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Convenor  
Equalities and Human Rights Committee

By email only

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Dear Convenor

## **COVID-19 emergency legislation**

Thank you for your letter of 16 April 2020 asking for the Commission's input to the scrutiny of the legislation and its potential impacts. We will provide an update on the human rights issues arising from both the UK and Scottish emergency legislation, in particular, those on which we believe further action is needed.

In our briefings, we outlined the human rights principles which must apply to emergency powers, namely, that measures must be lawful, necessary, proportionate, time-limited and non-discriminatory. This means they must go no further than is strictly necessary, and should be linked to scientific and public health evidence. It must be recognised that measures could disproportionately impact certain groups and every effort should be made to address this. Finally, measures must be subject to meaningful review and scrutiny. These principles remain at the core of our analysis.

We welcome the commitment, outlined by the First Minister, to safeguarding human rights across the Coronavirus response especially the commitment to ensuring that any restrictions are justified, necessary

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and proportionate<sup>1</sup>. We believe that the carrying out and continued review of human rights impact assessments would assist in meeting this aim and ensuring people's rights are respected on an ongoing basis. The issues we raise aim to support that shared goal.

## **UK Act**

### **Scrutiny and review**

We welcome the proposed establishment of a Coronavirus Committee at the Scottish Parliament which will act as a key scrutiny mechanism, alongside the UK Parliamentary review required at six-monthly intervals. It will be important that the new Committee employs a human rights based approach to its work to complement the work of the EHRiC Committee.

It is essential that all forms of scrutiny of the emergency powers are undertaken by appropriate external and independent bodies, who can ensure the most robust data informs that scrutiny. There are a range of existing monitoring bodies into whose remit areas of the Act may fall and who would have the expertise to carry out such an exercise, subject to proper resourcing. Since raising this issue, we are pleased that monitoring by independent bodies has been set up in certain areas, for example mental health and policing (addressed below), however, we

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<sup>1</sup> COVID-19 – A Framework for Decision Making

<https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2020/04/coronavirus-covid-19-framework-decision-making/documents/coronavirus-covid-19-framework-decision-making/coronavirus-covid-19-framework-decision-making/govscot%3Adocument/coronavirus-covid-19-framework-decision-making.pdf>

believe there remains a need to clearly delineate the role of independent bodies in other areas, such as in relation to social care provision.

## **Mental health provisions**

Our key concern arising from these provisions was to establish adequate processes for monitoring and review of their use, once brought into force, to ensure they are used only as a last resort where necessary, proportionate and on a time-limited basis. It has since been confirmed that the Mental Welfare Commission has agreed with Scottish Government that it will lead on the scrutiny of emergency measures. We are working with the Mental Welfare Commission to support the application of human rights standards to that scrutiny. As the decision to commence and suspend the powers remains with Scottish Government, there remains a role for Parliament in ensuring that that decision takes place at the appropriate time, adhering to human rights principles and the findings of the independent oversight of the Mental Welfare Commission.

## **Social care**

In our 30 March briefing, we called for an ethical framework for both health and social care in Scotland which sets out ethical and human rights-based principles to guide decision-making. In relation to social care, the Scottish Government's guidance<sup>2</sup> relies upon the document produced by the UK Department of Health and Social Care '*Responding to COVID-19: the ethical framework for adult social care*'<sup>3</sup>. That guidance includes the principles of respect, reasonableness, minimising harm, inclusiveness, accountability, flexibility, proportionality and

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<sup>2</sup> *Coronavirus (COVID 19): guidance on changes to social care assessments*

<https://www.gov.scot/publications/coronavirus-covid-19-changes-social-care-assessments/>

<sup>3</sup> <https://www.gov.uk/government/publications/covid-19-ethical-framework-for-adult-social-care/responding-to-covid-19-the-ethical-framework-for-adult-social-care>

community. While the Commission welcomes the fact that many of these principles are grounded in human rights, the framework is not sufficiently robust in places and does not set out with sufficient clarity the legal duties which continue to apply to the actions or omissions of public authorities, in particular under the Human Rights Act 1998. Additionally, the Commission is disappointed to see limited reference to human rights within the ethical framework and no reference to the guiding principles of the UN Convention on the Rights of Persons with Disabilities, to which the UK has been a State Party since 2009.

The Commission recalls that in Scotland a very significant body of work has been undertaken by disabled people and carers, local and national government, providers and regulatory and scrutiny bodies to integrate human rights standards from domestic and international human rights law, in particular from the UN Convention on the Rights of Persons with Disabilities into law, policy and practice. This includes ‘A Fairer Scotland for Disabled People: Our Delivery Plan to 2021 for the

United Nations Convention on the Rights of Persons with Disabilities’ and the ‘Health and Social Care Standards: My Support, My Life’<sup>4</sup>.

These standards are especially important in responding to need during the pandemic period. While the UK guidance therefore provides a strong starting point, it would seem more appropriate to develop Scottish-specific guidance which takes account of the devolved nature of social care and the use of CRPD as a basis for policy-making.

Our primary concern, however, relates to implementation of social care duties on the ground, both those affected by the emergency powers and those which remain unchanged. The Committee will no doubt be aware of the call for immediate action issued by the Scottish Independent

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<sup>4</sup> Scottish Government, 2017, ‘Health and Social Care Standards: My support, my life’ available at

<https://www.gov.scot/publications/health-social-care-standards-support-life/>

Living Coalition (SILC)<sup>5</sup> which highlights a number of concerning impacts on disabled people and highlights that, while there have been Scottish Government announcements of actions that aim to address issues, they continue to hear evidence which *“tells us that these are not reaching disabled people on the ground, or not meeting disabled people’s needs and concerns.”*

We are particularly concerned about reports of significant reductions or removals of social care packages. While adjustments may be necessary to protect the individual or staff from the virus, it is essential that the care required by disabled people in their daily lives is maintained and that reductions in care do not result in risks to life or create the potential for inhuman and degrading treatment. The Commission supports the guidance recommendations that local authorities should ensure that where there are risks to the right to life, serious risks to health, freedom from degrading treatment and protection of bodily and mental integrity, a full assessment is undertaken.

We consider there may be a need for a coherent plan to address the issues facing disabled people. The picture so far suggests that social care, in particular, is an area where monitoring of implementation on the ground will be critical. We agree with SILC’s proposal in this regard

*“To identify what is happening on the ground right now, to ensure policies, guidance and Codes of Practice are having the impact desired and to plan for the future, monitoring will be essential. For example, this might include information received by third sector organisations, data*

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<sup>5</sup> [https://inclusionscotland.org/wp-content/uploads/2020/04/SILC-Statement-on-NHS-and-rights-of-Disabled-People\\_17.04.20.pdf](https://inclusionscotland.org/wp-content/uploads/2020/04/SILC-Statement-on-NHS-and-rights-of-Disabled-People_17.04.20.pdf)

*segmented by geographical area, and protected characteristics. The finding of such monitoring should be publicly reported”*

The Commission recommends this could be undertaken in the following ways

- Local authorities record and monitor instances where they make use of the power not to assess or not assess fully and set out the reasoning for this
- The Care Inspectorate should require regular reporting from local authorities on both the extent to which they are using the emergency powers and adhering to pre-existing duties
- The Commission notes the suggestion in guidance that individuals not assessed or only partially assessed should be reviewed within 6 weeks and recommends that the Care Inspectorate should monitor the extent to which is this being met.

It should be noted that the current context also engages significant rights issues for care and support staff, social workers and others, including the right to life, the right to health and the right to just and favourable conditions of work. This should be addressed through adequate and appropriate PPE, pay and conditions including rest and support for staff well-being and mental health in light of trauma.

### **Restrictions on movement and gatherings**

The Commission recommended that there should be continuing oversight including reporting on the use and impact of these powers to ensure consistency in their application and that there are no unintended consequences flowing from their use, such as disproportionate impacts on particular groups. We welcome the establishment by the Scottish Police Authority of the Independent Advisory Group on Police Use of Temporary Powers Related to the Coronavirus. The group is chaired by John Scott QC and will report directly to the Scottish Police Authority. Our Commissioner, Susan Kemp, represents the Commission on that group. This is an example of a clear oversight mechanism by an

independent body which is essential to ensuring human rights standards are upheld throughout the life of the emergency powers.

### **Places of detention (NPM mandate)**

In our first briefing, we outlined our concerns, as part of the UK National Preventive Mechanism (NPM), in relation to places of detention and other residential settings. Our key concerns relate to reducing the detained populations to mitigate the inherent risk of maintaining people in close confinement and spreading the virus. We welcome the Scottish Government's announcement on 21 April 2020 to use release powers to do so. This is particularly important for detainees with underlying health conditions, the remanded population, children, and those in other vulnerable categories, as well as in areas of the detention estate that are already overcrowded.

This should be facilitated where risk assessment and the impact on other services in the community deems it feasible and by expanding the use of existing instruments or executive release under emergency legislation.

We are concerned about staff availability of PPE, particularly on private prisons. Staff should be supported and should receive all professional support and health and safety protection, as well as training necessary in order to be able to continue to fulfil their tasks in places of deprivation of liberty. This includes support to monitoring bodies and the NPM as an essential safeguard against ill-treatment.

A key issue is the maintenance of the principle of equivalence of care in relation to both physical and mental healthcare to those in detention. At a time when all health services are under significant strain, the government must ensure that those deprived of their liberty are not disadvantaged in accessing the health services that they need. This is particularly important given the extent to which detainees are likely to be held in conditions that amount to solitary confinement.

In addition, we and the NPM are concerned that extended solitary confinement in spaces designed for one but holding two will be detrimental to both physical and mental health.

It remains important to reassess the need to continue involuntary placement of psychiatric patients, discharging or releasing to

community care, wherever appropriate. This is particularly important for residents of social care homes where the provision of care and imposed isolation to manage infection spread for an individual may give rise to a new or changed deprivation of liberty.

We are also concerned about family contact, particularly between detainees and their families, and contact with other professionals such as advocates. Where physical visits have had to be restricted, and given the many ways in which family contact plays a crucial role for those in detention, it is important to consider how the Scottish Government can ensure Skype, adapted mobiles and any other forms of contact are available.

Accountability means that the Scottish Government should provide periodic reports to the Scottish Parliament and wider public on the human rights of this population and progress in protecting those in detention. We have written to the Cabinet Secretary for Justice on this issue.

## **Scottish Act**

### **Expiry, suspension and revival**

The requirement on Ministers to keep the necessity of the provisions under review, and to report every two months on its assessment of that necessity, on the status of the provisions of the Act and on the use of the powers in the Act is positive. As with the UK Act, the success of review will depend on whether adequate and accurate data is collected on the use of the powers. Mechanisms should provide for external and independent scrutiny to make this reporting requirement meaningful and accurate.



## **Trials without a jury**

The Commission welcomes the Cabinet Secretary for Justice's approach in consulting key stakeholders to discuss workable solutions to the challenges the Coronavirus pandemic poses to Scotland's criminal justice system. The Commission has engaged fully in that process, and will continue to do so. While the Commission notes that jury trials are not specifically required in order to guarantee the right to a fair trial under the European Convention on Human Rights, jury trials are a key part of Scotland's criminal justice system. The Commission believes that the viability of options that could allow for modified jury trials to continue should be fully explored before proceeding with trials in the absence of a jury. The Commission will contribute our views to any legislation which comes forward in relation to these issues.

## **Adults with incapacity**

We previously raised concerns about the legislative changes permitting s.13ZA Social Work (Scotland) Act 1968 to be used as a basis for moving adults to residential care regardless of whether a guardian or other proxy is in place and dispensing with the need to take the adult's wishes and feelings into account. These provisions are not in force at the time of writing and we welcome the Scottish Government's commitment to implement them only in emergency circumstances. We understand the Mental Welfare Commission will be notified of each instance of use of the powers to enable them to monitor and provide oversight. This will take place alongside scrutiny of the mental health provisions outlined above.

## **New issues**

### **Clinical guidance**

The Commission wrote to the Chief Medical Officer on 9 April 2020 outlining areas of the *COVID-19 Guidance: Clinical Advice* which needed to be enhanced by explicit consideration of and reference to

human rights standards and principles<sup>6</sup>. These included guidance on addressing issues such as blanket non-treatment policies being applied to care home residents, and Do Not Attempt Cardio-Pulmonary Resuscitation (DNACPR) notices being encouraged for those with long term conditions without full discussion between doctors, their patients and carers or appropriate processes. We have had constructive engagement with Scottish Government in relation to our recommendations. It remains important that updated guidance is issued in early course which addresses our recommendations and the cogent human rights and equalities analysis provided by other stakeholders. We hope to see amended guidance soon.

## **Wider human rights impacts**

We welcome the Committee's inquiry into the equality and human rights implications of Coronavirus in Scotland, as called for by ourselves, the Equality and Human Rights Commission and the Children and Young People's Commissioner for Scotland. This reflects our concerns about the broader impact of Coronavirus on human rights, in particular, the indivisibility of the impacts on economic, social and cultural rights, from those on civil and political rights. We believe that it will also be necessary to consider the impact of Coronavirus in, at least, the following areas:

- Right to health: including protecting health workers, patients and families, primary care and management of long-term conditions, supporting people with mental health needs in inpatient environments and in the community
- Poverty and the right to an adequate standard of living: including housing, food, social security

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<sup>6</sup> [http://www.scottishhumanrights.com/media/2009/2020\\_04\\_09\\_clinicalguidance\\_vfinal.pdf](http://www.scottishhumanrights.com/media/2009/2020_04_09_clinicalguidance_vfinal.pdf)

- Economic impact: including the impact on the third sector, and learning from the impact on human rights of the response to the 2008 financial crisis
- Impact on advice and advocacy: in relation to a range of rights e.g. social security, housing, mental health
- Education
- Privacy
- Non-discrimination: including differential impacts related to gender, BME groups, disabled people (discussed above), older people and children and young people
- Climate justice and the right to a healthy environment

The Commission intends to maintain an overview of human rights issues in these areas, however, we believe a parliamentary inquiry of the nature proposed would be the most effective mechanism for scrutiny and action. We will submit further information and views as the situation continues to develop, in order to assist the Committee's inquiry.

In the meantime, we will be paying particular attention to those areas in which we consider that the human rights impacts are likely to be most significant and where additional scrutiny is required, for instance, social care.

Yours sincerely

Judith Robertson

**Chair**