SHRC
Scottish
Human Rights
Commission

COVID-19: Care homes and human rights

14 July 2020

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Introduction

1. It is now well documented that the coronavirus outbreak has significantly impacted the residents and staff of Scotland's care homes. Data released by the National Records of Scotland shows that 46% of COVID-19 deaths registered to date relate to deaths in care homes.[1] Questions have arisen over whether the approach taken to coronavirus in care homes has been sufficient and appropriate. Among those are questions over whether residents of care homes were afforded equal access to hospital treatment; whether older people or disabled people were or felt pressurised into signing Do Not Attempt CPR forms; whether clinical guidance from the outset of the pandemic was appropriate; whether personal protective equipment ("PPE") was made available to all those who required it for the protection of both staff and residents; and whether the availability and distribution of coronavirus testing of care home residents and staff (including patients being transferred from a hospital setting to a care home) was adequate.[2]

2. The First Minister confirmed to the Scottish Parliament on 27 May 2020 that there will be a public inquiry into the handling of all aspects of the pandemic, including what has happened in care homes.[3] The Scottish Human Rights Commission (the "Commission") welcomes that commitment. This briefing sets out the human rights framework as it applies to the issues we understand to have arisen in Scotland's care homes and details the requirements of human rights law to ensure effective investigations are carried out.[4] Throughout this briefing, the Commission uses the term "care home" to refer to all residential homes for adults, older adults and children and young people.

Human rights framework

Article 2 ECHR – the right to life

3. Article 2 of the European Convention on Human Rights ("ECHR") protects the right to life. Together with Article 3 (the prohibition of torture and other proscribed ill-treatment), Article 2 "enshrines one of the basic values of the democratic societies making up the Council of Europe".[5] Article 2 is non-derogable, which means that the state cannot depart from its obligations even in times of war or other national emergency.

4. The state has a number of obligations under Article 2, which are both substantive and procedural. The substantive obligations can be further divided into negative and positive obligations. The state must refrain from the taking of life, unless this occurs in the very narrow circumstances set out in paragraph (2) of Article 2.[6] This is known as a negative duty.[7] The provisions of Article 2 justifying the deprivation of life must be "strictly construed".[8]

5. The state also has positive obligations under Article 2. This means they must take particular action to comply with the right to life. These positive obligations can be summarised as:
    - Ensuring the effective protection of the right to life through effective domestic law and punishment; and
    - The duty to protect life through the taking of specific action.

6. Finally, when a life has been lost in circumstances that may engage state responsibility, there is a duty to undertake effective investigations. This is often referred to as the procedural aspect of Article 2.

Protection of the right to life through law

7. The first positive obligation is the obligation to protect the right to life through effective domestic law. The European Court of Human Rights ("ECtHR") has held that there is a "primary duty on the state to secure the right to life by putting in place an appropriate legal

and administrative framework to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions".[9]

8. While this obligation most obviously relates to effective criminal law provisions, it also requires regulation of activities that may pose a risk to life. For example, regulatory regimes must be in place compelling hospitals, whether public or private, to adopt measures for the protection of patients' lives.[10] The reference to hospitals should not be interpreted narrowly; this obligation extends to other healthcare settings, such as care homes.[11] Similarly, dangerous activities must be adequately regulated.[12]

9. The Commission considers this obligation requires an appropriate regulatory and administrative response to the threat posed by coronavirus in care homes. This could include, for example, clear guidance and regulation on PPE requirements and access to PPE; appropriate clinical guidance around access to treatment; and clear procedures around the movement of staff and residents between care homes, or from hospitals to care homes.

Protection of the right to life through the taking of specific action

10. States are under a positive obligation to take "appropriate steps" to protect life; this also requires the taking of preventive measures in certain circumstances. The ECtHR has held that Article 2 imposes an obligation on the state to do "all that could have been required of it to prevent the applicant's life being avoidably put at risk".[13] The obligation applies when the state knew or ought to have known of a threat to life[14] and has been found to apply in a number of different settings, including the unintentional loss of life resulting from dangerous activities.[15] The ECtHR has stated the obligation "must be construed as applying in the context of any activity, whether public or private, in which the right to life may be at stake".[16]

11. The obligation to "take appropriate steps" to protect life is relevant in the health and social care field.[17] In the 2017 case of *Lopes de Sousa Fernandes v Portugal*[18], the ECtHR stated that the obligation to take appropriate steps to safeguard life applies in the public health sphere. The Court noted the obligation (referred to above) requiring regulations compelling hospitals and healthcare settings to adopt appropriate measures for the protection of patients' lives and stated that where a death occurs as a result of medical negligence, this will not generally violate the positive obligation to protect life. However, the Court stressed that the ECHR does not exclude the possibility that acts and omissions of state authorities in the context of public health policies may, in certain exceptional circumstances, engage state responsibility under Article 2.[19] These circumstances are:
    - where life is "knowingly put in danger by denial of access to life-saving treatment"; or
    - where a "systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment, and the authorities knew or ought to have known about this risk and failed to undertake the necessary measures to prevent that risk materialising".[20]

12. It should be noted that states are afforded a broad margin of appreciation regarding the allocation of limited resources.[21] The term "margin of appreciation" means states are given discretion in how best they fulfil some ECHR obligations, as long as they comply with certain principles.

13. Given the unprecedented nature of the current public health crisis, the ECtHR has not yet been asked to apply Article 2 to the circumstances surrounding a global pandemic. That said, having regard to the principles established in the ECtHR's case law, it is likely that a number of issues could potentially engage state responsibility, therefore triggering the requirement for an effective investigation. Among those issues are questions over whether residents of care homes were afforded equal access to hospital treatment; whether clinical guidance was appropriate[22]; whether

adequate personal protective equipment ("PPE") was made available for the protection of both staff and residents; and whether the availability and distribution of coronavirus testing of care home residents and staff (including patients being transferred from a hospital setting to a care home) was adequate.

14. For the avoidance of doubt, the Commission does not suggest that any of the issues referred to above are necessarily violations of Article 2. However, where there have been potential or arguable breaches of the obligations outlined above, the state has a duty to conduct an effective investigation. The Council of Europe Commissioner for Human Rights has highlighted that, in accordance with Article 2 obligations, states must shed light on all deaths occurring in care homes, without exception.[23]

Procedural obligation to investigate

15. Article 2 imposes a procedural obligation upon the state to investigate deaths where state responsibility is potentially engaged. This obligation extends to all cases of alleged breaches of the 'substantive' limb of Article 2.[24] The ECtHR has held that, in the healthcare context, where the infringement of the right to life is not caused intentionally, the procedural obligation imposed by Article 2 is to set up an effective and independent judicial system; this does not necessarily require the provision of a criminal-law remedy.[25]

16. In healthcare cases, the Court has found that there are a number of different ways for ensuring compliance with the procedural limb of Article 2, and the choice falls within the state's margin of appreciation.[26] Certain cases may require a criminal law remedy. However, it is possible the obligation could be satisfied through a remedy in the civil courts. Other procedures, such as a fatal accident inquiry, may also be appropriate depending on the particular circumstances of a case.

17. On 13 May 2020, the Lord Advocate, James Wolffe QC, updated the Scottish Parliament on the approach taken to the investigation of deaths attributable to COVID-19.[27] The Lord Advocate is responsible for the investigation of sudden, unexpected and unexplained deaths in Scotland. A death must be reported to the Crown Office and Procurator Fiscal Service ("COPFS") if the circumstances are such as to give rise to public anxiety. At the outset of the pandemic, the Lord Advocate issued a direction that COVID-19 or presumed COVID-19 deaths did not require to be reported to COPFS unless there was another substantive reason for the reporting of the death. This decision has since been reviewed and two categories of COVID-19 or presumed COVID-19 deaths should now be reported to COPFS for an investigation to take place. The first category is where the deceased might have contracted the virus in the course of their employment or occupation. This would include the deaths of care home workers and NHS staff. The second category is all COVID-19 or presumed COVID-19 deaths where the deceased was resident in a care home when the virus was contracted. This decision was communicated to medical practitioners on 20 May[28] and applies retrospectively to relevant deaths prior to that date.[29]

18. The First Minister has also confirmed that a public inquiry into all aspects of the handling of the pandemic, including what has happened in care homes, will take place. While investigations into individual deaths are, of course, required, a public inquiry will be appropriate to investigate overarching policy decisions that impact on the right to life. Given the gravity, breadth and scale of the issues impacting on care homes, particularly during the early stages of the pandemic, the Commission is of the view that a public inquiry or investigation is welcome, and that a human rights based approach should be taken to the design and functioning of any inquiry.

19. In the health care context, regardless of the specific process, the procedural obligation under Article 2 requires an effective system capable of determining responsibility and ensuring accountability.

This system must not only exist in theory, but also operate effectively in practice. There is a requirement of independence of the domestic system set up to determine the cause of death. Independence means not only that parties investigating should have no "hierarchical or institutional connection" to the matter being investigated, but there should be "formal and *de facto"* independence from those people implicated in events.[30] The proceedings must be also be completed promptly and within a reasonable time[31] and there should be involvement of a deceased person's family.[32] In the healthcare context, the ECtHR has emphasised that knowledge of the facts and possible errors is not only important in individual cases, but it is essential in the more general sense as it allows institutions and medical staff to remedy any potential deficiencies. Promptness is therefore vital for the safety of patients or those receiving care.[33]

20. In cases concerning state use of force, or where the ECtHR views the deaths having occurred in the context of a "dangerous activity" which requires a specific legal, regulatory or administrative response, the obligation is on the state to begin investigations of their own motion.[34] This is in contrast to the position in medical negligence cases where death is caused unintentionally, where the state's procedural obligations may come into play upon the institution of proceedings by the deceased's relatives.[35] Given the unprecedented nature of the pandemic, the Commission believes it is arguable that deaths could have occurred in the context of a "dangerous activity" given the specific threat known to have been posed by COVID-19. It is also possible some deaths would be viewed in keeping with the court's case law on medical negligence, and an assessment of individual facts would be necessary.

21. In summary, investigations must be:
    - Effective and capable of determining responsibility and ensuring accountability;
    - Independent;
    - Completed promptly and within a reasonable time; and

- Conducted with the meaningful involvement of family members.

Article 3 ECHR – Freedom from torture or inhuman or degrading treatment of punishment

22. Article 3 of the ECHR reads "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". Article 3 is an absolute guarantee. It cannot be derogated from in times of war or other national emergency.[36] Ill-treatment within the terms of Article 3 is never permitted, even for the most pressing public interest reasons.

23. Torture has been defined by the ECtHR as "deliberate inhuman treatment causing very serious and cruel suffering".[37] For ill-treatment of an individual to amount to inhuman treatment under Article 3, it must attain a minimum level of severity. In particular, inhuman treatment must cause "either actual bodily injury or intense physical or mental suffering".[38] The threshold is relative:

> ***"***It depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim"[39]

24. It is also relevant to consider whether the victim is within a further category of people who are "vulnerable", including older people, children and young people, asylum seekers and people in detention.[40]

25. In contrast with torture, inhuman treatment does not need to be intended to cause suffering[41] and the suffering does not have to be inflicted for a purpose.[42] The crucial distinction between torture and inhuman treatment is in the degree of suffering caused.[43] It is not always necessary for the ECtHR to distinguish between the different types of ill-treatment listed in Article 3, and the term "treatment" for the purposes of Article 3 would also include a

failure to act, or an omission. It is important to note that the Convention is often referred to as a "living instrument" which "must be interpreted in light of present-day conditions".[44] This means that different types of treatment could now reach the minimum level of severity needed for Article 3, and those same practices may not have been considered a violation when the Convention was first drafted or even 20 years ago.

26. There is a wide range of treatment that could potentially fall within the ambit of Article 3. For the purposes of this briefing, treatment experienced in the health and/or social care setting such as decision making around appropriate care and support and availability of medical treatment could foreseeably engage Article 3.[45]

Positive obligations under Article 3

27. In addition to the negative obligation not to subject a person to treatment contrary to Article 3, Article 3 contains positive obligations to protect against ill-treatment and the obligation to investigate and to enforce the law.

28. As is the case with Article 2 discussed above, a state must have a framework of law in place, which is effectively enforced, that provides adequate protection against ill-treatment by either state officials or private parties.[46] Similar to the obligation in Article 2, states must also take practical measures in order to avoid a known risk.

29. Article 3 also carries a procedural obligation to conduct a thorough and effective investigation where a person raises an arguable claim of ill-treatment in breach of Article 3.[47] The ECtHR has held that this procedural obligation has the same scope and meaning as the procedural obligation in Article 2, which is discussed above.

Article 8 – Right to respect for private and family life, home and correspondence

30. Article 8 ECHR protects right to respect for private and family life, home and correspondence. For the purposes of this briefing, we concentrate on Article 8 in the healthcare setting. Article 8 is very broad in scope, covering a number of different areas. The ECtHR has held that the notion of "private life" protected by Article 8 encompasses a person's physical and psychological integrity[48] and has found that Article 8 is relevant to complaints around funding or availability of medical treatment.[49]

31. Article 8 contains both negative and positive obligations. The negative obligation protects against arbitrary interferences with private and family life, home and correspondence by a pubic authority. Positive obligations require national authorities to take reasonable and suitable measures to safeguard individual rights. Positive obligations require intervention by the state; whereas negative obligations require the state to refrain from doing something.

Positive obligations

32. In the healthcare context, Article 8 contains positive obligations that run in parallel to those contained in Article 2. States must have in place regulations compelling both public and private hospitals (and by extension care homes) to adopt effective measures for the protection of their patients' physical integrity, and also must provide victims of medical negligence access to proceedings where they could obtain compensation.[50] Positive obligations are therefore generally limited to the duty to establish an effective regulatory framework obliging hospitals and health professionals to adopt appropriate measures to protect the integrity of patients.

33. As is the case under Articles 2 and 3, in exceptional circumstances a state's responsibility may be engaged under Article 8 in relation to the actions or omissions of health care providers. This is where

a patient's life was knowingly endangered by the denial of access to life-saving treatment; or where a patient did not have access to treatment because of systemic or structural dysfunction in hospital services, and where the authorities knew or ought to have known of this risk and did not take the necessary measures to prevent the risk materialising. These principles, which are discussed above in relation to Article 2, also apply under Article 8 in the event of injury which falls short of threatening the right to life.[51]

34. It should again be noted that the ECtHR has been cautious to extend Article 8 in a way that would implicate extensive resources of the state concerned and states are generally granted a wide margin of appreciation around access to healthcare.[52]

Negative obligations

35. As stated above, the negative obligation in Article 8 protects against arbitrary interferences with the right. Article 8 is a qualified right, which means states can justify interferences as long as they are in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society.

36. An interference with a person's Article 8 rights must be in accordance with the law. This means that the interference must have some legal basis in national law, and further than the law must be clear, foreseeable and accessible.[53]

37. Article 8(2) sets out a number of legitimate aims which may justify an interference: "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

38. Any interferences must be necessary in a democratic society. Generally, interferences will be considered necessary in a democratic society for a legitimate aim if they answer a "pressing social need", if they are proportionate to the legitimate aim pursued

and if the reasons given by national authorities to justify the interference are relevant and sufficient.

39. The ECtHR has held that reduction in levels of care contrary to the wishes of the person concerned engages Article 8.[54] So, too, would restrictions on a person's movement. For example, the inability of care home residents to receive visitors is undoubtedly an interference with Article 8. However, as Article 8 is a qualified right the proportionality of any interferences must be considered. To do so, an examination of the stated legitimate aim being pursued (such as for the protection of health) and the reasons provided by public authorities to justify those interferences would be required.

Article 14 ECHR – Freedom from discrimination in respect of protected convention rights

40. Article 14 ECHR reads: **"**The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

41. Article 14 protects the right not to be discriminated against in "the enjoyment of the rights and freedoms set out in the Convention". This means that the right not to be discriminated against does not exist independently under Article 14; it must be connected to the fulfilment of another Convention right. This does not mean that there must be a violation of another Convention right before Article 14 applies, simply that the right must be engaged.[55]

42. The ECtHR has defined discrimination as "treating differently, without an objective and reasonable justification, persons in relatively similar situations".[56] The ECtHR has recognised that age constitutes "other status" for the purposes of Article 14.[57] A full discussion of Article 14 is beyond the scope of this briefing, particularly as discrimination matters in Scotland must also be

considered under relevant equality law.[58] That said, when examining the approach taken in Scotland's care homes, questions over whether residents or staff have been discriminated against, for example on the grounds of age, race or disability, are of paramount importance.

International Covenant on Economic, Social and Cultural Rights (ICESCR) – Right to highest attainable standard of physical and mental health

43. The Human Rights Act 1998 incorporates the ECHR into UK domestic law. As such, the rights contained in the ECHR can be relied on directly in domestic courts. The UK and devolved Governments also have legal obligations under a number of international human rights treaties. Of particular relevance to the situation experienced in Scotland's care homes is the right to the highest attainable standard of physical and mental health, contained in Article 12 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") signed and ratified by the UK.

44. The right to health, like many other economic, social and cultural rights, is measured through consideration of the following standards:
    - Available – are the resources needed to realise the right available in sufficient quantities?
    - Accessible – can people access these resources?
    - Acceptable and adaptable – are the resources available in a way that is culturally and socially acceptable?
    - Quality – are the available resources of an adequate and safe standard?

45. In general, economic, social and cultural rights encompass the following concepts:
    - The realisation of these rights does not have to occur overnight but should continuously improve (progressive realisation)

- The realisation of these rights depends on government using the “maximum available resources”
- The realisation of these rights should not get worse (non-retrogression)
- Discrimination in the realisation of these rights is prohibited.

46. When there is a crisis, such as the current pandemic, some retrogression of rights may occur subject to stringent tests being met. However, any retrogression in rights is also subject to important human rights standards and principles. Retrogressions of rights must:
    - Be temporary and time-limited
    - Be necessary and proportionate
    - Be non-discriminatory and mitigate inequalities
    - Ensure the protection of a minimum core content of rights
    - Consider all other options, including financial alternatives.[59]

47. Article 12 2(c) of ICESCR specifically references the “prevention, treatment and control of epidemic, endemic, occupational and other diseases”. General Comment No. 14 of the Committee on Economic, Social and Cultural Rights explains that the obligation contained in Article 12 2(c) requires the creation of urgent medical care in cases of epidemics and similar health hazards. The reference to control of diseases refers to states’ individual and joint efforts to “make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunisation programmes and other strategies of infectious disease control”.[60] CESCR General Comment No. 14 also highlights the importance of equality of access to health care and health services.

48. In relation to the current pandemic, the Special Rapporteur on the right to health, along with over 60 other mandate holders, issued a statement stressing: “Everyone, without exception, has the right to life-saving interventions and this responsibility lies with the

government. The scarcity of resources or the use of public or private insurance schemes should never be a justification to discriminate against certain groups of patients. Everybody has the right to health".[61]

Convention on the Rights of Persons with Disabilities (CRPD)

49. The UK is also a signatory to the Convention on the Rights of Persons with Disabilities ("CRPD"). Article 11 CRPD establishes the obligation on states parties to take all possible measures to ensure the protection and safety of persons with disabilities in the national response to situations of risk and humanitarian emergencies. The Chair of the UN Committee on the Rights of Persons with Disabilities and the Special Envoy of the UN Secretary-General on Disability and Accessibility have issued on joint statement entitled "Persons with Disabilities and COVID-19". In the statement, they make clear that the obligation in Article 11 comprises measures in all areas of life of persons with disabilities "including the protection of their access to the highest attainable standard of health without discrimination, general wellbeing and prevention of infectious diseases…"

50. In the current context, the statement is clear that states should take all appropriate measures to ensure access to health services, providing persons with disabilities with "the same range, quality and standard of health care as provided to other persons". States should also "prevent discriminatory denial of health care or life-saving services, food or fluids on the basis of disability".[62]

51. This should also be viewed in context of the other rights protected by the CRPD. In particular, Article 5 affirms that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. All discrimination on the basis of disability is prohibited.

Public Inquiry – Human Rights Based Approach

52. The Commission welcomes the First Minister's commitment to holding a public inquiry into all aspects of the handling of the pandemic, including what has happened in care homes. The requirements of human rights law regarding investigations under the ECHR are set out above and the procedures surrounding public inquiries are governed by the Inquiries Act 2005 and Inquiries (Scotland) Rules 2007. The Commission believes that the Scottish Government should further commit to taking a human rights based approach to any public inquiry which specifically gives consideration as to whether human rights standards and principles have been met.

53. A human rights based approach is about empowering people to know and claim their rights, and increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling human rights. There are some underlying principles which are of fundamental importance in applying a human rights based approach in practice. These are known as the PANEL principles.

- **P**articipation of everyone in decisions which affect their human rights
- **A**ccountability of those responsible for the respect, protection and fulfilment of human rights
- **N**on-discrimination
- **E**mpowerment of rights holders to know and claim their rights
- **L**egality – an explicit application of human rights law and standards

54. Taking a human rights based approach should ensure that human rights are respected, protected and fulfilled in the process as well as the outcome of the design and implementation of any inquiry or other remedy. A human rights based approach goes beyond simply ensuring compliance or accountability in relation to human rights law but rather sets out an approach to respect, protect and fulfil human rights in both process and outcome. The attached annex sets out the key elements of a human rights based

approach as it may relate to an inquiry or investigation into the issues related to care homes during the pandemic.

Annex 1 – A human rights based approach to inquiries/investigations

Participation

In the context of an inquiry, rights holders (whether those are care home residents or staff) and their families should be involved in both the design and implementation of an inquiry. This will include effective and accessible communication to ensure everyone who is affected knows about the inquiry and any other remedies, and support is in place to allow them to participate. Importantly, rights holders and their families should be involved in the design and in shaping how the inquiry will operate. Examples of questions that should involve rights holders and their families are how the independence of the inquiry will be secured; how members of the inquiry should be selected and selection criteria; how the inquiry will operate – including mandate and powers and, where required, what remedies may look like.

Accountability

Meaningful accountability should be embedded in any terms of reference and follow up. This means identifying what there should be accountability for; who is accountable; how will that accountability be realised; and what the duties are to ensure effective remedies. The requirements of effective investigations under Articles 2, 3 and 8 of the ECHR are set out above. Alongside the setting up of a public inquiry, the Government – alongside rights holders – should examine the question of what other remedies will be appropriate, ensuring that this is based on human rights law on effective remedy. Full discussion of the scope of remedies for human rights violations is beyond the scope of this briefing.

Non-discrimination

The principle of non-discrimination should run throughout any inquiry. This includes that all rights holders and family members should be able to access the inquiry, regardless, for example, of whether they or their family members were resident in/worked for a public or private care home. The inquiry itself should ensure focus on the particular circumstances of an individual in coming to findings around treatment. For example, a characteristics such as person's age, sex, disability, mental health and race could all be relevant factors in determining whether their experience amounted to a rights violation.

Empowerment

Rights holders must be empowered to know and claim their rights. This requires information to be delivered and made available through a variety of formats, and support to be made available to allow everyone to participate. This may include advocacy and psychological support at various stages of an inquiry process. Rights holders and their families should also be kept informed of how their input is being dealt with and the process should ensure that expectations around what can and cannot be delivered are managed.

Legality

Finally, there should be a full assessment of the wide range of human rights law and standards applicable to the situation experienced in care homes during the pandemic. This will assist the government and other stakeholders in ensuring it is fulfilling its human rights obligations, applying international best practice and learning lessons for the future. This briefing has highlighted some of the key rights engaged; however, a full framework of human rights that apply should be produced and inquiries and investigations should have human rights requirements at their core.

[1] https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/weekly-and-monthly-data-on-births-and-deaths/deaths-involving-coronavirus-covid-19-in-scotland
[2] See, for example: 'Care home coronavirus deaths in Scotland overtake hospitals', The Guardian, 3 June 2020; Age UK response to DNR forms during COVID-19 crisis; Official Report, Meeting of the Parliament (Hybrid) 3 June 2020, First Minister's Question Time; Official Report, Meeting of the Parliament (Virtual) 27 May 2020, First Minister's Question Time; Official Report, Meeting of the Parliament (Hybrid) 24 June 2020, First Minister's Question Time.
[3] Official Report, Meeting of the Parliament (Virtual) 27 May 2020, First Minister's Question Time. Available at: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12660&i=114533
[4] This briefing concentrates largely on ECHR rights and particular rights found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of Persons with Disabilities (CRPD); however, other relevant standards from international human rights law includes those found in the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention against Torture (CAT), Convention on the Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
[5] *McCann and Others v UK*, no. 18984/91, 27 September 1995.
[6] Article 2(2) ECHR: Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.
[7] For further information on elements of the negative duty, see 'Guide on Article 2 of the European Convention on Human Rights', European Court of Human Rights, Updated April 2020. Available at: https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf
[8] *McCann and Others v UK.*
[9] *Makaratzis v Greece*, no. 50385/99, 20 December 2004 at para. 57.
[10] *Calvelli and Ciglio v Italy*, no. 32967/96, 17 January 2002.
[11] See *Dodov v Bulgaria*, no. 59548/00, 17 April 2008, which concerned the actions of a Bulgarian nursing home.
[12] *Oneryildiz v Turkey*, no. 48939/99, 30 November 2004; *Stoyanovi v Bulgaria*, no. 42980/04, 9 February 2011.
[13] *LCB v UK*, no. 23413/94, 9 June 1998.
[14] *Osman v UK,* no. 23452/94, 28 October 1998.
[15] *Oneryildiz v Turkey*.
[16] Ibid.
[17] For an explanation as to how the ECtHR approaches health issues, see "Health related issues in the Case Law of the European Court of Human Rights", Council of Europe, June 2015. Available at: https://www.echr.coe.int/Documents/Research_report_health.pdf
[18] *Lopes de Sousa Fernandes v Portugal,* no. 56080/13, 19 December 2017.
[19] Ibid at para. 167.
[20] Ibid at para. 192. See also *Aydogdu v Turkey*, no. 40448/06, 30 November 2016.
[21] Ibid at para. 175.
[22] See, in particular, SHRC recommendations in relation to COVID-19 Guidance: Clinical Advice, 9 April 2020. Available at: https://www.scottishhumanrights.com/media/2009/2020_04_09_clinicalguidance_vfinal.pdf
[23] Council of Europe Commissioner for Human Rights, 'Lessons to be drawn from the ravages of the COVID-19 pandemic in long-term care facilities', 20 May 2020. Available at: https://www.coe.int/en/web/commissioner/-/lessons-to-be-drawn-from-the-ravages-of-the-covid-19-pandemic-in-long-term-care-facilities
[24] *Armani da Silva v UK*, no. 5878/08, March 2016 at para. 2016.
[25] *Lopes de Sousa Fernandes v Portugal*, at para. 215. The Court was clear that, in some exceptional situations, where the fault attributable to the health-care providers went beyond an error or medical negligence, compliance with the Article 2 procedural obligation will include recourse to criminal law.

[27] Official Report, Meeting of the Parliament (Hybrid), 13 May 2020. Available at: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12636&mode=pdf

[28] Updated Guidance to Medical Practitioners for Death Certification during the COVID-19 Pandemic, Chief Medical Officer, 20 May 2020. Available at: https://www.sehd.scot.nhs.uk/cmo/CMO(2020)15.pdf
[29] It is anticipated information on these deaths will already be within the knowledge of Police Scotland and the Health and Safety Executive.
[30] *Bajic v Croatia*, no. 41108/10, 13 November 2012, at para. 90.
[31] *Silih v Slovenia*, no. 71463/01, 9 April 2009.
[32] *Lopes de Sousa Fernandes v Portugal,* at para. 214-221.
[33] *Oyal v Turkey*, no. 4864/05, 23 March 2010.
[34] *Oneryildiz v Turkey*, at para. 94.
[35] *Silih v Slovenia*, at para. 156.
[36] Article 15(2) ECHR.
[37] *Ireland v UK*, no. 5310/71, 18 January 1978.
[38] *Kudla v Poland*, no 30210/96, 26 October 2000.
[39] Ibid.
[40] Harris, O'Boyle & Warbrick, 'Law of the European Convention on Human Rights', 4th ed. Oxford University Press, 2018 at pg. 239.
[41] *Ireland v UK*.
[42] *Denizci and Others v Cyprus,* nos. 25316-25321/94 and 27207/95, 23 August 2001.
[43] *Ireland v UK*.
[44] *Tyrer v UK*, no. 5856/72, 25 April 1978.
[45] There is currently an application pending before the European Court of Human Rights, which alleges violations of Articles 2, 3 and 8 ECHR. The case relates to death allegedly caused by poor hospital conditions and/or inappropriate treatment. *Volintiru v Italy,* no. 8530/08.
[46] *MC v Bulgaria*, no. 39272/98, 4 March 2004.
[47] *Gafgen v Germany,* no. 22978/05, 1 June 2010 at para 117.
[48] *Niemietz v Germany*, no. 13710/88, 16 December 1992.
[49] *Pentiacova and Others v Moldova,* no. 14462/03, 4 January 2005.
[50] *Lopes de Sousa Fernandes v Portugal*
[51] *Ibrahim Keskin v Turkey*, no. 10491/12, 10 September 2018.
[52] See European Court of Human Rights Guide on Article 8 https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf
[53] *Silver and Others v the United Kingdom* no. 7136/75, 25 March 1983.
[54] *McDonald v UK*, no. 4241/12, 20 May 2014.
[55] This is referred to as the Court's 'ambit test'. See *Rasmussen v Denmark*, no. 8777/79, 28 November 1984.
[56] *Zarb Adami v Malta*, no. 17209/02, 20 September 2006.
[57] *Schwizgebel v Switzerland*, no. 25762/07, 10 September 2010.
[58] The remit of the Equality and Human Rights Commission extends across Great Britain and is to promote equality and diversity and enforce equality laws, and to promote and protect human rights, by encouraging good practice and promoting mutual respect including good relations. In relation to human rights in Scotland, the EHRC's remit covers human rights issues arising in reserved areas.
[59] See SHRC Briefing: lived Experience of Poverty and COVID-19 produced by the Adequate Standard of Living Reference Group https://www.scottishhumanrights.com/media/2016/briefing-for-ehric-inquiry-final-040520-002.pdf
[60] CESCR General Comment No. 14, para. 16.
[61] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=E See also para 12 re allocation of public funds.
[62] https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2020/04/Joint_Statement_Persons_with_Disabilities_COVID19.pdf