

Towards an Economic, Social and Cultural Rights Bill

Consultation document on a draft Bill

Responses can be made by emailing escr.bill@gmail.com by 14 July 2019

More information is available at
<https://research.ncl.ac.uk/article22/consultation/>

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“The law must afford adequate protection of fundamental human rights.”

“The rule of law requires compliance by the state with its obligations in international as well as national laws.”

Lord Bingham, Principles 5 and 8 of the Rule of Law

Article 22 of the 1948 Universal Declaration of Human Rights affirms that all members of society are entitled to economic, social and cultural rights - such as access to adequate housing, education, health, food, decent work, social security, an adequate standard of living and participation in cultural life.

[“Article 22”](#) is an initiative of the Institute of Health and Society at Newcastle University to identify the law and policy changes needed to secure these rights as human rights in the UK.

As a part of this initiative a text of what in time could become [a proposed Draft Bill](#) to put these rights into UK law as human rights has been developed by the drafting group whose members are named on the front cover.

This document:

- explains why we think an Economic, Social and Cultural Rights Act is needed (section 1)
- describes our approach so far in drafting the Bill (section 2)
- outlines some rights which are not so far included in the Bill (section 3), and
- concludes with some questions that those wishing to respond to the consultation may wish to address (section 4).

1. Why we need an Economic, Social and Cultural Rights Act

Like so many other countries, the UK has voluntarily agreed to a number of international treaties which say that we are all entitled to the right to adequate housing, the right to health, the right to social security and to other socio-economic rights.

The pre-eminent treaty containing these rights is the International Covenant on Economic, Social and Cultural Rights ([ICESCR](#)) which was adopted by the UN General Assembly on 16 December 1966. It was [signed and ratified](#) by the United Kingdom on 16 September 1968 and 20 May 1976, respectively. There are 169 State Parties.

Social and economic rights are also included in the 1961 [European Social Charter](#) which is a Council of Europe treaty. It was [signed and ratified](#) by the UK on 18 October 1961 and 11 July 1962, respectively. The UK was the first country to ratify it.

However, unlike most other countries, by and large these rights have not been incorporated in domestic law. This means that the government and other public bodies are not obliged to deliver them and so people living in the UK do not have effective legal recourse to claim their rights.

The UK is an outlier. Over 90 per cent of world's constitutions recognise at least one socio-economic right, in around 70 per cent of them at least one of these rights is explicitly enforceable in court, and 25 per cent recognise ten or more as enforceable - particularly education, trade unions, healthcare, social security, child protection and the environment.¹

The Finnish constitution, for example, presumes the national parliament will legislate in favour of socio-economic rights, and there is prior parliamentary scrutiny and subsequent judicial review. Canadian courts have the power to strike down legislation that contravenes the constitutional bill of rights, but parliament has the power to override compliance and courts often allow parliament a period to comply with judgments. The South African system creates the expectation that public authorities will adopt reasonable measures to progressively realise the rights to housing, health and food.

But this is not a merely technical point. An Economic, Social and Cultural Rights Act would require ministers and public bodies to adopt and implement policies and decisions across government within a legally-mandated framework. It won't be a panacea but it will make a real difference to people's lives and the social determinants of their health.

In the Box below is a list of the type of areas where it would apply.

Funding, staffing and quality of the NHS and social care
Waiting times in the NHS
Access to health services and to essential medicines
Breast-feeding

¹ Courtney Jung, Ran Hirschl and Evan Rosevear, Economic and social rights in national constitutions, *American Journal of Comparative Law*, 62:4 (2014).

Housing supply and quality
Housing security for tenants
Benefit levels, conditionality, administration and dispute resolution
Taxation, public expenditure and provision of public services
Fair pay
Equal pay for equal work
Job security, with paid holidays and controls on wage deductions
Collective bargaining, with the right to withdraw labour
Food availability, quality and affordability
Water and fuel supply costs
Educational attainment gaps
Tuition fees and student loans
Library provision
Status of the Gaelic, Welsh and Irish languages
Participation in policy development

For example, currently English law does not protect tenants if a landlord fails to maintain a property in a standard that is fit for human habitation, and the law permits landlords to evict tenants without giving a reason. To comply with the right to adequate housing in an Economic, Social and Cultural Rights Act, no-fault evictions ([section 21](#) of the Housing Act 1988) would have to be abolished.

Even more significantly, taxation, public expenditure and provision of public services would also be in scope. If economic and social rights were enacted in the UK, among other things the government would have to analyse the cumulative impact of tax, social security and public spending reforms since 2010, and restore the link between social security entitlements and the costs of living.

We need this Act to waterproof our rights from austerity and from Brexit.

People in the UK have struggled for workers' and social rights for centuries. Yet the UK legal system has essentially ignored these rights as human rights – but the tide is turning.

The [Social Security \(Scotland\) Act 2018](#) starts from the principle that “social security is itself a human right and essential to the realisation of other human rights”. The Scottish government has also brought the socio-economic duty to life through the [Fairer Scotland Duty](#), and in December 2018 an advisory group set up by the First Minister has urged the Scottish parliament to show leadership by adopting a [new Scottish human rights act](#) including economic, social, cultural and environmental rights. In the exercise of their functions, Welsh ministers are [legally required](#) to have due regard to the UN Convention on the Rights of the Child, and the [Well-being of Future Generations \(Wales\) Act 2015](#) offers new opportunities to embed human rights considerations in public policy making.

We believe the time has come for an Economic, Social and Cultural Rights Act.

2. Our approach

Establishing ESC rights in domestic law is an enormous task, politically, intellectually and practically, which will take several years. We have made a start to what we hope will become a wider discussion on putting these rights into domestic law as human rights by trying to imagine what an Act of

Parliament could look like. So for the purposes of consultation and debate we have developed what in time could become a proposed Draft Bill.²

The approach we have taken is, firstly, to follow as far as possible the Human Rights Act 1998 (HRA). We think this is entirely justified, as many ESC rights are as capable of immediate realisation as civil and political rights. But we do not think that it is possible simply to ‘copy and paste’ the HRA, or to amend the HRA by adding in ESC rights, as there are several aspects of ESC rights which require different treatment, such as where fully realising them depends heavily on prioritising significant public expenditure and on making political choices from a potential range of possibilities.

We have drafted the rights in Schedule 1 of the Bill in an illustrative short form in order to convey their essence for the purposes of consultation and debate, and provided some [Reference Material](#) for those interested in more information. We are not suggesting that these are the only rights or formulations that should appear in an eventual Act. Rather, we hope that they – as well as the issues we highlight in section 3 and the questions we pose in section 4 - will stimulate discussion and debate, and in time inform a proposed Draft Bill.

3. What’s not included for now?

The rights imagined so far for the Bill would derive almost entirely from ICESCR, supplemented in a few instances by the European Social Charter.

As noted, however, there are several other obligations of the UK in relation to such rights in other UN treaties, in particular the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of All Forms of Racial Discrimination, and Convention on the Elimination of All Forms of Discrimination against Women. (There is also the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which the UK so far has not signed.)

Because we have framed our approach by reference especially to ICESCR, which applies in principle to everybody,³ two immediate questions arise. What about the economic, social and cultural rights in these other, ‘group’-based Conventions? And what about provisions in ICESCR which relate expressly to ‘groups’ of people?

We support the rights in these other Conventions being put into domestic law. Bills which sought to do so comprehensively would best be framed by a ‘group’-based approach, such as was previously done with the [Children’s Rights Bill](#).

Another approach might be to include in an ICESCR-based Bill any rights from the group-based Conventions which would not otherwise be sufficiently covered, taking into account the General Comments of the treaty’s monitoring body which invariably stress the importance of ensuring the

² A Draft Bill is the term used to describe possible legislation [that the government publishes](#) to enable consultation and scrutiny before an actual Bill is presented in Parliament.

³ The rights of trade unions in Article 8 could be characterised as an exception but they flow from the right of everyone to form and join them.

rights of people focused on by these other Conventions. We have not done an analysis that would enable us to propose any such additional provisions in an ICESCR-based Bill, but **would welcome the views** of organisations and individuals who have identified such possible provisions.

ICESCR also includes rights of families, mothers and children in Article 10,⁴ which we have not included in the illustrative list of rights. This is because we reasoned that putting into domestic law simply a single, limited and dated ICESCR-based Article would be inadequate where more extensive rights were guaranteed under more detailed and sometimes more recent treaties. Families, or mothers as such, however, do not have ‘their own Convention’ and **we would welcome views on the possible inclusion of the rights of families and mothers, as well as views on our reasoning in relation to Article 10.**

Similar reasoning has been adopted for now in relation to the seven Articles of the European Social Charter. These involve obligations under 32 paragraphs, of which [21 have been accepted](#) by the UK and which can be characterised as ‘group-based’ rights:

- the right of children and young persons to protection (Article 7, 6/10 accepted⁵)
- the right of employed women to protection (Article 8, 1/4 accepted⁶),
- the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement (Article 15, 2/2 accepted),
- the right of the family to social, legal and economic protection (Article 16, 1/1 accepted)

⁴ ICESCR, Article 10: “The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.”

⁵ The four paragraphs under Article 7 not accepted by the UK cover obligations: to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education (7.1); to provide that the working hours of persons under 16 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training (7.4); to provide that employed persons of under 18 years of age shall be entitled to not less than three weeks' annual holiday with pay (7.7); and to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations (7.8);

⁶ The three paragraphs under Article 8 not accepted by the UK cover obligations: to consider it as unlawful for an employer to give a woman notice of dismissal during her absence on maternity leave or to give her notice of dismissal at such a time that the notice would expire during such absence (8.2); to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose; and (a) to regulate the employment of women workers on night work in industrial employment and (b) to prohibit the employment of women workers in underground mining, and, as appropriate, on all other work which is unsuitable for them by reason of its dangerous, unhealthy, or arduous nature (8.4).

- the right of mothers and children to social and economic protection (Article 17, 1/1 accepted),
- the right to engage in a gainful occupation in the territory of other Contracting Parties (Article 18, 4/4 accepted) and
- the right of migrant workers and their families to protection and assistance (Article 19, 10/10 accepted).

It is particularly worrying, however, that the Charter’s monitoring body has found the UK not to comply with many of the obligations under these Articles which it has accepted - as summarised in the Table - and [deferred its conclusions](#) in 2016 on Article 15.1 (education and training for persons with disabilities) for 2011-2014. **We would welcome views therefore on the extent to which these rights should be included.**

Table: Situations of non-conformity in the UK found by the European Committee of Social Rights in relation to Articles 7, 8, 16, 17, 18 and 19 of the European Social Charter

Obligation (Article.paragraph)	Situation of non-conformity
Prohibition of employment of young persons subject to compulsory education (7.3)	The daily and weekly duration of light work for children who are still subject to compulsory education during school holidays is excessive.
Fair wages for young workers and apprentices (7.5)	The minimum wage of young workers is not fair.
Special protection against physical and moral dangers to which children and young persons are exposed, especially from work (7.10)	The legislation permits treating children involved in prostitution as offenders.
Paid maternity leave before and after childbirth up to a total of at least 12 weeks (8.1)	The standard rates of Statutory Maternity Pay, after six weeks, and Maternity Allowance are inadequate.
Promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means (16)	<ul style="list-style-type: none"> • In England, the right of Roma/Traveller families to housing is not effectively guaranteed; • Associations representing families are not consulted when family policies are drawn up.
Take all appropriate and necessary measures to ensure the effective exercise of the right of mothers and children to social and economic protection, including appropriate institutions or services (17)	<ol style="list-style-type: none"> 1. Not all forms of corporal punishment are prohibited in the home; 2. The age of criminal responsibility is manifestly too low.
Simplify formalities and reduce or abolish charges payable by foreign workers or their employers (18.2)	The fees charged for work permits are excessive. ***
Promote cooperation, as appropriate, between social services, public and private, in emigration and immigration countries (19.2) and extend protection and assistance to self-employed migrants (19.10)	Appropriate co-operation between the social services of the UK and emigration and immigration states is not sufficiently promoted.
Facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the UK (19.6) including the self-employed (19.10)	<ul style="list-style-type: none"> • Family members may be expelled following the deportation of their sponsor, without proof that they are a threat to national security, or offend against public interest or morals; • The language requirements imposed on the family members of migrant workers are likely to hinder family reunion; • The income requirement for migrants who wish their families to join them is too high and is likely to hinder family reunion.

Sources: *ECSR Conclusions XX-4 (2015)*, and, in relation to the finding marked ***, *ECSR Conclusions XXI-1 (2016)*. Table compiled from the [UK and ESC Fact Sheet \(2018\)](#).

We also welcome views on whether an environmental right should be included in the Bill.

4. Questions

As well as issues on which we would welcome views, mentioned in section 3, here are some questions we think it would be good to know the views of organisations and individuals about.

But please feel free to let us know what you think about any of the matters an Economic, Social and Cultural Rights Bill raises.

- Should the UK put its international obligations on economic, social and cultural rights into domestic law as human rights?
- If not, why not?
- If so, should this be done on a UK or on a devolved basis?
- Are there any rights listed in Schedule 1 of the Bill which you think should definitely be included, or definitely not included?
- Do you have any suggestions for how any of the rights should be formulated?
- Do you think that any of the provisions of the Bill don't go far enough, or go too far?
- Do you think that the Bill should follow the Human Rights Act 1998 as closely as possible?
- In what ways, if any, do you think the Bill should differ from the Human Rights Act 1998?
- In your opinion, what laws or policies of recent years would have been contrary to an ESCR Bill?

Further information is available [here](#).