

HUMAN RIGHTS CONSORTIUM SCOTLAND

Report on Implementation of the International Covenant on Civil and Political Rights in Scotland to UN Human Rights Committee Hearing 1st- 2nd July 2015

About Us

The HRCS is a network of over 160 civil society organisations and individuals. We work to increase understanding of and support for, human rights amongst civil society, brief politicians on ways to protect and better promote human rights and highlight where human rights practice can improve. The HRCS is an independent organisation and is non-party political. We happily work with international, UK and regional human rights organisations but we are 'home grown' rather than being a Scottish offshoot of a UK wide organisation.

The HRCS agrees that recognising the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and that these rights derive from the inherent dignity of the individual. We also recognise that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom free from fear and want can only be achieved if conditions are created where everyone can enjoy his or her civil, political, economic, social and cultural rights.

The HRCS understands that the UK Government has a 'long-term plan to provide economic stability and security at every stage of life, to bring the public finances under control and reduce and raise the productive potential of the economy and increase living standards.'¹ The HRCS believes this plan can be delivered without attacking, undermining or demonising our human rights. This plan can be achieved by protecting the human rights of the most vulnerable eg disabled people and respecting the rights of groups of people such as trade unionists.

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¹ Queen's Speech to both Houses of Parliament on 27th May 2015. For more information see <https://www.gov.uk/government/speeches/queens-speech-2015>

Section 1 Context of ICCPR in Scotland

In this submission, we focus on impact of laws and policies as well as the detail of policy and legislation. We have drawn on the expertise of our members. We are very proud of some of the achievements in Scotland in respect of human rights but recognise much more needs to be done. We offer constructive criticism.

The Referendum Result and Subsequent Developments

ICCPR Article 1(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Children aged 16 and 17 years had the right to vote in the referendum on independence in Scotland in September 2014. The vote produced a 'No' result. The HRCS is delighted that 95% of the electorate registered to vote. The turnout was 84.5% with more than 90% of the electorate casting a vote in some areas which is a record for any election held in the UK since the introduction of universal suffrage in 1918. A total of 3,619,915 Scots voted Yes or No, We are proud that so many people chose to exercise their fundamental human right to vote in a free election.

After the referendum in Scotland, the Smith Commission was established and reported on what powers could be further devolved to the Scottish parliament from the UK parliament. There is some support for devolving employment law, including control over the minimum wage to Scotland. We await developments on what additional powers will be devolved to Scotland². Whatever the outcome, the Scottish Government has obligations under ICESCR and we urge the UN Human Rights Committee to make concluding observations directed at Scotland too.

Respecting, protecting and fulfilling human rights in Scotland

The HRCS welcomes Scotland's National Action Plan on Human Rights (SNAP). (See Appendix 1) We recognise this is a positive development to be celebrated nationally and internationally. However HRCS members recognise SNAP's effectiveness will be determined if it is adopted by our 10,000 + public services and if it makes a direct impact on the lives of the general public.

The HRCS welcomes the Scottish Government's announcement of a public information campaign on human rights to be undertaken later in 2015. Such a campaign can address the disinformation on human rights as well as positively promote human rights more broadly eg ICCPR as well as the ECHR.

Commentary on rights and their application in Scotland

The HRCS welcomes the submissions made by the Scottish Government and our NHRIs. In compiling this report we have invited submissions from members and undertaken desk-top research. We offer a civil society perspective on some of the same issues as well as raise new issues. The HRCS receives no income from either the Scottish or UK Governments. Our very limited resources means this report is not as detailed as we would prefer. We hope the UN Human Rights Committee will pose these questions to the UK delegation which will include civil servants from Scotland.

² MPs will debate the second reading of the Scotland Bill in the House of Commons on Monday 8th June 2015

Section 2. ICCPR and List of Issues Response

Constitutional and legal framework within which the Covenant is implemented (art. 2)

State Duty to Respect and Enforce Human Rights in UK

The ICCPR is not enforceable in Scottish Courts. The only international human rights treaty that has been incorporated in UK law is the European Convention on Human Rights (ECHR) through the Human Rights Act 1998 (HRA) and in Scotland also through the Scotland Act 1998 eg sections 57 and 100. The Scottish Parliament declined to incorporate the UN Convention on the Rights of the Child into Scots law during the passage of the Children and Young People Scotland Act 2014 and instead opted for a range of specific measures including: “The Scottish Ministers must keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements...³

Ask 1:

- a) That the Scottish Government be asked what steps it can take, within its devolved powers, to give effect to ICCPR in Scotland.
- b) That the Scottish Government provides statistics on how many times the ICCPR has been raised in proceedings in Scottish courts.
- c) The Scottish Government should be invited to detail what specific ICCPR training has been delivered to judges and sheriffs in Scotland.

The Human Rights Act (HRA)

The recently-elected UK Government is set to deliver on its Manifesto promise to scrap the HRA and introduce a Bill of Rights instead. (See Appendix 2) We want such plans dropped as:

- Creating a new Bill of Rights is a diversion from the real problem, which is ensuring that people across the UK enjoy and understand their human rights.
- The HRA has still to reach its potential in everyday places and situations across the UK. There is too little evidence that the HRA is considered and applied in the design, delivery and funding of public services.
- The HRA upholds UK values of fairness, respect and dignity.
- There is no appetite for reform of the HRA in Scotland. For example the Scottish Parliament voted in support of the HRA and ECHR in November 2014. (See Appendix 3) The discord and parliamentary time taken up by changing the law is unwarranted and un-necessary.
- There is a lot of misinformation about the work of the European Court of Human Rights (ECtHR) and its impact in the UK. The impact of the ECtHR is positive because human rights are independently assessed and judged. There is no tidal wave but a trickle of case decisions: for example, the ECtHR dealt with 1,997 applications concerning the UK in 2014, 1,970 were declared inadmissible and it delivered 14 judgments (concerning 27 applications), only four of which found a violation of the ECHR⁴.

³ Section 1(a) <http://www.legislation.gov.uk/asp/2014/8/section/1/enacted>

⁴ ‘UK Press Country Profile’ published by the European Court of Human Rights updated May 2015 http://www.echr.coe.int/Documents/CP_United_Kingdom_ENG.pdf

- Human rights are too often a convenient punch bag for bad government decisions or practices. This is unfair and unacceptable.

Ask 2:

- a) The UK Government should be invited to justify why it seeks to abolish the HRA.
- b) The UK Government should be invited to justify how it can even consider abolishing the HRA when the Scottish Parliament has, so recently, voted to uphold it.

Effective Functioning of NHRIs - Pursuing Individual Cases/Strategic Litigation

Although the GB Equality and Human Rights Commission (EHRC) can take up individual human rights cases in England and Wales, the SHRC is specifically prohibited from taking individual cases.⁸ While we do not expect there will be a lot of cases, the SHRC could fund and pursue ‘test’ cases that could improve public service practice for all. Overall there is a problem in Scotland of individuals asserting their human rights through the court process. (See appendix 4)

Ask 3:

- a) The Scottish Parliament should amend the Scottish Commission for Human Rights Act 2006 by deleting Section 6, so that the SHRC can take up cases.
- b) The budget of the SHRC should be increased accordingly so that there is at least the prospect of litigation in addressing breaches of human rights.

Use of Stop and Search Powers by Police Scotland Para 8

“It is also intolerable in a mature democracy that the power to search an individual without legal cause has been appropriated by the police without due parliamentary scrutiny or approval.” Alison McInnes, Member of the Scottish Parliament (MSP)⁵

The new national police force, Police Scotland, has introduced “consensual” stop and search on an industrial scale and it is an unwelcome and controversial tactic particularly as, we understand, officers carrying guns conducted thousands of searches. The routine carrying of guns by police is not merited and is not acceptable in Scotland. The issues raised by these changes in police service practice include:

- The individual being stopped may not be sufficiently clear about the distinction between a statutory and non-statutory search. There are insufficient safeguards to ensure consent is informed.
- The tactic amounts to an arbitrary intrusion, conducted without sufficient legal justification or suspicion.
- The potential impact is an erosion of public trust in the new, national force.
- The policy of randomly searching young children without their parents’ consent which is “indefensible”.
- Despite assertions that the tactic reduces violence, disorder and anti-social behaviour, the Scottish Police Authority’s (SPA’s) scrutiny review on stop and search policy and practice concluded they could not be robustly corroborated.

⁵ Consultation response from Alison McInnes to Police Scotland, March 2015.

A consultation was subsequently issued by Police Scotland. There is an opportunity to ensure change via legislation, as amendments to the Criminal Justice (Scotland) Bill⁶ were tabled on 17 February to:

- ensure all stop and searches have a robust statutory footing;
- require Ministers to establish a code of practice, similar to that established in England and Wales, to be approved by Parliament and updated every four years;
- necessitate the Scottish Police Authority (SPA) to provide an account of the use of stop and search in its annual report to Parliament;
- place a duty upon a constable to consider a child's best interests when searching them.

These amendments would not limit the already extensive and appropriate statutory powers that police have to search for eg drugs, guns and knives.

It is worth noting that there has been a damning report by Her Majesty's Inspectorate of Constabulary in Scotland (HMICS)⁷ and in response the Cabinet Secretary for Justice announced that an independent advisory group, chaired by John Scott QC, will examine the use of stop and search powers. This is due to report back in August⁸.

Ask 4: Will the Scottish Government, via amendments to the current Criminal Justice (Scotland) Bill, provide clarity for the police and the public on duties and rights in relation to the selective use of stop and search powers?

Violence against Women (Para 10)

Every 13 minutes a woman in Scotland experiences violence⁹. There are a number of concerns regarding the prosecution of sexual violence in Scotland. Establishing corroborative evidence particularly in these crimes is a significant hurdle in cases proceeding to court. The Scottish Government had been committed to reforming the rules on corroboration but has now withdrawn such proposals. The Scottish Government still believes there is a case for reform of the law.¹⁰

A substantial submission was made by a coalition of NGOs¹¹, led by Scottish Women's Aid, to the UN Rapporteur on VAW who visited the UK, including Scotland, in 2014. It is impossible to summarise all of the NGO concerns in this brief submission, however we concluded that the primary prevention of violence against women is addressing gender inequality.

⁶ A date for consideration of amendments has not yet been announced by the Scottish Parliament

⁷ Audit and Assurance Review of Stop and Search: Phase 1 March 2015

http://www.hmics.org/sites/default/files/publications/HMICS%20-%20Audit%20and%20Assurance%20Review%20of%20Stop%20and%20Search%20-%20Phase%201_0.pdf,

⁸ For further information see <http://news.scotland.gov.uk/News/Stop-and-Search-review-181d.aspx>

⁹ Scottish Government (2013) *Domestic abuse recorded by the police in Scotland, 2012-13*

¹⁰ Scottish Government News release 21st April 2015 <http://news.scotland.gov.uk/News/Corroboration-abolition-removed-from-Bill-1866.aspx>

¹¹ Scottish NGO briefing for UN Special Rapporteur on Violence Against Women

March 2014 <http://www.engender.org.uk/content/publications/UNSR-briefing-final---March-2014---External.pdf>

The public sector equality duty (PSED) is a pillar of the Equality Act 2010 that obliges proactive due regard for equalities issues across all public authority activities. It was designed to bring together three predecessor duties on gender, race, and disability and to add a requirement to act to reduce discrimination and promote equality with regard to age, sexual orientation, religion and belief, gender reassignment, pregnancy and maternity, and marriage and civil partnerships. The PSED is interpreted and implemented differently across the devolved nations.

The equalities sector in Scotland successfully lobbied for the Scottish-specific regulations to require public bodies to publish equality impact assessments, as well as information on occupational segregation, the gender pay gap and other measures that relate to gender equality. English public bodies are not obliged to fulfil any of these requirements.

The ambition of all the public duties on equality has been to shift the onus for action to tackle discrimination from the individual to public bodies. In practice, the diluted focus on gender under the PSED amounts to regression, and has resulted in a selective approach to equalities across Scottish public bodies. Superficial adoption of the language of intersectionality and cross-cutting equalities strands by public authorities has masked weak implementation and compliance failures across the board. Scottish Women's Aid has carried out a specific analysis of local authority's adherence to the PSED in relation to activity to address violence against women¹².

Additional areas to highlight:

- A survey by Wise Women looking at disabled women's experiences of violence, identified that 73% of respondents had experienced domestic abuse and 52% of them identified that discrimination and stereotyping had stopped them being able to access services.¹³ In the case of most groups of marginalised women, where there has been any specific work done, it has mostly focussed on understanding the impact of gender based violence. We are not yet at the stage of automatically integrating consideration of the needs of women who experience multiple and intersecting forms of discrimination into policy, planning and service delivery. This applies across the public, private and NGO sectors.
- There have been several inquiries over the last 20 years into the high rates of suicide and self-harm among women prisoners at Cornton Vale Prison. Little has changed as a result. It is a matter of concern that so many women with histories of abuse in childhood and adulthood end up in the women's prison at Cornton Vale. We hope that the most recent enquiry, carried out by the former Lord Advocate, Dame Elish Angiolini, may result in more significant action for change at Cornton Vale.¹⁴

There is now a specific organisation working to support men who have experienced domestic abuse, and this is welcomed. <http://www.abusedmeninscotland.org>

¹² <http://www.scottishwomensaid.org.uk/publications-resources/resource/scottish-womens-aidsanalysis-local-authority-equality-outcomes>

¹³ <http://www.wisewomen.org.uk/docs/Daisie%20Report%20PDF.pdf>

¹⁴ Commission on Women Offenders final report April 2012
<http://www.scotland.gov.uk/Resource/0039/00391828.pdf>

Ask 5

- a) What steps will the Scottish Government take to ensure that the crime of rape is prevented and prosecuted robustly whilst respecting the right to a fair trial?
- b) What steps is the Scottish Government taking to ensure that the PSED is complied with, robustly?
- c) What steps is the Scottish Government taking to reduce the number of women experiencing violence, who end up in prison?
- d) Does the Scottish Government agree that we need to move from a punishment model to a restorative one, which can tackle the complex needs exhibited by women prisoners and, crucially, reduce reoffending?

Prohibition on cruel, inhuman or degrading treatment or punishment (para 19) Hitting Children as a Punishment

It is eleven years since the Scottish Parliament passed the Criminal Justice (Scotland) Act 2003 which introduced, in Section 51, a defence for adults of 'justifiable' assault¹⁵ when they hit a child as a punishment, and sought to prohibit the use of implements, blows to the head and shaking.¹⁶ At the time the Scottish Executive decided not to evaluate the impact of S51 although research had been published of the operation of Section 74 of the same Act¹⁷

There have been two attempts to amend this S51, in 2005 and 2014, but support has been so weak that the amendments have not even been pushed to a vote by MSPs (Members of the Scottish Parliament). Currently there is an opportunity to amend the law and give children equal protection from violence in the Criminal Justice (Scotland) Bill which is beginning Stage 2 of the process¹⁸. The incidence and impact of physical punishment on children in Scotland is not well understood. (See Appendix 5)

Ask 6: Will the Scottish Government use the opportunity of the current Criminal Justice (Scotland) Bill and table/accept an amendment to the 2003 legislation to give children equal protection from assault?

Right to participate in public life (art 25)

Convicted prisoners were not permitted to vote in the referendum in Scotland in September 2014 and we remain concerned that the substance of the ECtHR judgement on prisoner voting¹⁹ continues to be misunderstood.

Ask 7: Will Scotland lead the way in UK and implement European Court of Human Rights judgement on prisoner voting?

¹⁵ S51 (1) of the Criminal Justice (Scotland) Act 2003
<http://www.legislation.gov.uk/asp/2003/7/section/51>

¹⁶ Ibid S 51 (2)

¹⁷ Published by the Scottish Executive in November 2006

<http://www.scotland.gov.uk/Publications/2006/11/24133659/0>

¹⁸ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/65155.aspx>

¹⁹ Prisoners' Right to Vote published by the European Court of Human Rights February 2015
http://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf

Section 3 What upsets our members?

Impact of Inequality

Poverty and inequality results in an unequal enjoyment of rights across the UK.

Indicators include:

- The Scottish Census 2011 revealed that for all 25+ age groups there are more women than men with long-term health conditions or impairments.
- Disabled women are disproportionately impacted by current austerity measures within the UK.
- Disabled women are less likely to be in full-time employment than non-disabled women;ⁱ but are most likely to be the primary carer as well as the primary home-maker.ⁱⁱ As a result, disabled women are disproportionately and specifically impacted, compared to non-disabled women and men, by current UK government austerity policy, particularly benefits cuts.
- Overall, 1 in 5 children in Scotland live in poverty, rising to 1 in 3 in deprived areas ⁱⁱⁱ Poverty disproportionately affects children with a disabled parent (17% of Scotland's child population). One in 3 children who live with a disabled adult live in poverty, compared to 19% of children who do not live with a disabled adult.
- Gender discrimination in employment persists: for example only 15% of senior police and 25% of Senators of the College of Justice in Scotland are women; only 10% of UK national newspaper editors and 8% of Directors of FTSE 250 firms are women.
- HIV related stigma remains a huge barrier for people seeking and sustaining employment

The UK Government's failure to address poverty and inequality means that a number of human rights concerns continue and these are now summarised.

Unequal Scrutiny of Human Rights Application in Scotland

ICCPR Article 2 Each state should adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Scottish Parliament

There is an unequal scrutiny of rights in the UK. At the UK Parliament there is a dedicated Human Rights Committee but calls for one to be established at the Scottish Parliament, since 2011, have been ignored. Human rights, it is argued, are an integral part of the business of each committee. However, Glasgow University, which studied the work of all parliamentary committees in November 2011, published a report that concluded that there was considerable room for improvement:

“Although we are limited by the terms of reference to a single calendar month, the evidence for the period reveals a widespread disregard of the normative and institutional framework for conceptualising and analysing human rights issues. Although there is no evidence to suggest that this is deliberate, most Committees did not seize the opportunity to imbue human rights in their respective field of activities.”²⁰

²⁰ 'Scottish Parliament Committees' Perspective on Human Rights - A Glasgow Human Rights

Ask 8: Will the Scottish Government ensure that a Human Rights Committee is set up at the Scottish Parliament so that there is a thorough examination of the human rights implications of each Bill, inquiry, petition and business item? If this is resisted, will each parliamentary committee appoint a human rights rapporteur so that there is a focus on human rights at every stage of the committee's work and deliberations?

Changing the Public Sector Culture

The HRCS supports the delivery of Scotland's National Action Plan including the 'Better Culture Action group' as there is very little evidence of a human rights culture rooted in our public services in Scotland. UNISON Scotland, which represents 160,000 public service workers advises that "members don't generally operate in a human rights culture"²¹. This opinion is supported by other evidence, .e.g. two surveys of the public sector's delivery of their human rights duties under the HRA in 2006²² and in 2011⁶.

Ask 9:

- a) What specific steps can be undertaken to instil a human rights culture within our 10,000 public sector organisations and evaluate its **impact** on practice?
- b) When will there be clear evidence of a human rights culture in our public services?

Transparent and Accountable Sentencing

Article 6(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The present UK law allows drivers who have been disqualified from driving, e.g., because they have killed someone, to apply to the court to have their driving licence restored before their period of disqualification has been completed²³.

Victims injured and families bereaved by road crashes have no knowledge that the penalty of disqualification imposed by the courts will not be fulfilled. These victims suffer secondary victimisation when they realise that an offender's ban has been rescinded. One such family said that the driver "wished to make his life easier. Well, our family's sentence is for life and our lives will never be the same again." In another case a husband was in shock after seeing the driver who killed his wife driving locally²⁴.

For a number of years there has been consideration in Scotland of introducing an "opt-in" right for families so that they are notified if the convicted person applies to the court for the early return of a licence. The continued absence of an "opt-in" system to inform families who have been bereaved or victims seriously injured in road crashes by these drivers, discriminates against victims and leaves them with no remedy²⁵.

Network Report for the Cross-Party Group on Human Rights' pub April 2012 Page 20

²¹ Report of Responses to Our Consultation Human Rights in a Public Servant's Oath? Pub by HRCS

²² 'Delivering Human Rights in Scotland: A Report on Scottish Public Authorities' pub September 2006

²³ <https://www.gov.uk/driving-disqualifications/apply-to-reduce-your-disqualification-period>

²⁴ International Covenant on Civil and Political Rights Article 23 & 26

²⁵ International Covenant on Civil and Political Rights Articles 2,6, 7,14,16

The essence of human rights is to promote equal rights for everyone. However, as these statistics show, victims and victim families, fundamental groups in society, do not enjoy equal rights.

Statistics	2010	2011	2012	2013
Number of convicted persons that applied for removal of disqualification after a disqualification*	336	323	311	234
Number of convicted persons that applied for removal of disqualification after a disqualification and were successful*	222	235	228	183
*RE: FOI2014248 Request for information 21 st January 2015 (Scottish Court Service)				
Number of victims informed of application for removal of disqualification after a disqualification	0	0	0	0

Article 6 of the ECHR includes a provision for the sentence to be given in open court and this process of returning a driving licence early should be the subject of equal transparency and consideration of the public interest before a determination is made by the court. It should not be a passive process and it is a matter of some public interest given that we reasonably assume drivers subjected to a ban are not driving on public roads.

Ask 10: The Scottish Government introduces without further delay, an “opt-in” right for families who have been affected by a driver who has been banned from driving.

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 17: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.

Impact of UK Government austerity measures on vulnerable people

The UK Government’s welfare reforms are jeopardising disabled people’s right to life by increasing the occurrence of suicide after loss of benefits. Research by ICM Research Group found that 20% of GPs reported patients having suicidal thoughts due to stress from the Work Capability Assessment (WCA) and appeals process.^{iv}

The blog ‘Calum’s List’ recorded at least 30 suicides where early welfare reform changes were alleged to have had some culpability.^v The Mental Welfare Commission of Scotland (MWCS) aired ‘major concerns that the WCA is not sensitive enough to capture the elements of mental illness that mean a person is unable to function in a workplace’.^{vi} It investigated the death of a woman receiving mental health treatment who committed suicide after her Employment and Support

Allowance (ESA) was stopped^{vii} and found a number of deficiencies in the way the claimant was assessed and informed of the decision.

A Department for Work and Pension (DWP) response to a Freedom of Information request found that between January and November 2011, 1,300 people died within three months of being found partially fit for work.^{viii} Further, 43% of appeals in Scotland against decisions made in the Work Capability Assessment have been successful,^{ix} suggesting that a substantial proportion of initial assessments and decisions are wrong.

Paul Farmer, Chief Executive of a leading UK mental health charity, Mind, resigned from his position on the DWP's WCA review panel, stating serious concerns that claimants with mental health problems (40% of all claimants) are not having their needs met.^x

Ask 11: Will the UK Government agree to reform the current system to introduce respect for the human being, and protect the human rights of poor and disabled people who are in receipt of welfare benefits?

Access to Justice

Article 14(1): All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

Employment tribunals

The right to access and obtain a fair hearing has been undermined by the UK government introducing a new fee regime for taking a case to an Employment Tribunal (ET). Under the scheme employees must find fees of £1,250 to bring a claim against an employer. This has limited the ability to seek justice for many workers. Since the fees were introduced cases have dropped by 73%. The impact is a breach of human rights by denying access to justice for lower paid workers.

Since the introduction of fees in 2013:

- Unfair dismissal claims are down 74%,
- race discrimination cases are down 61%,
- disability discrimination cases are down 63%
- Sex discrimination cases are down a massive 91%

Ask 12: Will the UK Government abolish the new fee regime and instigate an effective access to justice system which complies with the duty to provide, without any discrimination, equal protection of the law to working people.

Freedom of Expression

Article 19 (2): Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas...

Extend Scope of Freedom of Information (Scotland) Act 2002

The Freedom of Information (Scotland) Act 2002 (FoISA) introduced an enforceable right of access to information but the value of the right has been diminished as the way that public services are delivered has changed. There is a need for legal reform to provide a right of access to information on the spending of public money by extending the range of organisations covered and increasing the information routinely disclosed to include all new Scottish Government contracts and tender documents. This change would involve proactive disclosure by existing public authorities such as the Scottish Government, NHS boards and local authorities, of specified contract information.

Ask 13:

- a) Will the Scottish Government introduce a comprehensive extension to FoISA when it launches its consultation on reform in June 2015? There needs to be a simple system so that people can assert their right to receive information from public bodies, rather than the current, confusing system where some bodies are covered and some are not.
- b) Will the Scottish Government make private contractors subject to FoISA? Transparency and openness should be part of doing business with the public sector. We believe contractors who build and maintain hospitals and schools, who build and maintain trunk roads or water and sewage facilities, run privately managed prisons or provide prison escort services whether via PFI/PPP or any other contracts, should be covered by FoISA. Trusts and other arms-length organisations (ALEOs) running public-service facilities should also be covered as should key organisations such as the Convention of Scottish Local Authorities (COSLA)²⁶. We note that the a Scottish Government consultation resulted in “near universal support” from everyone who commented on the proposals to extend coverage of the Act, apart from the contractors or other designated service providers.²⁷
- c) Will the Scottish Government include contractors responsible for contracts above certain values to be brought under FoISA? We accept that the thresholds must be realistic and subject to debate and public consultation. This change would bring certain contractors within the scope of FoISA in their own right. For example contracts over £10,000 and all new local government contracts and tender documents over £500 – including all performance indicators, break clauses and penalty measures. Voluntary organisations and charities delivering services for the public sector will, therefore, be brought within the scope of FOISA and this is right as the focus should be on the public’s right to know rather than who is delivering the public services.
- d) Will the Scottish Government bring all housing associations under FoISA so that all tenants in social housing have the right of access to information. This was first promised by the the Scottish Executive, in March 2002. Housing associations are already covered by data protection and health and safety laws so they have to comply with a series of regulatory laws that give individuals enforceable rights.

²⁶ COSLA is “the national voice for local government in Scotland”. For more information see <http://www.cosla.gov.uk/>

²⁷ Consultation Paper, Extension of Coverage of the Freedom of Information (Scotland) Act 2002 (FOISA), Scottish Government Response Paper, January 2011. <http://www.scotland.gov.uk/Resource/Doc/175356/0112479.pdf>

Cyber bullying

Cyberbullying members of the media is having a serious effect on freedom of expression. A survey into the extent of online abuse against journalists in Scotland has revealed cases where reporters have feared for their own personal safety as a result of cyberbullying²⁸. In some cases it led to journalists retreating from the use of social media and worrying about what stories to cover and how to report them. It should be noted that using social media is often part of the job which a journalist is required to undertake, in addition to writing copy or delivering broadcasts.

The survey, for the National Union of Journalists (NUJ), revealed that journalists were self-censoring material they were writing, as a result of online abuse, threats of violence and intimidation where journalists and/or their families had been threatened. It is a major problem for freedom of expression in Scotland if journalists, acting as watchdogs for the public, develop tendencies towards self-censorship, avoiding contentious stories, undermining the fundamental human right to freedom of expression in order to avoid being threatened and abused. Overall we are concerned about protecting the public in Scotland from the 'chill effect' persistent abuse is having on individual journalists and workplaces. In addition to the NUJ's concerns for the health and wellbeing of its members and their families, such actions impact upon society's right to be informed and the public are therefore unable to make rational and well-informed decisions about what is happening in society.

Ask 14:

- a) What steps can the government take to ensure employers within the media industry understand that this is not a 'normal' part of doing business in a democracy and take effective steps to prevent and react to such abuse including co-operation with law enforcement agencies when necessary? Private sector action is consistent with the UN 'business and human rights' initiative.
- b) Has the UN Human Rights Committee raised cyberbullying with companies such as Twitter, on what specific measures it has taken and how technology can be used, to protect the human rights of journalists?
- c) Is the Scottish Government satisfied that law enforcement agencies, such as the police and prosecutors in Scotland, have taken robust measures to prevent as well as address cyberbullying against journalists and the public?

Right to Join and Participate in a Trade Union

Article 22 (1): Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

Successive UK Governments have acted to undermine workers' legal protections and introduced a series of anti-trade union laws. Such attacks on trade union rights are attacks on fundamental human rights. There is real concern that such attacks threaten the very existence of trade unions across the UK.

²⁸ Cyberbullying the Media survey of NUJ members in Scotland by Fiona Davidson of Glasgow branch NUJ and Dr Sallyanne Duncan, University of Strathclyde, available at <https://www.nuj.org.uk/news/cyberbullying-the-media-survey/>

Right to strike

The UK government proposes to pass a law requiring 50% of workers in a workplace to vote for strike action before it is legitimate. The proposed Trade Unions Bill would make it illegal to hold strike action unless there is at least a 50% turnout and 40% or more of the people eligible to vote back such action within “core public services”. Currently, there is no minimum turnout to validate a ballot and only a simple majority is required. The Bill, if passed into law, would also remove restrictions on using temporary workers to cover strikes.

It should be noted that this government was elected on just 24% of eligible votes on 7th May 2015. 66.1% of the electorate voted giving the government 36.9% of the votes cast

Facility time

There is an attack on the rights of elected trade union representatives to represent members. Facility time, which is the time off agreed jointly by the union and the employer to carry out union work, is being withdrawn or reduced, particularly within the public sector. Critics of facility time fail to see the benefits it brings:

- Overall productivity gains worth between £4bn to £12bn to the UK economy;
- Savings of at least £19 million as a result of reducing dismissals;
- Savings to employers of between £82m - £143m in recruitment costs as a result of reducing early exits.

Public procurement

The Scottish government could do more with the public procurement process in order to promote and protect worker’s rights. For example obliging contractors to pay the ‘living wage’²⁹, which would reduce inequality and lift thousands out of poverty, must be a pre-requisite on all public sector contracts.

Generally, there is a growth of insecure, two-tier work in the labour market which is underpinned by numerous loopholes and inadequacies in our labour law, not least of which is the arbitrary legal distinction between workers and employees that means that many workers are not entitled to legal rights and protections.

The Office for National Statistics (ONS) estimate 1.4 million (April 2014) people are employed on zero hour contracts in the UK, rising from 134, 000 in 2006. Zero-hours contracts, or casual contracts, allow employers to hire staff with no guarantee of work. They mean employees work only when they are needed by employers, often at short notice and some are not permitted to work with any other employer. Their pay depends on how many hours they work. Zero hour contracts particularly impact more vulnerable groups in the labour market eg young people and in workplaces that employ non-UK nationals especially sectors such as food processing, cleaning, hospitality, agriculture, care and construction. Zero hour contracts also impact on workers wellbeing. A survey conducted by MASS 1 for Unite, the union, found that 69% of respondents felt anxious about being on a zero hour contract.

²⁹ There are currently 220 living wage employers <http://scottishlivingwage.org/>

The HRCS believes that: a system of guaranteed minimum hours in all contracts as standard, should be introduced; and zero hour contracts must be opt-in and must only be permitted if there is a collective agreement in place with an independent trade union or a worker voluntarily agrees to such a contract.

Umbrella companies, set up to deny workers their full wages, should also be banned by law. It is difficult to accurately measure, however it is estimated that around 200,000 people are employed by umbrella companies in the UK. According to UCATT³⁰, the UK Treasury loses around £3,800 for every construction worker employed on such contracts. Therefore on lower estimates this would put the loss to the UK economy of tens of millions of pounds each year.

Ask 15:

- a) What steps will the UK Government take to proactively respect Article 22 of the ICCPR in the UK and in Scotland?
- b) What steps will the Scottish Government take, via the public procurement process, to improve employment practices and respect worker's rights?

Blacklisting

Blacklisting is a practice whereby a list of individuals is designated for special discrimination or boycott by (potential) employers. Blacklisting is a particularly insidious practise despite some culprits justifying their motivation as common sense, for public good or commercially wise. Blacklisting is a clear breach of human rights as it lacks transparency, accountability and seeks to punish those who express an unwelcome opinion or who stand up for human rights and trade union rights.

Companies which have blacklisted workers on grounds of trade union membership or for raising issues around health and safety should be refused procurement contracts from the public sector. They must also be banned from bidding from future contracts until they take suitable remedial actions, including admitting their part in blacklisting workers, providing adequate compensation and employing workers previously blacklisted.

The Select Committee on Scottish Affairs at the UK Parliament has published a report³¹ which makes a series of substantial and reasonable recommendations including:

- That the UK Information Commissioner's Office (ICO)³² redouble its efforts to find and contact as many of the individuals whose names were on the original TCA list as possible-including the families of those blacklisted workers who may have passed away. (Paragraph 43)
- In order to maximise the number of victims who are compensated, the deadline for applications to the scheme be extended to allow more victims of blacklisting to access the scheme. (Paragraph 44)

³⁰ UCATT is the trade union for the construction sector in the UK. <http://www.ucatt.org.uk/>

³¹ 'Blacklisting in Employment: Final Report' pub by House of Commons on 27th March 2015
<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmsscotaf/272/27202.htm>

³² During 2008/09 the ICO carried out an investigation into employment blacklisting in the construction industry and seized information from the Consulting Association (TCA). For more information see <https://ico.org.uk/for-the-public/construction-blacklist/>

Since the Committee began its work, and despite an increased focus on the practice of blacklisting, it was “gravely concerned that, in some areas at least, the practice of blacklisting appears to be on-going and many questions remain unanswered.” (Para 5). The report acknowledged that blacklisting is not confined to the construction industry and concluded that:

“Despite the progress and positive steps which have been taken during the course of our inquiry, in this final report we have identified that many questions in relation to the practice of blacklisting remain unanswered. We are specifically concerned as to whether the extent and breadth of the practice is fully known, and whether this odious practice is ongoing within the construction industry. We are convinced that the only way to fully answer these questions is through a full Public Inquiry. We recommend that the Government take immediate steps to launch such an inquiry as a matter of priority in the new Parliament. (Paragraph 61)”

Ask 16:

- a) Will the UK Parliament act on the recommendations contained in the Select Committee’s report?
- b) Will the Scottish Parliament act on the recommendations contained in the Select Committee report to the fullest extent possible under the devolution settlement?

Article 25: Right to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections ... guaranteeing the free expression of the will of the electors;

The Lobbying Act 2014 - The proper title is the ‘Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014’, and it amended legislation passed in 2000 that also proved problematic. Under part two, campaigning organisations such as charities must now register with the Electoral Commission as non-party campaigners if they spend more than a threshold of £20,000 in England and £10,000 in Scotland, Wales or Northern Ireland on certain regulated activities during the election period. The Act expands the list of regulated activities and lowers the upper spending limits. The impact has been various, e.g. there has been a chilling effect on the activities of some organisations and some have scaled back their campaigning activities. Voters will suffer as the amount of information publicly available may be reduced, making it more difficult to form an opinion. That is not good for our democracy.

Ask 17: The Act is abolished and legislation passed that is ICCPR compliant.

Thanks to the organisations that informed this submission and assistance with editing the text. For further information contact:

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Appendix 1 SNAP

Scotland is the first part of the UK to have a ‘National Action Plan on Human Rights’. This initiative has been undertaken by the Scottish Human Rights Commission (SHRC) and was launched in December 2013.

<http://www.scottishhumanrights.com/actionplan>

Appendix 2 UK Government Policy

In the Queen’s speech on 27th May 2015 it was announced "My Government will bring forward proposals for a British Bill of Rights". In the Queen’s Speech Briefing Pack, available on the Ministry of Justice website at page 75, states:

“The Government will bring forward proposals for a Bill of Rights to replace the Human Rights Act. This would reform and modernise our human rights legal framework and restore common sense to the application of human rights laws, which has been undermined by the damaging effects of Labour’s Human Rights Act. It would also protect existing rights, which are an essential part of a modern, democratic society, and better protect against abuse of the system and misuse of human rights laws.”

Appendix 3 Scottish Government Policy

The Scottish Parliament voted in favour of the following Scottish Government motion on 11th November 2014 by 100 votes to 10:

“ The Parliament re-affirms and re-asserts, on behalf of all of the people of the community of Scotland, the inalienable human rights and fundamental freedoms that are the common inheritance of all members of humanity; recalls the particular importance to the Parliament, through its founding statute, its founding principles and in all aspects of its day-to-day work, of human rights in general and of the European Convention on Human Rights in particular; acknowledges the constitutional responsibility of the Parliament to uphold the principles and values expressed in the convention and to respect, protect and realise the rights and freedoms that it enumerates; further acknowledges the importance of that work not only in relation to Scotland, but also in establishing and maintaining standards of best practice, which provide a benchmark for human rights elsewhere in the world; expresses its confidence in, and support for, the Human Rights Act 1998 as a successful and effective implementation of the convention in domestic law, and believes that the principles and values that inform the convention, the rights and freedoms that it enumerates and the Acts that incorporate it into law, should be a source of unity and consensus across the whole of society and should enjoy the unequivocal backing of all who are committed to upholding human rights, democracy and the rule of law.”

Appendix 4 Cultural Problem

Historically, we have had a problem in people raising human rights cases in Scotland, including those which involve equality issues:

- The Faculty of Advocates has commented in 2004: “To date 85% or more of human rights cases have involved Article 6 procedural challenges in criminal proceedings. In a small jurisdiction like Scotland the limited throughput of

litigation means that developments in the substantive law could be fitful and protracted were they to depend solely on complaints brought by individuals.”³³

- In 2004, the then Equal Opportunities Commission stated “There is little tradition in Scotland of interest group intervention, and indeed no tradition at all of interest groups taking judicial reviews.”³⁴

So how bad is the problem? In judicial review proceedings, a court reviews the lawfulness of a decision or action made by a public body. Of the 866 Judicial Reviews in Scotland in the last 3 years there have been a narrow range of issues adjudicated eg there were only 3 on housing, 6 on the environment and 1 on social security. Even when cases do go to court research by Brodies on planning decisions in the last 10 years show that 75% of cases were unsuccessful³⁵. This is not inspirational.

Legal Context

There is a role in encouraging and informing people about access to justice. People need access to advocates or some degree of expert assistance to help make informed decisions about whether they should go to law to address a wrong. The State could act to make access to justice more real.

For example currently there is no obligation on a public authority covered by the Human Rights Act similar to that which applies to freedom of information cases in Scotland. Section 15 of the Freedom of Information (Scotland) Act 2002 “Duty to provide advice and assistance

(1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

(2) A Scottish public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 60 is, as respects that case, to be taken to comply with the duty imposed by subsection (1).”

The Section 60 Code, revised and published on 10th December 2014, provides more detail on what is expected of public authorities³⁶.

The rules which enable people to access to justice are theoretical rather than practical. Cost is a huge factor in preventing cases ever going to court. There is no existing equivalent in Scotland to Article 9 of the Aarhus Convention³⁷ (to which the EU has subscribed) which states that members of the public should be able to challenge environmental decisions, and the procedures for doing so shall be adequate and effective and “not prohibitively expensive”. It is useful to note that the

³³ ‘Scottish Commission for Human Rights: Analysis of Consultation Responses’ pub by Scottish Executive (2004) para 5.18

³⁴ Scottish Executive Social Research, ‘Scottish Commission for Human Rights: Analysis of Consultation Responses’ F. MacDonald and E. Thomson (2004) Para 5.20)

³⁵ ‘Judicial review of Planning Decisions in Scotland’ pub by Brodies 2014

<http://www.brodies.com/sites/default/files/pages/planning%20e-update%20report%20february%202013.pdf>

³⁶ <http://www.scotland.gov.uk/About/Information/FOI/Section60Code3>

³⁷ <http://www.unece.org/env/pp/contentofaarhus.html> and for recent commentary see UK Human Rights Blog

1st December 2014 “Why domestic Aarhus rules are not wide enough to comply with the Convention”.

Scottish Parliament can only pass legislation which is competent and that includes complying with the ECHR and EU law.

Existing law has a depressing effect on raising cases at court:

- Article 13 of the ECHR 'right to an effective remedy' is not incorporated into the Human Rights Act sending out a message that Governments do not want people to go to court to settle wrongs;
- Section 6 of the Scottish Commissioner for Human Rights Act specifically prohibits the SHRC taking up or advising on cases which creates a gap in its ability to help people and communities.

Failure to provide for an effective remedy, a human right, has arisen in a number of equality issues. In particular we are concerned about the right to an effective remedy for disabled people under the Disabled Persons' Parking Badges (Scotland) Act 2014 and in the schemes established by local authorities for the determination of social care cuts, and in determining social care packages.

Appendix 5 Physical Punishment of Children in Scotland

The impact of physical punishment on children's lives and the failure of the State to protect children is a source of shame and concern. It also, unintentionally, sends a message to some of our most vulnerable and disempowered children that their rights are weak and that the State cannot protect them. The extent and use of physical punishment in Scotland is not well understood.

The investigation into child abuse and neglect in the Western Isles (Eilean Siar) was published in 2005³⁸ and is instructive about the use and effect of physical punishment in one home. The Social Work Inspection Agency concluded that "...the children were subjected to physical abuse throughout their childhood until their removal from home. Some of the physical injuries to the children were caused by over-chastisement by Mr A. Once in England and twice in Eilean Siar he admitted at the time to losing his temper and/or causing an injury. In a later statement to police he said: 'I did have a temper...like anybody I became aggressive, shouting and shaking...if I had to smack them I would smack them, but I'm heavy handed ...on the legs...bruising...'

The Report went on to point out:

"We recognise that during the period when these physical injuries to the children occurred, common law entitled someone with parental responsibilities and rights relating to a child and someone with care and control of a child to physically punish the child. It entitled parents to use force to discipline their children provided their actions could be justified in court as 'reasonable chastisement'. Section 51 of the Criminal Justice (Scotland) Act 2003 set out to clarify the law relating to the physical punishment of children. The 2003 Act specifically prohibited blows to the head, shaking and the use of an implement."

"However, in all other cases the defence of 'reasonable chastisement' remains and the onus is on the prosecutor to prove that the punishment went beyond this. Mr and

³⁸ 'An inspection into the care and protection of children in Eilean Siar' published by the Social Work Inspection Agency, published by the Scottish Executive 2005 ISBN 0-7559-4757-6

Mrs A were, and still would be, legally entitled to physically punish the children and if prosecuted could have claimed a defence of 'reasonable chastisement'. While there is evidence that professionals, particularly in England, did encourage Mr and Mrs A to use more positive methods of discipline, they could not legally prevent them from using physical punishment." (para 80, *Ibid*)

A study of the ChildLine database by the Centre for Research on Families and Relationships at Edinburgh University, found alarming levels of violence reported in calls from children suffering physical abuse. Children tell of physical assaults that are frequent, brutal and sadistic. Whilst they use many terms to describe the nature of their abuse including smacking, slapping and hitting, they more commonly discuss it in terms of 'being battered', 'beaten', 'hammered', 'punched', 'kicked' and so on. Children often talk about having marks, bruises and abrasions after assaults and some children talk about being kept off school until their bruises are healed.³⁹

The use of physical punishment in the home does damage children. NHS Health Scotland produced health and wellbeing profiles for children and young people by Community Health Partnership area (CHPs) in 2010. The overview for Scotland counted hospital admissions per 100,000 population of 0 - 24 year olds as a result of assault, as an indicator of violence in children and young people's lives. The latest statistics are for 2008 - they do not publish these profiles anymore - and show that the average in Scotland was just over 100. 16 of the 38 CHP areas had above average rates of admission, with the rates of over 150 per 100,000 population in East Ayrshire, Kirkcaldy and Levenmouth, Glasgow South, North Ayrshire and Glasgow North East with the last two having rates of well over 200 per 100,000 population.

In 2011/12, the Reporter to the Children's Hearing system in Scotland received 52,527 referrals of which 39,737 were for care and protection grounds⁴⁰. The police made 79.9% of care and protection referrals. 2,485 children under age 1 were referred on care and protection grounds.

An analysis of counselling sessions provided by ChildLine UK, the free 24-hour helpline for children and young people provides a unique indication of the nature and levels of concerns among children. ChildLine held 315,111 counselling sessions in 2011/12 and physical abuse accounted for 6% (17,452 contacts), sexual abuse 5 % (15,993), emotional abuse 1% (2,729) and neglect 1 % (1,646).⁴¹

Research undertaken by the NSPCC "How Safe are our Children?"⁴² monitored the extent of child abuse and neglect in the UK to enable judgement on whether efforts to prevent maltreatment and to protect children are working. The report shows that one in five children today have experienced serious physical abuse, sexual abuse or severe physical or emotional neglect at some point in their lifetime.

³⁹ But what about me? is a research study of children's calls to ChildLine Scotland with concerns about the health and wellbeing of their parents and significant others. The study was carried out by the CRFR at Edinburgh University and funded by the ESRC.

⁴⁰ Reasons are set out in S52(2) of the Children (Scotland) Act 1995

⁴¹ http://www.nspcc.org.uk/Inform/research/findings/how-safe/indicator07_wdf95545.pdf

⁴² http://www.nspcc.org.uk/Inform/research/findings/how-safe/how-safe-2013_wda95178.html

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- ⁱ Metcalf, H., (2009) Pay gaps across equality strands: a review
- ⁱⁱ <http://www.engender.org.uk/content/publications/engenderwelfarereport.pdf>
- ⁱⁱⁱ <http://www.cpaq.org.uk/scotland/child-poverty-facts-and-figures>
- ^{iv} <http://www.rethink.org/media-centre/2012/09/new-gp-survey-shows-government-welfare-test-is-pushing-vulnerable-people-to-the-brink>
- ^v <http://wowpetition.com/calums-list/>
- ^{vi} MWCS 2014 Who Benefits? The Benefits Assessment and death of Ms DE http://www.mwcscot.org.uk/media/180939/who_benefits_final.pdf p. 33.
- ^{vii} Op Cit.
- ^{viii} P. 6 DWP July 2012 Incapacity Benefits: Deaths of recipients
- ^{ix} <http://www.snp.org/media-centre/news/2014/feb/msp-criticises-work-capability-assessment-failures>
- ^x 13/4/14: <http://www.scotsman.com/news/scotland/top-stories/suicide-watch-over-benefit-cuts-1-3374547>