

***Policy Paper***

**Update on Human Rights Protection in Scotland**

**- recommendations to review and revitalise collective action**



#Standup4humanrights #HumanRightsDay

**Carole Ewart 10 December 2020**

**The Jimmy Reid Foundation**

The Jimmy Reid Foundation welcomes the reproduction of this publication in whole or in part for the purpose of education, training and campaigning providing that no charge is made for the material and the source of information is acknowledged. Donations are welcome to support the work of JRF. For donation options please visit our website at [http://reidfoundation.org](http://reidfoundation.org/) and click on ‘Join Us’.

**About the author**

Carole Ewart is a public policy and human rights consultant, member of JRF Project Board and convener of the Campaign for Freedom of Information in Scotland.

**Abbreviations**

Equalities and Human Rights Commission  **EHRC**

Equalities and Human Rights Committee **EqHRC**

European Convention on Human Rights **ECHR**

European Court of Human Rights  **EctHR**

Human Rights Act 1998 **HRA**

International Covenant on Economic, Social and Cultural Rights **ICESCR**

National Performance Framework **NPF**

Scottish Human Rights Commission **SHRC**

Scotland National Action Plan on Human Rights **SNAP**

**Summary**

This follow up report calls for action on making rights real in Scotland in communities, for workers and in particular places such as in social care facilities. Human rights matter across all aspects of our lives including the right to life, respect for family life, liberty, the right to peacefully protest about matters which upset us, the right to join a trade union, the right to a home, the right to digital connectivity to enable us to fulfill our economic potential and as a way of inclusive communication for Scotland’s one million people who are Deaf and hard of hearing. There is understandable frustration on the extent of talking, the creation of processes which engage and harness people’s energy but the lack of tangible impact. Deeds not words count. Impact, not just statements matter.

The UK Government paused its ‘attacks’ on human rights as it tried to cook its ‘oven ready deal on Brexit’. Unlike previous manifesto commitments which promised to abolish the Human Rights Act 1998 (HRA), the 2019 recipe stated: ‘We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government. We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays.’[[1]](#footnote-1)

Many media outlets reported on 7th December 2020 that Sir Peter Gross has been appointed to lead an independent review of the HRA[[2]](#footnote-2) and this UK focus requires to be monitored as it may lead to limiting rights either in scope or to which people are protected. The Scottish Parliament has clearly and repeatedly voted to support the HRA, which incorporates the European Convention on Human Rights into domestic law and is seeking to make rights more real in everyday places. The UK national agenda will impact in Scotland so all the more important to capitalise on a Parliament with a positive ambition to uphold current human rights law, oppose any regression and to extend protections. The challenge is to work collectively to make an impact on its plans.[[3]](#footnote-3) Therefore, this report recommends:

* Talking less and doing more to make human rights and their enforcement a practical reality across Scotland.
* Affirming that human rights are universal, interdependent and must be equally enjoyed.
* Campaigning for the inclusion of economic, social and cultural rights in Scot’s law through direct incorporation of the International Covenant on Economic, Social and Cultural Rights and by influencing the detail of the new law for Scotland which is being currently developed by The National Taskforce for Human Rights.
* Taking forward UN identified action to **strengthen human rights, and in Scotland that must include promoting knowledge, delivering training, seeking effective enforcement of duties by regulators and improving access to remedy when an individual need to complain about an abuse of rights in the workplace, in their communities and when accessing publicly funded services.**
* **Inviting unions and organisations to work with the Jimmy Reid Foundation to sustain our research and influencing work to make our recommendations happen.**
1. **2020 Theme: Recover Better - Stand Up for Human Rights**

Our Policy Paper was first published in March 2016[[4]](#footnote-4) following the First Minister’s delivery of the third Jimmy Reid memorial address ‘Worker’s Rights are Human Rights’. We have updated the analysis to mark International Human Rights Day on 10th December 2020, which has a global theme of ‘building back better by ensuring human rights are central to recovery efforts’. In our post COVID world the UN states ‘we will reach our common global goals only if we are able to create equal opportunities for all, address the failures exposed and exploited by COVID-19, and apply human rights standards to tackle entrenched, systematic, and intergenerational inequalities, exclusion and discrimination.’[[5]](#footnote-5)

Whilst human rights are explicitly supported by the Scottish Government, the problem remains that there is a failure to evidently deliver on existing human rights obligations. In 2016, we argued that ‘Fixing that problem should occupy the political energy and practical action of our elected politicians with a consequent gain of the public understanding that human rights are relevant and powerful in making our lives better, and Scotland fairer.’ Despite developments, the challenge remains and the impact of COVID-19 on our human rights and their apparent inability to influence decisions has reignited debate on why human rights matter and must be enforced.

Therefore, revisiting the issues and urging constructive action fits with the Jimmy Reid Foundation’s commitment to practical, policy proposals for transforming Scotland. We propose progressive measures underpinned by our guiding principles that:

* society should be based on equality and social justice
* people have the democratic power to influence workplace and social institutions
* quality of life should be at the forefront of political debate and not an afterthought
* justice can only come from peace and support for human rights
* ideas, learning, arts and culture have the power to transform society and individuals
* all these principles are underpinned by the importance of national identity and a vision for Scotland

In this updated paper, we continue to focus on the two distinct components of human rights delivery: the role of duty bearers and the actions of right holders in making human rights equally real in everyday places. Human rights standards, universally applied, can address urgent issues as well as make Scotland fairer across economic, social, civil, political, cultural and economic rights. COVID-19 has caused huge suffering, prompted extraordinary acts of humanity and created an opportunity for human rights to define the design and delivery of publicly funded services. It has also led to significant restrictions on our liberty with insufficient scrutiny of decisions as to whether they were proportionate and necessary. Recognising that we each have defined human rights, which should be enjoyed equally, validates our calls for fair work, the right to an adequate standard of living, the right to the highest attainable standard of physical and mental health and the right to a home. The duty to respect those rights sits, in practice, with the public, private and Third sectors. The UN’s call to action ‘Stand Up for Human rights’ fits with our belief that by engaging the general public to ‘bolster transformative action’, we can contribute to recovering better and fostering a more resilient and just society.

**Reviewing progress**

*Society and its prevailing sense of values leads to another form of alienation. It alienates some from humanity. It partially dehumanises some people, makes them insensitive, ruthless in their handling of fellow human beings, self-centred and grasping. The irony is, they are often considered normal and well adjusted… Reject the values and false morality that underlie these attitudes. A rat race is for rats. We’re not rats. We’re human beings. Reject the insidious pressures in society that would blunt your critical faculties to all that is happening around you, that would caution silence in the face of injustice lest you jeopardise your chances of promotion and self-advancement. This is how it starts and before you know where you are, you’re a fully paid-up member of the rat-pack. The price is too high. It entails the loss of your dignity and human spirit.*

Jimmy Reid on ‘Alienation’ 1972[[6]](#footnote-6).

The 2016 Policy Paper made a number of recommendations on the delivery of human rights and several have been taken forward by the First Minister, the Scottish Government and the Scottish Parliament. Government, the public sector, those delivering publicly funded services are all duty bearers and with that comes with obligations. For example, Section 6 of the Human Rights Act 1998 states that all those delivering public services and services of a public nature are covered.

Much of what was written then, still applies now and we encourage you to read the original version. Clearly it was a surprise to many readers that human rights can be legally enforced just like data protection law, planning law and consumer law. However there remains an absence of organised and systematic education and information on the issue, so it is important just to summarise at the start:

* The UK Human Rights Act 1998 (HRA) gives domestic effect to the European Convention on Human Rights (ECHR)[[7]](#footnote-7). The law works in two ways: rights holders can assert and enforce their rights; duty bearers must pro-actively comply. Section 6 of the HRA requires those delivering public services and services of a public nature to comply with the ECHR and this legal duty has not realised its potential.
* The Scotland Act 1998 requires MSPs to pass legislation that is compatible with the ECHR, Section 29, and Scottish Government Ministers to comply with the ECHR and international human rights law, Section 57.
* The UK has ratified international human rights treaties which means that all our laws and policies should comply. Experts serve on Committees at the UN provide periodic scrutiny and produce reports and recommendations to improve practice. Their considered judgements remain under utilised in Scotland.

# Asserting rights should not therefore depend on benevolence of kindness but understood as a legal transaction between State and a human being. We are all in this conversation together.

**The Scottish Government**

In 2016 we recommended that the Scottish Government should entrench its commitment to human rights by proactively ensuring that our 10,000 + public services in Scotland fulfil their existing obligations to comply with the ECHR as well as international law. There has been progress, but we want to see impact, measured and evidenced.

* The Scottish Government has included human rights in the National Performance Framework (NPF): specifically, a national outcome is people respecting, protecting and fulfilling human rights and living free from discrimination. In practice that means: ‘we demonstrate our commitment to these principles through the way we behave with and treat each other, in the rights, freedoms and protections we provide, and in the democratic, institutional and legal frameworks through which we exercise power.’ Importantly the Scottish Government has produced resources to evaluate impact[[8]](#footnote-8). However, obeying the law is not optional and that message has not ‘landed’ yet.
* The Scottish Government has secured legislation requiring the inclusion of human rights in the design and delivery of services e.g. in the Social Security (Scotland) Act 2018 where one of the principles is ‘social security is itself a human right and essential to the realisation of other human rights’.[[9]](#footnote-9)
* The Scottish Government has still to develop a ‘Business and Human Rights’ framework based on the 31 UN Guiding Principles. However, the UK National Action Plan on Business and Human Rights (NAP), first launched in 2013[[10]](#footnote-10), could suffice and be attached to all contracts for services publicly funded.

**The First Minister**

* In 2017 The First Minister established the ‘Advisory Group on Human Rights Leadership’ to examine how Scotland ‘can continue to lead by example in the field of human rights’[[11]](#footnote-11). Its report of December 2018 included a recommendation of the 2016 Policy Paper to ‘Introduce a Human Rights Bill in respect of devolved powers, which fits in with the appetite for active democracy, as it consults people on what rights they wish to see enforceable.’ It also made recommendation on the International Covenant on Economic, Social and Cultural Rights[[12]](#footnote-12).
* In 2019 it morphed into the Human Rights Taskforce on Human Rights Leadership[[13]](#footnote-13) with recruited new people to think and help deliver on the report’s recommendations. That consultation is underway and there is an opportunity to feed into the process directly.[[14]](#footnote-14) The Agenda and Minutes of meetings appear online and provide guidance on the direction of travel. At the 9th September meeting, members acknowledged that ‘access to justice and remedy have been a recurring theme in roundtable discussions, so the Taskforce will consider means for rights holders to seek remedies when rights have been breached. It was also noted consideration should be given to resolve human rights breaches as proactively as possible, with courts being used as a last resort.’[[15]](#footnote-15)

**The Scottish Parliament**

* The Scottish Parliament delivered on the Policy Paper recommendation to ‘entrench its commitment to human rights by setting up a Human Rights Committee to provide scrutiny of all Bills, inquiries etc. and ensures a focus on the impact on our human rights.’ The Parliament merged its equalities function and established an Equalities and Human Rights Committee (EqHRC) in September 2016 and has delivered consultations and reports. Impact is key – see below.
* The Scottish Parliament has passed specific legislation to be human rights compliant e.g. a private member’s Bill became The Children (Equal Protection from Assault) (Scotland) Act on 7th November 2019[[16]](#footnote-16) and enforceable on 7th November 2020. Scot’s law is now compliant with UN Convention on the Rights of the Child and its General Comment No 8 ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment’.[[17]](#footnote-17)
* The Scottish Parliament has so far failed to abolish Section 6 of the Scottish Commission for Human Rights Act 2006 which specifically prohibits the SHRC from advising or taking cases alleging a breach of rights. Without a realistic expectation of rights being enforced, a weak message is sent to duty bearers in Scotland. The GB EHRC can take up human rights cases in England.

**Scottish Human Rights Commission (SHRC)**

Our 2016 recommendation for the SHRC was that the persuasive framework for Scotland’s National Action Plan on Human Rights (SNAP) needed to change delivery mode to compulsion supported by funding. However, we welcomed development of SNAP as a tool and a focus for action. It had been drafted over a three-year period and launched in December 2013 with three strands over four years: better lives, better world and better culture. Changing culture is a key route to improving human rights practice so that human rights law is understood to be just as powerful as that on freedom of information etc. However, in 2020, SNAP 2 is still being developed and for the last three years there has been much discussion but no output as yet[[18]](#footnote-18). The SHRC has of course been working on other valuable projects.

**The Bill of Rights in the State of Victoria**

In 2016 we identified The Bill of Rights in the State of Victoria, Australia, as an interesting example of a devolved framework designed to deliver on human rights, agreed by the people. The focus is on the public sector and its obligations as the duty bearer. This updated paper has not gone into the issue further as that is a separate project although it is worth noting that the State of Victoria has just emerged from draconian lockdown measures to deal with COVID 19 which focused on protecting the right to life. 816 deaths have been recorded to 25th November 2020[[19]](#footnote-19).

**Conclusion**

The pace of reform is slow in Scotland involving much discussion. It is understood that a greater impact will be achieved by the sum of the parts rather than just focusing on individual actions. Clearly there are opportunities in law, in policy and practice to make human rights real but the pace and detail of progress is slow and there is a growing separation from high level political aspirations to people’s experiences across everyday life such as health and social care, in employment, the impact of air quality on health, in education. Critically more people need to know about human rights and what they mean in practice so they can used to assert rights and have a reasonable expectation that duty bears will comply with the law. Otherwise the process is disempowering. Together we can make a difference on human rights. Therefore, we again offer constructive challenge to ensure human rights make a greater impact.

1. **Current Opportunities and Challenges**

Scotland has an explicit human rights agenda in policy, in budgeting, in service design and delivery. The evidence and mechanisms for delivery include:

* The First Minister’s Taskforce of Human Rights Leadership, clearly with a focus on leadership across those funded to deliver public services and services of a public nature.
* The integration of human rights in the National Performance Framework
* The legacy of SNAP and the ongoing process to update and relaunch it.
* The EqHRC’s inquiries, work and reports including the 40 recommendations in its report of November 2018 ‘Getting Rights Right’.
* Numerous motions in the Scottish Parliament in support of human rights and human rights defenders.
* Making global human rights domestic though Sections 29 and 57 of the Scotland Act 1998 and through the Human Rights Act 1998 which gives effect to (most of) the European Convention on Human Rights.

However, the pandemic and the Scottish Government and public sector’s response to it is a startling example of why human rights have failed to make the impact expected and promised. Despite our human rights credentials, there have been clear failings. The right to life is a fundamental human right protected by Article 2 of the ECHR, yet 5,135 deaths have been registered in Scotland where COVID-19 was mentioned on the death certificate up to 15th November; 42% of COVID-19 registered deaths related to deaths in care homes, 51% were in hospitals and 7% were at home or non-institutional settings[[20]](#footnote-20). It was reasonable to expect Scotland to have some degree of preparedness given the anticipated impact of ‘Exercise Iris’, the table-top exercise held in March 2018 to assess NHS Scotland’s response to a suspected outbreak of MERS-CoV[[21]](#footnote-21) . Significantly decisions made to purchase care home places and release patients into care homes without testing from March 2019 had repercussions. These matters remain ongoing especially testing staff in the care homes and care settings and the role of human rights in the work of Integrated Joint Boards[[22]](#footnote-22) in designing Scotland’s response to COVID-19.

**Impact**

There is undoubtedly progress on legislating for human rights, but the key question is impact, and we have a shared interest in ensuring that what is recommended happens and what is legislated for is enforced. The EqHRC report of November 2018 made 40 recommendations[[23]](#footnote-23) and after two years it is fair to assess progress as each one has a timeframe attached from immediate to nine years. For example, those which relate to the Committee and to the Parliament include:

* **Rec 40**: ‘Create a detailed action plan to support the implementation of the Report recommendations.’ Cttee timeframe: ‘Immediate Priority’.
* **Rec 15**: ‘Enforcement and remedies – Investigate strengthening powers of the Scottish Human Rights Commission. Also, consider human rights and regulatory or inspection regimes.’ Cttee timeframe is 1-3 yrs. This is particularly important and should include strengthening its regulatory role.
* **Rec 3**: ‘Develop scrutiny of human rights through the Scottish budget process.’ Cttee timeframe is ‘ongoing’. For example, what clause has been added to contracts/grants to public sector organisations requiring promotion of and compliance with human rights law?
* **Rec 4**: Equalities and Human rights advocacy support – Investigate the capacity and resourcing of civic society equalities and human rights advocacy.’ Cttee timeframe: 1-3 yrs. Will the Third Sector receive unconditional extra money to challenge breaches?
* **Rec 13:** ‘Scotland's National Action Plan for Human Rights – Hold an annual evidence session on Scotland’s National Action Plan and Parliamentary debate.’ Cttee timeframe: 1-3 yrs. According to SHRC website SNAP 2 is still under development.
* **Rec 22**: ‘Equalities and Human Rights Committee – Produce guidance to embed and support human rights in the work of the Parliaments and its Committees.’ Cttee timeframe: 1-3 yrs. Would be useful to see specific impact.
* **Rec 37**: ‘Building capacity - Identify a human rights Champion for each Committee’. Cttee timeframe: ‘start 1 year’. Are there any yet and who should we contact?

**Conclusion**

Nicola Sturgeon used the 2016 memorial lecture to argue for the fundamental human right of people to join and be active in a trade union to represent and articulate their interests:

‘When Jimmy Reid spoke here in April 1972, it was towards the end of the Upper Clyde Shipworkers dispute. The work-in which Reid helped to organise … is a reminder that trade unions are a source of empowerment. They provide a voice for those who might otherwise go unheard. The right to strike is an essential part of that, but the real value of trade unions goes much wider. They help employers to create the safe, humane, productive working conditions which head off industrial disputes – and which build better businesses. Because of that, trade unions are a force for good in modern societies.’

The human rights map is much bigger, and three issues have emerged to progress:

* The need for a significant increase in education and awareness of human rights and duties so that rights are understood, applied and enforced.
* Capitalising on the expertise and knowledge of people who know, understand and recognise human rights.
* Establishing accessible structures for asserting and enforcing rights – we are not there yet!
* Enforcement and consequences for duty bearers who refuse to comply.
1. **Case Study Issue – FoI**

Famously Tony Blair stated in his Memoirs that giving the public FoI rights was a big mistake: ‘You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it.’[[24]](#footnote-24) Despite his opinion, accessing official information to form an opinion is an established human right. The right has been and remains critical to hold government and public bodies to account as well as promoting transparency.

The public’s right to receive official information and to form an opinion is contained in Article 10 of the ECHR and in Article 19 of the International Covenant on Civil and Political Rights (ICCPR)[[25]](#footnote-25). Where Article 10 of the ECHR has been ruled togive the right to information in order to form an opinion,[[26]](#footnote-26) the cases have related to requests for information which are in the public interest and that is established by four tests: the purpose of the information request; the nature of the information sought; the particular role of the seeker of the information in ‘receiving and imparting’ it to the public; and whether the information was ready and available. In addition to the HRA, the Scotland Act 1998 places duties on public authorities and Scottish Government Ministers to comply with human rights law so FoI rights are not just a domestic matter but legislation and practice must be human rights complaint, internationally.

The Freedom of Information (Scotland) Act 2002 (FoISA) became effective on 1st January 2005 and places clear duties on an identified 10,000 bodies designated for coverage[[27]](#footnote-27): to properly manage information so that it can be disclosed ‘promptly; to answer individual request for information unless covered by one of the (too) many exemptions; to advise and assist requestors; and to pro-actively publish information. It provides for the individual right to be enforced through an internal review process and an external appeal to the Scottish Information Commissioner (SIC)[[28]](#footnote-28). Importantly the three-stage process is free: making an information request; if unsuccessful in whole or in part requesting an internal review of the decision, if unsuccessful in whole or in part appealing to the SIC. Sometimes the SIC achieves a satisfactory resolution of a case through mediation but he can decide to force publication and within a specific timeframe. Failure of a designated body to comply with the Commissioner’s decision can be tough including being the subject of contempt of court proceedings.

FoISA and the Environmental Information (Scotland) Regulations 2004 (EISRs) provide the main legal framework on devolved matters whereas the Freedom of Information Act 2000 covers reserved matters such as defence, international relations and the economy. The UK government has been accused of operating an ‘Orwellian’ unit that obstructs the release of sensitive information requested by the public under the Act.[[29]](#footnote-29) FoISA and the EISRs have made a huge difference but action is needed to keep the rights robust and human rights complaint. For example the Campaign for Freedom of Information produced a ‘Get it Minuted’ report in 2018 which identified 'failure to Minute Government meetings' as increasingly problematic and explained the rules for civil servants on the duty to minute government business. [[30]](#footnote-30) The issue has arisen again in 2020 on the lack of Minutes of key meetings involving the Minister, John Swinney, over exam issues during the pandemic[[31]](#footnote-31). The problem was also identified by the Public Audit and Post Legislative Scrutiny Committee’s evaluation of FoISA in May 2020 and reform urged[[32]](#footnote-32). However, the matter has stalled. The Scottish Government’s poor performance on FoISA delivery is still subject to enforcement action by the SIC who reported a decline in performance in September: ‘Failing to take action at this time will send a dangerous message to staff and the wider public about the perceived importance of openness, transparency and accountability through FOI, at a time when the public benefit arising from these characteristics has never been clearer.’[[33]](#footnote-33)

FoISA allows the Scottish Government to extend the number of bodies designated e.g. to keep up with changes in how publicly funded services are delivered. It has already consulted on the potential for extension to organisations which exercise functions of a public nature such as private care homes funded by public money and Third Sector organisations.[[34]](#footnote-34) Acting on the consultation is in keeping with the UN Human Rights Committee’s General Comment 34 on interpreting the ICCPR, which defines ‘public bodies’ and states that ‘The designation of such bodies may also include other entities when such entities are carrying out public functions’. Such an approach also fits with the introductory text of FoISA ‘An Act of the Scottish Parliament to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them; and for connected purposes.’[[35]](#footnote-35) Despite the clarity in human rights law, currently there are inconsistencies in Scotland on what is a public authority[[36]](#footnote-36) and who ‘are providing services for them’.

**Conclusion**

Using a human rights approach, FoI rights would be stronger in Scotland, compliance with the law would be better and the range of bodies designated for compliance would be more extensive. Therefore, using human rights law is clearly an advantage to enhance transparency and accountability. As we are in a pandemic compounded by a barrage of fake political and health news, accessing official information is critically important. *Therefore, FoI rights* must be robust. However, making an information request falls mostly on individuals and organisations such as trade unions. Unusually in Scotland the Third Sector use it less as ‘the closer their relationship with a public authority, the less likely a voluntary organisation will be to use FOI.’[[37]](#footnote-37)

1. **Case Study Process – Incorporation**

**UNCRC Incorporation**

The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill is underway at the Scottish Parliament and according to the Scottish Government it will ‘revolutionise’ children’s rights. As a model, incorporation is an ideal way to transpose international human right into Scot’s law which then must be interpreted by duty bearers and rights holders across all aspects of life. It is simpler than adding human rights into selected laws and to varying degrees.

The EqHRC is the lead Committee and has been deluged with submissions from individual organisations and alliances[[38]](#footnote-38). An emerging theme is the need for education on rights, for rights holders and duty bearers, and for accessible enforcement of rights. It is understood that a law cannot just rely on good intentions to be effective, there need to be consequences for failing to comply. The process has also involved a consultation. For example, Together and seven-member organisations organised two online engagement sessions with over 50 children and young people who shared their views on a range of issues, including:

* Whether the Bill would make it easier for them to access their rights.
* What Scottish Government and public authorities can do to ensure children’s views are listened to and taken into account.
* How children and young people would like to learn about their rights; and
* What the Bill could do to make children’s rights stronger

Engaging on the details of rights and method for enforcement builds ownership of rights and enables them to be practical and responsive.

**ICESCR**

In 2016, we observed that ‘the Scottish Government could define an expansive set of rights under the International Covenant on Economic Social and Cultural Rights (ICESCR). However, such rights are meaningless unless the Scottish Government also introduces mechanisms requiring duty bearers to deliver such rights and with an independent regulator to monitor impact.’[[39]](#footnote-39)

ICESCR already requires the Scottish Government to ‘progressively realise through the maximum of its available resources’ economic, social and cultural rights ‘by all appropriate means, including particularly the adoption of legislative measures.’[[40]](#footnote-40) In addition, ICESCR defines government duties and lists universal human rights such as:

* Article 11 (1) ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right ...’.
* Article 12 is the ‘right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’

The 2020 pandemic has had profoundly negative impacts on the enjoyment of economic, social and cultural rights, especially the right to health of the most vulnerable groups in society despite governments being under an obligation to take measures to prevent, or at least to mitigate, these impacts. The UN is clear that no one should be left behind due to the measures it is necessary to take to combat this pandemic.

The UN Committee on Economic, Social and Cultural Rights, which supervises Government compliance with ICESCR, has specifically decided to inform the behaviour and decisions of Governments by issuing a ‘Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights’. The purpose is to make recommendations to governments ‘to combat the COVID19 pandemic in a manner consistent with their obligations’ under the ICESCR. The Committee states:

* Disadvantaged and marginalized groups are severely affected.
* Certain categories of workers, such as delivery workers and refuse collectors, are exposed to heightened risks of being infected.
* Many health-care workers are being infected as a result of inadequacies in or shortages of personal protective equipment and clothing.

The Committee’s recommendations include:

* The inherent dignity of all people must be respected and protected, and the minimum core obligations imposed by ICESCR should be prioritised.
* Governments must adopt regulatory measures to ensure that health-care resources in both the public and the private sectors are mobilised and shared.
* All health-care workers must be provided with proper protective clothing and equipment against contagion and are consulted and heard by decision-makers.[[41]](#footnote-41)

Despite the potential of ICESCR to robustly address specific social and economic priorities in Scotland, it is not under consideration for incorporation, yet:

* The Programme for Government states the Scottish Government will continue work on the FM’s National Taskforce for Human Rights Leadership, and take forward our commitment to incorporate the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) into domestic legislation. Also actively consider the incorporation of the UN Convention on the Rights of Disabled People (UNCRPD) and the UN Convention on Racial Discrimination (CERD). [[42]](#footnote-42)
* At the September meeting of the Taskforce, members will give full consideration to incorporation of other relevant international treaties, as part of the recommendations the Taskforce will publish in March 2021 including CERD, UNCRPD and CEDAW, plus rights for older people and LGBTI communities.[[43]](#footnote-43)

**Conclusion**

Governments are responsible for people’s human rights and on a day to day basis those rights are effectively respected, protected and fulfilled by public bodies and organisations. If a government decides to ‘privatise’ or sub-contract the public service they are still liable to ensure, for example, a person’s right enjoy the highest attainable standard of physical health which is important in respect of PPE provision. ICESCR is relevant to the everyday lives of people, focusing on economic, social and cultural rights, and organising around them is key to addressing the causes of poverty and promoting a just agenda. Such a strategy should operate in tandem with ‘Fair Work Commission’, The Social Renewal Advisory Board and The No One Left Behind: Delivery Plan. Organised pressure is needed and sustained to make incorporation of ICESCR happen.

1. **Conclusions and recommendations**

‘I have heard serious people in Geneva refer to human rights as 'aspirations' and I have heard it said that human rights are a 'soft subject'. Both these misconceptions should be knocked on their heads. Human rights belong to all individuals and not to some future utopia. If those rights are violated, it represents a violation of the law, not the disruption of a dream. Human rights treaties and customary law are as 'hard' as trade or investment law.’[[44]](#footnote-44)

Professor Andrew Clapham

Undoubtedly the Scottish Government and the Scottish Parliament have consistently sought to protect human rights and comply with Article 1 of the ECHR ‘to secure to everyone within their jurisdiction the rights and freedoms defined in the ECHR’. All actions are enabled by the Scotland Act 1998 as well as the Human Rights Act 1998. However, 22 years after the Human Rights Act was passed and 14 years since legislation established the SHRC, the results are frankly disappointing. The barriers are well known. The challenge set down by the UN for International Human Rights Day 2020 is to tackle entrenched, systematic, and intergenerational inequalities, exclusion and discrimination which Jimmy Reid identified and addressed in 1972:

‘…Restructuring of the institutions of government and where necessary, the evolution of additional structures so as to involve the people in the decision-making processes of our society. The so-called experts will tell you that this would be cumbersome or marginally inefficient. I am prepared to sacrifice a margin of efficiency for the value of the people’s participation anyway, in the longer term, I reject this argument. To unleash the latent potential of our people requires that we give them responsibility.’

In reality, we have two distinct but interdependent problems for the equal enjoyment of human rights in Scotland: generating public interest in and take up of human rights; adopting an effective framework which ensures that the publicly funded services proactively comply with human rights. Until people understand and identify with human rights and see them working positively, they will be more inclined to view human rights as a problem rather than a solution. The credibility of human rights is not automatic, they have to be earned as something viable and solid to make Scotland fairer. Key to making that happen is for ‘duty bearers’ to comply with existing human rights law. The pressure for the enjoyment of rights cannot just come from those complaining about access to rights after all they are the ones least powerful. The spend of the public pound must become conditional on evidenced compliance. Despite frenetic activity on policy, services and budgets only sometimes are human rights specifically mentioned and too often they are erroneously interpreted as aspirations or a set of values when in fact they are a quite specific set of legal rights to be progressively realised to the maximum extent of a Government’s resources.

The Scottish Parliament elections in May 2021 provide an excellent opportunity to focus on human rights delivery in Scotland with each party setting out specific commitments in its manifesto. Those commitments should include agreement to improve human rights promotion and protection. Can you to be part of this challenge to make human rights real at home, in your job, as a volunteer and through your networks?

1. Pg. 48 at [5dda924905da587992a064ba\_Conservative 2019 Manifesto.pdf (website-files.com)](https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf) [↑](#footnote-ref-1)
2. 7th December 2020 [Ex-judge Sir Peter Gross to head human rights law review - BBC News](https://www.bbc.co.uk/news/uk-politics-55209269) [↑](#footnote-ref-2)
3. See ‘Rights, Remedy and Rollout’ in Third Force News, 8th December [Rights, remedy and roll out - TFN](https://tfn.scot/opinion/rights-remedy-and-roll-out) [↑](#footnote-ref-3)
4. At [Our Human Rights Respected Equally Delivered Fairly - The Jimmy Reid Foundation Website](https://reidfoundation.scot/portfolio/our-human-rights-respected-equally-delivered-fairly/) [↑](#footnote-ref-4)
5. UN website at [Human Rights Day | United Nations](https://www.un.org/en/observances/human-rights-day) [↑](#footnote-ref-5)
6. Copies of “Alienation” are available from the Reid Foundation and reproduced by kind permission of the Reid Family. [↑](#footnote-ref-6)
7. The ECHR is supervised by the Council of Europe, not the EU so Brexit has no impact on its legitimacy. [↑](#footnote-ref-7)
8. At [Resources | National Performance Framework](https://nationalperformance.gov.scot/resources) [↑](#footnote-ref-8)
9. Section 1(b) at [Social Security (Scotland) Act 2018 (legislation.gov.uk)](https://www.legislation.gov.uk/asp/2018/9/section/1/enacted) [↑](#footnote-ref-9)
10. Report on progress issued in May 2020 at [UK National Action Plan on implementing the UN Guiding Principles on Business and Human Rights: progress update, May 2020 - GOV.UK (www.gov.uk)](https://www.gov.uk/government/publications/implementing-the-un-guiding-principles-on-business-and-human-rights-may-2020-update/uk-national-action-plan-on-implementing-the-un-guiding-principles-on-business-and-human-rights-progress-update-may-2020) [↑](#footnote-ref-10)
11. At [First Minister's Advisory Group on Human Rights Leadership Home -](https://humanrightsleadership.scot/) [↑](#footnote-ref-11)
12. At [First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf](https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf) [↑](#footnote-ref-12)
13. [National Taskforce for Human Rights Leadership - gov.scot (www.gov.scot)](https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/) [↑](#footnote-ref-13)
14. Human rights Consortium Scotland [Human Rights Consortium Scotland – Civil society network to protect human rights in Scotland (hrcscotland.org)](https://hrcscotland.org/) [↑](#footnote-ref-14)
15. Para 2.4 at <https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-agenda-and-minutes-9-september-2020/> [↑](#footnote-ref-15)
16. At [Children (Equal Protection from Assault) (Scotland) Bill – Bills (proposed laws) – Scottish Parliament | Scottish Parliament Beta Website](https://beta.parliament.scot/bills/children-equal-protection-from-assault-scotland-bill) [↑](#footnote-ref-16)
17. At [Treaty bodies Download (ohchr.org)](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f8&Lang=en) [↑](#footnote-ref-17)
18. At [SNAP | Scottish Human Rights Commission](https://www.scottishhumanrights.com/projects-and-programmes/scotlands-national-action-plan/) accessed 25th November 2020. [↑](#footnote-ref-18)
19. At [Department of Health and Human Services Victoria | Coronavirus (COVID-19) (dhhs.vic.gov.au)](https://www.dhhs.vic.gov.au/coronavirus) [↑](#footnote-ref-19)
20. Accessed on 24th November 2020 at <https://www.gov.scot/publications/coronavirus-covid-19-daily-data-for-scotland/> [↑](#footnote-ref-20)
21. Scottish Government published report on 3rd June 2020 at <https://www.gov.scot/publications/exercise-iris-report/> [↑](#footnote-ref-21)
22. Roles and responsibilities set out at <https://www.gov.scot/publications/roles-responsibilities-membership-integration-joint-board/pages/2/> [↑](#footnote-ref-22)
23. Published 28th November at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3/EHRiCS052018R6Rev.pdf> [↑](#footnote-ref-23)
24. Quoted in a Blog by the BBC's [Martin Rosenbaum](https://www.bbc.co.uk/blogs/opensecrets/2006/05/about_martin_rosenbaum.html) on 1st September 2010 at [BBC - Open Secrets: Why Tony Blair thinks he was an idiot](https://www.bbc.co.uk/blogs/opensecrets/2010/09/why_tony_blair_thinks_he_was_a.html) [↑](#footnote-ref-24)
25. Treaty available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [↑](#footnote-ref-25)
26. For example, the Grand Chamber decision in the case of on Magyar Helsinki

Bizottság v. Hungary *(*Application no. 18030/11*)* 8th November 2016 <http://hudoc.echr.coe.int/eng?i=001-167828> and Studio Monitori and Others v. Georgia (applications nos. 44920/09 and 8942/10) 30th January 2020 at <http://hudoc.echr.coe.int/eng?i=001-200435> [↑](#footnote-ref-26)
27. Freedom of Information (Scotland) Act 2002, Survey of Designated Public Authorities’ by Craigforth Consultancy and Research for Office of Scottish Information Commissioner, March 2004. More organisations are covered under human rights law than FoISA e.g. over 200 housing associations. [↑](#footnote-ref-27)
28. See <http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.aspx> [↑](#footnote-ref-28)
29. #  Report in the Guardian 24th November 2020 'Orwellian' government unit obstructs freedom of information, says report’ ['Orwellian' government unit obstructs freedom of information, says report | Politics | The Guardian](https://www.theguardian.com/politics/2020/nov/24/orwellian-government-unit-obstructs-freedom-of-information-says-report)

 [↑](#footnote-ref-29)
30. At <https://www.cfois.scot/?p=8383> [↑](#footnote-ref-30)
31. Scotsman article at <https://www.scotsman.com/education/john-swinney-responds-directly-exam-results-cover-accusations-over-summer-meetings-sqa-3020695> [↑](#footnote-ref-31)
32. Published 27th May 2020, at pgs. 4-5 and at paras 14-18 <https://sp-bpr-en-prod-cdnep.azureedge.net/published/PAPLS/2020/5/19/Post-legislative-scrutiny--Freedom-of-Information--Scotland--Act-2002/PAPLS052020R2.pdf> [↑](#footnote-ref-32)
33. At [Commissioner publishes report on Scottish Government FOI performance (itspublicknowledge.info)](https://www.itspublicknowledge.info/home/News/20200910.aspx) [↑](#footnote-ref-33)
34. See analysis of responses at <https://www.gov.scot/publications/freedom-information-extension-coverage-consultation-analysis/> [↑](#footnote-ref-34)
35. FoISA at <https://www.legislation.gov.uk/asp/2002/13/introduction> [↑](#footnote-ref-35)
36. For example analysis of the decision of the ONS to consider RSLs as private non-financial bodies <https://www.tcyoung.co.uk/blog/2018/social-housing/ons-reclassification-rsls-private-bodies> [↑](#footnote-ref-36)
37. ESRC funded research 2008 – 2011, undertaken by Scottish Information Commissioner and Strathclyde University at <http://www.itspublicknowledge.info/home/SICResources/voluntarysectorresearch.aspx> [↑](#footnote-ref-37)
38. [United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill - Parliamentary Business :  Scottish Parliament](https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/115977.aspx) [↑](#footnote-ref-38)
39. See position statement from Scottish Government on ICESCR in July 2014 at [ICESCR+-+SG+position+statement+2014.pdf (www.gov.scot)](https://www.gov.scot/binaries/content/documents/govscot/publications/correspondence/2018/12/international-covenant-on-economic-social-and-cultural-rights-2014-position-statement/documents/international-covenant-for-economic-social-and-cultural-rights-scottish-government-position-statement-2014/international-covenant-for-economic-social-and-cultural-rights-scottish-government-position-statement-2014/govscot%3Adocument/ICESCR%2B-%2BSG%2Bposition%2Bstatement%2B2014.pdf) [↑](#footnote-ref-39)
40. Section 2 and see a full list of rights at the UN website <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> [↑](#footnote-ref-40)
41. Agreed on 17th April 2020, at [ICESCR COVID19.pdf](file:///C%3A%5CUsers%5Ccarol%5CDocuments%5CSCLD%5CUN%20Covid%5CICESCR%20COVID19.pdf) [↑](#footnote-ref-41)
42. ‘Protecting Scotland, Renewing Scotland, Programme for Government 2020-2021, published by the Scottish Government on 8th September 2020, Pg. 107 at [protecting-scotland-renewing-scotland (1).pdf](file:///C%3A%5CUsers%5Ccarol%5CDownloads%5Cprotecting-scotland-renewing-scotland%20%281%29.pdf) [↑](#footnote-ref-42)
43. Ibid at para 2.6 [↑](#footnote-ref-43)
44. Andrew Clapham, Professor of Public International Law, in an interview with the Graduate Institute of Human Rights on the publication of “A second revised and updated edition of Human Rights: [A](http://graduateinstitute.ch/clapham-humanrights) [Very Short Introduction”](http://graduateinstitute.ch/clapham-humanrights) published by Oxford University Press, 2nd December 2015 and found at [http://graduateinstitute.ch/home/relations-publiques/news-at-the-institute/news-](http://graduateinstitute.ch/home/relations-publiques/news-at-the-institute/news-archives.html/_/news/corporate/2015/what-will-our-human-rights-be-in) [archives.html/\_/news/corporate/2015/what-will-our-human-rights-be-in](http://graduateinstitute.ch/home/relations-publiques/news-at-the-institute/news-archives.html/_/news/corporate/2015/what-will-our-human-rights-be-in) [↑](#footnote-ref-44)