

BIHR BRIEFING: Response to the first Progress Report to the Scottish Parliament on the use of Coronavirus Emergency Powers in Scotland

The human rights risks of the use of Emergency Powers without transparent communications or robust monitoring mechanisms

18 June 2020

The [British Institute of Human Rights](https://www.bihr.org.uk) (BIHR) is a charity working in communities across the UK to enable positive change through human rights. We work to support people with the information they need to benefit from their rights; with community groups to advocate for better protections; and with staff across public services to support them to make rights-respecting decisions. This enables us to call for the development and implementation of national law and policy which truly understands people's experiences of their human rights. Each year we work with over 2,000 people using public services and the staff members delivering them. Our policy recommendations are directly informed by people's real-life experiences of the issues.

Summary

In response to Coronavirus (Covid-19), the UK government introduced a range of temporary changes to health and care legislation via the Coronavirus Act 2020 (CVA), passed by Parliament on 25 March 2020. The Coronavirus Act includes changes to health and care legislation in Scotland, to which Scottish Ministers gave their legislative consent. The Coronavirus Act is time-limited for two years and will be subject to six monthly reviews (although the robustness of this review process has raised concerns). The Scottish Government has the power to switch these changes on (and off again) when they consider it necessary and appropriate to do so (based on the situation in Scotland). The Scottish Parliament also passed the Coronavirus (Scotland) Act on 6 April 2020 which introduces a range of further powers.

The purpose of the legislative changes within the Coronavirus Act 2020 and the Coronavirus (Scotland) Act are explained by the Scottish Government as necessary to help protect the public, maintain essential public services and support the economy. This is indeed an



unprecedented time at which many of us find ourselves in an unfamiliar (or familiar) position of vulnerability.

Emergency powers are not in themselves incompatible with human rights law. Emergency powers exist to safeguard those most in need of protection. However, for this to be the case, it is vital that the Scottish Government can assure the following:

- The process for activation and continued use of emergency powers is clear and transparent.
- That support is provided to public officials and those delivering a function of public nature to ensure they apply any restrictions compatibly with human rights law. It cannot be assumed that public bodies have the legal knowledge and capacity to do this.
- That there is a clear commitment to democratic oversight in monitoring and reporting on the use of emergency powers.

Based on our work with Scottish groups and people over the last 10 weeks, this briefing highlights our concerns that the above conditions are not being met. In particular:

- There is confusion amongst people, service providers, authorities and other organisations involved in care and support in Scotland about which provisions of Scottish law have been suspended.
- Where duties have been suspended, for example social care duties under Section 16 and 17 of the Coronavirus Act, there is no transparency about which Local Authorities are implementing these easements and how these are being monitored.
- The First (two monthly) Progress Report to the Scottish Parliament published on 9 June 2020 falls far short of offering any clarity on the use of Emergency Powers at local level.
- Without transparency and monitoring of these Emergency Powers we cannot be sure that these are being implemented according to human rights law. People and their families remain worried about their access to care and support, advocacy and community groups are unable to challenge without information and those working across health and care cannot offer clarity.

This briefing sets out the work BIHR has been doing in Scotland during Coronavirus, the concerns that have been raised with us, our response to these issues and recommended actions.

This briefing highlights:

1. [Our work as a human rights organisation: the voices who have shaped our desire to call for action](#)
2. [Our concerns about Section 16 of the Coronavirus Act and its current status as reported on 9th June 2020](#)
3. [Our response to the First \(two monthly\) Progress on the use of Emergency Powers in Scotland.](#)
4. [The human rights implications of the current situation in Scotland](#)

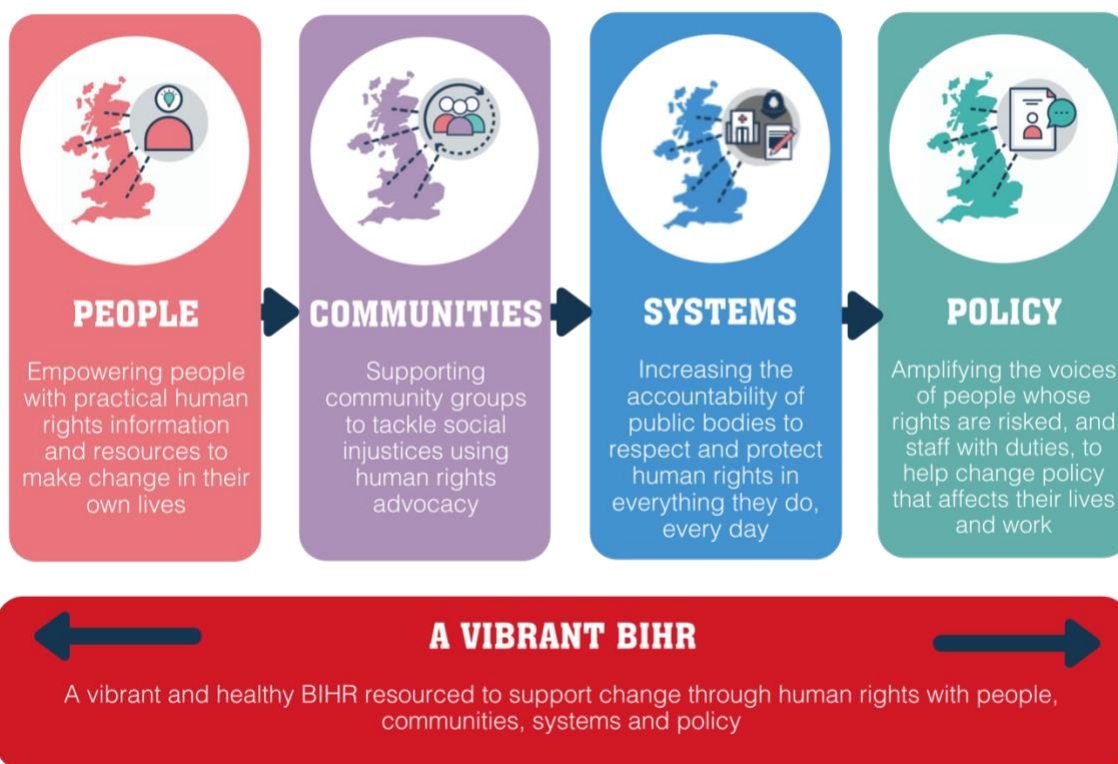
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- 5. [Our campaigning, next steps and how you can be involved](#)

1. BIHR’s work as a human rights organisation: the voices who have shaped our call for action

We work in 4 key areas which exist as separate strands but which also intertwine. Crucially, the learning from our work in each area informs our work in the others. To create change through human rights we must use a holistic approach.

The British Institute of Human Rights: Our Work



Our work during Covid-19

During Covid-19 we have seen a huge increase in the demand for our work. We know from engagement with people, communities and public bodies in Scotland that this increase in demand is a direct result of the lack of clarity, transparency and support to understand the Emergency Powers under the Coronavirus Act and the Coronavirus (Scotland) Act.

PEOPLE: People, their families and self-led groups have come to us looking for clear messaging around changes in the law which may impact their access to public services or their

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existing support during this time. There is widespread confusion in Scotland about what the Emergency Powers are and the process for these being used locally. There is a clear demand for communication on the use of the Emergency Powers in local areas and what this means for people accessing or trying to access public services. This lack of clarity and accessible information has human rights implications for the [\(minimum of\) 230,117 people](#) across Scotland accessing or trying to access health and social care services.

In response to this we have run online open human rights sessions for people and their families worried about their care and support during Covid-19. During these sessions we engaged with people and organisations in Scotland about their specific concerns to support our policy response. We have also created a Coronavirus Hub which contains Explaners on the legal changes in Scotland and what these mean for human rights. You can access them [here](#).

COMMUNITIES: Advocacy and community groups have come to us in need of support to understand the legal changes. These groups are looking for support to challenge decisions made during Covid-19 which they believe violate both the Human Rights Act and the Equality Act. Advocacy and community groups tell us that public bodies are not acting compatibly with human rights law. **For example, we have heard this week that complaints processes in many Local Authorities across Scotland have been stopped, violating the key human rights principles of participation and accountability.**

In response to this we are now creating online open human rights sessions for advocates and community groups, in partnership with other organisations. Our Coronavirus Hub and host of Explaners also offer clarity and support to advocates.

SYSTEMS: Public officials who have applied legislation the same way throughout their careers have come to us for clarity on the legal changes which have been switched on by Scottish Ministers. There is widespread confusion over the provisions and whether or not they can be used. The Scottish Government Guidance, written before provisions were switched on, has not helped to clarify this. Indeed, it has created further confusion. We have seen panic amongst public officials who have read within the Coronavirus Act and the Coronavirus (Scotland) Act that any changes to care and support must be compatible with the European Convention on Human Rights (ECHR) and mistakenly believe this to be a new legal duty. Rather, this duty has been in place since the Human Rights Act brought the ECHR into domestic law in 1998. Our experience shows a very low number of public officials in Scotland are trained to meet this duty in usual circumstances, which has been exacerbated in the current unprecedented situation.

In response to this we have run online open sessions specifically for people working in health and care in Scotland, for those whose Local Authority or Health and Social Care Partnership (HSCP) has not commissioned human rights training. We are also offering capacity building sessions to Local Authorities and HSCPs to support them to understand the legal changes and apply them according to human rights law. You can access a description of our Scottish human rights sessions [here](#).

POLICY: The Coronavirus Act itself raised significant human rights concerns. We engaged with the legislative procedure with [briefings](#) for both the House of Commons and House of Lords, highlighting the human rights implications of the proposed legal changes.



In May, we supported the Human Rights Consortium Scotland's [joint submission](#) to the Scottish Parliament Equalities and Human Rights Committee inquiry on the Impact of the COVID-19 Pandemic on Equalities and Human Rights. This raised some key human rights concerns from a cross section of civil society groups throughout Scotland, such as the concern that various healthcare, social care and ethical guidance notes published do not contain anything explicit or detailed about the equalities and human rights issues raised by the pandemic.

We are currently in the process of developing Communities of Practice, an online platform for people to be heard on human rights issues affecting their life and work. We are using this approach to gather evidence for [the Joint Committee on Human Rights inquiry](#) on "The Government's response to COVID-19: human rights implications". You can find out more about this platform and how to be involved [here](#). We will use this platform to ensure that Scottish voices are included in our submission and share this evidence with the relevant Scottish mechanisms.

2. BIHR's concerns about Section 16 of the Coronavirus Act and its status on 9 June 2020

The Coronavirus Act (2020) set out provisions to suspend duties under various pieces of Scottish health and social care legislation. Scottish Ministers have the power to switch these on and off again in response to the situation in Scotland.

Sections 16 and 17 of the Coronavirus Act contain changes to important social care duties such as assessments, support planning and involvement of the person in decision-making under the:

- Social Work (Scotland) Act 1968
- Children (Scotland) Act 1995
- Social Care (Self-directed Support) (Scotland) Act 2013
- Carers (Scotland) Act 2016

On 5 April 2020, these "easements" of social care duties were commenced through [Scottish Commencement Regulations](#). On 9th June 2020, in the first two-monthly-report to the Scottish Parliament, the Scottish Government confirmed that these easements remain switched on. You can read the report and status of the easements [here](#).

The Easements

Below, we provide detail about what these easements look like in practice

Changes to The Social Work (Scotland) Act 1968

The CVA makes changes to the Social Work (Scotland) Act 1968. The following duties on LAs can be suspended:

- The duty to conduct a needs assessment for relevant persons (s.12A).

This includes adults who may lack capacity (if not previously been assessed as such). It also includes people with a “mental disorder” not in hospital under sections 25-27 of the Mental Health (Care and Treatment) (Scotland) Act.

Changes to the Children (Scotland) Act 1995

The CVA makes changes to the Children (Scotland) Act 1995. The following duties on LAs can be suspended:

- The duty to conduct assessments to safeguard and promote children’s welfare (section 23).
- The duty to provide aftercare (advice, guidance and assistance) to young people (section 29(1) and (2)) - for example, to young people who were formerly looked after.

Changes to the Social Care (Self-directed Support) (Scotland) Act 2013

The CVA makes changes Section 1 of the Social Care (Self-directed Support) (Scotland) Act 2013. The following duties on LAs can be suspended:

- The duty to involve the person as much as they want to be in assessment and provision of care.
- The duty to provide assistance to enable involvement and informed choice in assessment and provision of care.
- The duty to collaborate with a person in relation to assessment and provision of care.

Changes to the Carers (Scotland) Act 2016

The CVA makes changes to the Carers (Scotland) Act. The following duties on LAs can be suspended:

- The duty to prepare Adult Care and Support Plans (Section 6)
- The duty to prepare young carer statements (Section 12)

The duty to provide support to carers will remain while Section 16 is in force (Section 24). There is recognition that, “some form of analysis of a carer’s situation will still need to happen so that the most effective response can be delivered.”

Are these powers being used?

The easements set out above are “switched on”, meaning that since 5 April 2020, public services across Scotland are able to use these powers. On the date of writing- 19 June 2020, these remain switched on.

The Cabinet Secretary for Health and Sport, Jeane Freeman MSP, issued a letter to Local Authority Chief Executives, Chief Officers Health and Social Care Partnerships, Chief Social Work Officers, COSLA and Social Work Scotland which stated:

“Regulations will commence sections 16 and 17 of the Coronavirus Act 2020 on 5th April. These sections allow Local Authorities in Scotland not to comply with particular assessment duties in relation to social care for children, adults and carer support, to the extent that complying would not be practical or would cause unnecessary delay in providing support to people. The relaxation of these obligations is to allow Local Authorities to prioritise and provide urgent care without delay.

Urgent commencement of these provisions is now necessary in Scotland to allow Local Authorities to respond to rising pressures across the social care system as a result of the Covid-19 outbreak.

These powers will remain in operation for the shortest time possible and only while absolutely necessary to protect people. We intend to gather information from Local Authorities and partners such as COSLA and Social Work Scotland to assist in informing our decision to rescind these powers.”

The Scottish Government Guidance on the use of these easements was published on the Scottish Government website on 8 April 2020. One of the most significant concerns being raised with us by people, communities and public bodies across Scotland is that the Guidance remains written in the future tense. This is causing uncertainty amongst people, civil society and members of Parliament themselves as to whether these provisions are on or off. For example, the Guidance published on 8 April (and accessed again at the date of this report) states:

“When section 16 is in force.”

“These powers will only be switched on when they are absolutely necessary to allow local authorities to prioritise and provide urgent care without delay.”

Following a series of communications the Scottish Government informed us that the process is such that Guidance is written in advance of Commencement Regulations. “The Guidance was in fact written on the 3 April (before the Regs switched on) and is in the correct tense.” However, the website states that the Guidance was published on 8 April.

At the start of June 2020, we suggested that this be corrected; this small change will lead to significant clarification for people with care and support needs across Scotland. The error currently remains, causing continued confusion.

We know from our interaction with people, communities and public bodies in Scotland that people are much more likely to refer to Guidance than search the Coronavirus Act for Commencement Regulations. As a result, the Guidance must be clear. In this unique situation, where provisions can be switched on and off again, we ask the Scottish Government to ensure that incorrect dates are amended immediately and there is complete clarity, achieved through dates, on whether or not any provisions can be used across all emergency powers.

How is the use of Emergency Powers communicated in Scotland?

The Scottish Government Guidance on changes to social care [section 4.1](#) covers public messaging and states that:

“There are understandable concerns from supported people and carers about how authorities may choose to use their powers to dispense with assessment duties. Clear public messaging at local level will be vital to provide information and reassurance about how those powers will be used.”

Our work with people and families, community and advocacy organisations and public services across Scotland has highlighted huge concerns about the lack of clear understanding and communication about the social care legal changes in Scotland. During a civil society meeting in mid-May it became clear that no one was entirely sure whether these Emergency Powers under Section 16 of the Coronavirus Act were in force.

We reached out to both the Scottish Government and COSLA asking for clarification about whether or not section 16 Coronavirus Act 2020 (CVA) provisions were in force and if so, what the announcement and monitoring processes were. In England, for example, in order for a Local Authority to “switch on” the Care Act Easements, the Director of Adult Social Care must communicate the decision to all providers, service users, carers and local MPs. The decision should also be reported to the Department of Health and Social Care. See section 6 of the [Care Act easements: guidance for local authorities](#).

In our communications, we were informed by the Scottish Government that:

“Unlike in England, there is no obligation for local authorities in Scotland to tell SG [Scottish Government] whether they are using the powers.”

In our communications, we were informed by COSLA that:

“Regarding your question around the monitoring and usage of S.16 and 17 within the Coronavirus Act, the monitoring of the Coronavirus Act including S.16 and 17 is the responsibility of Scottish Government.”

We know that The Cabinet Secretary for Health and Sport, Jeane Freeman MSP, in her letter to Local Authority Chief Executives, Chief Officers Health and Social Care Partnerships, Chief Social Work Officers, COSLA and Social Work Scotland stated that:

“We intend to gather information from Local Authorities and partners such as COSLA and Social Work Scotland to assist in informing our decision to rescind these powers.”

We are concerned about decisions to continue to keep the powers switched on without an obligation on public bodies to report on the usage of these easements. Following our communications with the Scottish Government on this issue we have more clarity on the monitoring process. As we understand it, the Government has sent Local Authorities a survey to complete on the use of the powers up until 31 May 2020. There is however no legal obligation on Local Authorities to provide the asked for information. The responses to this first survey request shaped the first progress report to the Scottish Parliament issued on 9 June 2020. You can read it [here](#).

3. Our response to the First (two monthly) Progress Report on the use of Emergency Powers in Scotland

The first two-monthly report to Scottish Parliament on the use of the Emergency Powers contained within the Coronavirus Act 2020 and Coronavirus (Scotland) Act 2020, covering the reporting period up to 31 May 2020 was published on 9 June 2020. This is a single report which covers provisions in both Acts. Section 3.2 of the report explains that:

“In developing our approach, careful consideration has been given to ensuring that this balances openness and transparency with the need to avoid placing undue pressures on those individuals and organisations at the heart of the coronavirus response.”

The Report and our concerns

Section 3.4 of the report acknowledges the limitations of the data in the report stating that this is a new approach which requires new data and monitoring processes and that this will continue to evolve as the powers are used and new data becomes available.

We welcome the recognition that monitoring of the use of these significant powers is needed. It is certainly useful to have the data collected, as these actions of Local Authorities directly impact on the lives of people with care and support needs across Scotland. However, given the concerns that people, community groups and staff in public authorities in Scotland have raised with BIHR, we have identified the following issues in the first Progress report on the use of Emergency Powers:

1. **The report states that:** “Following liaison with COSLA and Social Work Scotland, a survey was issued to Chief Social Work Officers to identify use of the powers over the period from commencement of the above regulations on 5 April 2020 until 16 May 2020. Responses were received from 26 Local Authorities/Health and Social Care Partnership areas.”

BIHR concern: From our correspondence with Government, we know that the surveys were optional. There is a lack of clarity in this first progress report around which authorities responded to the survey and which did not. This is problematic because it means that people with care and support needs do not have access to independent information on whether their local authority/partnership is using the easements, and

therefore what limitations can be placed on their care and support. In addition, the number refers to “Local Authorities/ Health and Social Care Partnership area”. It is unclear if some Local Authorities may have been counted twice if the Health and Social Care Partnership they exist under also responded.

2. **The report states that:** “Of these [26 Local Authorities/Health and Social Care Partnership areas], five partnership areas comprising six Local Authorities said they were using the powers. Some are using the powers across the whole authority area and all services, while others are using the powers in a more targeted way, for example, on particular services only.”

BIHR concern: From this, we know that six Local Authorities are using the powers. However, again, there is no inclusion of which authorities these are. There is therefore also no clarity on which authorities are using which powers and in what ways, for example which authorities are using these powers on particular services only and which are using them wholesale.

3. **The report states that:** “Some of the reasons for the use of the powers included: to support quick access to services where face to face assessment cannot take place, to allow staff to support frontline duties and reduce bureaucracy, and to avoid delays in the provision of care.”

BIHR concern: The report does not detail what monitoring or oversight, if any, is in place to help authorities assess whether their use of the powers has resulted in these outcomes, or whether it has resulted in other, potentially unintended outcomes. Yet, without this data, the decision to keep the powers switched on has been made.

4. **The report states that:** “Most Local Authorities have decided that it is not operationally necessary for them to use these powers. This may suggest that Local Authorities are carefully considering use of the powers and seeking to use them only where appropriate and necessary, subject to their governance processes.”

BIHR concern: Again, there is a lack of inclusion of which authorities have reported using the powers and which have reported they have not used the powers and have therefore decided that it is not operationally necessary. This could provide potentially vital information to support more positive practice across Scotland, including supporting those who are using the easements to explore how they can avoid / reserve this decision through other approaches. Further, there is no detail on what decision-making criteria individual authorities have used in their decisions, either to use or not use the powers. While the report says this, “*may suggest that Local Authorities are carefully considering use of the powers and seeking to use them only where appropriate and necessary*” (emphasis added) there is no monitoring process to evidence that this is the case. The report does not detail what considerations have been taken into account by authorities, or whether any data of this kind has been collected.

5. **The report states that:** “While significant progress is being made, the future path of the virus, and levels of demand for assessments and impact on social work professionals is hard to fully predict. It is therefore appropriate at this time to maintain the flexibility for Local Authorities to use these powers. This will be subject to further monitoring and review.”

BIHR concern: There is a lack of clarity as to what form “further monitoring and review” will take. We know from the beginning of the report that the reporting will “evolve” but we have no further detail on how at this stage.

Crucially, there is no reference to human rights law in the progress report despite the fact that both the Coronavirus Act and the Coronavirus (Scotland) Act must be applied compatibly with human rights law. Yet this information could have been asked of the Local Authorities / Partnerships. This means there is no data on whether or not people’s human rights are being upheld in the use of Emergency Powers in Scotland.

The human rights implications for people in Scotland

It is clear that human rights law in Scotland (and the rest of the UK) has not been relaxed or changed due to Coronavirus. Internationally, the United Nations has recognised that the pandemic presents a human rights crisis, with particularly disproportionate impacts on people with care and support needs, and that human rights must be part of the response to and recovery from the pandemic. As the Secretary General of the UN, António Guterres, said on 23 April 2020¹:

“The COVID-19 pandemic is a public health emergency — but it is far more. It is an economic crisis. A social crisis. And a human crisis that is fast becoming a human rights crisis ... human rights cannot be an afterthought in times of crisis — and we now face the biggest international crisis in generations ... human rights can and must guide COVID-19 response and recovery. The message is clear: People — and their rights — must be front and centre. A human rights lens puts everyone in the picture and ensures that no one is left behind. Human rights responses can help beat the pandemic, putting a focus on the imperative of healthcare for everyone. But they also serve as an essential warning system — highlighting who is suffering most, why, and what can be done about it. We have seen how the virus does not discriminate, but its impacts do — exposing deep weaknesses in the delivery of public services and structural inequalities that impede access to them. We must make sure they are properly addressed in the response.”

Scotland, via the UK government, has committed to a number of international human rights standards, which are relevant to both responding to, and recovering from, the pandemic. Whilst, for the most part, these standards have not been directly incorporated into UK law, the Scottish

¹ “We are all in this Together: Human Rights and COVID-19 Response and Recovery”:

www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and

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Government and civil society often looks to give these further effect domestically. Notwithstanding this, there are also a range of UK-wide enforceable human rights laws which are not only relevant, but part of our domestic legal system and must be upheld. The Human Rights Act (“HRA”) and the European Convention on Human Rights (“ECHR”) apply across the UK. The Scotland Act 1998 prohibits both the Scottish Parliament from passing law which is incompatible with ECHR rights (section 29) and prevents Scottish Ministers from exercising their powers in a way that is incompatible with ECHR rights (section 57(2)). The passing of Emergency Laws by both the Scottish Parliament (Acts) and the Scottish Government (Regulations) is not incompatible with human rights in and of themselves. However, how these measures are implemented and managed may amount to breaches of human rights.

Through the HRA, there is a direct legal duty on public bodies to uphold ECHR human rights across their actions, decisions, policies and services. This legal duty on officials essentially has three parts:

1. Respect: duty to not breach human rights
2. Protect: duty to take action to safeguard people’s rights
3. Fulfil: duty to have the right processes and procedures in place, and to investigate when things have gone wrong

This duty has not changed during the Covid-19 pandemic. It means that decisions being made by a public body interacting with people, including in health and social care settings, must respect and protect human rights. **This includes decisions by local authorities to use or not use the Emergency Powers.** Review and accountability of these decisions is a vital element of the fulfil aspect of the duty. **This includes actions by the Scottish Government to monitor the use of powers, as well as local accountability processes.**

Additionally, and importantly, the HRA is a foundational law. This means that other UK laws should be compatible with the HRA. Accordingly, other laws such as the Coronavirus Act and the Coronavirus (Scotland) Act should be applied in a way that respects human rights. This continues throughout Covid-19, and is reinforced by references in the Coronavirus Act (and throughout its Westminster parliamentary passage) to the application of provisions without breaching human rights.²

From our work in Scotland and the analysis of the First Progress report from the Scottish Government, we believe the following human rights are at risk (this list is not necessarily exhaustive. As we work with more people, further risks are emerging):

The [right to respect for private and family life and home and correspondence](#) (Article 8 of the HRA)

This right covers many significant aspects of people’s everyday lives, particularly people with care and support needs and their relationships with public authorities. As discussed below, this right covers autonomy and involvement in decision-making, physical and mental wellbeing and health, as well as family relationships and privacy issues. The right to private and family life is a

² Please see the Hansard debates on this [here](#) and Part 1 paragraphs 4 6(c) of [Schedule 12 the Coronavirus Act 2020](#) refer directly to application of provisions without breaching human rights.
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non-absolute human right; it can therefore be restricted, but only where the Government or Authority can meet the 3 tests of the restriction being lawful, legitimate and proportionate. In particular, the proportionality test focuses on taking the option least restrictive of human rights in the situation. This promotes exploring new and creative approaches which build on the person and their assets, involvement and communication are key. We are concerned that these tests are not being properly considered in the current use of the Emergency Powers, particularly the proportionality test.

This right covers autonomy, the right to make our own decisions about our body and life.

The changes to Section 1 of the Social Care (Self-directed Support) (Scotland) Act mean that the Local Authority no longer needs to support a person to be involved in making informed decisions about their care. These changes remain switched on at the date of writing. The changes to the Social Work (Scotland) Act (not currently switched on) would also mean that a Local Authority no longer needs to consider past and present wishes of the person or others involved in their lives when making decisions about community care. For example, a person with care and support needs could be moved into a residential care facility without being involved in the decision.

If a person is not supported to make an informed choice about their care, then their right to autonomy is risked. For this restriction to be human rights compliant, it needs to be accessible to the person and proportionate. The lack of clear communication from Local Authorities and/or the absence of robust monitoring by the Scottish Government of Authorities using these powers means that people who are impacted are not involved in those decisions about usage. Nor are they informed about the legal changes which then happen to them (not with them) and which could significantly impact their life, without transparent or accessible communications about why or for how long.

This right also protects wellbeing, physical and mental health. The Emergency Powers discussed in this Briefing mean that Local Authorities are not required to carry out full assessments (including adult carer support plans and young carer statements) to the extent that it is deemed impractical or will cause unnecessary delay in the provision of care to do so. Local Authorities can also now dispense with the duty to complete needs assessments for children with disabilities and for the after-care needs of young people who have previously been looked after by the local authority. Further, Local Authorities can now dispense with the duty to prepare an adult carer support plan.

In order to identify if someone's human rights are at risk, a proper assessment of their needs must take place and there must be regular review of people's care, noting the impact any changes are having on them, listening to the views of the person and supporting them to be involved in decisions about their care. This is essential to ensure that a situation does not develop into either a disproportionate interference of the right to private and family life or into a situation which is inhuman or degrading, risking a non-absolute right, which is never lawful (see below).

The [right not to be tortured or treated in an inhuman or degrading way](#) (Article 3 of the HRA)

This right protects against serious harm to a person, irrespective of whether that harm is intended or not; it is about the impact on the person, taking into account their particular situation. This is an absolute human right and can therefore never be lawfully restricted (the 3 legal tests for restrictions above are not relevant). Importantly, a situation which does not immediately amount to inhuman or degrading treatment can develop into a situation which meets that threshold. At BIHR, we are seeing this in the pandemic where decisions to cut care do not raise immediate human rights violations, but the longer a person is left without support, the more their situation worsens, to the point of being undignified. Dignity is at the heart of this right. It is clear that people with care and support needs rely on the Government and Local Authorities for a range of packages that enable them to live dignified, equal, independent lives. When these care and support packages and systems are compromised, people are left vulnerable to harm.

If the changes to the Children (Scotland) Act 1995 or the Social Work (Scotland) Act are switched on, a person or child in need of a care assessment could be refused this. For children and adults in vulnerable positions, this could risk not protecting them from inhuman or degrading treatment. For example, when someone is unable to get out of bed without support, or unable to wash, dress or use the bathroom, or where a child is at risk of harm, but no assessment takes place. These are scenarios we are hearing about at BIHR.

Again, the lack of clear communication, monitoring and review is concerning. It is unclear what monitoring or oversight, if any, is in place to help authorities assess whether using the powers has resulted in the stated aim: “to allow staff to support frontline duties and reduce bureaucracy, and to avoid delays in the provision of care” or whether it has resulted in other, potentially unintended outcomes. Unintended outcomes could include people’s needs being unmet, particularly where there is a removal of previous support, potentially putting them at risk of inhuman and degrading treatment, which is always unlawful.

The [right to be free from discrimination](#) (Article 14 of the HRA)

All of the changes described above, if applied as blanket policies could have a disproportionate impact on people in Scotland who have a physical or a learning disability, have a capacity or mental health issue, are older or any other factor. Blanket approaches are rarely human rights compliant, often being disproportionate and discriminatory by their very nature.

Discrimination also includes failing to treat a person differently when they have very different needs or circumstances to others. For example, the duty in Section 1 of the Social Care (Self-directed Support) (Scotland) Act to support a person to be involved in decisions about their care is there to ensure that people, regardless of their support needs, can have a say in their care. If the changes mean that is not fulfilled, this could have a discriminatory impact on those that need support to express their views. Indirect or direct discrimination is not lawful.

4. Taking an explicit human rights-respecting response



The Scottish Government's approach to care and support law and policy has long been informed by human rights. The focus on the person and self-directed support places that person and their rights at the heart of public service provision. As the [Social Care \(Self-directed Support\) \(Scotland\) Act 2013: statutory guidance states](#):

The provision of social care, and the facilitation of choice as part of this, is a means by which to protect human rights.

The pandemic, and the response to it, has shone a spotlight on the need for explicit reference to human rights as the central decision-making framework for local and national action; without that, in the difficulty and challenge of responding to an unprecedented situation, it becomes too easy to leave people behind. The intentional focus on human rights helps prevent this.

In May and June, BIHR, supported by our relationships with civil society groups and networks in Scotland, has engaged in useful policy communications with the Scottish Government and COSLA around the specific concerns set out in this briefing. This has been very useful, and we have welcomed the clarity this has provided, enabling us to better support the people, communities and systems we are working with in Scotland to understand the use of Emergency Laws relevant to care and support. We also welcome the publication of the First Progress Report to the Scottish Parliament as an additional public step in providing further information.

However, our human rights concerns have not diminished. Indeed, the publication of the First Progress Report to the Scottish Parliament has raised further concerns about the use and monitoring of Emergency Powers in Scotland.

Recommendations:

There are a range of actions which BIHR believes can be taken by the Scottish Government to ensure an explicit commitment protecting and respecting people's human rights as part of the response to, and recovery from, the pandemic. These are listed below:

1. The process for activation and continued use of Emergency Powers must be clearly communicated. To have absolute clarity, the wording and tense of the Scottish Government Guidance must be updated or supplemented with dates of activation/review to avoid further confusion and uncertainty going forward.
2. There must be transparency around which Local Authorities are using the Emergency Powers, and which are not, in easy to access information that enables people to be aware of what duties the Local Authority they are interacting with are bound by, and to ensure frontline staff are fully informed.
3. That support is provided to public officials (and those delivering a function of public nature) to ensure they apply any restrictions compatibly with human rights law.

It cannot be assumed that public bodies have the legal knowledge and capacity to do this. From our work in Scotland, we know that training to support people and public bodies with duties to fully understand and apply current human rights laws is low, even in usual times. Considering the widespread use of Emergency Powers in the face of

Covid-19, human rights capacity building is more important now than ever. Equipped with human rights knowledge and skills, both leaders and frontline staff in Local Authorities / Partnerships can make rights-respecting decisions which not only prevent the abuse or unlawful restriction of the rights of people their decisions affect, but which also promote people's rights and improve standards of care. In short:

- Frontline staff must be supported to know and understand in which situations a person's legally protected human rights are at risk, and what actions they can take to make rights-respecting decisions and to monitor and review these with the person.
 - Processes and recording methods must support this, as should management support of frontline staff.
 - Leadership should have oversight of these human rights risks, and use this to support non-discriminatory and proportionate service-level and strategic decisions in responding to the pandemic
4. That there is a clear commitment to democratic oversight in monitoring and reporting on the use of Emergency Powers:
- Information being used at the local level should be monitored centrally via a robust procedure.
 - This should enable the Government to identify trends and concerns, including human rights flash points during the pandemic, as well as positive practice which others can learn from.

We will continue to work with the Scottish Government, alongside our Scottish colleagues in civil society groups and networks, in calling for these recommendations to be implemented. We believe they are in line with previously stated commitments of the Government and offer some important ways to support people in Scotland with clarity and reassurance about the protection of their rights in this unsettling time.

5. BIHR's next steps

In order to formalise both our gathering of information and communication with those in positions of power. We are now setting up "Communities of Practice", which will include a Scotland specific community. This is an online platform where people can share their experiences of human rights implementation with us as a person who receives care and support (or family or carer), as an advocate or community workers, or as a public official. This will inform our policy work going forward, ensuring that the people whose rights are impacted, and those charged with protecting them every day, continue to be at heart of our analysis and recommendations to those in power.

We will be using this approach in the first instance to gather evidence for the Westminster Parliament Joint Committee on Human Rights [inquiry](#) on "The Government's response to COVID-19: human rights implications". We have already submitted evidence to the Scottish Parliament's Equality and Human Rights Committee and will provide further insights directly



from our Scottish Communities of Practice. You can find out more about, and sign up to, our Communities of Practice [here](#).