

Delivering Human Rights in Scotland – An update on Scottish Public Authorities in 2010

A report from SAMH, SWA, SRC and AI

February 2011



About the Four Organisations

Amnesty International Scotland

Amnesty International is a campaigning organisation with the purpose of protecting people wherever justice, fairness, freedom and truth are denied. Amnesty's Scottish office provides a focus for campaigning and fundraising in Scotland. It engages with Scotland's distinct political, education and media structures and takes part in wider political and cultural life in Scotland.

www.amnesty.org.uk

SAMH

SAMH is the Scottish Association for Mental Health, a charity working across Scotland. Every year we provide over a million hours of support to people who need our help. Every week we work with around 3,000 individuals in over 80 services. Every day we campaign for better mental health for the people of Scotland. SAMH's Respect Protect Fulfil programme promotes recognition of the links between mental health and human rights.

www.samh.org.uk

Scottish Refugee Council

Scottish Refugee Council is an independent charity dedicated to providing advice and information to people seeking asylum and refugees living in Scotland. Since 1985 we have been campaigning for fair treatment of refugees and people seeking asylum, raising awareness of refugee issues through the media, arts and local communities and working hard to influence policy in both Scotland and the UK. Our vision is for a Scotland in which all people seeking refugee protection are welcome. It is a place where women, children and men are protected, find safety and support, have their human rights and dignity respected and are able to achieve their full potential.

www.scottishrefugeecouncil.org.uk

Scottish Women's Aid

Scottish Women's Aid was established in 1976 in response to the lack of protection and support for women who were experiencing violence from their partners or ex-partners. We are the lead organisation in Scotland working towards the prevention of domestic abuse. We campaign for effective responses to domestic abuse and provide advice, information, training and publications to Women's Aid groups, other organisations and the general public.

Our members are local Women's Aid groups that provide specialist services to women, children and young people, including refuge, information and support.

www.scottishwomensaid.org.uk

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Summary

In 2006, Amnesty International funded a report into Scottish public authorities' compliance with the Human Rights Act. In 2010, a group of charities working in human rights, mental health, women's aid and refugee support came together to commission an update of this report. We made Freedom of Information requests to 43 public sector bodies, asking them what steps they had taken to comply with Section 6 of the Human Rights Act. We did this because human rights are fundamental in meeting the needs of the people that we work with. This report sets out the responses that we received, and makes recommendations for further action.

Using the Freedom of Information (Scotland) Act 2002

The Freedom of Information (Scotland) Act 2002 (FoISA) is a useful tool to gain information within a specified time limit from Scottish public bodies. However bodies like the Convention of Scottish Local Authorities (COSLA) and the Improvement Service are not covered by FoISA which is a significant omission¹ since they receive public money to influence and inform policy by bodies delivering services of a public nature such as our 32 local authorities.

Thanks

We would like to thank all the public bodies that answered the FoISA request for information.

This report has been compiled with the assistance of Carole Ewart, a public policy and human rights consultant.

¹ The Scottish Government has been considering extending coverage of FoISA and launched a consultation which closed in November 2010

1. Background

The Scottish Refugee Council (SRC), the Scottish Association for Mental Health (SAMH), Scottish Women's Aid (SWA) and Amnesty International (AI) have commissioned an update of the Report published in September 2006 'Delivering Human Rights in Scotland - A Report on Scottish Public Authorities.'

The four NGOs campaign on respect for and observance of human rights. In particular vulnerable people benefit from the protection afforded by human rights principles and standards such as women facing violence, people with mental health problems experiencing discrimination and asylum seekers who do not have equal protection of the law. Human rights law is much broader than equalities legislation and is of particular benefit when everyone is being treated equally but badly e.g. the framework used to prevent life threatening infections spreading in NHS hospitals, that can afflict anyone.

Whilst AI is generally understood to work on human rights issues, the other three NGOs recognise that there is low awareness of the connection between the human rights of their service users and public sector duties to comply with human rights law including:

- 'Right to enjoy the highest attainable standard of physical and mental health.'²
- Governments have a positive obligation to protect women from domestic violence and gender-based violence is a form of discrimination under the European Convention on Human Rights.³
- The UN has recommended that the UK take "...measures making the asylum procedures more equitable, efficient and unbiased."⁴

The initial Report was commissioned by AI specifically to inform debate around the Scottish Commissioner for Human Rights Bill then being considered by the Scottish Parliament. The lead Committee, Justice 1, had made Parliamentary history by failing to recommend the General Principles of the Bill and concluding that "*In a country where breaches of human rights are extremely rare and in a country with open, independent and robust legislative and judicial systems, do we need to create a public body charged with promoting best practice in human rights?*"⁵ After extensive debate, the Parliament passed the Scottish Commission for Human Rights Act 2006 moving the emphasis away from appointing an individual to establishing an independent organisation. The now established Scottish Human Rights Commission (SHRC) has limited powers and specifically is prohibited from undertaking any form of casework.⁶

Since publication of that report there has continued to be little evidence of the public sector explicitly promoting human rights or delivering specific human rights obligations. The report's eight recommendations have also been largely ignored (see Appendix 1). Given this, the four NGOs decided to revisit the same question with a smaller sample of public bodies in Scotland to investigate whether there is a strategic problem with explicit public sector compliance with statutory human rights duties in Scotland.

² Article 12 International Covenant on Economic, Social and Cultural Rights (ICESCR)

³ *Opuz v. Turkey*, Application no. 33401/02, European Court of Human Rights 9th June 2009

⁴ UN Committee on Elimination of Racial Discrimination 'Concluding Observations on UK', Dec. 2003

⁵ News Release CJ1001/2006, 23rd February 2006

⁶ Section 6 Scottish Commission for Human Rights Act 2006

2. Human Rights in Scotland

Legal Framework

The legal framework to promote and protect human rights in Scotland has been mainly used in respect of criminal cases that have received significant publicity in Scotland because they have forced a change in law e.g. *Cadder v HM Advocate* (2010) and the payment of small amounts of compensation to significant numbers of people e.g. *Napier v Scottish Ministers* (2004). However human rights belong to us all, equally, and their relevance to our daily lives is still not fully appreciated despite individual rights and public sector obligations being rooted in statute:

- S6 of the Human Rights Act 1998 (HRA) requires all public authorities in Scotland to comply with the European Convention on Human Rights (ECHR) on reserved and devolved matters. There are at least 10,000 public bodies in Scotland and coverage is increasing e.g. housing associations.⁷
- S29 of the Scotland Act 1998: MSPs must pass ECHR compliant legislation.
- S57 of the Scotland Act 1998: Scottish Government Ministers must positively comply with the ECHR – apart from certain actions of the Lord Advocate.

Since 1966, the UK has permitted individuals to complain to the European Court of Human Rights (ECtHR) in Strasbourg but the HRA enables people to domestically enforce their human rights. The Scotland Act requires more from Ministers than a technical, reactive compliance with the ECHR. They have positive obligations to comply across the range of devolved functions and the expected impact was that human rights would be mainstreamed in the design and delivery of public services.

The four NGOs who commissioned this report regard human rights as being directly applicable to the lives of the people they serve. Rights in the ECHR include:

- Article 3 – freedom from torture and ill-treatment e.g. an absolute prohibition on violence against women
- Article 4 – absolute ban on slavery e.g. prohibition on human trafficking
- Article 8 – right to protection of the home, private and family life including autonomy in decision making, the right to live with dignity and to social interaction which is particularly relevant for isolated, vulnerable adults
- Article 14 – the right to equal enjoyment of the above rights

The challenge for our Government and public bodies is to have robust and explicit systems in place to promote human rights and prevent and address potential and actual human rights violations. Effective compliance requires understanding by staff at all levels of their duties and responsibilities.

In addition to the ECHR, there are seven Treaties ratified by the UK which broaden the range of human rights to cover economic and social rights. The UK has confirmed to the UN it will not ratify a treaty unless it is “*satisfied that domestic law and practice enable it to comply.*”⁸

⁷ London & Quadrant Housing Trust, UK Supreme Court decision November 2009

⁸ ‘UK National Report submitted to UN Universal Periodic Review’ para 18, pub by UN 6 March 2008 A/HRC/WG.6/1/GBR/1

Application of these Treaties is reviewed periodically by the UN which publishes 'Concluding Observations' detailing specific actions the UK should take to ensure compliance, for example to make recommendations on how the UK can fulfil its duty to work progressively, to the maximum extent of its available resources and to deliver economic and social rights even in a period of economic downturn.⁹ Responsibility to deliver the recommendations falls on the Scottish Government in respect of devolved matters. The UN Treaties are:

1. Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW)
2. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
3. UN Convention on the Rights of Persons with Disabilities (UNCPRD)
4. Convention on the Rights of the Child (CRC)
5. International Covenant on Economic, Social and Cultural Rights (ICESCR)
6. International Covenant on Civil and Political Rights (ICCPR)
7. Convention Against Torture (CAT)

The ECtHR will make reference to country reports on implementation of UN Conventions when deciding on ECHR cases. In respect of UNCPRD, the UK has ratified Optional Protocol No1 which permits individuals to complain to the UN about a breach of their rights. The UK also permits individuals to complain to the UN alleging violations of their right(s) under CEDAW.

Implementation Framework

According to the UK Government the Human Rights Act 1998 was a component of public services reform that would significantly impact on public sector business and:

- ECHR rights and responsibilities form a common set of binding values among public bodies and the public, right across the UK
- Public bodies must have human rights principles in mind when they make decisions about people's rights
- Human rights must be part of all policy¹⁰

The UK Government said the Act would "... *help change the way people think and behave and create an atmosphere in which decisions and policies are discussed and understood.*"¹¹ In 2006, the Justice 1 Committee of the Scottish Parliament reported positively on compliance "... *The evidence is that public bodies, in the main, successfully operate in a way which is compliant with Convention rights. This should be no surprise given that in doing so public authorities are merely acting in accordance with the law. It is simply what people would expect to be the case.*"¹²

The survey therefore set out to evaluate responses by their impact on public service delivery.

⁹ UN Convention on Economic, Social and Cultural Rights Article 2(1)

¹⁰ The Study Guide: Human Rights Act 1998, 2nd Edition produced by the Department of Constitutional Affairs and the Bar Council of England and Wales

¹¹ 'Human Rights Act – An Introduction' Page 12

¹² Justice 1, Stage 1 Report on the Scottish Commissioner for Human Rights Bill, Vol 1, published February 2006, Paragraph 88

3. Current Context

The four NGOs have taken account of developments in the last four years including:

- In 2007 Audit Scotland identified the risk to the public pound for public bodies found to be in breach of human rights but only in relation to the Scottish Prison Service which had to set aside £85m *“for its possible liability for compensation and other costs for cases brought by prisoners.”*¹³
- In 2008 the GB Equality and Human Rights Commission (EHRC) was set up by the Equality Act 2006. It has conducted a Human Rights Inquiry for England and Wales and it is undertaking an inquiry into human trafficking in Scotland.
- Scottish Human Rights Commission (SHRC) is co-located with the EHRC in 2008. SHRC’s work includes *“Mapping the realisation of human rights in Scotland”* from October 2009 and *‘developing an understanding ... of human rights impact assessment methodology and tools for public authorities.’*¹⁴
- In September 2008, the UN Hearing on UK Compliance with the UNCRC was attended by a variety of NGOs and the Scottish Commissioner for Children and Young People (SCCYP). In September 2009, the Scottish Government produced an action plan ‘Do the Right Thing’ to implement the UN’s Report.¹⁵
- In May 2009, SAMH attended the UK Hearing by the UN Committee on Economic, Social and Cultural Rights on implementation of the ICESCR which recommended the UK *“take immediate steps to address... the poor health conditions for persons with mental disabilities, as well as the regressive measures taken in funding mental health services.”* The Committee also recommended *“appropriate measures to ensure that complaints of rape are diligently and impartially investigated and prosecuted...”*¹⁶
- In June 2009, the UK ratified the UNCRPD. Ratification means all our laws and policies comply.
- In May 2010, the UK Coalition Agreement committed to *“... establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention of Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties..”* (pg 11). The Commission will be established by December 2011.

The UN has repeatedly called on the UK to adopt a National Action Plan on Human Rights which would help in monitoring the enjoyment of human rights in Scotland.

¹³ Annual Report & Accounts to 31st March 2007, p 26

¹⁴ ‘SHRC Annual Report’ 2009/10 Chapter 2 ‘Putting a Human Rights Based Approach into Action’

¹⁵ ‘Action Plan on Children’s Rights’ Scottish Government News Release 1st September 2009

¹⁶ UN Committee on Economic, Social and Cultural Rights ‘Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories’ E/C.12/GBR/CO/5 22 May 2009, para 24

4. The 2010 Survey

Whilst the four NGOs welcome the SHRC's 18-month project, beginning in October 2009, 'Mapping the realisation of human rights in Scotland', this survey has arisen from concern that key decisions are currently being made by public authorities in Scotland without sufficient reference to their human rights obligations.

The four NGOs are also mindful of the EHRC's Human Rights Inquiry, held under its statutory powers, to assess progress on an effective human rights culture and examine how the human rights framework can be developed. Whilst no permission was given to extend its remit to Scotland, the recommendations for England and Wales are relevant such as "*Human rights need to be mainstreamed into the work of all those who provide relevant public services.*"¹⁷ It is also interesting to note that the inquiry's report concluded that "*There is overwhelming general acceptance in society of the value of human rights (81 per cent of people agree that human rights are important for creating a fairer society in the UK).*"¹⁸

Framework

Internationally, there are a variety of mechanisms to mainstream human rights into the culture of nations and within both public and private sector bodies. The UN's view, repeatedly delivered to the UK at periodic hearings on human rights compliance, includes incorporation of the ratified Conventions into domestic law. NGOs such as the British Institute of Human Rights suggest a 'Human Rights Based Approach (HRBA) as an appropriate model.¹⁹ The HRBA is a human rights tool for organisations as a way of doing things (process) as well as an end to be achieved (compliance with standards).

The HRBA's five principles have been developed by international bodies such as the UN and are defined as:

- Putting human rights principles and standards at the heart of policy and planning
- Ensuring Accountability
- Empowerment
- Participation and Involvement
- Non-discrimination and attention to vulnerable groups

Good practice in delivering the five principles includes: leadership, strategy and policies, processes and practice.

Survey Process

The focus of the FoISA request was to explore public bodies' specific understanding of and compliance with, human rights obligations in Scotland which arise from two Acts:

- Reactive and proactive duty of Scottish Government Ministers to comply with ECHR – s57 of Scotland Act 1998

¹⁷ Human Rights Inquiry: Executive Summary pub by EHRC June 2009, Para 3.2

¹⁸ Human Rights Inquiry Report pub by EHRC, Chapter 2, section 1.0, June 2009

¹⁹ 'Human Rights in Healthcare: A framework for local action' pub by BIHR, end edition 2008 pg 39

- General duty on the public sector and those delivering services of a public nature to comply with S6 of the Human Rights Act 1998 which requires compliance with the ECHR

The four NGOs agreed a list of 43 public sector bodies (see Appendix 2) that would be the subject of a request. All local authorities were included as they deliver the public services on which we all so depend such as education and social work. Key regulatory bodies were included for their ability to influence compliance with human rights law. The public bodies that the four NGOs have regular contact with were also included such as the UK Border Agency (UKBA) and the Crown Office. The list was not exhaustive and was limited by the funds available to carry out the work e.g. health boards were not included. Some of the bodies did not exist when the last survey was undertaken such as the Risk Management Authority. 42 authorities replied.

A standard letter was sent by email from August to October 2010. This replicated the question posed in 2006:

“I am requesting information about the explicit steps taken to implement or put into practice, compliance with Section 6 of the Human Rights Act 1998 over the last three years. Examples may include specific training programmes for staff, policies on human rights and how the decision making process takes account of human rights obligations.”

As the public sector works on a strategic planning basis, the answers included in the last survey would have included the financial year 2006-2007 and this question relates to the subsequent financial years so there is no ‘year’ missing.

However, before the information request was emailed, a brief examination was undertaken of each public authority’s website content to ascertain whether the information was already available. A simple key word search ‘human rights’ was used. Where references were found, they were acknowledged in the letter to make clear that the information had already been accessed but was insufficient to meet the terms of the broader request.

Research Findings

The research undertaken prior to making the FoISA request identified that:

- Scottish Legal Aid Board experienced a rise in ‘Intimations of civil advice and assistance and ABWOR (advice by way of representation) on ‘human rights’ - at 160 in 2008-2009 compared to 79 in 2007-2008.²⁰
- Aberdeen City Council has introduced an ‘Equality and Human Rights Impact Assessment’ process which is a form to be completed by referring to specific guidance. However the EHRIA for 2009-2010 in respect of the Budget Process stated that there were “no” human rights implications.

²⁰ Scottish Legal Aid Board Annual Report 2008-2009 pg 46

- Scottish Legal Complaints Commission explicitly acknowledges it is covered by the Human Rights Act.²¹
- West Lothian Council's vision on housing acknowledges human rights. <http://www.westlothian.gov.uk/917/925/EqualityinHousing>
- Explicit human rights references were most likely to be confined to more 'traditional' human rights issues. For example local authorities have identified that The Regulation of Investigatory Powers Act (2000) [RIPA] and the Regulation of Investigatory Powers (Scotland) Act (2000) [RIP(S)A] ("the Acts") together provide a legal framework for the "*use of Covert Human Intelligence Sources by public authorities and an independent inspection regime to monitor these activities*" and that this new regime has implications for human rights. Similarly the human rights implications of CCTV have been acknowledged by several authorities such as Orkney Council.
- In September 2010 the Scottish Government and COSLA provided leadership as well as producing practical guidance on the 'Procurement of care and support services' which "*describes a service user and human rights-based approach ...*"²²

There are many examples of public bodies making general assertions about human rights such as "*We will continue to ensure that equality and fairness is embedded in everything we do, and promote a respect for human rights at an individual, organisational and societal level.*" The purpose of this report is to identify explicit evidence of actions and impacts. This has proven, again, to be problematic.

Two local authorities declined to provide the requested information on the basis of cost.

2010 FoISA Survey Key Findings

Human Rights Standards - No explicit steps

Ten out of the 42 public bodies admitted they could not provide explicit steps taken to implement or put into practice compliance with Section 6 of the Human Rights Act 1998 over the last three years.

- The Council "*has done nothing specific to implement Section 6 of the Human Rights Act 1998.*"
- "*We have undertaken a full search for the information which you have requested, and I now write to confirm that this information is not held by us.*"
- We have "*... not completed anything specific to comply with Section 6 of the Human Rights Act 1998 however we have completed general training to raise awareness of our equality duties and requirements.*"

The number of public bodies failing to provide evidence of specific compliance increases when the responses are analysed in detail, particularly if attendance at conferences and responses which equate human rights to equality are removed.

²¹ Scottish Legal Complaints Commission Annual Report 2008-2009 pg 9

²² Procurement of Care and Support Services, published by Scottish Government 2010 pg 5 www.scotland.gov.uk/Resource/Doc/325109/0104824.pdf

More positively one local authority stated that it had managed to ensure human rights compliance by service providers: *“Whilst no information is held on specific compliance, nonetheless a number of the Council’s Social Care contracts require the contractor to comply with the Human Rights Act 1998 as though they were a public authority for the purposes of the Human Rights Act 1998.”*

Human Rights Principles

Explicit compliance with S6 of the HRA requires human rights to be mainstreamed across the business of the public authority. However there is little evidence to suggest that is happening:

- There is a danger of an uneven enjoyment of human rights in that those of staff are mainstreamed in systems but not those of the public. For example a local authority pointed out *“Consequently rather than running specific HRA training courses, the requirements of the legislation are now an integral part of the relevant policies and training courses, e.g. amongst other things the right to a fair trial in relation to disciplinary and grievance procedures for employees, the right to respect for private and family life in relation to managing attendance...”*
- There is a danger that human rights are solely regarded as a set of legal duties which misses the importance of mainstreaming human rights standards and principles, such as dignity and respect in delivering care services to adults with mental health problems. For example one local authority responded it is the duty of *“...our monitoring officer to ensure and continually monitor that actions taken by council services are intra vires ... I note too that as a "Creature of Statute" should this council act in a manner which is found to be ultra vires in any instance, such an action would be open to judicial review.”*
- There is a danger that the distinctive human rights law and the resultant statutory obligations, melt into a collection of other duties and responsibilities rather than being the framework for making all decisions. For example one response stated *“Before the Act was implemented, there was training about the possible/likely consequences on practice across Council activities. However, the aim was to ensure that HR became part of the day to day work and not something special. It was to be seen in the same context as other “social legislation” such as Disability Discrimination, recent Equalities legislation, Mental Health, Adult Protection, Child Protection, etc. There are many strands to everyday Council work and HR is just but one.”*

Leadership and Governance

The Human Rights Act and Scotland Act were each passed in 1998 so it is reasonable to expect, by this time, an explicit understanding of human rights application to public services. However analysis of responses produces some worrying conclusions:

- As in 2006, this survey received a response from a public sector body explaining that they are not involved in ‘fair trials’ so the FOISA request did not really apply to their work. This time the reason for the confusion was clear: S6

of the HRA was confused with Article 6 of the ECHR which is the 'right to a fair trial'. Such confusion must impact on daily compliance with the HRA.

- Human Rights appear still to be narrowly understood. For example one local authority responded directing us to 19 committee reports where human rights had been considered dating back to 2000. Only five relate to the last three years and four relate to licensing. This appears to be a very narrow application of human rights given the vast range of business delivered by local authorities.
- A majority of respondees that provided information (17) answered by offering evidence that focuses on how they have met their equality duties. For example "*The Council has developed an Equality Training Plan to build the capacity of the Council to fulfil our commitment to Equalities, Diversity and Human Rights.*" There appears to be a general problem in public authorities understanding the legal distinctiveness of their human rights obligations from their equality duties.
- An absence of evidence of leadership and a danger that measures on human rights will be a reaction to situations that may breach human rights rather than a proactive strategy. This is a risky approach particularly if the victim is entitled to financial compensation. For example one local authority equates the public's failure to complain about the implementation of human rights with successfully compliance: "*No explicit steps have been taken to implement or put into practice compliance with Section 6 of the Human Rights Act 1998 over the last three years. Further to this, no complaints in respect of the council breaching human rights have been received in the past 3 years.*"

Strategy and Policy

More positively there is evidence from two public authorities that they are working on assessing strategy and policy for human rights compliance. One local authority is now "*committed to developing a comprehensive Equality and Human Rights Policy*" and another stated that it was revisiting and checking "*... our policies and procedures continue to comply with emerging and developing human rights jurisprudence. We would be happy to share this report with you once it is completed but would advise that it is only at a very early draft stage at this point.*"

Beyond assertions about human rights, it is difficult from the information available to establish how decisions that have the potential to infringe human rights such as on funding services or agreeing policy have been assessed for their impact. Public authorities have no discretion in complying with 'absolute rights' such as a total ban on degrading treatment (Article 3). If public authorities are permitted to limit rights in defined circumstances, then their decisions must be taken using established criteria and can be challenged using the same criteria:

- Is the interference legal?
- Is the interference in pursuit of a legitimate aim?
- Is the interference proportionate i.e. the minimum necessary interference to achieve the legitimate aim?²³

²³ For a more detailed analysis go to 'A Guide to Human Rights Law in Scotland', Robert Reed and Jim Murdoch pub by Butterworths Lexis Nexis pub 2001 pg 135.

Public authorities have no discretion in complying with ‘absolute rights’ in the ECHR such as a total ban on degrading treatment (Article 3). If public authorities are permitted to limit rights in circumstances defined by the ECHR, then their decisions must be taken using established criteria and can be challenged using the same criteria.

Processes and Practice

- The information provided by public bodies overwhelmingly focuses on human rights compliance via a general process for decision making. For example *“With regard to your specific query about the decision making process, all decisions made by councillors are published and any paper presented to the elected members has a section where the author/responsible officer is required to highlight policy/ legal /personnel/financial implications and whether an equalities impact assessment was required.”* However in order for human rights to be properly considered, staff need to understand the detail as well as the potential impact of the HRA.
- Another local authority asserted *“All committee papers are scrutinised by the Corporate Management team (which includes the Solicitor to the Council) prior to consideration by the Cabinet. In this way, any issues of legal significance (including human rights) are highlighted and addressed in advance of the decision making process.”* Given this generalist approach, it is difficult to establish an audit trail of how human rights have explicitly influenced the decision-making process.

Period of Transition

The survey also exposed the issue of new and merged organisations that use inherited strategies and policies. Clearly this creates an opportunity for fresh thinking and new ideas. For example Creative Scotland has advised that *“All of our new and existing policies will be screened in relation to their impact on equality and human rights. We are developing a new staff training and induction programme for Creative Scotland. This will include equality and human rights training.”* Cultural rights are one of the six strands of human rights standards so the work of Creative Scotland is particularly important not just in how it operates but the leadership it exercises in relation to national and local cultural activities.

Strategic Bodies

The Improvement Service (IS) was set up to ‘help improve the efficiency, quality and accountability of local public services in Scotland by providing advice, consultancy and programme support to councils and their partners.’ The IS reported that *“As part of the Induction and Training programme we provide all employees with a variety of Ministry of Justice guidance on Human Rights including the ‘human rights; human lives’ handbook. We aim to raise awareness among staff of the different rights and freedoms protected by the Human Rights Act and encourage all staff to consider, in relation to their work, any potential human rights impacts. In addition, we have a range of employment policies in place which are supportive of key values such as dignity, fairness, equality and respect.”* The IS has an important strategic role to play in providing advice and supports to councils and their partners on human rights standards and compliance.

Watchdogs and Regulators

Audit Scotland stated its intention on human rights but evidence of specific practice was limited to equality and diversity duties: *“Audit Scotland aims to ensure that the fundamental human rights enshrined in the Human Rights Act 1998 are protected through our work, and with the partners we work with in the UK and from other countries. However the practical focus appears to be on equalities: “We believe that as an employer and public body, and in our audit role, we can play a leading part in the promotion and application of best practice in the areas of diversity and equality. We have created a Single Equality Scheme... (and) have established a Diversity and Equality Steering Group...”*

There is no evidence on how human rights are explicitly implemented in the audit process and when further information and clarification was sought, we received a copy of the Audit Scotland staff disciplinary policy.

5. Explicit Evidence Examples

The survey has revealed a number of examples of good practice that are now highlighted.

Leadership and Governance

In 2007, the Scottish Public Services Ombudsman (SPSO) set out explicit duties for the public sector and has thus provided leadership and direction on human rights:

*“My expectation is that public authorities are not only technically compliant with the law, and with their own policies and procedures, but that they make decisions and take actions that further an approach that integrates human rights into their work.”*²⁴

The SPSO is an influential body to exercise leadership on human rights because it is the final stage in handling complaints about councils, the National Health Service, the Scottish Government and its agencies and departments, the Scottish Parliamentary Corporate Body, colleges and universities, most Scottish public authorities and certain matters relating to housing associations. However given the results of this survey, it would also be useful for the SPSO to be proactive and provide specific guidance for the general public on the human rights dimensions of its work as well as provide guidance for public sector bodies

Strategy and Policy

Good practice is also reflected across policy and practice:

- East Lothian Council advised that *“The development of the 2010-2012 Single Equality Diversity and Human Rights Scheme allowed us to align our local outcomes to the 10 domains of life where everyone should experience equality. These align very closely to the articles of the Human Rights Act. We hope that this framework will continue to allow the Council to meet the requirements of Section 6 of the Human Rights Act.”*
- Aberdeen City Council reported that it *“uses an Equality and Human Rights Impact Assessment tool, which was jointly developed between the Council and Prof. Allan Miller of the Scottish Human Rights Commission. Prof. Miller has delivered training to our Corporate Management Team, to elected members at Policy Committee and to officers across the Council, to which our community planning partners were also invited.”*
- Edinburgh Council advised that its ‘Services for Communities’ department recently undertook human rights training delivered by the SHRC.
- There is evidence of a strategic network on human rights *“Since before implementation Falkirk Council has participated in the SOLAR (The Society of Local Authority Lawyers and Administrators in Scotland) Human Rights Special Interest Group. Over the years the group has been combined with the special interest areas of Data Protection and Freedom of Information.... It is fair to say, however, that there have been fewer stand alone human rights*

²⁴ Ombudsman’s Commentary January 2007

issues coming to the group in recent years. This is not through lack of interest but because human rights seems to be more built in to, and pervasive generally across, the work of local authorities such as in housing, planning and social work.” The Human Rights Special Interest Group is a welcome acknowledgement of the importance of human rights but the lack of activity recently is worrying given the pressures on public spending on services for the most vulnerable in a period of economic downturn.

- North Ayrshire Council evidenced compliance with the HRA in terms of policy commitments including the North Ayrshire Violence Against Women Strategy 2010/13 which is underpinned by the principle that violence against women is a violation of human rights. The North Ayrshire Integrated Children’s Services Plan 2010/15 *“embraces the principles of the UN Convention on the Rights of the Child, recognising children’s rights and responsibilities.”*
- Several public authorities have identified domestic abuse as a violation of human rights for women and children. There are a few examples of strategic partnership working between the public sector and civil society to deliver human rights obligations. For example South Ayrshire Council cited its Multi Agency Partnership on Violence Against Women and Children (MAPVAW). *“Examples of the work of the MAPVAW supporting human rights include actively assisting the establishment of Anti –Stalking Legislation in Scotland and raising awareness of Human Trafficking issues.”*

Processes and Practice

- The importance of reviewing existing procedures is understood. For example *“When the Human Rights Act came into force Angus Council carried out a full audit of its processes to ensure compliance with the Human Rights Act, including article 6 compliance. Within the last year, the Council has carried out an audit of its processes again to ensure compliance. All departments have been included.”*
- Training on human rights standards and obligations has been delivered by several public sector bodies. The Scottish Legal Complaints Commission sent information about training provided by a legal firm for ‘complaints handlers’. The issue of ‘Fairness and Human Rights – the requirements of the law in this area’ is addressed in some detail focusing on applying human rights to the process of handling complaints. The SPSO’s 2006 ‘Technical Update – Implications of Human Rights Legislation’ included slides on ‘Ombudsmen and Human Rights’ which made reference to *“three kinds of failure may give rise to a finding of maladministration”* which includes *“failure to respect human or fundamental rights.”* Importantly it is acknowledged that *“Maladministration can encompass human rights issues although it is not always seen in these terms by public servants, or, indeed, by ombudsmen and their staff...”*²⁵ *Ombudsmen should take the broadest possible view of their role and see it as encompassing two principal aims viz., promoting*

²⁵ From a paper presented by Emily O’Reilly, Ombudsman of Ireland, to the 8th IOI conference in September 2004

respect for human dignity and protecting individuals who are dependent on public authorities.”

The UK Border's Agency provided information on the delivery of support services in Scotland and how it takes account of human rights obligations *“when entering into commercial transactions. The Home Office provides guidance on contracting for services in light of the Human Rights Act and account is also taken of the Department of Communities and Local Government guidance on the same subject.”* However this response illustrates the apparent gap between policy and practice.

In November 2010, the UK Border Agency sent letters to 600 households stating it had notified Glasgow City Council of its intention to terminate the contract to provide housing for asylum seekers dispersed to the city and that they would be required to move within the 'Scottish region'. This decision as well as implementation of the decision raises significant human rights concerns. Those concerns relate specifically to people's enjoyment of Article 8 of the ECHR: the right to respect private and family life, home and correspondence. The technical process for arriving at that decision should have been the subject of a rigorous and informed human rights impact assessment:

- Is the interference legal?
- Is the interference in pursuit of a legitimate aim?
- Is the interference proportionate i.e. the minimum necessary interference to achieve the legitimate aim?

Given the disruption caused to home life, children's schooling and the community ties established by asylum seekers, this appears to be a classic case of where human rights law could have been used to deliver better decisions. It should be noted that the right to a house is not in dispute, it is about the right of people to live in their homes.

6. Conclusions

Establishing evidence of compliance with human rights obligations in Scotland should not be so difficult especially if public authorities had followed the recommendations from 2006 such as 'adopting a Human Rights Policy' to ensure accountability. Human rights are still not fully understood and mainstreamed across the public sector in Scotland and this survey received some correspondence from staff who are struggling to respond to the information request.

Another problem is the confusion between equality and human rights law. Human rights and equality are different laws and require different, but interdependent, strategies. The confusion arises from a lack of knowledge about the detail of the ECHR which does not provide a right to equality but rather the right to equal enjoyment of ECHR rights. So, for example, ensuring the right to respect for private and family life is enjoyed equally. To emphasise the distinction, the GB EHRC is responsible to the UK Government Equalities Office (GEO) in respect of its equality functions and to the UK Ministry of Justice in respect of its human rights duties.

There is a shortage of detail on explicit compliance as well as the impact human rights law has made on the decision making process. The evidence from the survey suggests that human rights are delegated to a subsidiary role rather than being the framework used to determine how services are designed and delivered. Overall, this survey provides evidence that Section 6 of the Human Rights Act 1998 is not high on the daily working agenda of the majority of public authorities in Scotland.

The survey has failed to evidence the impact on service users of human rights activity by public authorities. This finding on public authorities is consistent with the view of the House of Commons House of Lords Joint Committee on Human Rights on the performance of the previous UK Government on human rights: "*The Government is, of course, to be commended for introducing the Human Rights Act; but too often subsequently there has been a lack of leadership to use the Act to its full potential, ensure that public bodies promote human rights as well as do the minimum necessary to comply with the legislation...*"²⁶

What has been identified is an absence of action plans to implement human rights in Scotland which makes the process of monitoring, evaluation and accountability very difficult. At this stage there are only a few robust examples of public bodies explicitly mainstreaming knowledge and application of human rights law across policies, services and the decision-making process. Despite the depressing picture, we did gain new information, have captured signs of good practice and progressive developments and again confirmed the need for the public sector to access assistance and expertise to enable them to comply with Section 6 of the HRA. For example help from the EHRC and SHRC to deliver their human rights obligations e.g. toolkits and basic information on which human rights are relevant to whom.

²⁶ 'Work of the Committee in 2008-09' House of Commons House of Lords Joint Committee on Human Rights, Paragraph 20, Report 2010

7. Recommendations

Since the last report was published, the SHRC and the EHRC have been established by law. The four NGOs recognise the importance of these National Human Rights Institutions (NHRIs) in promoting and protecting human rights in Scotland. The Paris Principles, the UN principles on the status of NHRIs, repeatedly acknowledge the important role of NGO's such as "...*the fundamental role played by the non-governmental organizations in expanding the work of the national institutions.*"²⁷ We regard this report as fulfilling our commitment to inform the work of both NHRIs as well as the public sector in Scotland.

In drafting the recommendations, we have referred to those made in 2006 which then seemed sensible and practical and remain so today (see Appendix 1). In particular, entrenching human rights within the Best Value Framework would enable national consistency as well as being a framework within which Audit Scotland could assess performance. It is disappointing that those recommendations have been largely ignored.

The following recommendations should be read in conjunction with those from 2006. The four NGOs recommend them as necessary to integrate human rights into the design, delivery and monitoring of public services in Scotland.

1. Public bodies should undertake regular reviews of compliance with the HRA as part of their commitment to deliver effective public services.
2. To minimise risk to public funds, the Audit Scotland 'Code of Audit Practice' should explicitly state the importance of human rights in the framework for the conduct of public audit in Scotland. This requirement will assist in meeting the objective that "*Public resources should be safeguarded, properly accounted for and used economically, efficiently and effectively.*"²⁸
3. The EHRC Scotland should specifically address existing misunderstandings that equality duties are the same as human rights obligations. The distinctive human rights laws that relate to the public sector in Scotland, across both devolved and reserved matters, need to be better understood and compliance assured. The dual remit of the EHRC is perhaps one reason for the confusion.
4. The EHRC Scotland should adapt the recommendations of its 'Human Rights Inquiry Report' of 2009 to give them effect in Scotland.
5. The SHRC has published an academic study on the human rights impact assessment processes and will ultimately work towards guidance in this area. The SHRC should consider publishing this guidance as a matter of urgency to better equip the public sector to meet human rights duties. One Council has

²⁷ Principles relating to the Status of National Institutions (The Paris Principles) para 3(g)
www2.ohchr.org/english/law/parisprinciples.htm

²⁸ Code of Audit Practice Consultation Draft published by Audit Scotland July 2010, Para 7

stated that it is waiting on this tool “*and it is our intention to utilise this tool to widen our current impact assessment activity...*”

6. The SHRC should continue to exercise leadership by producing a range of information to help the public sector in Scotland meet its statutory obligations. The SHRC should also provide information to the public directly e.g. publications on ‘human rights and local authority services’.
7. The EHRC and the SHRC need to inform the voluntary sector about human rights obligations e.g. in delivering contracts for the public sector.
8. Local authorities, in their drive to share services across local authority areas, should identify a central point for a national resource which disseminates information, promotes best practice and drafts guidance on human rights compliance and delivery.
9. NGOs and the public have a role to play in monitoring human rights delivery in Scotland. NGOs and the public can apply pressure to ensure application of human rights in their geographical area or their subject area of interest. The GB EHRC and the SHRC both have a role in informing this work.

Appendix 1

Recommendations from 2006 Report

1. There requires to be a rigorous application of human rights values at all levels in public authorities in Scotland as a matter of priority.
2. Best Value criteria should include human rights promotion and compliance. This will also enable human rights activity to be sustained.
3. Delivering and respecting human rights should be a key plank of public sector reform in Scotland.
4. All public authorities should adopt a Human Rights Policy which is publicly available and which clearly sets out: a set of binding values, how human rights will inform decisions about people's rights and their influence in all policy development. It should also make explicit that people have human rights and that culture should be effectively respected and implemented by staff.
5. Public authorities should designate particular staff to drive forward the human rights agenda within departments as well as mainstream human rights so that, like racial and sexual equality, the duty is a core part of everyone's job and is explicitly stated in the job description.
6. More training should be offered to staff which is reviewed and updated to take account of case law and practice.
7. Every two years, public authorities shall be required to produce an audit of human rights compliance across their range of functions.
8. Civic Society should actively promote human rights culture and values in its work with those delivering public services in Scotland.

Appendix 2 List of Bodies Contacted re Fol Requests

Regulators

- Audit Scotland
- Scottish Public Services Ombudsman
- Improvement Service – not covered by FoISA but request made
- Scottish Commission for the Regulation of Care

Other Bodies

- Crown Office
- Risk Management Authority – not covered by FoISA but request made
- Scottish Legal Aid Board
- Scottish Legal Complaints Commission
- Scottish Law Commission
- Creative Scotland

UK Fol Act

- UK Borders Agency – operation in Scotland

Local Authorities

- | | |
|-------------------------|-------------------------|
| 1. Edinburgh, City of | 17. Moray |
| 2. Glasgow City | 18. Argyll & Bute |
| 3. Dundee City | 19. West Lothian |
| 4. Orkney Islands | 20. South Ayrshire |
| 5. Aberdeen City | 21. Eilean Siar |
| 6. East Lothian | 22. North Lanarkshire |
| 7. Scottish Borders | 23. Shetland Islands |
| 8. West Dunbartonshire | 24. East Ayrshire |
| 9. Perth & Kinross | 25. Clackmannanshire |
| 10. Dumfries & Galloway | 26. Midlothian |
| 11. East Renfrewshire | 27. East Dunbartonshire |
| 12. Fife | 28. Inverclyde |
| 13. Angus | 29. South Lanarkshire |
| 14. Renfrewshire | 30. Aberdeenshire |
| 15. North Ayrshire | 31. Falkirk |
| 16. Stirling | 32. Highland |