short-term accommodation but to date no such Regulations have been made. **Incorporating the Right to Adequate housing would strengthen the rights of individuals who have little security of tenure under domestic law**. At present, such persons are wholly reliant on the practice of their landlords and political will. A position which is neither empowering nor robust from an accountability perspective.

(4) Remedies & Access to Justice

The Shelter Scottish Housing Law Service has a high success rate in keeping people in their homes, however historically has been unable to take on all referrals to its services, given the high number of such cases. Most legal representation is provided by law centres and other third sector organisations who are dependent on grant funding. The legal aid which is available does not cover the true costs of these cases and therefore makes it impossible for high street firms to specialise in housing & homelessness law.

It follows, that the important legislative changes made to provide increased protection for tenants will only be effective if tenants have access to those rights. Meaningful accessibility requires tenants to be (a) aware of their rights; and (b)

⁷ <https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-12/signed-away-privatisation-and-human-rights/>

able to access advice and representation regarding the protection and enforcement of rights. Landlords in the private rented sector now require as a matter of law to provide certain key information to tenants about their rights at the outset of the tenancy. Furthermore, the transfer of jurisdiction from the sheriff court to the First Tier Tribunal regarding private rented sector cases has increased access to justice for private rented sector tenants. These are both very welcome developments. However, the disparity in legal representation between landlords and tenants is a cause for concern, giving rise to fundamental questions of access to justice. In the context of social rented sector evictions, the high number of unrepresented tenants and the lack of specialist legal representation available to tenants makes it difficult to assess how effective the pre-action requirements are, as in practice the onus is on the tenant and her representative to challenge compliance.

Where a homeless person is denied their right to make a homeless application or denied temporary homeless accommodation, their remedy is judicial review for breach of statutory duty in Court of Session. To access that remedy they will need to find a solicitor willing to take their case, who in turn will need to secure legal aid funding and identify an advocate. Shelter Scotland has a lot of experience in advising homeless clients who are in crisis, and at times sleeping rough or in other precarious housing. Concerns about the repeated failure of Glasgow City Council to meet its statutory obligations to homeless persons resulted in our taking legal action against both the Council and IJB in 2019. We were very much concerned about those homeless clients who were not able to access our services in Glasgow or elsewhere falling through the gaps, despite our domestic legislation.⁸

The incorporation of the Right to Adequate Housing, with robust access to justice processes and budgeting to ensure the delivery of such processes, could significantly reduce access to justice issues across housing and homelessness.

(5) Realisation of rights to the maximum available resource

In 2016 the UN Committee on Economic, Social & Cultural Rights in its report on United Kingdom noted:

“The Committee is concerned about the persistent critical situation in terms of the availability, affordability and accessibility of adequate housing in the State party, in part as a result of cuts in State benefits”.

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- It reiterated its previous recommendation and urged the State party to :

(a) *“Adopt all necessary measures to address the housing deficit by ensuring a sufficient supply of housing, in particular social housing units , especially for the most disadvantaged and marginalized individuals and groups, including middle- and low-income individuals and households, young people and persons with disabilities”*

The Committee’s comments reinforce that **a human rights compliant approach requires necessary measures to be taken to address a shortfall in housing**. This shortfall has been starkly relevant as we deal with the economic and human consequences of the pandemic.

Alongside the right to adequate housing is the obligation on state parties to ensure the full realisation of that right to the maximum of its available resources.⁹ In abolishing the priority need test, Scotland has, in essence, created a right to (temporary) housing. Pressure on local authorities has resulted in that right being denied, often on the basis that the local authority has no temporary accommodation available¹⁰.

Proposals to abolish the intentionality test and a national commitment to Housing First are further welcome indications of an intention by devolved government to progress the right to housing. The incorporation of the Right to Adequate Housing would supplement and strengthen these progressive policy intentions with a legal framework ensuring the human rights of those in housing crisis are enforceable. In the absence of a Right to Adequate Housing civil society at large remain wholly reliant on political will to progress changes.

⁹ Article 2 IESCR

¹⁰ See Scottish Housing Regulator’s Report into Glasgow, November 2020:

<https://www.housingregulator.gov.scot/landlord-performance/national-reports/thematic-work/report-on-inquiry-into-glasgow-city-councils-services-for-people-who-are-experiencing-homelessness-november-2020#>

Shelter Scotland helps over half a million people every year struggling with bad housing or homelessness through our advice, support and legal services. And we campaign to make sure that, one day, no one will have to turn to us for help.

We're here so no one has to fight bad housing or homelessness on their own.

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