

COVID-19: Human Rights Considerations Related to Students

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Introduction

1. In October 2020 the Scottish Human Rights Commission (the Commission) issued a statement noting our concern about the impact of COVID-19 related restrictions on many students.¹ In particular, we expressed concern about the suitability of student accommodation for quarantining and the fact that many students lack a local support network.
2. This briefing looks in more detail at the relevant human rights engaged by the impact of recent COVID-19 related decisions on people in student accommodation and makes a number of recommendations for future decision-making affecting them. We hope that this will be useful in informing accountability for decisions taken by the Scottish Government, colleges and universities, as well as in aiding decision-making in the period ahead.²
3. We have recommended that questions as to whether it was appropriate to allow students, both Scottish and international, to take up places in student residences at that point in the pandemic should be scrutinised by a future public inquiry. The Scottish Government has committed to holding a public inquiry into all aspects of the handling of the pandemic in due course, which we have welcomed. The human rights framework set out in this briefing may be of assistance in that inquiry.

Background

4. Colleges and Universities in Scotland suspended in-person teaching in March 2020 in response to COVID-19. On 27 May 2020 Universities Scotland announced that under the third phase of the Scottish Government's COVID-19 route map, universities and colleges would return the following term with "most planning for an initial combination of digital and blended learning with public health measures, including physical distancing in place."³ Minister for Further Education, Higher Education and Science, Richard Lochhead, was reported to have confirmed that there would be a "phased campus return in the new academic year, with the safety of students and staff of paramount importance."⁴ Students returned to campuses and student accommodation in Scotland during September 2020.

5. On Tuesday 22 September 2020 the First Minister announced new restrictions on indoor visits with other households in private dwellings, which would take effect on Friday 25 September.⁵ The new rules would have a significant impact on students who had recently moved into temporary student accommodation. On 24 and 25 September, Universities Scotland and individual universities produced a series of statements which gave the impression that additional legal restrictions had been imposed on students, over and above the general restrictions.⁶ Students were left with the impression that they were prohibited from socialising with anyone from another household, including outdoors or in a public or hospitality venue, and that they may face disciplinary sanctions if they did not comply.⁷ Other media reports also referred to potential sanctions if students returned home in breach of the general restriction preventing people from moving from one household to another.

6. On Monday 28 September the Scottish Government released [guidance](#) clarifying the situation for students. The guidance made clear that no additional legal restrictions had been placed on students; they had been asked to voluntarily avoid socialising

outwith their household over one weekend as a temporary measure intended to drive down infections rates. The fact that this was voluntary and applied only over one weekend had not been made clear in the announcements by universities. The National Union of Students welcomed the clarity provided in the guidance,⁸ which also gave examples of what might constitute a reasonable excuse for returning home, and noted that students should request support from colleges, universities and accommodation providers if they were having to self-isolate.

Human Rights Framework

7. The human rights of students living in student accommodation are engaged in relation to both the decision to allow a return to campuses in September 2020, and the way in which additional restrictions on meeting other households in dwellings were communicated to students. It is important to note that students are not a homogenous group and include: young people leaving home to live independently for the first time, including people who are under 18 years old; care leavers; mature students; disabled people; people affected by poverty; and international students.
8. Section 6 of the Human Rights Act 1998 (HRA) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The definition of “public authority” includes “any person of whose functions are functions of a public nature”. The HRA therefore applies not only to “core” public authorities, for example the NHS and the police, but also to private parties when exercising functions of a public nature, such as universities.

Decision to Allow Return to Campuses

9. The Commission recognises that the decision as to whether or not to allow a return to campuses following the summer break would have necessitated a balancing of rights. For example, on the one hand the need to protect people from the virus, including those

working on campus and in the wider community, and on the other hand the right of students to education. A determination as to whether or not the human rights implications of a return to campus were given adequate consideration would require review of the decision-making process, including any advice given to the decision-makers, which may be part of the future public inquiry.

10. The Commission notes that on 20 August, SAGE produced a report and recommendations for The UK Government in which it recommended that *“Universities should focus on providing excellent quality remote learning rather than on opening up campuses that are likely to close again.”*⁹ SAGE also advised the UK Government of a number of measures that ought to be taken for students who were returning to campus, including testing on or before arrival, mitigations in classrooms including wearing masks, and residential bubbles.
11. The public inquiry may review the decisions taken by the Scottish Government, Scottish universities and colleges, taking into account any advice they were provided with by the Scottish Government Covid-19 Advisory Group or others. The inquiry may also consider if sufficient consideration was given to measures to protect and support students. The following human rights are engaged in relation to these decisions:

The Right to Life

12. The Commission has noted from the outset that the State has positive obligations under Article 2 of the European Convention on Human Rights (ECHR) to take reasonable steps to minimise the risk to life posed by the coronavirus outbreak.
13. The Article 2 right to life is non-derogable,¹⁰ meaning that the state cannot depart from its obligations even in times of war or other national emergencies. The right to life requires states to take positive steps to protect people's lives. This does not amount to a guarantee for any individual of absolute security, but does require the state to put in place a regulatory framework and take preventative measures to protect people.

Right to Health

14. The right to health is provided for in the International Covenant on Economic Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC), which applies to people under the age of 18. The right covers both physical and mental health. While the right to health is not a right to be healthy, it is a right to a range of goods, services and information which are needed for health, including mental health treatment and care. Article 12 of the ICESCR includes the right to a system of health protection that gives everyone an equal opportunity to enjoy the highest attainable level of health.¹¹ In addition, Article 11 of the Convention on the Rights of Persons with Disabilities (CRPD) establishes obligations on states parties to take all possible measures to ensure the protection and safety of persons with disabilities in response to situations of risk and emergencies.

Right to Adequate Housing and Food

15. The right to an adequate standard of living, provided for in Article 11 of the ICESCR, includes the provision of adequate housing and food. The minimum requirements for adequate housing includes security of tenure, adequate lighting, heating and sanitation.

Habitability includes the provision of adequate infrastructure of cultural adequacy.¹²

16. In terms of food, the UN Committee on Economic, Social and Cultural Rights has clarified that the right to adequate food should 'not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients', but implies it should be of sufficient quality and quantity, free from adverse substances, culturally acceptable and accessible, both economically and physically'.¹³ Cultural acceptability may be particularly important in institutional settings, where a duty to provide Halal, Kosher, vegetarian, vegan or other dietary options should be recognised. This right is closely linked to the Article 12 right to health.

Participation

17. Taking a human rights based approach to decision-making involves ensuring that people who will be affected by a decision are involved in the decision-making.¹⁴ In addition, children and young people have particular rights in relation to participation in decision-making (Article 12 CRC) and any decisions made should be in their best interests (Article 3 CRC). It is not clear to what extent students themselves were consulted or given the opportunity to participate in the decision to allow a return to campuses in September 2020, or the manner of that return and possible protective measures that could have been put in place. Clear information in advance of their return, in terms of safety measures, living arrangements and teaching methods, would have been critical for all students but particularly for new students unfamiliar with student accommodation or the area.

Restrictions introduced in September

18. When the Scottish Government decided to impose increased restrictions in September, after students had been permitted to return to campuses, the particular impact those restrictions would have on people in student accommodation ought to have been

considered as part of that decision-making process. The most important way of ensuring this happens is to engage with those who will be affected by the decision, ensuring they are participants in the decision-making, taking account of the different demographics and needs within the student population. Again, it is not clear what engagement took place between the Scottish Government, universities and colleges in advance of the decision to impose greater restrictions on social gatherings in September. It is clear that the way the general restrictions would apply to students was not clearly communicated and that led to confusion and anxiety.

19. Reports indicate that there was engagement with student bodies following the confusion created by the university announcements, and that steps were taken to respond to students' concerns and offer support. Whether or not this support was adequate may be considered by the inquiry. For example, whether or not universities and colleges ensured that those self-isolating in student accommodation had access to adequate and culturally appropriate food, and were provided with adequate mental health support given their particular circumstances.

Respect for private and family life

20. Article 8 of the ECHR protects the right to respect for private and family life, home and correspondence. The right is very broad in scope, covering a number of different areas. The European Court of Human Rights has held that the notion of "private life" protected by Article 8 encompasses a person's physical and psychological integrity and their home.
21. This is a qualified right and it may be interfered with if necessary to achieve a legitimate aim, such as national security, public safety, public order, prevention of crime, protection of health and morals and protection of the rights and freedoms of others. Restrictions must be set down in law and be proportionate to the aim being pursued, going no further than necessary.

22. Clarity regarding the status of restrictions, whether legal requirements or only recommendations, is very important. Care should be taken to avoid blurring the lines between what is being encouraged by the Government and what is legally required. People should not be left in any doubt about the extent of legal restrictions on their rights, particularly where backed up with sanctions. In this case, confusion regarding the extent of restrictions was created by the statements issued by universities. This confusion could have been prevented had there been active and ongoing engagement with students, in line with the human rights principle of participation.
23. Transparency of decision-making is also essential in order that restrictions can be assessed for proportionality. The aim being pursued must be clearly identified, the restriction justified as necessary to achieve that aim and proper consideration given to whether a lesser restriction would be sufficient. Restrictions must be time limited, kept under continual review and lifted when no longer necessary or proportionate. The reasoning behind decisions should be made clear in order that decisions can be scrutinised in this way.

Conclusion and Recommendations

Future Public Inquiry

24. The Commission has recommended that questions as to whether it was appropriate to allow students, both Scottish and international, to take up places in student residences at that point in the pandemic should be scrutinised by a future public inquiry. The inquiry may also consider if it was appropriate to allow that return without additional mitigation measures, and if adequate support was put in place, in particular for those required to self-isolate in shared accommodation. We hope that the above human rights framework will be useful for that purpose.

Future decisions affecting students

25. The Commission recognises that the situation created by the pandemic has meant that decisions requiring a balance of rights have had to be taken in a high pressure environment. This brings into focus the need to ensure that a human rights based approach to decision-making is fully embedded into all of Scotland's public institutions, in order that it is established practice when an urgent situation arises.
26. People's rights should be at the very centre of all policies and practices, and one key aspect of this is that people should be involved in decisions that affect their rights. Students in accommodation are one group of people whose rights are particularly affected by the COVID-19 related restrictions. It is important that their particular needs are taken into account through their active participation, prioritising the needs of those students who face the biggest barriers to realising their rights.
27. At the time of writing, the Scottish Government had not yet announced decisions regarding return to campuses in January 2021, following the winter break. We make the following recommendations to the Scottish Government, universities and colleges, in relation to that decision and any other decisions regarding students in accommodation:

- Involve students in the development of an emergency decision making framework for tertiary education, which is grounded in human rights and the principles of participation and non-discrimination;
- Ensure that the particular impact on students in accommodation is given due consideration when imposing restrictions across the population, including by listening to students regarding the likely impact and taking account of the diverse needs within the group;
- Clearly communicate decisions as early as possible in order that students can make informed decisions and to avoid unnecessary confusion and anxiety;

- Ensure access to support that is sufficient and culturally appropriate, including food and mental health support, and that students themselves are involved in determining what that support should be. This is particularly important given many students will not be able to rely on the help of friends or family when they have moved to a new city with no support network in place.

¹ **'Statement: Human rights of students at Scottish universities'** (2/10/20), available at: <https://www.scottishhumanrights.com/news/statement-human-rights-of-students-at-scottish-universities/>

² The Commission has been monitoring the impact of COVID-19 across a whole range of legislative and policy environments and rights impact during the pandemic. You can see all the reports in our website: <https://www.scottishhumanrights.com/covid-19/>.

³ See **'Colleges and universities preparing for phased return'** (posted May 27th 2020) Universities Scotland, available at: <https://www.universities-scotland.ac.uk/colleges-and-universities-preparing-for-phased-return/>

⁴ *ibid.*

⁵ **'Coronavirus (COVID-19) update: First Minister's speech'** (posted 22 September 2020), available at: <https://news.gov.scot/speeches-and-briefings/coronavirus-covid-19-update-first-ministers-speech-22-september-2020>

⁶ **'Preventing spread of coronavirus in universities'** (posted on 24/09/2020), News Universities Scotland, available at <https://www.universities-scotland.ac.uk/preventing-spread-of-coronavirus-in-universities/>.

⁷ See: **'NUS Scotland responds to updated rules for university students'** (posted 24/09/2020) NUS, available at <https://www.nusconnect.org.uk/articles/nus-scotland-responds-to-updated-rules-for-university-students>. See also **'UCU response to rules banning Scottish students from socialising'** (posted 24/09/2020) UCU, available at: <https://www.ucu.org.uk/article/11021/UCU-response-to-rules-banning-Scottish-students-from-socialising>

⁸ NUS Scotland said the new guidance "provides welcome clarity to students in halls", see **'NUS Scotland responds to government guidance for students in halls'** (posted 27/09/2020) available at: <https://www.nusconnect.org.uk/articles/nus-scotland-responds-to-government-guidance-for-students-in-halls>

⁹ **'Independent SAGE-Behaviour Group Consultation Statement on Universities in the context of SARS-CoV-2'** (20/08/20) The Independent Scientific Advisory Group for Emergencies (SAGE), available at: <https://documentcloud.adobe.com/link/review?uri=urn%3Aaid%3Aacds%3AUS%3A5e2e1350-dcdc-49db-83eb-91f470afee1a#pageNum=1> This information was made public on 12 October 2020 by the media. The report set out recommendations for best practice regarding the behavioural implementation

of, and adherence to, measures for a Zero Covid University and a Covid-Safe Student Experience ahead of the new university terms across the UK in Sept/Oct 2020.

¹⁰ Article 15 of the ECHR (https://www.echr.coe.int/documents/convention_eng.pdf)

¹¹ [General comment No. 20](#): Non-discrimination in economic, social and cultural rights. UN Committee on Economic, Social and Cultural Rights (CESCR) (2009). [Article 24 of the Convention on the Rights of the Child](#) (CRC) expands on the child's right to health and health services

¹² UN Committee on Economic, Social and Cultural Rights Concluding Observations on the United Kingdom (2009), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/GBR/CO/5&Lang=En.

¹³ [General Comment No. 12: The Right to Adequate Food](#) (1999). UN Committee on Economic, Social and Cultural Rights.

¹⁴ For more detail on a Human Rights Based Approach see: <https://www.scottishhumanrights.com/projects-and-programmes/human-rights-based-approach/>