

## Written evidence to support the Stage 1 consideration of the Housing (Scotland) Bill

September 2024

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## Introduction

The Commission is pleased to offer the following comments to the Local Government, Housing and Planning Committee ahead of the conclusion of its Stage 1 review of the Housing (Scotland) Bill.

In this evidence, we highlight the overarching international and domestic human rights framework applicable to the Bill to inform the Committee's considerations.

Scotland already has a range of statutory measures and obligations intended to reduce and protect people at risk of homelessness. The Commission has previously observed that despite these duties, there remains a gap between policy intention and reality.<sup>1</sup>

We welcome all steps to improve the realisation of the right to adequate housing and other standards which are impeded by homelessness, and recognise that in some instances, homelessness poses real potential for violations of rights already protected by domestic human rights law.

Our submission provides an assessment of the human rights legal framework impacted by the proposed Bill to guide MSPs through due consideration of all of the human rights at stake.

## Summary of Key Points

The right to peaceful enjoyment of property is not absolute, and states have broad discretion to determine how property may be controlled in the public interest. The key assessment of whether controls on the use of private property amount to a violation of rights is a proportionality assessment.

Property owners, such as landlords, have a right to peaceful enjoyment of their property. Renters also have property rights to peaceful enjoyment of their legal rights under leases etc.

The right to adequate housing is protected by international human rights law and includes certain standards, including affordability, accessibility, availability and habitability which must be provided to every person without discrimination.

The state has a duty to realise the right to adequate housing progressively, meaning that housing rights must improve over time and generally should not regress (worsen).

The Housing Bill as introduced includes a number of measures that collectively impose a wide range of controls over the peaceful enjoyment of private property. These measures must be analysed for their collective and specific proportionality at both a general level (Bill level) and individual level (application of a particular measures, such as an individual challenging a specific rent cap).

There is a clear legal obligation for state action to ensure the right to adequate housing. It is for the Government and Parliament to determine whether the measures proposed are the correct measures within the applicable legal framework.

Whilst State effort to strengthen the prevention of homelessness is a welcome step in the progressive realisation of the right to housing, the Commission expresses a degree of caution if adequate resourcing is not available, including housing stock, meaning that the obligations are not deliverable in practice.

## The Human Rights Framework

### Housing rights in human rights law

The right to housing and related human rights standards are consistently recognised and protected by a number of regional and international human rights treaties.<sup>2</sup>

Article 8 of the European Convention on Human Rights (ECHR), which protects the right to respect for private and family life, home and correspondence, does not create a standalone right to housing; rather it has been interpreted to require that the state cannot arbitrarily deny somebody access to or peaceful enjoyment of a home to which they already have a property right. Further detail is set out below.

A right to adequate housing is explicitly inherent in the right to adequate standard of living recognised by Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>3</sup>

Housing rights also intersect with a number of other essential protections, across civil, political, economic, social and cultural rights, and rights required to deliver substantive equality. For example, the right to adequate shelter may engage issues of social security access as part of the affordability consideration and the right to work or education may be impossible to access without a permanent address.

Housing rights can also be identified in other international human rights treaties that provide standards for specific groups:

- The 1951 Convention Relating to the Status of Refugees (art. 21)

- The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (e)(iii))
- The 1979 Convention on the Elimination of All Forms of Discrimination against Women (arts. 14 (2) and 15 (2))
- The 1989 Convention on the Rights of the Child (arts. 16 (1) and 27 (3))
- The 2006 Convention on the Rights of Persons with Disabilities (arts. 9 and 28)

In general, the standards that apply to these groups align closely with ICESCR.

## Content of relevant rights

### ECHR

Article 8(1) of the ECHR provides: “Everyone has the right to respect for his private and family life, his home and his correspondence.” This is the most immediate provision of human rights law that people in Scotland can rely on, under the Human Rights Act 1998. However, the right to respect for one’s home has not been interpreted to create a standalone right to housing.<sup>4</sup> Instead, Article 8 requires that the state does not arbitrarily deny somebody access to or peaceful enjoyment of a home to which they already have property right. That said, the European Court of Human Rights (ECtHR) has interpreted Article 8 to, in some cases, require states to take positive steps to ensure shelter (discussed further below).

A number of additional ECHR articles have been interpreted in ways that make clear their relevance to housing and homelessness policy. Of note:

- Article 6, the Right to Fair Trial
- Article 13, the Right to Effective Remedy
- Article 14, Prohibition of discrimination
- Article 1 of the First Protocol (A1-P1), the Right to the Peaceful Enjoyment of property.

Like Article 8, A1-P1 does not generally require a public authority to provide property, but requires that where individuals own or have some other proprietary right such as a lease or legal claim,<sup>5</sup> they are not deprived of that right “except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

Property rights under A1-P1 are not absolute and the test that has been applied to whether any interference is allowed has been found to be threefold:

- (1) The general principle of peaceful enjoyment of property is respected
- (2) Any deprivation of possessions should be subject to certain conditions set out in paragraph 1 of the right, i.e. *“in the public interest and subject to the conditions provided for by law and by the general principles of international law.”*
- (3) The principle that states are entitled to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose.<sup>6</sup>

Over time, UK Courts have developed a general framework for determining whether restrictions are compatible with human rights:

- a) Has there been an act by the state that interferes with the right?
- b) Is there a source of law that allows that state action?
- c) Was the state pursuing a legitimate aim in the public interest?
- d) Was there a ‘fair balance’ struck between the needs of the state and the rights of the individual, i.e.
  - i. Does the aim justify a restriction?
  - ii. Is the measure ‘rationally connected’ to the aim?
  - iii. Could the same aim have been actually achieved by less restrictive measure?
  - iv. On balance, do the benefits of achieving the aim outweigh the negatives resulting from restrictions?

### **ECHR case law**

Case law from the European Court of Human Rights (ECtHR) has considered a number of scenarios relevant to the Committee’s consideration of the Bill. A full discussion of case law is beyond the scope of this paper; however, the following may be useful for the Committee’s considerations.

In relation to homelessness, the ‘abandonment’ of people to the elements or state failure to act when people are rough sleeping or sleeping in shelters not designed for human habitation for long periods has been found to reach a threshold of inhuman and degrading treatment.<sup>7</sup>

On forced evictions more specifically, in *Yordanova and Others v. Bulgaria*,<sup>8</sup> for example, the Court found that public authorities could not progress with an eviction even where the eviction itself had a legal basis without considering the individual risk of homelessness, especially where the individual was a member of a historically marginalised group.

The Court has also found that under Article 8, while in general requiring limited positive action to provide housing, the consequences of an eviction may make the specific eviction disproportionate, and therefore a violation of somebody's right to enjoy their existing housing, even if that housing is inadequate or eviction is being pursued for another justifiable reason.<sup>9</sup>

The Court has also held that failure to prevent people from exposure to 'deplorable conditions' can amount to a violation of Article 3, the freedom from inhuman and degrading treatment.<sup>10</sup> In such circumstances, the very crossing of such a threshold would amount to a violation, which can never be justified as Article 3 is an absolute right.

Many such cases involve Roma (Gypsy / Traveller) persons or refugees and asylum seekers, where an additional element in considering whether the whole circumstances of the treatment amount to a violation is the discriminatory treatment and/or bias people may encounter from public authorities. Measures of such groups in positions of heightened vulnerability must also consider their way of life and needs.<sup>11</sup>

Finally, the ECtHR has also examined the application of Convention rights to rent control measures in a number of countries.<sup>12</sup> ECtHR caselaw demonstrates the following points that are particularly relevant to the present Bill:

- Rent control legislation invariably involves a balancing of rights that must be convention compliant (i.e. the above A1-P1 test must be carried out)
- Domestic authorities must be able to demonstrate that a full balancing of rights and opportunity to challenge the subsequent application of a general measure such as rent controls has been undertaken.

## **International human rights law**

### **International Covenant on Economic, Social and Cultural Rights (ICESCR)**

At the international level, the most comprehensive assessment of what the right to housing consists of has been set out by the Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No. 4: The Right to Adequate Housing.<sup>13</sup> While General Comments are not binding under international law, they are consistently recognised and affirmed as authoritative interpretations of the Covenant's articles and are drawn upon by a number of international and domestic law and soft law standards.

The CESCR identifies that the right to adequate housing is composed of a number of elements (the **normative content**):

1. **Legal security of tenure.** Everyone should be guaranteed security of tenure against forced eviction, harassment and other threats. This means there should be laws that protect people's rights to continue living in a rented property.
  - 1.
2. **Availability of services.** Everyone should have available facilities and infrastructure such as drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage, refuse disposal, site drainage and emergency services;
  - 2.
3. **Affordable housing.** Housing costs should not threaten someone's ability to afford other essential goods and services. This includes protection against unreasonable rent levels or unreasonable rent increases;
  - 3.
4. **Habitable housing.** Everyone should have adequate space and protection against the cold, damp, heat, rain, wind or other threats to health or structural hazards. Everyone should be safe physically in their housing;
  - 4.
5. **Accessible housing.** Housing should be accessible to everyone without discrimination. Special measures should be taken to ensure adequate housing for disabled people, older people, people living in areas vulnerable to natural disasters, and other groups with particular needs;
  - 5.
6. **Location.** Housing should be in a location which allows access to employment options, healthcare services, schools, childcare and other social facilities. It should not be located on or near polluted sites.
  - 6.
7. **Cultural adequacy.** Housing policy and decisions about housing must be made in a way which respects and supports people's culture.

The components include a mix of both positive and negative obligations. States must refrain from certain activities such as arbitrary or forced evictions or destruction of housing and provide individuals with certain things, such as security of tenure and emergency shelter.

The CESCR has also published a specific General Comment on Forced Evictions and Article 11(1) (General comment No. 7) which examines circumstances where an individual's eviction from their home may be justified. This emphasises that where eviction is to be justified, it should be carried out in strict compliance with international human rights law and in accordance with the general principles of reasonableness and proportionality. Importantly, evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

The Committee also sets out a number of procedural considerations that should apply to any legal eviction process. These are:

- an opportunity for genuine consultation with those affected;
- adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- all persons carrying out the eviction to be properly identified;
- evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- provision of legal remedies; and
- provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

The right to adequate housing, like all rights in the ICESCR, is subject to the overarching obligations of progressive realisation and non-retrogression. These standards require that states take steps to improve standards protected by the treaty over time and that where things may get worse, the Government is able to show that it undertook every effort to avoid this and that the impacts do not discriminate between groups.<sup>14</sup>

The Scottish Government has consulted on proposals to incorporate the ICESCR into Scots Law, which would have the effect of requiring duty bearers to take progressive action over time to achieve these rights; for the situation not to worsen;



and for the rights to be justiciable - that is, to be tested through the Scottish courts system.

For more information on any element of this briefing note, please contact:

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## Endnotes

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<sup>1</sup> SHRC (2023) Parallel Report to the ICESCR PSWG

<sup>2</sup> For example, the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of all forms of Discrimination Against Women; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities.

<sup>3</sup> [International Covenant on Economic, Social and Cultural Rights | OHCHR](#)

<sup>4</sup> Chapman ; O'Rourke v. the United Kingdom (dec.), no. 39022/97

<sup>5</sup> Stretch v. the United Kingdom, 2003

<sup>6</sup> [Protocol 1 Article 1 - UK Human Rights Blog](#)

<sup>7</sup> Moldovan and Others v. Romania (no. 2), no. 41138/98 V.M.v. Belgium, no. 236/14

<sup>8</sup> [Yordanova and Others v. Bulgaria, no. 25446/06 Art.8 ECHR](#)

<sup>9</sup> Winterstein and Others v. France, no. 27013/07

<sup>10</sup> Moldovan and Others v. Romania (no. 2), no. 41138/98 V.M.v. Belgium, no. 236/14

<sup>11</sup> Winterstein and Others v. France, no. 27013/07

<sup>12</sup> [Guide on Article 1 of Protocol No. 1 - Protection of property \(coe.int\)](#)

<sup>13</sup> [General Comment No. 4: The Right to Adequate Housing \(Art. 11 \(1\) of the Covenant\) | Refworld](#)

<sup>14</sup> [General Comment No. 3: The Nature of States Parties' Obligations \(Art. 2, Para. 1, of the Covenant\) | Refworld](#)