



Submission to the United Nations Committee on Economic, Social and Cultural Rights

Parallel Report to the fifth periodic report of the United Kingdom under the International Covenant on Economic, Social and Cultural Rights

April 2009

Statement of purpose:

In May 2009 the United Nations Committee on Economic, Social and Cultural Rights considered the progress made by the UK in realising the human rights protected by the International Covenant on Economic, Social and Cultural Rights. To support their review SHRC submitted the present parallel report.

More information on the review can be found on the website of the Committee: <http://www2.ohchr.org/english/bodies/cescr/cescrwg40.htm>

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Introduction

The Scottish Human Rights Commission (SHRC) is a national human rights institution, created by the Scottish Commission for Human Rights Act 2006 (the Act), an act of the Scottish Parliament. The Commission has been operational since 10 December 2008.

SHRC is functionally independent of both the Scottish (and UK) Government and the Scottish (and UK) Parliament. It is one of three NHRIs in the UK, alongside the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission.

According to the Act, SHRC has a general duty to promote awareness, understanding and respect for human rights, and has powers to:

- Conduct an inquiry into the policies or practices of Scottish public authorities, where relevant to the promotion of human rights;
- Enter places of detention as part of an inquiry;
- Intervene in civil proceedings where relevant to the promotion of human rights and where the proceedings appear to SHRC to raise a matter of public interest.

Under the Act the Commission should promote the human rights protected in the European Convention on Human Rights, as well as “other human rights contained in any international convention, treaty or other international instrument ratified by the United Kingdom”. SHRC is also required to focus in particular on those within society whose rights are not sufficiently protected, which may include marginalised or excluded groups and those in a vulnerable situation.

SHRC therefore has a particular interest in promoting and protecting economic, social and cultural rights, the majority of which relate to issues within the competence of the Scottish Parliament.¹

SHRC will be applying to the International Coordinating Committee of National Human Rights Institutions for “category A” status later this year.

¹ The Scotland Act 1998 created the Scottish Parliament and introduced devolution. Under that Act, the Scottish Parliament has competence over the majority of areas under the Covenant, including health, education and housing, although some of the rights protected in the Covenant relate to reserved matters within the competence of the UK Parliament, including social security, child support, employment and “the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.”

SHRC welcomes the present opportunity to contribute to the review of the UK's practice under the International Covenant on Economic, Social and Cultural Rights (ICESCR). SHRC aims to ensure our submissions to UN treaty bodies are evidence based. The Commission is currently finalising the development of its first Strategic Plan and has just completed a three month national consultation on this. At this stage in its development, SHRC would like to make some general observations on the State report, the list of issues and the UK's replies to the list of issues, based on our initial scoping work during 2008 and national consultation in 2009.

Awareness of the International Covenant and of Economic, Social and Cultural Rights

“the Government does not believe that further awareness raising of the general provisions of the Covenant would be of practical benefit to officials delivering specific services, or to improved standards of service...

The Government is confident that, in general, people in the United Kingdom are aware of their economic, social and cultural rights...

The Government does not believe that further raising of awareness of the provisions of the Covenant would be of practical benefit to the general public, or that it would necessarily lead to better standards of service.”²

SHRC believes that awareness and understanding of all human rights is crucial to empowering people to monitor, claim and defend their rights. It is also central to the ability, and accountability of duty bearers to realise rights. One of the Commission's four aims is to build upon a sense of fairness and further develop a human rights culture in Scotland, developing greater awareness of human rights, including economic, social and cultural rights. Awareness and understanding of economic, social and cultural rights is also key to enabling public, private and voluntary bodies to provide services essential for the realisation of those rights in a way which complies with the Covenant.

Based on our three month national consultation, the Commission believes that there is an incomplete awareness and understanding of human rights in general, and economic, social and cultural rights in particular. However the Commission has also noted significant goodwill on the part of public, private and voluntary bodies towards all human rights, to the adoption of a human rights-based approach and a desire to be provided with the tools to enable this to happen. Likewise SHRC has

² Replies by the Government of the United Kingdom of Great Britain and Northern Ireland to the list of issues, UN Doc. E/C.12/GBR/Q/5/Add.1, 6 March 2009, para 2 - 4. See also para 30 of concluding observations on fourth periodic report, and para 91 of the State report.

been struck by examples from elsewhere in the UK (notably in the Seven Towers housing estate in Belfast) where communities have built on a greater understanding of economic, social and cultural rights such as the right to adequate housing, to increase accountability and to improve the delivery of services which are shaped by the participation of rights-holders.

While SHRC has a role in promoting greater awareness and understanding of economic, social and cultural rights, this is ultimately a state obligation under the Covenant.³ The Commission has already begun to discuss the further integration of all human rights in the major curriculum development process in Scotland,⁴ the Curriculum for Excellence. In this work SHRC will encourage an understanding of the role of human rights in education that respects the right to education, rights of learners in education and the promotion of human rights through education. Building on the UN Convention on the rights of the Child and the General Comments of the CRC and the CESCR, in particular, we will support the further development of a human rights ethos in education, which permeates the curriculum, contents and methods of instruction so that human rights are at the heart of education in Scotland.

The Commission also intends to reach out to communities of practice in the legal, medical and other professions, to consider how human rights can be integrated more into relevant curricula at the higher or further education level to ensure that those responsible for delivering public services have a greater understanding of human rights. While this would focus primarily on duties of public authorities under the Human Rights Act, we also aim to build understanding of economic, social and cultural rights such as the right to the highest attainable standard of physical and mental health and the right to adequate housing with those who have relevant responsibilities.

SHRC recommends that the Committee ask the UK what steps it is taking to promote greater understanding and awareness of economic, social and cultural rights as human rights and to promote specific rights with constituencies which have a particular interest in them – e.g. promoting the right to health with the medical profession or including health and human rights and the right to health in particular in the university medical curriculum.

In addition SHRC is working to promote awareness of human rights through informal education directly with communities, as well as with broader civil society. In this connection SHRC aims to promote the Concluding Observations of CESCR and other

³ cf. Replies, para 4.

⁴ Including with Learning and Teaching Scotland – referred to in para 91 of the State report, which is leading on the development of the Curriculum for Excellence.

UN treaty bodies in Scotland, as part of its work to build greater understanding of the relevance of international human rights law to the realisation of human rights in Scotland.

In its previous concluding observations, para 44, the Committee

“request[ed] the State party to disseminate the present concluding observations widely at all levels of society...it also encourages the State party to involve non-governmental organisations and other members of civil society in the preparation of its fifth periodic report.”

SHRC notes the lack of a consultation in Scotland during the drafting of the current state report, and **encourages the Committee to ask the UK what steps it is taking to ensure the involvement of Scottish civil society in the development of its State report, and the dissemination of the Committee's concluding observations.**

Responses to specific observations by the Committee

Incorporation of the ICESCR and justiciability of economic, social and cultural rights in the UK (paras 72-75 of the State Report)

Human Rights Act and Scotland Act

Human rights today have a stronger legal basis in Scotland than ever before. Since the passage of the Human Rights Act and the Scotland Act in 1998, people in Scotland have been able to enforce their rights under the European Convention on Human Rights in the domestic courts. Public authorities have legal obligations to comply with the Human Rights Act. From the experience of SHRC's consultation, there is a palpable willingness to introduce a human rights-based approach to public service in Scotland. There are very promising examples of potential good practice, such as The State Hospital mentioned below in relation to the right to the highest attainable standard of mental health, but in general there remains insufficient awareness, understanding and ability to uphold and apply the rights under the Human Rights Act. The Commission's aim is to act as a catalyst for change, to work with public, private and voluntary bodies to provide the “know-how” to enable them to respect, protect and fulfil all human rights.

As the European Court of Human Rights famously stated in *Airey v Ireland*, “there is no water-tight division between civil and political and economic, social and cultural rights”.⁵ However, SHRC notes the strong encouragement of the Committee for

⁵ *Airey v Ireland* (6289/73) [1979], ECHR 3, decision of 9 October 1979, para 26.

formal adoption or incorporation of the Covenant in domestic law and its view that, “Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.”⁶

The Commission believes that there is, at present, insufficient legal protection for economic, social and cultural rights in the UK. In particular, the Commission is not convinced by the suggestion of the UK Government in the recent Green Paper on the Bill of Rights and Responsibilities that judicial review of entitlements related to economic, social and cultural rights, can serve as a sufficient remedy for denials of those rights.⁷

SHRC recommends that the Committee ask the UK to reconsider its position and to incorporate the ICESCR into domestic law.

Duties of private providers of public services

At present there is a lack of legal certainty as to the extent to which the Human Rights Act extends to private bodies providing public services, an issue which the UK Government has been compelled to address following the decision of the House of Lords in *YL v Birmingham City Council*.⁸ The Health and Social Care Act 2008⁹ addresses the issue of responsibility of private providers of residential care services, but there remains an outstanding question of the extent of duties of private providers of other public services (including those essential to the realisation of

⁶ Committee on Economic, Social and Cultural Rights, General Comment no. 9, *Domestic Implementation of the Covenant*, UN Doc. E/C.12/1998/24, 3 December 1998, para 7.

⁷ Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework*, London, March 2009, p 41.

⁸ *YL v Birmingham City Council and others*, [2007] UKHL 27. In this case Lord Bingham (at paras 6-12) provided a list of factors which may assist in determining whether a body is to be considered a public authority for the purposes of the Human Rights Act. These included, but were not limited to: the nature of the function in question, the role and responsibility of the state in relation to the subject matter, the nature and extent of the public interest in the function, any statutory power or duty in relation to the function, the extent to which the state regulates the performance of the function, whether the state is by one means or another willing to pay, the extent of the risk that improper performance of the function might violate an individual’s Convention right.

⁹ Section 145 of the Health and Social Care Act 2008 of the UK Parliament, which defines private providers of residential care facilities as public authorities for the purposes of the Human Rights Act, extends to Scotland as a result of a Legislative Consent Motion passed by the Scottish Parliament to consent to the UK Parliament legislating over this area which lies within its devolved power.

economic, social and cultural rights) under the Human Rights Act. This is an area which SHRC intends to focus on to identify what steps are required to ensure the human rights responsibility of private bodies.

SHRC recommends that the Committee ask the UK what steps it is taking to ensure that private bodies which provide services essential for the realisation of economic, social and cultural rights have human rights responsibilities.

Bill of rights and responsibilities

In its recent Green Paper, “Rights and Responsibilities: developing our constitutional framework”, the UK Government recognised the importance of human rights in times of austerity, whether a threat to national security – as was the case in the Second World War, or a threat to economic security – as is the current situation. The Green Paper also indicates that “The Government does not consider a general model of directly legally enforceable rights or responsibilities to be the most appropriate for the future Bill of Rights and Responsibilities”,¹⁰ citing in particular that this “may not be the best mechanism for ensuring fair provision for society as a whole” in relation to economic, social and cultural rights.

SHRC agrees that the importance of human rights is even more pronounced during times of crisis, including during an economic crisis. SHRC also agrees that legal enforcement alone is not the most effective way of developing and delivering policy to ensure the progressive realisation of human rights. However, it is crucial that rights entail obligations and that the right to an effective remedy is secured in case of breach. We therefore do not agree that a non-binding declaration, a symbolic statement, or a statement of principles – as suggested in the Green Paper - is the most effective manner of ensuring the respect, protection and fulfilment of human rights. SHRC believes that effective legal protection of all human rights, including the right to an effective remedy where economic, social and cultural rights are violated, is an essential but not sufficient step to ensuring the consistent respect, protection and fulfilment of human rights.¹¹

¹⁰ Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework*, March 2009, p 10.

¹¹ SHRC is conscious of the view expressed by the Committee in its General Comment on Domestic application of the Covenant, that “The right to an effective remedy need not be interpreted as always requiring a judicial remedy.” However it also notes that, “An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate.” *Supra*, General Comment no. 9, para 9. In addition, understanding of the justiciability of economic, social and cultural rights has advanced significantly since the Committee adopted this General Comment, and the principle of justiciability is now far more widely accepted and the role of access to justice in case of violation more widely recognised. See e.g. *Background Paper prepared by the Secretariat: selection of case law on economic, social and cultural rights*, UN Doc. E/CN.4/2005/WG.23/CRP.1, 15 November 2004; Interights, *Economic, Social and Cultural Rights in*

SHRC believes that a range of steps are required to ensure the realisation of human rights in practice. Steps to secure the respect, protection and fulfilment of human rights in practice may include a legal requirement that public authorities demonstrate they have given due weight to economic, social and cultural rights in decision making, the use of such tools as human rights impact assessments, as well as access to justice in case of violation of rights. For example, our three month strategy consultation across Scotland has demonstrated the challenges which local authorities and others face in ensuring that budget decisions respect human rights. We aim to support this ability through increasing understanding of the requirements of the Human Rights Act as well international human rights law and the use of such tools as Human Rights Impact Assessments.

Clearly, more is required to secure human rights than expectations derived from experience. While the UK is rightly proud of the establishment and achievements of the National Health Service, which recently celebrated its 60th birthday, there is much more to respecting, protecting and fulfilling the right to the highest attainable standard of health than a general belief that there is a “right” to healthcare based on the fact that there is a health service which is generally available and accessible (as is implied in the UK's reply to the list of issues in para 3). An understanding of the requirements of progressively realising the right to health, prioritising the rights of the most marginalised (including those who require adequate mental health services) and core obligations would ensure that debate on policy choices took human rights adequately into account, and legally enforceable rights would ensure that decisions which are taken are reasonable and any limitations on rights necessary and proportionate.

In the Green Paper the UK Government outlines several arguments against the justiciability of economic, social and cultural rights, some of which are included in the State report (at paras 72-75). For example, the Green Paper states, “While many specific welfare entitlements are legally enforceable, the Government believes that such policy matters should generally be developed by democratically accountable elected representatives, rather than by the courts. Decision-making in economic, social and cultural matters usually involves politically sensitive resource allocation and if the courts were to make these decisions, this would be likely to impinge on the principles of democratic accountability as well as the separation of powers between the judiciary, the legislature and the executive which underpins our constitutional arrangements.”¹²

Practice: the role of judges in implementing economic, social and cultural rights, London, 2004; Centre on Housing Rights and Evictions (COHRE), *Leading cases on economic, social and cultural rights: summaries*, Working Paper No. 6, Geneva, 2008.

¹² Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework*,

SHRC notes that the doctrine of Parliamentary sovereignty, which the Government asserts is at the heart of the UK constitution,¹³ does not have the same resonance in Scotland where the Scotland Act establishes that acts of the Scottish Parliament can be struck down by the courts if they are incompatible with the rights in the ECHR.

The Commission also notes that the proposed Bill of Rights for Northern Ireland takes a wholly different approach and includes a number of economic, social and cultural rights. The proposed Bill of Rights also contains a provision which would require public authorities to:

- “a) act compatibly with the rights in a Bill of Rights for Northern Ireland;*
- b) in making a decision, have due regard to a relevant right in a Bill of Rights for Northern Ireland; and*
- c) take active steps to respect, protect, promote and fulfil the rights in a Bill of Rights for Northern Ireland.”¹⁴*

SHRC believes that such a formulation would provide a more effective guarantee of the respect, protection and fulfilment of economic, social, cultural and other human rights than the proposals in the UK Government’s current green paper.

SHRC recommends that the Committee ask the UK what legislative and other steps it intends to take to ensure the realisation of economic, social and cultural rights in practice, including consideration of the application of public sector duties in the proposed Bill of Rights for Northern Ireland to the rest of the UK.

Optional Protocol

Whilst the UK initially expressed some reservations about the justiciability of economic, social and cultural rights, it subsequently participated actively in the Open-Ended Working Group on the elaboration of an Optional Protocol to the ICESCR which was adopted on 10 December 2008. The resulting Optional Protocol included various elements which stemmed from suggestions of the UK delegation. In relation to its general position on individual complaints' mechanisms related to UN human rights treaties, the UK stated in its replies to the list of issues raised by the Human Rights Committee ahead of its recent review under the International Covenant on Civil and Political Rights, that it had decided to accept the Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (OP CEDAW) so as to “consider on a more empirical basis the merits of the

March 2009, p 43.

¹³ Ibid, p 57.

¹⁴ Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: advice to the Secretary of State for Northern Ireland*, 10 December 2008, p 55.

right of individual petition under the other three UN treaties”.¹⁵ The Government also commissioned an independent review of its experience under the OP CEDAW which was published in December 2008.¹⁶ The review concluded that, *inter alia*:

- “the important symbolic value of a State's recognition of the right of complaint under the Optional Protocol indicates a clear commitment to human rights”;
- acceptance of the OP CEDAW “has in principle added to remedies available to women in the UK. However, it is difficult to identify any real practical benefits arising from the UK's acceptance of the right of individual complaint.”

Following the publication of this evaluation the UK announced that it intended to sign the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities.

SHRC agrees with the independent review that “the minimal utilisation of the right of communication ... suggest(s) a widespread lack of awareness or understanding of the Optional Protocol on the part of individuals”. However, SHRC is unconvinced by the explicit assumption that “NGOs are likely to be aware of the Optional Protocol”.¹⁷ We have already become aware, during the course of our consultation, of a lack of awareness of the OP and its relevance to the protection of human rights of women in Scotland. SHRC notes the conclusion of the independent review that “until the initiative is taken to address the reasons for this lack of recourse to the Optional Protocol, it is unlikely that the intentions behind the adoption of the Optional Protocol will be realised.”¹⁸

SHRC welcomes the positive precedent set by the UK in ratifying (or indicating an intention to ratify) two individual complaints' mechanisms which protect the human rights – including the economic, social and cultural rights – of certain groups within the UK. SHRC hopes that this indicates a willingness of the UK Government to ratify the Optional Protocol to the ICESCR, to ensure equal protection of the economic, social and cultural rights of everyone in the UK.

SHRC recommends that the Committee ask the UK if it intends to sign and ratify the Optional Protocol to the ICESCR.

¹⁵ UN Doc. CCPR/C/GBR/Q/6/Add.1, para 5

¹⁶ Ministry of Justice, *The Optional Protocol to the United Nations Convention for the Elimination of all forms of Discrimination Against Women (CEDAW): the experience of the United Kingdom*, an evaluation by Professor Jim Murdoch, School of Law, University of Glasgow, 2008.

¹⁷ Ibid, p 27.

¹⁸ Ibid.

National Human Rights Action Plan (paras 84-86)

“it is not clear what added value a national human rights action plan would bring...such a plan would end up summarizing who is responsible for what but this aim can be best achieved by creating, and maintaining up to date, a 'core document'” (UK State report, para 85)

In its previous concluding observations the Committee:

“strongly recommend[ed] that the State party establish a national human rights plan of action in accordance with paragraph 71 of the 1993 Vienna Declaration and Programme of Action.”

As part of its strategic plan for 2008-2012, which SHRC will lay before the Scottish Parliament in June 2009, we will outline our plans to undertake a national mapping of the realisation of all human rights – including economic, social and cultural rights – across Scotland, to contribute to the Universal Periodic Review process and to develop a road map for the realisation of human rights in Scotland. SHRC believes that such a process will identify both the gaps and the good practice in human rights across Scotland, and could form the basis for a participatory process to develop a national plan of action on human rights.

SHRC recommends that the Committee ask the UK how it plans to monitor the experience in Scotland of steps towards the development of a National Human Rights Action Plan, with a view to learning lessons for the rest of the UK.

Reporting on the realisation of economic, social and cultural rights in Scotland

In general SHRC notes that the State report does not fully reflect the realisation of economic, social and cultural rights in Scotland. There are a large number of areas relevant to the Covenant in which the law, policy and practice in Scotland is significantly different than that in the rest of the UK. Under the Scotland Act 1998 the Scottish Parliament has competence in all areas which are not reserved to the UK Parliament under Schedule 5 of the Act. Consequently the Scottish Parliament has competence over areas such as health, housing and education. In order to ensure that the Committee's review of the UK's progress under the Covenant is based on an accurate reflection of the realisation of rights across Scotland, it is essential that the State report include a full and accurate picture of Scottish reality. In the following sections SHRC outlines some gaps in the State report, and the UK's replies, in respect of steps taken to progressively realise Covenant rights in Scotland.

SHRC recommends that the Committee ask the UK what steps it will take in the future to ensure its review by UN treaty bodies is based on an accurate picture of the realisation of human rights in Scotland.

Article 11(1): The Right to adequate housing

SHRC welcomes the short reference to the Homelessness (Scotland) Act 2003 in the State report (paras 162 – 165) but notes that this is in response to the Committee's previous concluding observations, and not under the relevant section on substantive rights (housing is included in relation to law, policy and practice in England in paras 283 – 294 and in relation to Wales in para 295).

The Homelessness (Scotland) Act 2003 sets a time bound target of 2012 for the removal of the current categories of “priority need” in accessing housing such that, by that date, everyone who is “unintentionally homeless” will have a legally enforceable right to housing. The law has received some international recognition, with the former Scottish Executive (now Government) receiving the Housing Rights Promoter of the year award from the international NGO Centre on Housing Rights and Evictions (COHRE) in 2004.

SHRC recommends that the Committee ask the UK how it intends to monitor developments on the right to adequate housing and towards a legally enforceable right to housing in Scotland, with a view to learning lessons for the rest of the UK.

Article 12: The Right to the highest attainable standard of physical and mental health

The right to health is included in the State report with respect to England in paras 296 – 317, in respect of Northern Ireland in paras 318 – 321 and in respect of Wales in paras 322 – 325. No Scottish experience is included in the State report. In the replies to issues raised by the Committee the UK refers to steps taken in Scotland to reduce health inequalities in paras 213-215.

In addition to a failure to report on general steps to realise the right to health in Scotland, there is a specific failure to reflect on steps taken in relation to mental health.

The profile of mental health issues in Scotland has risen with the introduction of the Mental Health (Care and Treatment) (Scotland) Act 2003 which came into force in 2005. This act introduced a rights-based approach to mental health in Scotland. There have also been a number of awareness raising campaigns, including the “see me” anti-stigma campaign, and the recent campaign “Respect, Protect, Fulfil” of the Scottish Association for Mental Health. A Scottish Recovery Network has also been

established by mental health service users. During its consultation SHRC has become aware of other initiatives of mental health service users to increase their participation in decisions which affect their human rights.

In addition, SHRC is looking closely at the experience of The State Hospital at Carstairs, the high security mental health hospital for Scotland and Northern Ireland, which introduced a human rights-based approach to its work. SHRC hopes that this evaluation will identify lessons learned which may be applied by other mental health institutions in Scotland as they comply with their human rights duties under the Human Rights Act, and in our work to promote the right to the highest attainable standard of mental health.

SHRC recommends that the Committee ask the UK how it intends to monitor developments on the right to the highest attainable standard of mental health in Scotland, with a view to learning lessons for the rest of the UK.



Scottish Human Rights Commission
Optima House
58 Robertson Street
Glasgow G2 8DU
hello@scottishhumanrights.com
0141 2432721