

Academic Advisory Panel to the National Taskforce for Human Rights Leadership
Minimum Standards for Delivering Economic, Social and Cultural Rights

Minimum Standards for Delivering Economic, Social and Cultural Rights

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Explanatory Note

This briefing paper is one of a series written by the Academic Advisory Panel to the National Taskforce for Human Rights Leadership, which was established in 2019 in response to the recommendations made in December 2018 by the First Minister's Advisory Group on Human Rights. The aim of the briefing papers is to consider some of the legal complexities involved in translating international human rights treaties into domestic legislation.

For further information, please go to: <https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/>

1. Executive Summary

This briefing paper presents an overview of the economic, social and cultural rights under consideration for incorporation in a new Act of Scottish Parliament. The rights discussed link to recommendations from the First Minister's Advisory Group on Human Rights Leadership to progressively realise economic, social and cultural rights of everyone in Scotland.

- The paper examines several rights, including: the right to and adequate standard of living, including the rights to housing, food, water and protection from poverty and social exclusion; the right to the enjoyment of the highest attainable standard of physical and mental health; the right to education; the right to social security and social protection; and the right to take part in cultural life.
- Each right is recognised either directly or indirectly through interpretation in a variety of international human rights treaties as well as other international agreements and soft law standards.
- The minimum core of each right is defined and put into context in relation to the essential features of economic, social and cultural rights from the international perspective. These human rights are indivisible, interrelated and interdependent and the deprivation of one of the examined rights necessarily diminishes the potential to

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deliver other rights, whether economic, social, cultural, civil or political. Non-discrimination is the guiding principle that underpins all human rights. Accessibility, adequacy and accountability are core features of the minimum core of economic, social and cultural rights.

- Each right is situated in the Scottish context and key issues are noted for guidance in contemplation of future legislation.
- Lack of accountability is the key barrier to realising economic, social and cultural rights in Scotland.
- While the existing devolution settlement poses some challenges to fully guaranteeing economic, social and cultural rights in Scotland, the devolved areas of competence can secure a minimum baseline for most of the rights under consideration.
- Developing effective human rights legislation demands a participatory consultation process supported by disaggregated data that is freely available to and accessible by all members of the public. The shortcomings of existing equalities impact assessments and children's rights and wellbeing impact assessments should be addressed in the developing legal framework in order to ensure government has the proper tools to give effect to incorporated rights from the outset of its decision-making processes.
- Legalising economic, social and cultural rights will only be effective if transparent human rights budgeting is mandated by any new legislation. This must take into account the principles that underpin a commitment to using the maximum available resources to progressively secure these rights for every individual.

2. Introduction and Background

The First Minister's Advisory Group on Human Rights Leadership (FMAG) published its 'Recommendations for a new human rights framework to improve people's lives' (HR Framework Recommendations) in December 2018.¹ From the outset, the FMAG was asked to consider the full range of human rights that could potentially support the improvement of the lives people in Scotland, including civil, political, economic, social and cultural rights. Civil and political rights have been well-entrenched in UK law and developed through common law and entrenchment of the European Convention on Human Rights (ECHR) through the Human Rights Act 1998 (HRA 1998). Economic, social and cultural (ESC) rights, however, have gained little traction in UK law as independently recognised legal rights in the UK or in the devolved Scottish context. This does not mean that certain aspects of these internationally recognized rights are not reflected in Scots law and policy. Rather, their mutually reinforcing, elemental status as independent, enforceable human rights has thus far been ignored in law.

The FMAG and the Human Rights Task Force (TF) have prioritised economic, social and cultural (ESC) rights. Specifically, the FMAG proposed that any new Act of Scottish Parliament (ASP)

¹ <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

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should 'include[] a duty on the government to take steps, including as part of budgetary processes and decision-making, to use the maximum of its available resources to achieve progressively the full realisation of the economic, social and cultural rights of everyone.' It further outlined that any new legislation should be accompanied by a system for ensuring accountability, which has generally been the missing link to enforcing ESC rights in countries that have constitutionalised these rights.²

3. Economic, Social and Cultural Rights

3.1 Legal Framework

The clearest reference point for civil and political rights at the international level is the International Covenant on Civil and Political Rights (ICCPR) while its twin, the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides the same for ESC rights. ESC rights are further recognized in the following international human rights treaties with respect to specific vulnerable groups and, therefore, the following treaties provide further points of reference for establishing the minimum standards for delivering ESC rights.

- International Convention on the Elimination of all forms of Racial Discrimination (ICERD)
- Convention on the Elimination of all forms of Discrimination against Women 1979 (CEDAW)
- Convention on the Rights of the Child 1989 (UNCRC)
- Convention on the Rights of Persons with Disabilities (CRPD)
- Further recognition of these rights are found in conventions of the International Labor Organisation

Reference to these further international agreements (see Annex I) such as the European Social Charter (ES Charter) is particularly relevant in terms of delivering ESC rights in line with the principle of non-discrimination and in consideration of the intersectionality of different protected characteristics typically addressed under the Equality Act 2010.³

The FMAG's HR Framework Recommendations outlined a number of ESC rights that should be included in a new ASP designed to entrench human rights in Scotland. Each of the recommended ESC rights is recognised in ICESCR, among other international human rights treaties, and include the following:

- Right to adequate standard of living, including:
 - Right to adequate housing;
 - Right to adequate food;
 - Right to protection against poverty and social exclusion;

² See discussion in Nico Moons and Bernard Hubeau, '[Conceptual and Practical Concerns for the Effectiveness of the Right to Housing](#)' (2016) 6:3 Oñati Socio-legal Series 656.

³ See briefing paper by Nicole Busby.

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- Right to the enjoyment of the highest attainable standard of physical and mental health;
- Right to education;
- Right to social security and social protection;
- Right to take part in cultural life.

In line with ICESCR Article 2, all states parties to the treaty are to 'take appropriate steps to ensure the realization of' these rights. Each of these rights, as with all human rights, benefits from both positive and negative dimensions of protection. The rights will be discussed individually in s.4 below.

Furthermore, the interrelated nature of human rights is most clearly demonstrated when ESC rights are not fulfilled. For example, the ability to gain access to adequate housing and the right to be protected against poverty are directly linked to a person's right to education. If the right to education is not fulfilled, then the earning potential of the individual cannot be fully realised which will impact their ability to secure housing and make them vulnerable to poverty. Similarly, fulfilling ESC rights also has a direct impact on the ability of an individual to engage and enjoy their civil and political rights. The right to education, again, is instructive in that without an education, individuals will have difficulty in fully engaging with social and political life.

3.2 Substantive issues for Scotland

As indicated, Scotland has a range of law and policy that reflect and implement certain aspects of the enumerated rights that were the focus of the FMAG. Relevant legislation will be discussed following the overview of the essential features of each identified ESC right below. For convenience, the overlap in coverage across the international, European and national law is set out in the table in Annex II.

The current devolution settlement poses some challenges for fully guaranteeing ESC rights in Scotland. Many areas touching directly upon ESC rights are devolved to Scotland – such as education, the environment, health, and housing – whereas social security, for example, remains a mostly reserved matter. In areas such as immigration or equality legislation, which are reserved to Westminster, the Scottish Parliament may not be able to guarantee equal ESC rights legislation for all the people living in Scotland, such as persons with unsettled immigration status. Therefore, even in cases where human rights in devolved areas carry strong protections in Scotland through incorporation of international human rights, alongside subsequent legal and policy measures, it could still be the case that one or more aspects of those rights will be incapable of fulfilment due to the reserved nature of particular ESC rights. To the extent possible, these tensions should be mapped at the outset and highlighted in legislative guidance in order to explain how Scotland aims to fulfil ESC rights to the maximum of its devolved abilities.

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3.3 Further issues to be considered

Enforcement of ESC rights has predominately occurred through the enforcement of civil and political rights. This approach has rendered imperfect protection of ESC rights and, more importantly, has facilitated the assumption that ESC rights cannot stand alone. Independent recognition of ESC rights will entrench these rights, which are core to the ability of individuals to live in dignity and reach their full potential.

A number of parallel processes designed to strengthen ESC rights protections alongside civil and political rights protections are currently taking place in Scotland. Incorporation of the ESC rights addressed below will only be the first step as secondary legislation and comprehensive guidance will be necessary to give effectively respect, protect and fulfil human rights for every person in Scotland. Coordination across drafting committees on the architecture of new legislation and the accompanying guidance in advance of initial publication of the envisioned ASP is an obvious way to address overlapping rights. Adopting a clear, common framework for the use of terminology, administrative procedures and enforcement would be a step forward in clarifying for the people of Scotland the value of an ASP that incorporates a range of human rights, including ESC rights.⁴

4. ESC Rights: Core Elements and Underpinning Principles

As indicated in the FMAG's HR Framework Recommendations, it is essential to outline the content of these rights, the minimum standards necessary to commence delivery of these rights on a path of progressive realisations in line with the maximum available resources and ensure non-regression. As with all human rights, there is a three-pronged obligation of the state to respect, protect and fulfil ESC rights. Respecting ESC rights at a bare minimum requires government to not interfere directly or indirectly with an individual's exercise of their rights and freedoms.⁵ As explained by CESCR, many of these measures, such as legislating to ensure equal pay for equal work, require no budgetary measures.⁶ Scots law reflects a number of these measures to some extent (see Annex II).

A necessary preliminary matter for incorporating various ESC rights it to appreciate the interdependent, interrelated and indivisible nature of human rights.⁷ This is in relation both to the interrelated nature of ESC rights but also in terms of the relationship between ESC rights and civil and political rights. A common example of latter can be illustrated in the relationship

⁴ See relevant terminology discussion in Kasey McCall-Smith, '[Scottish Government's UNCRIC Incorporation Consultation: Options](#)' (Youthlink Scotland, 7 August 2019).

⁵ CESCR, [An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under and Optional Protocol to the Covenant, Statement](#), UN Doc E/C.12/2007/1, 21 September 2007), 2.

⁶ *ibid.* Other examples include articles 3, 7 (a)(i), 8, 10.3, 13.2 (a), 13.3, 13.4^[SEP] and 15.3, see CESCR, [General Comment No. 3: The nature of states parties' obligations](#).

⁷ OHCHR, 'What are human rights?' <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>

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between the freedom of expression and the right to education. Without an education, the freedoms of speech, assembly or expression cannot be fully and effectively realised. Similarly, without a home, a person may not be able to engage their rights to education, healthcare or social security. The positive dimension of the interrelated nature of human rights is that civil and political rights have been the primary vehicle for realising most ESC rights. This results from to the failure of many jurisdictions to provide an avenue for recognition of these rights. This situation has, however, meant that full realisation and exercise of ESC rights has been curtailed.

ESC rights must be accompanied by enforcement mechanisms, including domestic remedies supported by the possibility of judicial review. Domestic remedies may include administrative remedies that are accessible, affordable, timely and effective as long as administrative authorities are competent in what standards are associated with applying the right.⁸ Essential to the development of enforceable ESC rights is ensuring adequate information about what implementing these rights in law means and how individuals may access these rights.

4.1 Adequate standard of living

ICESCR Article 11 establishes the basis for the right to an adequate standard of living (ASOL). CEDAW Article 14, UNCRC Article 27 and CRPD Article 28 further reinforce the right to ASOL. ASOL is an umbrella or holistic right that includes a number of component rights necessary to its effective realisation, including: right to food, right to water, right to housing and the right to protection against poverty and social exclusion, though other related rights are easily identified. The right to ASOL is key to the enjoyment of all economic, social and cultural rights.⁹ While levels of 'adequacy' vary among the sub-components of Article 11, the term has been interpreted to ensure, at a minimum, the 'inherent dignity of the human person'. Any ASP must recognise that this minimum is variable depending on a person's specific vulnerabilities, such as persons with disabilities as set out in CRPD Article 28.

The right to ASOL does not equate to the state being solely responsible for providing all elements necessary to achieve the right free to the population. However, as discussed below, the minimum core of the right is that the state ensures effective access to the sub-components of the rights. The continuous improvement of living conditions is the focus of the progressive development of ASOL.

Scottish context and guidance. There is no free standing right to ASOL in Scotland at present. The UK Supreme Court has linked this right to ECHR Article 8 in the *Benefits Cap* case, acknowledging that 'It cannot seriously be disputed that the values underlying the right [to] family life include those of a home life underpinned by a degree of stability, practical as well as emotional, and thus by financial resources adequate to meet basic needs, in particular for

⁸ CESCR, [General Comment No. 9: The domestic application of the Covenant](#), paras 3, 9.

⁹ Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 4: The Right to Adequate Housing (Art 11(1)), UN Doc E/1992/23, 13 December 1991.

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accommodation, warmth, food and clothing.¹⁰ Though the Supreme Court's decision offered no remedy for the complainants in the *Benefits Cap* case, it demonstrates the interlinking impact that failure to fulfill one element of the holistic ASOL can have.

Guidance on the right must acknowledge the minimum core required for each of the interlinking rights that collectively ensure the right to ASOL. It should also note that vulnerable persons often experience intersecting barriers to accessing the individual components rights that ensure ASOL, such as women, children and persons with disabilities. As a result, taking an approach to vulnerable groups based on adherence to different equalities designations alone cannot effectively overcome these barriers. For example, a woman's ability to realise her right to ASOL cannot be addressed by gender mainstreaming considerations alone under the Public Sector Equality Duty.¹¹

4.1.1 Right to adequate food

The right to adequate food is set out in ICESCR Article 11(2) and means that everyone has a right to be free from hunger and feed themselves in dignity. This is not the same as the right to be fed.¹² People must individually meet their own needs and the government must ensure the conditions that allow them to do so, either by affording people the opportunity to produce food or to have access to markets accompanied by a means of purchasing food. The UK has committed to the FAO Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food (RtFGs) and a limited right to food is also recognised in the ES Charter.

The ability of any government to protect and fulfil the right to food is closely linked to ensuring a healthy environment as degradation to the environment has a direct impact on the ability to cultivate adequate supplies of food.¹³ Nutritious food is directly linked to the right to water, the right to life and the right to health. The ability to obtain food is linked to the right to social security and labour rights. CEDAW Article 12(2) and UNCRC Article 24, respectively, link nutritious food to women's and children's right to health.

The minimum core of the right to food is set out by the CESCR and links up the guiding principles outlined by the FAO and recognised by the Committee.

¹⁰ *R (on the application of DA and DS and others) (appellants) v Secretary of State for Work and Pensions (Respondent)* [2019] UKSC 21, para 35. Though the Court dismissed the appeals, it acknowledged that mitigating circumstances in relation to the case stimulating renewed research into the impacts of the benefits cap was a factor in not making a declaration of incompatibility in this particular case.

¹¹ Carolyn Whitzman et al (eds), *Building Inclusive Cities: Women's Safety and the Right to the City* (Routledge 2013) 203.

¹² See CESCR, General Comment No. 12, para 6.

¹³ <https://www.ipcc.ch/srccl/>, executive summary. This issue is examined in the briefing paper by Professor Elisa Morgera.

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- **Availability.** Food should be available from natural resources either through the production of food, by cultivating land or animal husbandry, or through other ways of obtaining food, such as fishing, hunting or gathering. On the other hand, it means that food should be available for sale in markets and shops.
- **Accessibility.** Economic and physical access to food to be guaranteed. Economic accessibility means that food must be affordable. Individuals should be able to afford food for an adequate diet without compromising on any other basic needs, such as school fees, medicines or rent. Physical accessibility means that food should be accessible to all, including to the physically vulnerable, such as children, the sick, persons with disabilities or the elderly. Access to food must also be guaranteed to people in remote areas and to victims of armed conflicts or natural disasters, as well as to prisoners.
- **Adequacy.** Food must satisfy dietary needs, taking into account the individual's age, living conditions, health, occupation, sex, etc. Food should be safe for human consumption.
- **Sustainability.** Food should be accessible for both present and future generations.¹⁴

Scottish context and guidance. The 2019 findings of an 18-month study of Scottish food banks revealed that at least 480,583 food parcels were handed out by charities across Scotland during the period of analysis.¹⁵ Recourse to food banks is linked to shortcomings in social benefits programmes and evidence of food poverty underpins the need to secure the right to food. Since it began monitoring the relationship between people and food in 2001, Scotland has failed consistently to meet its dietary goals.¹⁶ The proposed Good Food Nation Bill could be a significant step in securing the right to food in Scotland.¹⁷ However, the right to food should be legalised in conjunction with interrelated ESC rights and independent of other developing legislation.

The FAO identifies seven practical steps to implementing the right to food:

- Identify hungry people, whose right to food is not realized
- Assess existing policies and programmes
- Develop strategies for an enabling environment and assistance measures
- Improve institutional coordination and functioning
- Review and strengthen the legal framework
- Monitor progress over time with a human rights focus
- Ensure effective recourse for violations of the right to food¹⁸

¹⁴ OHCHR Toolkit on the Right to Food <https://www.ohchr.org/EN/Issues/ESCR/Pages/Food.aspx>; OHCHR Right to Food, Factsheet 34 <https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>; Food and Agricultural Organization of the UK <http://www.fao.org/right-to-food>.

¹⁵ <https://thirdforcenews.org.uk/tfn-news/foodbank-use-in-scotland-laid-bare>

¹⁶ https://www.foodstandards.gov.scot/downloads/Final_Report.pdf

¹⁷ <http://www.nourishscotland.org/campaigns/good-food-nation-bill/>

¹⁸ <http://www.fao.org/3/y7937e/y7937E03.htm#ch2.7>

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Guidance for a new ASP should clarify that: no measures should be taken to prevent access to food without an extensive, inclusive, participative human rights impact assessment; the right must be protected against breaches by non-state actors, such as by businesses destroying sources of nutritious food through environmental pollution or blocking access to markets; food quality standards and safety standards must be enforced; there should be a progressive strengthening of people's access to and use of resources to secure food.¹⁹

In line with the Scottish Government's declaration of a 'climate change emergency', the right to food must be considered both in terms of availability, adequacy and the contribution to environmental degradation created by food production. Therefore guidance should clarify the relationship between environmental and sustainability objectives and delivery of adequate and nutritious food.

4.1.2 Right to water

Even though the right to water is not expressly mentioned in ICESCR, it is widely accepted as a necessary element to supporting the right to ASOL and the right to health, as expressed in ICESCR Articles 11 and 12 and recognised in both CEDAW and the UNCRC.²⁰ This includes the right to clean sanitation, without which it is impossible to maintain human dignity.²¹ Safe and potable drinking water and effective sanitation are essential to the realisation of the right to health, discussed below in s.4.2. Water is also necessary to ensure the rights to adequate food, to work to secure livelihood and, in certain circumstances, to take part in cultural life.

As with other ESC rights, the right to water contains freedoms and entitlements. For example, freedom from interference with water supplies and ensuring potable water are two dimensions of the state's responsibility when fulfilling the right to water. CESCR has acknowledged that different, location specific conditions will lead to variations in the state's control over adequate water supplies, there are certain factors that must guide the state in order to ensure the minimum core of the right to water:

- **Availability.** Water must be available to every person in sufficient quantities for personal and household use and in light of particular vulnerabilities.
- **Quality.** Water must be safe and standards for water safety should be publicly available.
- **Accessibility.** Water and water services and facilities must be accessible on a non-discriminatory basis. Accessibility must be considered in terms of:

¹⁹ OHCHR Right to Food, Factsheet 34, p 17.

²⁰ CESCR, General Comment No 15: The Right to Water (Arts. 11 and 12), UN Doc E/C.12/2002/11, 20 January 2003; UN General Assembly, [The Human Right to Safe Drinking Water and Sanitation](#), UN Doc A/C.3/70/L.55/Rev.1, 18 November 2015.

²¹ Ben Saul, David Kinley and Jacqueline Mowbray, 'Article 11: The Right to an Adequate Standard of Living' in Ben Saul, David Kinley and Jacqueline Mowbray (eds), *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 869-70.

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- Physical accessibility;
- Economic accessibility;
- Non-discrimination;
- Information accessibility.

Scottish context and guidance. Scotland is in a fortunate situation in that water is typically in abundant supply. However, water quality in rural areas is from time to time a problem, particularly where water supplies are in close proximity to agricultural operations. There is a range of legislation that addresses variable components regarding the provision and quality of water in Scotland. These laws must be revisited in order to ensure that enforcement measures align with delivery of the minimum core right to water and its roles as an essential feature of other ESC rights.

4.1.3 Right to adequate housing

ICESCR Article 11(1) is the source of the right to adequate housing, which is crucial in order to enjoy other interdependent fundamental rights. Habitability and the availability of services, materials, facilities and infrastructure underpin considerations of 'adequacy'.²² CERD Article 5(e), CEDAW Article 14, UNCRC Article 27 and CRPD Articles 9 and 28 further recognise the right to housing. The right is broader than simple shelter and must be understood as the right to access and live somewhere in security, peace and dignity. The right to housing is an integral part of ensuring the right to health and should form part of a national housing strategy.²³

A range of issues must be taken into account when determining the 'adequacy' of housing and the development of a national housing strategy, including:

- Legal security of tenure;
- Availability of services, materials, facilities and infrastructure (which is particularly important in relation to protecting against poverty) and includes access to safe drinking water and sanitation facilities, electricity and cooking facilities;
- Affordability;
- Habitability;
- Location;
- Cultural adequacy.²⁴

Any national housing strategy should capitalise on a mix of public and private sector resources and ensure enabling strategies that assist the most vulnerable. '[T]he obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right for

²² CESCR, General Comment No 4, para 8(d).

²³ B Thiele, 'The Human Right to Adequate Housing: A tool for promoting and protecting individual and community health' (2002) 92:5 *American Journal of Public Health* 712.

²⁴ CESCR, General Comment No 4, para 8.

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every individual in the shortest possible time in accordance with the maximum of available resources.’²⁵

The UNHCR’s Global Strategy for Settlement and Shelter’s key principles reflect the holistic complement of principles that underpin the right to adequate housing in conjunction with other ESC rights. These include:

- Protection
- Age, gender and diversity
- Equity
- Accessibility
- Access
- Sustainability
- Community empowerment
- Appropriateness and reliability
- Environment²⁶

The Collective Complaints Protocol of the European Social Charter allows approved NGOs to lodge a complaint to the European Committee of Social Rights where there appears to be a violation of any provision of the Social Charter by any State which has accepted it. In a 2006 decision regarding the forced eviction of Roma families, the Committee determined that ‘The state must take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right to housing’ The Committee further noted that states ‘must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and that alternative accommodation is available. The law must also establish eviction procedures, specifying when they may not be carried out (for example, at night or during winter), provide legal remedies and offer legal aid to those who need it to seek redress from the courts. Compensation for illegal evictions must also be provided.’²⁷ The decision is instructive in that it clarifies minimum standards about process and procedure in the event of evictions as well as underscoring the need to ensure the dignity of the concerned individuals.

Scottish context and guidance. Housing is often discussed as a commodity rather than a right. Failing to understand housing as a right prevents its integral role in the realisation of the full complement of ESC rights that collectively support ASOL. Housing rights were part of ASOL, one of the five main addressed in SNAP 2013-17 and are a continuing theme for SNAP 2. The right to housing is acknowledged as a crucial element of the right to an ASOL and has been a key work

²⁵ CESCR, General Comment No 4, para 14.

²⁶ The UNHCR’s Global Strategy for Shelter <https://www.unhcr.org/uk/protection/livelihoods/530f13aa9/global-strategy-settlement-shelter.html>.

²⁷ *European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005*, 18 October 2006.

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area of the Scottish Human Rights Commission.²⁸ Primary issues in Scotland relate to homelessness, housing quality and housing affordability.²⁹ Scottish law in the area is progressive in that from 2012 everyone that is found to be unintentionally homeless has the right to settled accommodation.³⁰ There is still work to be done in order to fully recognise the minimum core of the right in Scotland for all people.

Statistics released in January 2020 indicate that 18,645 applications to register for homelessness assistance were made in the six-month period beginning 1 April 2019. This marked a decrease from the previous year. Only 4 per cent of those assessed were intentionally homeless. Despite the decrease in overall applications, as of September 2019, there were 11,432 households and 7,252 children in temporary accommodation, representing an increase from 2018. Households with children spent an average of more than 50 days more in temporary accommodation than households without children.³¹ There were 430 breaches of the Homelessness Persons (Unsuitable Accommodation) Order for the year ending September 2019, which suggests that the seven-day limit is not an onerous requirement, particularly in Edinburgh where most of the breaches occurred. The Order was extended in 2019 to take away the priority that was formerly given to pregnant women and households with children as a means of promoting equality across the full range of homelessness applicants. The impact of this change will need to be monitored for compliance with the UNCRC in line with the Children and Young People (Scotland) Act 2014 in the form of a follow-up impact assessment, the relationship with which must be clarified in any guidance issued. Unsuitable accommodation for children can impact on their rights to education, health, rest and leisure, among others.³²

Victims of domestic violence often find their inability to access housing increases their exposure to potential violence.³³ The rights of refugees and asylum seekers are frequently affected in the intersection of domestic violence and housing rights. UK Immigration Rules provide some relief on this specific intersectional issue of migrants in abusive relationships through the destitution domestic violence concession.³⁴ In light of the reserved nature of migration, the link to available UK level relief in guidance is necessary.

²⁸ http://www.snaprights.info/wp-content/uploads/2019/09/SNAP-2_Online.pdf;

<https://www.scottishhumanrights.com/media/2029/housin-project-report-vfinal-may-2020.pdf>

²⁹ <https://www.housinglin.org.uk/Topics/type/Housing-as-a-Human-Right-Scottish-Housing-Day-Report/>

³⁰ https://scotland.shelter.org.uk/_data/assets/pdf_file/0010/1657801/Housing_is_a_human_right_FINAL_10011_9.pdf_nocache.

³¹ <https://news.gov.scot/news/homelessness-statistics>

³² <https://www.gov.scot/publications/amendment-homeless-persons-unsuitable-accommodation-scotland-order-2020-crwia/>

³³ <https://www.womensaid.org.uk/women-escaping-domestic-abuse-left-at-risk-of-homelessness/>

³⁴ [Immigration Rules, s.289B](#); [Destitution Domestic violence concession](#).

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4.1.4 Right to protection against poverty and social exclusion

Poverty is a key factor in preventing people from attaining ESC rights.³⁵

‘[P]overty may be defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.’³⁶

While protection from poverty is not explicitly mentioned as a stand alone right in any of the international treaties, the collective nature of fulfilling ESC rights guards against poverty and related social exclusion, as is acknowledged in the preambles to many human rights treaties. For example, the rights to food and water are obstructed for people living in poverty where they have neither the means nor the resources to access adequate food and safe, potable water. Similarly, poverty has a direct impact on the rights to housing, health and any number of additional rights where freedoms are limited by interrelated rights deprivations.

Scottish context and guidance. In Scotland 26% of children, 20% of working age people and 13% of pensioners live in poverty, with Minority Ethnic people, lone parents and families with a disabled adult overrepresented.³⁷ In combination with the rates of homelessness and food insecurity (covered above), these numbers highlight the importance of realising the right to be free from poverty and social exclusion as an enabler for other ESC rights. The 2019 report by the UN Special Rapporteur laid bare a number of truths about cuts to social programming in the broader UK as well as specific issues relevant to Scotland.³⁸

According to the Children and Young Person Commissioner Scotland (CYPCS) ‘historically, the key cause of increases in number of children in poverty [relative child poverty rates estimated to be 34.5% in 2020/21] has been changes to the UK-wide tax and benefit system.’³⁹ This demonstrates that clear links to the right to social security have been outlined. Similar concerns were reflected in the CRC’s concluding observations to the UK in 2016,⁴⁰ which called for a ‘comprehensive assessment of the cumulative impact’ of the UK tax credit and benefit system on children.

³⁵ CESCR, General Comment No. 14, para 5.

³⁶ OHCHR Right to Food, [Factsheet 34](#), p 10.

³⁷ <https://povertyinequality.scot/poverty-scotland/>.

³⁸ Philip Alston, [Report of the Special Rapporteur on extreme poverty and human rights on his visit to United Kingdom of Great Britain and Northern Ireland](#), UN Doc A/HRC/41/39/Add.1, 30 May 2019.

³⁹ Children and Young People’s Commissioner Scotland ‘Submission to the United Nations Special Rapporteur on Extreme Poverty and Human Rights’ 2018 pp. 3 and 6.

⁴⁰ UN Committee on the Rights of the Child ‘Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland’ 3 June 2016 UN, Doc: CRC/C/GBR/CO/5, paras. 69-70.

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4.2 Right to the enjoyment of the highest attainable standard of physical and mental health

ICESCR Article 12 provides the most comprehensive treatment of the right to health in international law though other treaties, including CERD, CEDAW, UNCRC and CRPD, also recognise the right.⁴¹ Physical and mental health are dependent upon the realisation of other rights, including the 'rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.'⁴² Fulfilling the right to health requires promotion of the conditions that enable people to live a healthy life, which are linked to the full range of ESC rights and in particular those of food and water as well as environmental conditions.

The right to health is not merely the right to be healthy but includes freedoms and entitlements, many of which align with other rights, such as reproductive freedom and freedom from bodily interference. The entitlements include a range of principles relating to accessibility. In addition to basic access to health services and facilities that are fit-for-purpose, accessibility must be understood as a multidimensional concept dependent on ensuring:

- Accessibility on the basis of non-discrimination;
- Physical accessibility in terms of safe for vulnerable groups and persons with disabilities;
- Economically accessible;
- Information accessibility - reflecting the right to receive and impart information and ideas about health issues and in confidence.⁴³

The minimum core obligation reflects the integral relationship between the right to health and other ESC rights:

- **Accessibility.** To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
- **Minimum standards.**
 - To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
 - To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
 - To provide essential drugs;
 - To ensure equitable distribution of all health facilities, goods and services; [SEP]
- **Transparent strategy.** To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; the

⁴¹ The right is also protected by CERD, CEDAW, UNCRC and CRPD, see Annex II.

⁴² CESCR, General Comment No. 14, para 3.

⁴³ CESCR, General Comment No. 14.

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process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalised groups;

- **Progressive development.** National public health strategies shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored.⁴⁴

Scottish context and guidance. Social healthcare provided by the NHS underpins the resource-intensive dimension of the right to health but it is not the only consideration. To ensure the positive dimension of the right, hospitals, clinics and social-health care facilities must be manned by trained and competitively-paid staff and have the ability to provide essential drugs.⁴⁵ However, the right to health also extends to the natural environment and working environments. In this context, fulfilling the right requires environmental protection more broadly as well as effective oversight of health and safety regulations in workplace environments. This should be coupled with education about social determinants relating to health and transmittable diseases, including those that are transmitted sexually or through hazards, disasters (natural or manmade) or epidemics that result in highly communicable diseases.

Specific issues relating to mental health and the criminal justice system have been highlighted in Scotland. Children and mental health issues are frequently issues of concern in terms of inadequate provision of services, social bullying in schools and through social media.⁴⁶ While the NHS offers a specialist Child and Mental Health Service (CAMHS), it has been repeatedly criticised for underfunding, extensive waiting times and inadequate provision. Left unattended, treatable mental health concerns can evolve into disabling conditions. These issues also exist for adults in terms of extensive waiting times and inadequate provision. Collectively, further clarification about how mental health treatment interacts with other rights, such as the right to bodily integrity and the right to refuse treatment.

The CESCR has clarified that the legal obligation extends to all persons, including non-citizens and those seeking refuge, as it is a basic requirement of ensuring human dignity. Therefore, outlining the ways in which migrant populations with undetermined status may access healthcare is necessary. Furthermore, clarifying how the core obligation is to be met for rural populations is required.

4.3 Right to education

The right to education is protected across several human rights treaties, including ICESCR Articles 13 and 14, CERD Articles 5 and 7, CEDAW Article 10, CRPD Article 24 and a number of articles in the UNCRC. These variable protections make it clear that the right to education more

⁴⁴ CESCR, General Comment No. 14, para 43.

⁴⁵ CESCR, General Comment No. 14, paras 12(a), 17. Essential drugs are defined by the WHO Action Programme on Essential Drugs.

⁴⁶ https://www.togetherscotland.org.uk/media/1436/socrr_online_version.pdf.

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comprehensive than mere provision of primary education for children, as set out in ICESCR Article 13 (2)(a) and UNCRC Article 28(1). Education should 'enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups' (ICESCR Article 13(1)).

The minimum core obligation is to ensure essential levels of the most basic forms of education across all groups and levels – primary, secondary (including technical and vocational training) and higher – in line with the following principles:

- **Accessibility.** Accessible public educational institutions open to all on a non-discriminatory basis, including necessary adjustments for vulnerable persons.
- **Progressive development.** Ensure that different levels of education are actively developed, continuously reviewed and progressively improved.
- **Non-discrimination.** At a minimum, free primary education for every person on a non-discriminatory basis.
- **Transparent strategy.** To adopt and implement a national education strategy that addresses primary, secondary, technical/skills and higher education.
- **Minimum standards.** Ensure free choice of education complying with minimum educational standards without interference from the state or private parties.⁴⁷

Scottish context and guidance. The right to an education and responsibility of parents to ensure children attend school has long been a feature of Scots law. However, a number of issues in terms of fulfilling that right in conjunction with other legal principles and rights, such as the rights of children to participate in decisions affecting them, should be strengthened through incorporation of the right to education. Education provision in Scotland struggles to accommodate intersectional vulnerabilities. In particular, the needs of children with disabilities have not been met despite a range of legislation directly addressing this issue.⁴⁸ The recent Covid pandemic and associated suspension of face-to-face delivery of teaching has revealed a wide discrepancy in provision of minimum standards of education and accessible delivery for all those in primary and secondary education.⁴⁹ Digital exclusion and online appropriateness for varying age groups contribute to the inequity caused by school closures. In these contexts it is clear that a minimum standard is not being satisfied for all children in Scotland and that serious gaps in both protection and accountability need to be addressed and not just in the context of the current pandemic situation.

The right to education specifically in the context of children will no doubt form part of the protections in the UNCRC incorporation bill being developed by Scottish Government if it holds true to its pledge to take a maximalist approach to incorporation. Therefore, new ASPs should acknowledge where there are overlaps and ensure alignment between access and

⁴⁷ CESCR, [General Comment No. 13, The Right to Education \(Art. 13\)](#), para 57.

⁴⁸ *Jack James Guild v. City of Edinburgh Council* [2002] SCLR 92. See Lovisa Backman, et al, [State of Children's Rights in Scotland 2019](#), 90-91.

⁴⁹ Aoife Nolan, [Should Schools Reopen? The Human Rights Risk](#).

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accountability procedures and opportunities for judicial review and remedy. As education is devolved to Scotland but immigration status is not, special care should be taken to clarify the government's obligations to children and adults without confirmed leave to remain in the UK, such as asylum seekers.

4.4 Right to social security and social protection

ICESCR Article 9 outlines the right to social security. The right is recognised in the specific context of persons with disabilities in CRPD Article 28, women in CEDAW Articles 11(e) and 14(c), minorities in CERD Article 5(e) and children in UNCRC Article 26. The right underpins other rights, such as the right to food in that social programmes must acknowledge the accessibility and minimum market costs of nutritious food. To fulfil the right to social security the state must identify specific measures to be taken.

The core of the obligation demands that all individuals and families have access to a social security scheme that provides a minimum essential level of benefits enabling them to enjoy the basic level of other ESC rights, including the rights to health, housing, water, food and education, reinforcing the interrelated nature of ESC rights.⁵⁰ CESCR outlines the minimum core to the right to social security and underpinning elements as follows:

- **Availability.** Social security systems, however composed, must be available to address impacts on livelihoods, must be administered or regulated by the state and continued over generations.
- **Social risks and contingencies.** Social security systems must at a minimum provide for: health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability and survivors and orphans.
- **Adequacy.** Benefits must be adequate in amount and duration to ensure that recipients relevant human rights are realised, in particular the rights to family life, adequate standard of living and health.
- **Accessibility.** Access to social security programmes must be ensured on five accounts: coverage, eligibility, affordability, participation and information, and physical access. Schemes must be non-contributory to ensure universality.
- **Non-discrimination.** Ensure access to social security systems on a non-discriminatory basis.
- **Non-retrogression and non-interference.** Respect and protect existing social security schemes from unreasonable interference.
- **Transparent strategy.** Adopt and implement a national social security strategy and plan of action.
- **Progressive realisation.** Take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalised individuals and groups; and monitor progressive realisation of the right to social security.⁵¹

⁵⁰ CESCR, [General Comment No. 19: The right to social security \(art. 9\)](#), para 59(a).

⁵¹ *ibid.*

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Scottish context and guidance. Social security is predominantly reserved and the 2019 report of the UN Special Rapporteur on Poverty drilled down into the variable failings of the British government to keep its citizens out of poverty.⁵² The Social Security (Scotland) Act 2018 sets out the Scottish Government's powers to regulate certain benefits in accordance with the devolved powers under the Scotland Act 2016. However, the Social Security Committee in Scottish Parliament rejected an amendment to include a duty of due regard for the right to social security in the Social Security (Scotland) Act,⁵³ thus a significant accountability gap remains in terms of protecting and fulfilling the right to social security. The devolved benefits competences relate to disability, industrial injuries, carers, maternity benefits, funeral and heating expenses and discretionary housing payments with further detail provided in secondary legislation. The Act commits the government to establish a social security system 'with dignity and respect being core to its approach'. In 2019 the Scottish Parliament adopted the Social Security Scotland Charter, which recognises that 'social security is itself a human right and essential to the realisation of other human rights'.⁵⁴

4.5 Right to take part in cultural life.

ICESCR Article 15(1) outlines the right of every person to take part (participate) in cultural life.⁵⁵ Unlike many of the other rights discussed in this paper, the right to take part in cultural life is a freedom that is primarily protected by the state's commitment to not interfere with the full enjoyment of the right. The right is secured by ensuring every person – individually or as part of a community – is able to participate in, access and contribute to cultural life.

CESCR outlines that 'cultural life' is a multifaceted concept,

...[encompassing], inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.⁵⁶

⁵² Philip Alston, [Report of the Special Rapporteur on extreme poverty and human rights on his visit to United Kingdom of Great Britain and Northern Ireland](#), UN Doc A/HRC/41/39/Add.1, 30 May 2019.

⁵³ <https://www.scottishhumanrights.com/news/commission-calls-for-due-regard-duty-to-advance-right-to-social-security/>; see briefing paper by Dr Katie Boyle on the duty of due regard.

⁵⁴ <https://www.gov.scot/publications/charter/>.

⁵⁵ The right is also protected by CERD, CEDAW, UNCRC and CRPD, see Annex II.

⁵⁶ CESCR, [General Comment No. 21](#), para 13.

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To respect, protect and fulfil the right to take part in cultural life, the government must ensure the following minimum conditions:

- **Availability.** The presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sports stadiums; literature, including folklore, and the arts in all forms; the shared open spaces such as parks, squares, avenues and streets; nature preserves, such as seas, lakes, rivers, mountains and forests; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities;
- **Accessibility.** Concerns effective and concrete opportunities for individuals and communities to access and share information in a language of their choice about cultural life. It also encompasses the opportunity to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination and taking account of the needs of vulnerable persons;
- **Acceptability.** Entails that domestic strategies, policies, programmes and measures adopted in relation to the enjoyment and exercise of cultural rights should be considerate and acceptable to the individuals and communities involved and respectful of cultural diversity;
- **Adaptability.** Refers to the flexibility and relevance of domestic strategies, policies, programmes and measures in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities;
- **Appropriateness.** Refers to the realisation of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples. CESCR has linked cultural appropriateness to the rights to food, health, water, housing and education. How those rights are implemented may impact cultural life.⁵⁷

As noted by ICESCR Articles 4 and 5, the right can be limited but only to the extent necessary to promote general welfare in a democratic society or to ensure against the infringement of others' human rights.

Scottish context and guidance. Scotland benefits from an ethnically diverse society, largely due to rich culture of first and second-generation migrants many of whom are largely concentrated in urban centres. An ASP must ensure that the variable minority populations are able to freely exercise and develop their unique cultural traditions in a safe environment in line with the minimum conditions outlined above.

At the same time, Scotland is also home to its own internal ethnic minorities. Two particular groups stand out in this context. The first is the small part of the population that identifies as ethnic Scots. The second is the part of the population that speaks Scottish Gaelic, roughly 1 per

⁵⁷ CESCR, [General Comment No. 21](#), para 16.

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cent according to a 2011 census. This population is predominantly located in the Highlands and Islands and particularly in the Outer Hebrides.⁵⁸ There is also a small minority that speaks Scots. Efforts to support and increase fluency in Scottish Gaelic among the population have been underway for over a decade and culminated in the Gaelic Language (Scotland) Act 2005, which aims to secure Gaelic as an official language of Scotland alongside English.⁵⁹ The Education (Scotland) Act 2016 also places a duty on education authorities to promote and support Gaelic Medium Education and Gaelic Learner Education 2016 and establishes a process by which parents can request Gaelic Medium Primary Education from their education authority. Scottish Studies degrees across Scottish universities, Scottish history classes in primary or secondary education and traditional Scots celebrations, such as Burns Night, are on the rise and are viewed as markers relevant to fulfillment of the right to take part in cultural life. Collectively, Scotland is progressively meeting the minimum core with respect to its internal minority populations. How this compares with protections for other minority groups exercising the right to cultural life warrants further consideration.

4.6 Human rights impact assessments

Currently, legislation put forward by the Scottish Government must pursue two different assessments of potentially vulnerable groups. The Public Sector Equality Duty requires Equality Impact Assessments (EQIA) pursuant to the Equality Act 2010 and Children's Rights and Well-being Impact Assessments⁶⁰ (CRWIA) are required by the Children and Young People (Scotland) Act 2014. Effectively conducted impact assessments enable decision-makers to have access to information relevant to assessing why and how different options impact individual rights holders. In short, it enables government to assess proposed legislation against human rights obligations on the front-end in order to minimise potential breaches once a law is in place.

Existing processes for both EQIAs and CRWIAs are inconsistent and often delivered in half-measures rendering these front-end and less than effective.⁶¹ New human rights legislation must include a duty to deliver more systematic impact assessments across the range of human rights protections envisioned. This demands a structured and transparent approach to data collection that feeds into impact assessments. The collection of appropriate disaggregated data is essential to the development of effective secondary laws and policies and is increasingly

⁵⁸ See Robert Dunbar, 'Language Legislation and Policy in the UK and Ireland: Different Aspects of Territoriality in a "Celtic" Context' (2016) 23 *International Journal on Minority and Group Rights* 454.

⁵⁹ <https://www.gov.scot/publications/scottish-government-gaelic-language-plan-2016-2021/pages/4/> Scottish Gaelic is one of the three protected languages identified by the UK government under the European Charter for Regional or Minority Languages, see Dunbar (2016).

⁶⁰ Scottish Government, [When and how to best use the Child Rights and Wellbeing Impact Assessment \(CRWIA\): Guidance](#), updated February 2019 (CRWIA Guidance).

⁶¹ See, for example, <https://www.togetherscotland.org.uk/news-and-events/news/2019/06/using-crwia-to-promote-child-rights-based-decision-making/>.

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recognised as key to fulfilling human rights in the domestic setting, including those of the most vulnerable.⁶²

Ongoing monitoring above the initial impact assessment would ensure progressive realisation of human rights and outlined policy objectives underpinning any new ASP.⁶³ Thus, in addition to assessing how law and policies are progressing the tripartite obligation to respect, protect and fulfil each right, keeping up with developments at the international and regional levels in parallel rights discourse must be integrated into benchmarking for impact assessments.

4.7 Human rights budgeting

Resources are required to protect and fulfil human rights. ESC rights are variably resource dependent therefore if the Scottish Government is to commit to any minimum level of ESC rights protection, legislation must include a commitment to and guidance on human rights budgeting. This aligns with the commitment in ICESCR Article 2 for the state to undertake steps to fulfil ESC rights to the 'maximum of its available resources' ('MAR'). Notably, many preliminary measures are not resource intensive. These include ensuring that all legislation relating to ESC rights is applied without discrimination⁶⁴ and ensuring that in times of economic constraint that clear measures exist to ensure the protection of the most vulnerable in Scotland.⁶⁵

In order to fulfil ESC rights, the state's positive obligations to facilitate, promote and provide these rights must be continually be assessed in order to progressively develop rights provision in line with the MAR.⁶⁶ The CESCR explains the 'progressive realisation' of ESC rights as 'deliberate, concrete and targeted steps within a reasonably short time after [ICESCR's] entry into force...including particularly the adoption of legislative measures...as well as "administrative, financial, education and social measures".'⁶⁷ Effectively, the state must increase its 'fiscal space'. 'Fiscal space refers to the flexibility...available to a government to adjust elements of its budget in order to increase spending, either overall or in some priority area.'⁶⁸ Arguing that social protection is unaffordable in the context of delivering the minimum core ESC rights is a losing argument.⁶⁹

⁶² For example, see integration of the obligation to collect data in CRPD, art 31.

⁶³ CESCR, General Comment No. 19, para 74.

⁶⁴ Aligning with existing UK law under the Human Rights Act 1998 and the Equality Act 2010.

⁶⁵ CESCR, [An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under and Optional Protocol to the Covenant](#), Statement, UN Doc E/C.12/2007/1, 21 September 2007), 1-2.

⁶⁶ See comment in Katie Boyle, [Models of Incorporation and Justiciability for Economic, Social and Cultural Rights](#) (SHRC, November 2018) 7.

⁶⁷ CESCR, [An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under and Optional Protocol to the Covenant](#).

⁶⁸ United Nations Children's Fund (UNICEF), ['Fiscal Space and Public Expenditure on the Social Sectors'](#) (February 2009) Briefing Paper, 2.

⁶⁹ ILO, [Fiscal Space for Social Protection and the SDGs](#), Extension of Social Security Working Paper, ESS048 (ILO 2017).

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Human rights budgeting should outline Scottish Parliament and Scottish Government's methods of prioritising legalised rights. Budgeting priorities must be linked to freely available research and relevant impact assessments (discussed in s.4.6). Prioritising should also be a participatory process in order to ensure buy-in from the public, including children who are often indirectly impacted by budget processes.⁷⁰ Committing to fiscal transparency on ESC rights budgeting aligns with the Task Force's terms of reference and the FMAG's guiding principles for the future development of human rights protections in Scotland.

The government should be able to identify the elements of its budget that are linked directly and indirectly to the entrenchment of each ESC right.⁷¹ Once earmarked for ESC rights, funds should be fully expended to that end and not diverted to fill other gaps.⁷² Incremental tax reform where necessary is inevitable for progressive realisation and should be carried out in a way that enables gradual entrenchment of ESC rights while ensuring the most vulnerable are at the forefront of concerns but at the same time not ostracising higher earners whose contributions to the public purse are crucial to all social programmes. In essence, government revenues (including taxation), public expenditure, public goods and private goods must all be mobilised to ensure MAR are employed to progressively realise ESC rights.

The principle of MAR 'implies that the role of the state is not only as an efficient administrator of existing resources, but as an institution that mobilises additional resources' which include: 'human; technological; organisational; natural and information resources – not only in the public sector but also through its impact on the activities of businesses and households.'⁷³ In determining whether the MAR principle has been applied, the following considerations are relevant:

- The extent to which the measures taken were deliberate, concrete and targeted towards the fulfillment of ESC rights;
- Whether the state exercised its discretion in a non-discriminatory and non-arbitrary manner;
- Whether the decision (not) to allocate available resources was in accordance with international human rights standards;
- Where several policy options are available, whether the state adopted the option that least restricts ESC rights;
- The time frame in which the steps were taken;
- Whether the steps had taken into account the precarious situation of disadvantaged

⁷⁰ See, for example, CRC, General Comment No. 19; <http://nangozim.org/program/child-friendly-national-budget-initiative-investment-children>.

⁷¹ See, for example, discussion by the CRC Committee, General Comment No. 5, UN Doc. CRC/GC/2003/5 (2003), para 51.

⁷² Diane Elson, Radhika Balakrishnan and James Heintz, 'Public Finance, maximum Available Resources and Human Rights' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance Budgets and the Promotion of Economic and Social Rights* (Hart 2013), 16.

⁷³ *ibid*, 14.

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and marginalised individuals or groups and, whether they were non-discriminatory, and whether they prioritised grave situations or situations of risk.⁷⁴

5. Conclusions and Recommendations

Entrenchment of ESC rights requires not only changes in law, but changes in society. The measure of success of a new ASP will not only be the reshaped vertical relationship between Scotland and her people, but between the people in Scotland and their understanding of how ESC rights work for the benefit of each person individually and in concert with their community.

The following recommendations reinforce the discussion above:

- The minimum core of each right should be clarified for the public and duty bearers, including all agents of the government involved directly and indirectly in the delivery of any ESC rights. The minimum core for each right discussed must be underpinned by a multifaceted approach to accessibility on a non-discriminatory basis.
- The range of state agents responsible for protecting and fulfilling each right should be clarified in guidance.
- Comprehensive, consultative and participative impact assessments should accompany a new ASP in addition to secondary legislation and policy developed to further implement the initial ASP. These should be followed up with monitoring to ensure progressive realisation and linked to developing international understandings of the rights with direct reference to relevant treaty bodies or other monitoring organs that oversee implementation of ESC rights at the international and regional levels.
- All ESC rights are premised on the principle of non-discrimination. This entails those considerations recognised through equalities law but, more fundamentally, demands positive measures to ensure the enjoyment of all human rights by persons experiencing a range of different vulnerabilities. The intersectional nature of distinct vulnerabilities should be considered at every step of development and implementation of new law and policy.
- Impact assessments, whether under the public sector equality duty or in relation to children, should be a participative process, transparent and the conclusions accessible across the broad spectrum of stakeholders. Impact assessments should continue in the context of monitoring all legislation in order to ensure non-regression and the progressive realisation of individual rights.
- A new ASP should include a duty to ensure human rights budgeting that outlines Scottish Parliament and Scottish Government's methods of prioritising legalised rights through allocation of maximum available resources. The budgetary processes must be transparent and accessible. Budgeting priorities must be linked to freely available research and relevant impact assessments.

⁷⁴ CESCR, [An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under and Optional Protocol to the Covenant](#), 2.

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- A new ASP must be accompanied by extensive educational and publicity campaigns in a variety of accessible formats to account for variable vulnerabilities, cultural nuance and education levels. Materials should be tailored to both rights-holders and duty-bearers.

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ANNEX I

International human rights treaties to which the UK is party

Treaty Description (including links to treaties referenced in paper)	Treaty Acronym	UK Signature Date	UK Ratification Date
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	CAT	15 Mar 1985	08 Dec 1988
Optional Protocol of the Convention against Torture	CAT-OP	26 Jun 2003	10 Dec 2003
International Covenant on Civil and Political Rights	ICCPR	16 Sep 1968	20 May 1976
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty	CCPR-OP2-DP	31 Mar 1999	10 Dec 1999
Convention on the Elimination of All Forms of Discrimination against Women	CEDAW	22 Jul 1981	07 Apr 1986
International Convention on the Elimination of All Forms of Racial Discrimination	CERD	11 Oct 1966	07 Mar 1969
International Covenant on Economic, Social and Cultural Rights	ICESCR	16 Sep 1968	20 May 1976
Convention on the Rights of the Child	UNCRC	19 Apr 1990	16 Dec 1991
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	CRC-OP-AC	07 Sep 2000	24 Jun 2003
Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	CRC-OP-SC	07 Sep 2000	20 Feb 2009
Convention on the Rights of Persons with Disabilities	CRPD	30 Mar 2007	08 Jun 2009

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ANNEX II

Overlap across different law and policy frameworks

International	European	Scots Law	Scots Policy
Right to adequate standard of living			
ASOL (general) <ul style="list-style-type: none"> • ICESCR art 11 • UNCRC art 27 • CRPD art 28 	<ul style="list-style-type: none"> • European Social Charter (ESC) • European Convention on Human Rights (ECHR) art 8 		
Housing/Living conditions <ul style="list-style-type: none"> • ICESCR art 11(1) • CERD art 5(e)(iii) • CEDAW art 14(h) • UNCRC art 27 • CRPD art 9(1)(a) and 28 • ILO Workers' Housing Recommendation, 1961 (No. 115) 	<ul style="list-style-type: none"> • ECHR art 8 • ESC arts 16 and 31 • Race Directive (Council Directive 2000/43/EC) • Gender Directive (Council Directive 2004/113/EC) 	<ul style="list-style-type: none"> • Housing (Scotland) Act 1987 • Homelessness (Scotland) Act 2003 • Homeless (Abolition of Priority Need Test) (Scotland) Order 2012 • Housing (Scotland) Act 2014 • Private Housing (Tenancies) (Scotland) Act 2016 • Planning (Scotland) Act 2019 	<ul style="list-style-type: none"> • Ending Homelessness Together: High level action plan
Food <ul style="list-style-type: none"> • ICESCR art 11(1) & (2) • UNCRC art 24(2)(c) • UN Declaration on the Rights of Peasants art 15 • FAO Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food 			<ul style="list-style-type: none"> • Good Food Nation policy
Water <ul style="list-style-type: none"> • ICESCR arts 11 and 12 • CEDAW art 14(2) • UNCRC art 24(2)(c) • Geneva Conventions 		<ul style="list-style-type: none"> • Sewerage (Scotland) Act 1968 • Water (Scotland) Act 1980 • Water Industry (Scotland) Act 2002 • Water Services etc (Scotland) Act 2005 • Water Resources (Scotland) Act 2013 • Water environment legislation 	
Protection against poverty and social exclusion <ul style="list-style-type: none"> • ICESCR • 	<ul style="list-style-type: none"> • ESC art 16 		

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Right to the enjoyment of the highest attainable standard of physical and mental health			
<ul style="list-style-type: none"> • ICESCR art 12 • CERD arts 5(e)(iv), 11(1)(f), 12 • CEDAW arts 12, 14(b) • UNCRC art 24 • CRPD 		<ul style="list-style-type: none"> • Public Health etc. (Scotland) Act 2008 • Mental Health (Scotland) Act 2003 • Mental Health (Scotland) Act 2015 	<ul style="list-style-type: none"> • Getting it Right for Every Child (GIRFEC) • Mental Health Strategy 2017-2027
Right to education			
<ul style="list-style-type: none"> • ICESCR art 14 • CERD arts 5(e)(v), 7 • CEDAW arts 10, 14(d) • UNCRC arts 28, 29 • CRPD • UNESCO Convention against Discrimination in Education 	<ul style="list-style-type: none"> • ECHR OP-1 art 2 • ESC art 10 	<ul style="list-style-type: none"> • HRA • Equality Act 2010 • Education (Scotland) Act 1980 • Standards in Scotland's Schools Act 2000 • Education (Additional Support for Learning) (Scotland) Act 2004 • Gaelic Language (Scotland) Act 2005 • Requirements for Community Learning and Development (Scotland) Regulations 2013 • Children and Young People (Scotland) Act 2014 • Education (Scotland) Act 2016 	<ul style="list-style-type: none"> • Getting it Right for Every Child (GIRFEC) • Curriculum for Excellence
Right to social security and social protection			
<ul style="list-style-type: none"> • ICESCR art 9 • CERD art 5(e)(iv) • CEDAW arts 11(c), 12, 14(c) • UNCRC art 26 • CRPD art 28 		<ul style="list-style-type: none"> • Social Security (Scotland) Act 2018 	<ul style="list-style-type: none"> • Social Security Scotland Charter
Right to take part in cultural life			
<ul style="list-style-type: none"> • ICESCR art 15(1)(a) • CERD arts 5(e)(vi), 7 • CEDAW art 13(c) • UNCRC arts 23(3), 30, 31 • CRPD art 30 • ICRMW art 43(1)(g) (UK not party) • Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities art 2 • UN Declaration on the Rights of Indigenous Peoples arts 5, 8, and 10–13 	<ul style="list-style-type: none"> • Framework Convention for the Protection of National Minorities (Council of Europe, ETS No. 157) art 15 • European Charter for Regional or Minority Languages 	<ul style="list-style-type: none"> • Gaelic Language (Scotland) Act 2005 • Education (Scotland) Act 2016 	