

A Human Rights Bill for Scotland

Evidence submitted to the Scottish Government 06 October 2023

This is a response to the Scottish Government's consultation on proposed Human Rights Bill for Scotland.

Introduction

As part of its Housing to 2040 strategy, the Scottish Government committed to implement a legal right to adequate housing. The commitment to embedding a human rights framework for adequate housing, if adequately understood, developed and resourced could prove transformational in not only directing policy, but also directing investment from the Scottish Government into affordable housing.

However, the consultation as drafted gives no indication to as to what housing as a human right looks like in practice, a timeline, or what the full scope of costs will be as ultimately set out in the legislation's financial memorandum. This is understandable given there has been no sector wide discussion on what minimum core obligations (MCOs) should be in the housing sector, how that could drive a change in standards, and what a human right to housing looks like in practice for tenants, customers and landlords. However, the lack of consideration of MCOs risks undermining the potential impact of human right legislation and confidence in a legislative process that will deliver improvements in housing stock and in tenants' realisable rights at this time.

CIH Scotland fully supports a human-rights approach to housing and we believe that this can have a real impact in driving improvements in outcomes for tenants and customers. But the responsibility for these standards ultimately lies with the State. Firstly, in leading the discussion and setting the standards, and secondly by providing adequate resources and mechanisms for enforcement. The failure to lead and catalyse this discussion is disappointing and jeopardises the potential of the Human Rights Bill to deliver transformational changes for Scotland's tenants.

For our part in 2022 CIH Scotland published guidance for landlords on how to adapt their policies to meet human rights obligations, without any legislative drivers. While we are already seeing advancements in terms of our policy development, such as the human rights approach to victims of domestic abuse in our domestic abuse guidance, these policy advancements can only go so far without human rights leadership by Scottish Government - which is why the government's



commitment to legislating for a domestic abuse policy requirement in the upcoming Housing Bill is so important in improving outcomes

We note the 2021 [report](#) from ALACHO (Association of Local Authority Chief Housing Officers) which sought to outline the progress made (or lack thereof) surrounding how the right to adequate housing has been translated into housing policy and practice, including resource allocation. Importantly, the report notes that homelessness is not the only human rights failing in the context of adequate housing. Alongside a broad spectrum of unacceptable housing conditions, the report also highlights the poor energy efficiency of many homes, challenges surrounding affordability, and the extent of people trapped in unsuitable accommodation, including people with disabilities and those facing domestic abuse. While we welcome the recognition by the Scottish Government of human rights within Housing to 2040, a legislative framework as envisioned by the consultation does not provide confidence as to impact.

If the Bill is to progress, we want to see greater discussion as to what the benefits will be to the housing sector with, for example:

- Earlier consideration of MCOs, where they are already in place and ensuring that they are practical standards that are easy to adjudicate.
- Consideration of existing legally enforceable CMOs by embedding human rights outcomes for adequate housing within the Scottish Social Housing Charter and Annual Assurance Statements. In effect this would impose positive obligations on social landlords and guide their efforts to progress adequate housing.
- The Scottish Government developing a shared understanding of the right to adequate housing and associated obligations for different organisations for all through extensive dialogue with social landlords, other housing providers, tenants and the wider public.
- The Scottish Government to lead by example by explicitly using a pro-active human rights approach to steer the drafting and communication of all new housing related laws, strategies and policies, including in the upcoming Housing Bill.
- Policy conflicts and tension in housing policy are identified and addressed through the policy development process.
- Clarity on what obligations housing providers would have in relation to the rights guaranteed under such a Bill, including MCOs and resources to meet said requirements.

Question 1: What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?



The principle of dignity in the development of human rights law is fundamental. Homelessness, for example, violates the principle of dignity and negatively impacts on the right to life, health, education etc. and we would support such a provision to be considered by courts when reviewing the application of the law. Nonetheless, we are also mindful of the courts being heavily involved in interpreting legislation rather than applying/ directing the legislation with regards to human rights and would want to see a great deal of direction and examples from the accompanying guidance so that courts have clear direction where dignity has not been upheld.

Question 4: What are your views on the proposed model of incorporation?

At its core, Human Rights are a set of principles for tackling inequalities, discrimination, and powerlessness. It is adherence to these principles in decision making and service delivery rather than legal remedy that will ultimately ensure people are treated with respect, fairness and dignity, have a real say over the services they use and live in adequate housing.

We support incorporation as is suggested but to translate this into a human rights policy framework with concrete priorities and actions to improve people's lives, the Scottish Government will require constructive and ongoing dialogue with local authorities, housing providers, other service providers and the wider public to identify lasting solutions to fulfil human rights in light of available resources. This was recognised by the Taskforce. It called for extensive engagement to develop statutory guidance, advisory guidance and additional legislation 'to give practical effect to these rights' and to put in place appropriate monitoring arrangements, all underpinned by major education and capacity-building programmes. This is something that needs to work in parallel with the legislative programme.

Question 19: What is your view on who the duties in the Bill should apply to?

Governments have various tools to fulfil their human rights obligations, such as legislation, strategies, policies, regulation, public spending and taxation. If human rights legislation is to provide a positive impact on the Scottish Government then we need to see the private and third sector play a bigger role in upholding human rights alongside public authorities. The legislation should set out what constitutes a public function or service and the extent to which tenants and owner occupiers should have comparable ability to exercise their right to adequate housing and seek effective remedy if this right is violated.

Indeed, we note that companies not classed as delivering a public function already have negative duties. For example, The Human Rights 1998 Act requires private landlords to respect the rights of a tenant to live in their home without intrusion or interference. While Scots law gives private landlords positive obligations to respect



their tenants' rights in relation to lettings, deposit requirements, evictions and the repairing standard and we would expect duties to apply across the public, third and private sector.

Nonetheless, there remains confusion about which private and third sector organisations constitute public authorities from a human rights perspective or the purpose of legal liability under the Human Rights Act. For instance, it is not wholly clear if a registered social landlord (RSL) subsidiary that owns and manages Mid-Market Rent (MMR) properties provides a public function and is therefore subject to the human rights duties of its parent body. As such we suggest the Scottish Government should:

- Ensure that the new Human Rights Bill clarifies what obligations housing providers, including both social and private landlords, have in relation to the rights guaranteed under such a Bill.
- Produce guidance for social and private landlords that sets out their negative obligations to not interfere with someone's human rights, their positive obligations to progress the right to adequate housing and other human rights and offers advice on how to balance competing rights.

Question 22: Do you think certain public authorities should be required to report on what actions they are planning to take, and what actions they have taken, to meet the duties set out in the Bill?

Reporting and assessment of the actions taken by public authorities is central to creating transparency and ultimately creating a human rights culture in Scotland of continual progress and improvement. However, such a reporting process needs to be proportionate, and it also needs to be supported in good faith by the State and relevant agencies with budgetary and legislative policies that ensure there is no regression on agreed MCOs and there is the scope for progressive realisation.

Question 24: What are your views on the need to demonstrate compliance with economic, social and cultural rights, as well as the right to a healthy environment, via MCOs and progressive realisation?

The principle of 'progressive realisation' acknowledges that adequate housing, like other economic and social rights, requires time and resources to fulfil and that each state must weigh up and balance how best to use its finite resources across a range of policy areas. The legislation must ensure the government monitors progress and shows that coherent and concrete steps are being taken to fulfil these rights as quickly and effectively to the maximum of its available resources and to provide clear and convincing reasons for any delay and factors that are impeding progress.



However, in practice we have doubts that there will be much incentive/ expectation among landlords to ensure progressive realisation. The understandable caveats of providing convincing reason for delay or working within available resources at the outset provides a rationale for any housing provider to ignore standards and services that they feel are not practical. As such, we believe the importance of the debate about human rights centres on MCOs as a duty that must be fulfilled immediately and without delay. This then brings the debate over human rights legislation to perhaps its most important aspect. What are the MCOs with regards to housing, how do we address the policy tension and contradiction in existing housing policy in our determination of MCO's, and what resource is required immediately?

The Taskforce called for the Scottish Government to set up a participatory process to define MCOs and this is appropriate. These obligations would provide the basis on which someone could take legal action against the government or a landlord for a breach of the right to housing, so the importance of housing providers engaging in this participatory process should not be under-estimated. However, the whole process of determining MCOs must include a commitment to develop a more coherent understanding of how the housing system is failing to provide adequate and affordable homes for a growing share of people living in Scotland and that is underfunded. More immediately, there are a number of housing policy areas that would warrant re-appraisal from a human rights perspective and which the Scottish Government might be able to progress in the shorter term that will need to be addressed before defining MCOs, including:

- The provision of funding for the development of specially designed new homes and adaptations for older and disabled people.
- Updating the 2019 social housing allocations guidance to provide social landlords with a clear steer on how their allocations policies and practice should respect their human rights duties.
- The production of good practice guidance, principally for local authorities, on engaging different social groups (especially the protected equalities groups) on housing related matters and the use of this evidence to inform their housing need and demand assessments (HNDAs), their local housing strategies (LHS) and their landlord policies and practice.
- Whether the ability to convert Scottish Secure Tenancy (SST) to Short Scottish Secure Tenancy (SSST) in cases when an Antisocial Behaviour Order (ASBO) is served or where a new tenant was accused of previous antisocial behaviour is wholly human rights compliant or would be a derogation of a person's rights.
- Whether the SST agreement clause "you, someone residing in your house, or anyone visiting it, has been convicted of using the house or allowing it to be used for illegal or immoral purposes or a criminal offence, punishable by imprisonment, which was committed in the house or the locality" is compliant

with international human rights and whether it is appropriate to use tenancy conditions to regulate moral behaviour.

There is also the fundamental question of where we set the bar with regards to MCOs. Scottish law already contains some obligations that resemble those related to MCOs for adequate housing, particularly in relation to homelessness, evictions and the physical quality of homes. The development of a human right law provides us with an opportunity to provide a higher floor, a higher standard. However, given the range of existing duties currently in breach by housing organisations it may not be practically possible to raise MCOs above existing standards. If that is the case, it begs the question - what impact will this legislation have on improving the housing outcomes of communities across Scotland?

27. What are your views on the most effective ways of supporting advocacy and/or advice services to help rightsholders realise their rights under the Bill?

At the core of the Human Rights Bill is the need for capacity building. This is true among duty holders, rights holder and for advice and advocacy services. The proposed participatory process to develop MCOs is a key part of this capacity building. However, rights cannot be realised without resources for duty holders to meet standards of MCOs and beyond. The development of the financial memorandum for the Bill must set out the expected cost for how the housing sector will meet the standards of MCOs. The ambition of the resource expectations should be set out by Government.

39. What are your views on our proposals to establish Minimum Core Obligations through a participatory process?

As discussed above, a participatory process for developing MCOs is welcome and essential. However, waiting until the legislation has concluded the Parliamentary process risks undermining confidence in the practicality of the legislation and the benefits that should be immediately realisable. The participatory process does not require legislative effect and we would encourage the Government to start the participatory process in parallel with the Bill to give greater meaning to what MCO/ Human Rights Bill means in practice and to give Parliament greater clarity about the cost of implementation. We believe that at the latest MCOs should be agreed within two years of the passing of the legislation and given the breadth of issues to consider would encourage the government to begin the process of consultation on what MCOs as soon as possible to ensure there is a fully participatory approach that can meet this deadline



Question 42: How can the Scottish Government and partners effectively build capacity across the public sector to ensure the rights in the Bill are delivered?

As noted above, the participatory process is central for building understanding of the Bill, the standards, rights and how they can be enforced. Early and ongoing engagement with duty holders is critical and is why we encourage the Scottish Government to begin the process immediately so that there is greater understanding on expectations and costs of meeting MCOs before the passing of the Bill.

About CIH

The Chartered Institute of Housing (CIH) is the independent voice for housing and the home of professional standards. Our goal is simple - to provide housing professionals and their organisations with the advice, support, and knowledge they need to be brilliant. CIH is a registered charity and not-for-profit organisation. This means that the money we make is put back into the organisation and funds the activities we carry out to support the housing sector. We have a diverse membership of people who work in both the public and private sectors, in 20 countries on five continents across the world. Further information is available at: www.cih.org.

Contact:

Callum Chomczuk
National director
CIH Scotland
Callum.Chomczuk@cih.org

06 October 2023