



The Jimmy Reid
Foundation

Policy Paper

Human Rights Protection in Scotland

- Raising the Bar

(Treatise on why Scotland must do better)



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The Jimmy Reid Foundation

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Overview

Human rights are under attack from the UK Government. Whilst human rights are explicitly supported by the Scottish Government, the real problem remains the failure of ‘duty bearers’ ie the public sector, to deliver on existing human rights obligations. Fixing that problem should occupy the political energy and practical action of our elected politicians with a consequent gain of the public understanding that human rights are relevant and powerful in making our lives better, and Scotland fairer. A YouGov poll for the Scottish Government in 2015 confirmed the difficulties in perception with one in five Scots saying human rights are for minority groups only and two in five Scots saying they have no bearing on their everyday life.

The decision by the First Minister of Scotland to deliver the Third Jimmy Reid memorial address on ‘Worker’s Rights are Human Rights’ showed leadership and emphasised the importance of Scotland being a rights respecting nation. However to realise the vision, we need a number of operational and institutional reforms initiated by the Scottish Government and the Scottish Parliament. The spotlight needs to focus on our 10,000 + public sector bodies who are the ‘duty bearers’ as that will make the biggest and quickest impact. Depending on individual right holders forcing change by pursuing cases is a slow route and unrealistic for many.

This paper sets out what the Scottish Government and the Scottish Parliament can do, using devolved powers, to become an international model of best practice in the delivery of human rights. As the range of devolved functions increases due to the passing of the Scotland Bill at the UK Parliament, so does their capacity to make a positive difference. Human rights standards, universally applied, can address urgent issues eg poverty, care for elderly people and unfair employment practices.

This paper is divided into three sections:

1. A response to the Lecture delivered by First Minister on 24th November 2015.
2. A list of measures which are required by our Government and Parliament to mainstream human rights across our public services, plus opportunities to define rights in domestic law and to what gain.
3. An examination of the state of Victoria in Australia, which has used its devolved powers to wrestle with similar issues as Scotland, to progress human rights into the daily lives of people and thereby create a fairer and more just society.

Conclusions

- Scotland should build on its established and distinctive approach to supporting human rights by now taking concrete and measurable steps to deliver these in practice via the Scottish Government, Parliament, public authorities and those delivering services of a public nature.
- Human rights are seen by many as weak, owned by a minority and of little relevance. Positive steps must be taken to address this reputational damage.
- The Scottish Government has proactively and consistently declared its support for the Human Rights Act (HRA) and the European Convention on Human Rights (ECHR). It has condemned the UK Government’s announcement that it intends to abolish the HRA, replace it with a Bill of Rights and possibly also withdraw from the ECHR. The Scottish Government should now focus on action which makes Scotland a model of best practice.

- Defining human rights broadly will help make Scotland fairer. The ECHR is the only international treaty to be incorporated into domestic law but there is scope for the Scottish Government to ensure we incorporate into Scot's law many more treaties that have been ratified with the UN eg that cover economic and social rights. However the Scottish Government has resisted incorporating international human rights treaties into Scots law and new promises to consider incorporation should not detract from the more pressing agenda for 'duty bearers' to make rights real.
- Thus far a Bill of Rights has been hijacked as a tactic to constrain human rights in the UK. In other countries a Bill of Rights is regarded as a positive vehicle to mainstream human rights and we can learn from such experiences.

Recommendations

1. The Scottish Government should entrench its commitment to human rights by
 - a) Proactively ensuring that our 10,000 + public services in Scotland fulfil their existing obligations to comply with the ECHR as well as international law. The model of the Charter of Rights in the State of Victoria, Australia, should be considered.
 - b) Introduce a Human Rights Bill in respect of devolved powers, which fits in with the appetite for active democracy, as it consults people on what rights they wish to see domestically enforceable.
 - c) Citing its obligations to positively comply with the ECHR, under the Scotland Act, the Scottish Government can justify its rejection of the UK government's Trade Union Bill and other measures that seek to undermine or negate fundamental human rights.
2. The Scottish Parliament should entrench its commitment to human rights by:
 - a) Setting up a Human Rights Committee to provide scrutiny of all Bills, inquiries etc. and ensures a focus on the impact on our human rights.
 - b) The current human rights inquiry being undertaken by the European and External Affairs Committee should focus on duty bearers' compliance with existing human rights obligations and what drivers for change are needed.
3. The Scottish Human Rights Commission (SHRC) consulted on, designed and established the framework for Scotland's National Action Plan on Human Rights (SNAP). Whilst a welcome development, and after two years of delivery, it is time to change the delivery mode from persuasive to compulsion supported by funding.
4. The Scottish Parliament elections in May 2016 provide an excellent opportunity to focus on human rights delivery in Scotland with each party setting out specific commitments in its manifesto. Those commitments should include: agreement to improve human rights protection regardless of what the UK government decides on the future of the Human Rights Act and the European Convention on Human Rights; a public consultation on what human rights should be added to those which are currently enforceable in Scottish domestic courts; as a priority in May 2016, the elected Scottish government should require public authorities in Scotland to explicitly promote and comply with existing human rights law via regulations or legislation.

Section 1 - A response to the Lecture delivered by First Minister on 24th November 2015

“Society and its prevailing sense of values leads to another form of alienation. It alienates some from humanity. It partially dehumanises some people, makes them insensitive, ruthless in their handling of fellow human beings, self-centred and grasping. The irony is, they are often considered normal and well adjusted... Reject the values and false morality that underlie these attitudes. A rat race is for rats. We’re not rats. We’re human beings. Reject the insidious pressures in society that would blunt your critical faculties to all that is happening around you, that would caution silence in the face of injustice lest you jeopardise your chances of promotion and self-advancement. This is how it starts and before you know where you are, you’re a fully paid-up member of the rat-pack. The price is too high. It entails the loss of your dignity and human spirit.”

Jimmy Reid on “Alienation”, 1972¹

The Lecture

The Rt. Hon. Nicola Sturgeon MSP, First Minister of Scotland (FM), delivered the Third Annual Jimmy Reid Memorial Lecture “Worker’s Rights are Human Rights” on 24th November in the Bute Hall, University of Glasgow. The venue was the location for Jimmy Reid’s inauguration as Rector of The University in 1972. The 1,000 strong audience included members of Jimmy’s family, and veterans of the UCS dispute.

The Lecture took place against a backdrop of engineered uncertainty on the status of trade unions and fundamental human rights in the UK: the Trade Union Bill is currently being debated at the UK Parliament and its provisions seek to weaken the ability of trade unions to represent their members²; the UK government wants to change the mechanism to define and enforce human rights and will publish proposals to abolish the Human Rights Act and introduce a Bill of Rights early in 2016³. All these legal changes are opposed by the Scottish Parliament, the Scottish Government and the First Minister⁴.

Nicola Sturgeon used the lecture to argue for the fundamental human right of people to join and be active in a trade union to represents and articulate their interests:

“When Jimmy Reid spoke here in April 1972, it was towards the end of the Upper Clyde Shipworkers dispute. The work-in which Reid helped to organise ... is a reminder that trade unions are a source of empowerment. They provide a voice for those who might otherwise go unheard. The right to strike is an essential part of that, but the real value of trade unions goes much wider. They help employers to create the safe, humane, productive working conditions which head off industrial disputes –

¹ Copies of “Alienation” are available from the Reid Foundation and reproduced by kind permission of the Reid Family.

² For more information, watch the video which explains the issues and promoted the Lecture <https://youtu.be/yPx84fiADQ> and see website of the STUC to find out more about the campaign <http://www.stuc.org.uk/trade-union-bill>

³ For an analysis of the delay see the Blog of the Human Rights Consortium Scotland “Threatened Consultation Further Delayed” of 2nd December 2016 www.hrcscotland.co.uk

⁴ For example see speech delivered by the FM in Govan, Glasgow on 23rd September 2015 <https://firstminister.gov.scot/protecting-human-rights/>

and which build better businesses. Because of that, trade unions are a force for good in modern societies.”

In 2015 we are still talking about the same problems, as well as the same solutions. The legacy of Jimmy Reid is about the right to work – he opted for a work in at UCS rather than a strike - as well as the right to belong to a trade union, because that enables people to have dignity, earn a living and make a contribution to the collective good. Exercising rights is not a threat to economic success but an intrinsic part of a fair society which refuses to tolerate profit at any cost. Defining human rights, and establishing robust delivery and enforcement mechanisms is therefore key to creating a rights respecting society, which achieves dignity in the design and funding of public services, provides for a collective right to strike, an individual right to work to earn a decent standard of living, and ensures economic success so everyone can enjoy the fruits of our labours.

Action on the TU Bill

Testing the Scottish Government’s commitment to upholding basic human rights arrives with the UK Trade Union Bill, and the continuing controversy over whether a legislative consent motion is required from the Scottish Parliament. Nicola Sturgeon and the Scottish Parliament will vote against any such motion thus rendering the Trade Union Bill inoperable in Scotland. However the view of the Scottish Parliament is that no such motion is required. During the lecture the First Minister established her defence under the Scotland Act for refusing to implement the Trade Union Bill in Scotland if it becomes law courtesy of the UK Parliament:

- S57 of the Scotland Act requires Scottish Government Ministers to positively comply with the ECHR;
- Article 11 of the ECHR is everyone should enjoy freedom of peaceful assembly and to join a trade union for the representation of his/her interests.
- Article 14 requires equal enjoyment of ECHR rights and needs to be partnered with other rights rather than being a ‘stand-alone’ right.
- Given the above, the Bill is not legal, fails to serve a legitimate aim and is not proportionate in the circumstances.

The Scottish Government employs a fairly small number of people directly but its impact on could be greater if it instructs the public sector with devolved functions, which it funds, to also comply with existing ECHR obligations and refuse to implement the TU Bill it is becomes law. If the Scottish Government leads opposition to the TU law, it will take a big step in proving that human rights are relevant to people and improve people’s lives.

Issues on Current Human Rights Delivery

It was great to hear human rights being explained as workers’ rights. Debates in Scotland about everyday issues which cause unfairness are not usually undertaken using a human rights lens: personal care and lack of money for independent living, blacklisting, homelessness, poverty, barriers to just and favourable conditions of work, access to food, water and clothing, are real life situations covered by international human right law. How governments should deal with abuses and comply with international standards is set out in many documents. So the key

question is why has Scotland not done more to learn from best practice and thus make Scotland fairer?

Human rights should be a core feature of the work of government and all the public services that it funds. Yet mainstreaming human rights in Scotland has been a mixed picture due to structural failings:

- Despite human rights being embedded in the Scotland Act 1998, there is a lack of systems to ensure compliance. Examples include: the regulation and audit of public agencies do not yet include annual returns on human rights compliance; unlike at the UK Parliament, there is no Human Rights Committee at the Scottish Parliament that reviews legislation and holds inquiries⁵.
- In the ‘Policy Memorandum’, accompanying each Bill at the Scottish Parliament, there are statements about compatibility with the ECHR but they vary in detail. More detailed reasoning cannot be obtained by MSPs, the public or civil society under freedom of information laws as it is “legal” advice which is an exemption in the Freedom of Information (Scotland) Act 2002. The legal advice is two-fold: from the Scottish Government’s lawyers if it is a government bill and, separately, from the Scottish Parliament’s lawyers. At the very least there is scope for gathering all human rights statements into one database on the Scottish Parliament website so that MSPs can refer and develop knowledge and capacity on human rights law.
- MSPs have the right to form an opinion under Article 10 of the ECHR and that includes receiving and imparting information. It is reasonable to argue that this right extends to satisfying themselves that legislation is ECHR and EU compliant which is the criteria for approving legislation at the Scottish Parliament under S29 of the Scotland Act 1998. Given the ‘confidentiality’ of legal advice, MSPs should assert their ECHR rights and seek specific information about the human rights implications of any Bill or measure being considered and voted upon at the Scottish Parliament.
- There is no systematic review of legislation in respect of human rights for example there is a growing view that our mental health laws are not compliant with the International Covenant on the Rights of Persons with Disabilities (UNCRPD). Following the Holyrood elections in May 2016, there is a case to systematically review all legislation passed over the last 17 years to assess if it is ‘fit for purpose’ under international human rights law.

During the Q and A at the Lecture, the FM reminded the audience that the White Paper on independence made a commitment to define human rights in line with international law. For example that human rights would be core to the design and delivery of the welfare benefits system in an independent Scotland.⁶ The White Paper made a number of commitments including “strengthening or extending equality and human rights” and “to develop an enforcement and promotion

⁵ For example the DWP had to provide a Policy Memorandum to the Joint Committee on Human Rights on “Welfare reform and the work Bill 2015”

<https://www.gov.uk/government/publications/welfare-reform-and-work-bill-2015-human-rights-memorandum>

⁶ ‘Scotland’s Future – Your Guide to an Independent Scotland’ pub by Scottish Government 2013 pg 156 <http://www.gov.scot/resource/0043/00439021.pdf>

infrastructure”⁷. A separate paper was published about consulting on and adopting a constitution which would include “provisions to strengthen individual rights in areas such as homelessness and education; prevent weapons of mass destruction being based in Scotland; and prevent the government from engaging in illegal wars.”⁸ Despite the ‘no’ vote, the Scottish Government could still develop a ‘Bill of Rights’ which is expansive and ambitious on human rights protection.

The Scottish Parliament has had opportunities to incorporate international standards into Scots law but has shied away from doing so. Ratification means that all our laws and policies comply and that the rights can be asserted in our domestic courts in Scotland. Examples include:

- it opposed the UN Convention on the Rights of the Child (UNCRC) being “incorporated” into the Children and Young People (Scotland) Act 2014⁹;
- It resisted attempts to introduce “human rights” into the purpose and principles of the Social Care (Self-directed Support) (Scotland) Bill and instead opted for (human rights) principles such as ‘dignity’.¹⁰

In reality, we have two distinct but interdependent problems: generating public interest in and take up of human rights; adopting an effective framework which ensures that the public sector proactively complies with human rights. In fact until people identify with human rights and see them working positively, they will be more inclined to see human rights as a problem rather than a solution. As a priority Scotland must expedite the introduction of robust mechanisms which make ‘duty bearers’ comply with existing human rights, enjoy the benefits which flow and build on that.

Scotland’s National Action Plan on Human Rights (SNAP), drafted over a three year period, and launched in December 2013 is a persuasive and capacity building model with three strands: better lives, better world and better culture. Changing culture is a key route to improving human rights practice so that human rights law is understood to be just as powerful as that on data protection, freedom of information etc. In a speech on 9th November, Nicola Sturgeon said:

“The protections offered by the HRA and the ECHR should represent a floor rather than a ceiling. We should be looking to go further... In fact the key challenge for progressive governments ... is finding ways to embed those responsibilities across different areas of policy. That’s what Scotland’s National Action Plan does.”

Yet the Scottish Human Rights Commission (SHRC) recently pointed out in a briefing to MSPs:

⁷ Ibid pg 357

⁸ ‘Scotland’s Future: from the Referendum to Independence and a Written Constitution’ pub by Scottish Government pub 5th February 2013 pg5 <http://www.gov.scot/Publications/2013/02/8079>

⁹ See the discussion the Education and Culture Committee had in this Official Report from 17th December 2013 when the debate took place:

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=8887>

¹⁰ For more information on the oral and written evidence on human rights delivered by civil society organisations such as Inclusion Scotland , ILiS, Age Scotland, SAMH and many more, and for the text of amendments eg at Stage 2 go to

[http://www.scottish.parliament.uk/S4_Bills/Social%20Care%20\(Self%20directed%20Support\)%20\(Scotland\)%20Bill/BBV_181_Final.pdf](http://www.scottish.parliament.uk/S4_Bills/Social%20Care%20(Self%20directed%20Support)%20(Scotland)%20Bill/BBV_181_Final.pdf)

“Those in power, who have a responsibility to protect, respect and fulfil people’s rights must step up to discharge their duties. While progress has been made by reaching out, engaging, raising awareness and supporting Scotland’s public authorities, more action is needed by them to demonstrate how they are protecting human rights in practice. A step-change is needed across the public sector, building on the willingness and commitment already shown.”¹¹

Conclusion

Further specific action should be taken by the Scottish Government to give effect to existing human rights in Scotland. The HRA was passed by the UK Parliament 18 years ago and has not met expectations about its impact on the regulation, design, delivery and funding of public services. For example compliance with the HRA should be an explicit part of the work of Audit Scotland on the 200 bodies for which it has responsibility.

The Scottish Parliament debated and disagreed with the UK government’s Trade Union Bill by 104 votes to 14. The Scottish Parliament has voted to support and uphold the HRA and ECHR and there is all party support for SNAP. A clear pattern of evidence is emerging showing Scotland understands and seeks to uphold human rights law. Making rights real was an objective of Jimmy Reid in 1972 and Nicola Sturgeon in 2015. The law exists but needs to be mainstreamed and enforced.

Section 2: Delivering International Human Rights Minimum Standards

“I have heard serious people in Geneva refer to human rights as ‘aspirations’ and I have heard it said that human rights are a ‘soft subject’. Both these misconceptions should be knocked on their heads. Human rights belong to all individuals and not to some future utopia. If those rights are violated, it represents a violation of the law, not the disruption of a dream. Human rights treaties and customary law are as ‘hard’ as trade or investment law.”¹² **Professor Andrew Clapham**

Duty Bearers

The Scottish Parliament has already voted for Scotland to become a model of international best practice on human rights and there is no shortage of guidance, domestic and international, to progressively realise human rights by ‘duty bearers’. There are 10,000+ duty bearers in Scotland including local authorities, health boards, GP surgeries, Police Scotland, Universities and colleges, schools, housing associations as well as the Scottish Government¹³.

¹¹ SNAP - Scotland’s National Action Plan for Human Rights (SNAP) Parliamentary Briefing February 2016

¹² Andrew Clapham, Professor of Public International Law, in an interview with the Graduate Institute of Human Rights on the publication of “A second revised and updated edition of Human Rights: A Very Short Introduction” published by Oxford University Press, 2nd December 2015 and found at <http://graduateinstitute.ch/home/relations-publiques/news-at-the-institute/news-archives.html/ /news/corporate/2015/what-will-our-human-rights-be-in>

¹³ Freedom of Information (Scotland) Act 2002, Survey of Designated Public Authorities’ by Craigforth Consultancy and Research for Office of Scottish Information Commissioner, March 2004. More organisations are covered under human rights law than FOISA eg Scotland has over 200 housing associations.

Agreeing the human rights that duty bearers must comply with remains controversial. In addition to the ECHR, the UK has ratified a number of international human rights treaties which means that all our laws and policies should comply. The categories are expansive: economic, social, cultural, civil, political and environmental rights. Using devolved powers, the Scottish Government could define an expansive set of rights eg the right to an adequate standard of living under the International Covenant on Economic Social and Cultural Rights (ICESCR). However such rights are meaningless unless the Scottish Government also introduces mechanisms which require duty bearers to deliver such rights, with mechanisms to monitor impact.

Also, we need a fundamental cultural shift in Scotland backed up by action. For example, at a recent SHRC and Scottish Government ‘Innovation Forum’ Megan MacInnes from the organisation “Global Witness” explained

“As someone who has worked on human rights and land reform internationally for the past decade, it’s difficult to imagine how we came to the situation … where discussions in Scotland about human rights focused on only one instrument and were being used to block land reform. This is completely the opposite of how human rights and land reform interact in most of the rest of the world.”

She went on to explain that those involved in land reform globally apply a “human rights approach” which involves:

- “using rights to food and adequate housing for securing and registering land titles and protecting against so-called land grabbing;
- referring to rights against discrimination, to ensure that everyone has secure land rights – women, marginalised groups, ethnic minorities …
- relying on rights to freedom of expression, assembly and association, to be able to speak out when land rights are not respected”.¹⁴

Landownership is therefore less about property rights and more about individual and collective economic and social rights as well as civil and political rights such as the right to access information in order to make informed decisions eg about poverty and food supply.

Developing and sustaining a new human rights culture, backed up by a delivery and enforcement framework, may sound radical but is actually a fundamental part of modern democracies across the world. As the SHRC points out: “A strong human rights culture is about shifting power to people so that they understand their rights and can take part in decisions that affect them.”¹⁵ An abuse of one person’s human rights diminishes us all. For example the variation in provision of health and social care across Scotland and within cities is not fair to individuals, carers and families; the working conditions and pay levels for foreign agricultural workers working for contractors in farms around Scotland can negatively affect the labour market in local communities.

¹⁴ “ Short speeches on Land Reform and Human Rights” pub by SHRC December 2015
<http://www.communitylandscotland.org.uk/wp-content/uploads/2015/12/Short-speeches-on-Land-and-Human-Rights.pdf>

¹⁵ “Scotland’s Future – An Insights Paper” pub by SHRC August 2014.

Delivering on UN Treaties

The UK has ratified a number of human rights treaties which have been developed to protect particular groups such as women and disabled people, and to strengthen particular rights such as economic and social rights. There is no hierarchy of rights and they are interdependent eg children's rights complement family rights.

Ratification of a treaty means all our laws and policies should comply. The treaties are explicit about how to make that happen eg the International Covenant on economic, Social and Cultural Rights (ICESCR) requires the Scottish Government to "progressively realise through the maximum of its available resources" economic, social and cultural rights "by all appropriate means, including particularly the adoption of legislative measures."¹⁶ In Addition, the UN recommends how the UK should deliver on its international human rights obligations. Examples of criticism against the UK which the Scottish Government can act upon in respect of its devolved powers include:

- **Rights of the Child** – In 2008 the UN Committee on the Rights of the Child, while welcoming the UK's efforts to implement the concluding observations on previous reports, noted "with regret that some of the recommendations contained therein have not been fully implemented, in particular: (a) With respect to the concluding observations on the second periodic report of the United Kingdom (CRC/C/15/Add.188), those recommendations related, inter alia, to incorporation of the UN Convention on the Rights of the Child in the State party's law (paras. 8-9); budgetary allocations (paras. 10-11); dissemination and awareness of the Convention (paras. 20-21...¹⁷
- **Civil and Political Rights** – In 2015 the UN Human Rights Committee on concluded "The UK should engage in consultation with stakeholders at all levels to identify ways to give greater effect to the Covenant in all jurisdictions that fall under its authority or control or with regard to which it has formally undertaken to implement the Covenant.¹⁸
- **Against Torture** – In 2013, the UN Committee against Torture recommended that the UK "incorporate all the provisions of the Convention against Torture in its legislation and raise awareness of its provisions among members of the judiciary and the public at large.¹⁹
- **Economic and Social Rights** – In 2009 The UN Committee on Economic, Social and Cultural Rights urged the UK "to ensure that the Covenant is given full legal effect in its domestic law, that the Covenant rights are made justiciable, and that effective remedies are available for victims of all violations of economic, social and cultural rights."²⁰

¹⁶ Section 2 and see a full list of rights at the Un website

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

¹⁷ Concluding observations: UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, 20th October 2008 pub by United Nations' Committee on the Rights of the Child CRC/C/GBR/CO/4

¹⁸ UN Human Rights Committee – Concluding Observations on the UK, published August 2015

¹⁹ Concluding observations on the fifth periodic report of the United Kingdom, adopted by the UN Committee against Torture pub 31st May 2013.

²⁰ Concluding observations of the Committee on Economic, Social and Cultural Rights "United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories" pub 12th June 2009

Economic and Social Rights

The UK is in the midst of the UN review of its compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR). ICESCR includes fundamental rights eg Article 11 (1) “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right ...”²¹

A ‘list of issues’ has been agreed by the UN and that means that the UK should provide answers by April in advance of the full hearing in June 2016. At this time, civil society should be organising to make an impact eg gather evidence which provides answers to the ‘list of issues’ as well as drafting a report to the full hearing.

These rights are relevant to our daily lives. The impact of private sector financial recklessness and the public having to bail them out for the collective good had a number of repercussions. For example the process of forcing people to be homeless because they could not make their mortgage payments. The matter has just been considered by the UN Committee on Economic, Social and Cultural Rights in the case of I.D.G. v Spain. The Committee has given its view under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). It could do so as the Spanish Government has agreed to its nationals having the right to complain to the UN Committee about breaches of human rights.²² The UK Government, as the signatory to the Treaty which is a reserved matter, has not given its permission for UK Nationals to do the same.

In this case, the matter had already been considered by the Spanish Constitutional Court which upheld the position of the Spanish Government, the highest domestic court, but the UN Committee has disagreed and found Spain in violation of the right to housing. The first case decided under the OP-ICESCR, involved a homeowner, who learned that her home was being auctioned after she fell behind on payments during the economic crisis:

“The Committee’s recommendations addressed both the individual complainant and the structural change required to prevent similar violations in the future. The Committee said that Spain should assure that no eviction takes place against I.D.G., if she is not protected by due process guarantees, as well as calling on the government to cover her legal costs. The Committee also reminded Spain of its obligation to ensure that the country’s legislation and its application are consistent with human rights, including guaranteeing access to remedy, adequate notification and procedural protections in cases of foreclosure.”²³

²¹ Full list of the articles can be found at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

²² Judgement at UN Committee’s website

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/55/D/2/2014&Lang=en

²³ See analysis of the case in Open Democracy website “Historic step towards access to justice for ESCR violations at UN” pub 1st December 2015 at

<https://www.opendemocracy.net/openglobalrights/chris-grove-daniela-ikawa/historic-step-towards-access-to-justice-for-escr-violatio>

Conclusion

The Scottish Government can use its duties under the Scotland Act, regarding the ECHR and its obligations to comply with international human rights law, to justify its refusal to give effect to the Trade Union Bill in Scotland.

The principled commitment of the Scottish Government and Scottish Parliament to give human rights practical effect can only be realised if the focus for action is on the public sector rather than debates about encouraging more people to assert their rights and consider going to court to enforce those rights. It won't happen as people do not have the energy, the financial resources and our culture works against us.

International standards domestically defined, and delivered via an enforcement mechanism that suits Scotland is what we are supposed to be doing anyway. That requires structural change, accompanied by training across the public sector so that decisions are informed by knowledge of human rights standards.

Section 3 – A Human Rights Framework?

The Bill of Rights in the State of Victoria, in Australia, is an example of a framework designed to deliver on human rights which have been agreed by the people. The focus is on the public sector and its obligations as the duty bearer.

An examination of the Bill offers ideas for Scotland about enabling and encouraging our 10,000 public sector bodies to act and comply with existing obligations. Victoria has used its devolved powers to wrestle with similar issues as Scotland, to make human rights real in people's daily lives thus creating a fairer society.

Previous studies on what Scotland can learn from different countries have too often placed the onus on people asserting their rights – knowing them, activating the remedy framework and accessing advocates, or paying for lawyers to argue their case. That is too big an expectation of the weakest in our society. The persuasive approach of SNAP is not sufficient to force the changes first initiated in the Human Rights Act 1998 and the Scotland Act of the same year. This case study is, therefore, designed to focus on moving public sector bodies towards a human rights culture and a delivery framework to ensure compliance.

A Bill of Rights Focusing on 'Duty Bearers'

As the Scottish Parliament was developing its human rights framework with the passing of the Scottish Commission for Human Rights Act in 2006, a similar challenge was being undertaken in the state of Victoria in Australia.

Scottish legislation was delivered as part of the coalition agreement between Labour and the Liberal Democrats and the Bill made parliamentary history as there was a split on whether the general principles were appropriate - "in a country such as Scotland where abuses of human rights are so rare, do we really need an independent human rights commission?"²⁴ There was criticism that the Bill was

²⁴ Justice 1 Committee News Release February 2006

weak as, unlike the GB EHRC, the SHRC would not undertake casework and was prohibited from advising or guiding anyone even thinking of taking a case.²⁵

In Victoria, the legislation adopted was quite different although there was equally a reluctance to adopt a measure designed to clog up the courts with lots of cases. The Charter of Human Rights and Responsibilities Act 2006 requires public authorities, government departments, government agencies, and people delivering services on behalf of government, to act consistently with the human rights in the Charter. The law was passed by the Parliament of the State of Victoria, after a three year consultation with the public about what rights they would like protected. 20 rights were agreed including the right to freedom from forced work (section 11), the right to privacy and reputation (section 13) and right to peaceful assembly and freedom of association (section 16).²⁶

Consultation is the most effective and inclusive way to agree what rights a country should have and is the model adopted in a variety of places including Iceland.²⁷ However consultation should not be used by governments to delay action, and cannot be used to justify restricting rights if that is what people want. Governments must comply with their duties under international human rights law to have an expansive list of rights that are equally enjoyed.

The focus in Victoria is that rights should be equally enjoyed, regardless of who is delivering the service, and so duty bearers must always:

- Act compatibly with human rights
- Consider human rights when developing policies, making laws, delivering services and making decisions.

As in Scotland in respect of the ECHR, there is a preventative role for the Charter which requires “Statements of Compatibility” to accompany legislation²⁸. The Supreme Court can hear cases and issue a ‘declaration of inconsistent interpretation’ requiring the minister who proposed the law to revisit it. However, unlike in Scotland the Court does not have the power to strike down legislation.

The process of adopting the Charter enables the values of the State of Victoria to be included as legislative principles “human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom” and a stated purpose of the legislation is to promote and protect human rights by “imposing an obligation on all public authorities to act in a way that is compatible

²⁵ Scottish Commission for Human Rights Act 2006, Section 6

http://www.legislation.gov.uk/asp/2006/16/pdfs/asp_20060016_en.pdf

²⁶ To see the Charter in full go to

[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/edfb620cf7503d1aca256da4001b08af/54D73763EF9DCA36CA2571B6002428B0/\\$FILE/06-043a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/edfb620cf7503d1aca256da4001b08af/54D73763EF9DCA36CA2571B6002428B0/$FILE/06-043a.pdf)

²⁷ For example see review undertaken for EHRC Scotland in “Equality, Human Rights and Constitutional Reform in Scotland”, pub November 2013 <http://www.equalityhumanrights.com/about-us/devolved-authorities/the-commission-in-scotland/research-in-about-us/devolved-authorities/the-commission-in-scotland/equality-human-rights-and-constitutional-reform-in-about-us/devolved-authorities/the-commission-in-scotland>

²⁸ To see reports go to <http://www.humanrightscommission.vic.gov.au/index.php/the-role-of-the-commission-under-the-charter/reporting/register-of-compatibility-statements>

with human rights”²⁹. Fine words are therefore given context and effect in legislation.

Practical Impact

The focus on the state’s actions in respecting, protecting and fulfilling human rights has resulted in a number of gains:

- The process of adopting the charter increased public knowledge about human rights and the benefits they bring to rectify wrongs but also generate an equal playing field of rights.
- Focus on mainstreaming human rights as “The common language of human rights has helped Victorians to navigate the complex patchwork of laws and service standards across government.”³⁰
- Has increased transparency and accountability within and across the public sector.
- People are asserting their rights effectively without having to go to court as those delivering public and state services are clearer about their duties.

Case studies have been gathered to illustrate successes which include:

- A man over fifty years getting treatment for a hand condition as the cumulative delays raised issues about his right to be equally protected from “inhumane and degrading treatment”.
- A widow with children had to find a new rented home but the housing agency failed to consider her human rights eg the best interests of her family in the accommodation they proposed. Following a reconsideration of the case, alternative, suitable accommodation was found due to “the right to privacy, protection of families and children and liberty and security of person.”³¹

A common thread running through the cases is that advocacy services need to be in place so that people can effectively raise abuses of their human rights. Interestingly “A person is not entitled to be awarded any damages because of a breach of this Charter”³² so demolishing an idea that people pursue cases for financial gain.

The Victorian Equal Opportunity and Human Rights Commission (the Commission) has several functions relating to the charter including:

- Reporting annually to the Attorney general about the operation of this Charter, including its interaction with other statutory provisions and the common law
- If requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights.³³

Enabling the Victorian Parliament to be informed about progress and trends respects the principle of democratic accountability.

Lessons Learned from Delivery

The performance of the Charter has been the subject of two reviews, every four years until 2015. This process was understood to be necessary to drive forward

²⁹ s1(c)

³⁰ Website of Victorian Equal Opportunity and Human Rights Commission

<http://www.humanrightscommission.vic.gov.au/index.php/the-charter>

³¹ See more information on this and other case studies see website of the Victorian Equal Opportunity and Human Rights Commission at <http://www.humanrights.vic.gov.au/>

³² Charter of Human Rights and Responsibilities Act 2006 Act, Section 39(3)

³³ Ibid, Section 41

compliance and ensure the Charter made an impact in everyday places. Clearly the Parliament did not think there would be a need for reviews thereafter.

The 2015 review was launched in March 2015 led by an independent reviewer. In setting the terms of reference the focus was on enhancing the effectiveness and improving the operation of, the Charter. Eight public forums were held, 60 meetings organised with individuals and organisations, and 109 written submissions received. The final report “From Commitment to Culture – 2015 Charter Review” was tabled in Parliament in September 2015 and the independent reviewer stated:

“It is clear to me that the Charter has helped to promote and protect human rights in Victoria. However, there is more work to be done in making the Charter as practical as it could be, in demystifying it and bringing it with the reach of all Victorians.”³⁴

However demonstrating the size of the mountain to climb, the 2015 terms of reference invited comment on whether further reviews were needed and the final report answered in the affirmative. The report made “52 recommendations to strengthen human rights culture and make the Charter more accessible, effective and practical” on the themes of:³⁵

1. Building our human rights culture
2. Clarifying responsibilities for human rights—acts and decisions of public authorities
3. Facilitating good practice and dispute resolution—the role of statutory authorities
4. Remedies and oversight—the role of the courts
5. Interpreting and applying the law
6. Firming the foundations—more effective parliamentary scrutiny

The idea of reviewing legislation and its impact is sensible and there are recommendations that could equally apply to Scotland including:

- Ministers reinforce in their dealings with departments and agencies their expectation that they should act compatibly with human rights³⁶
- The Victorian Secretaries Board include the development of a human rights culture as part of its work in setting values and standards across the Victorian public sector.³⁷
- The Charter be amended to define a non-exhaustive list of functions of a public nature to provide clarity.³⁸
- The Commission be given responsibility to provide human rights education within the public sector to leaders across the Victorian public sector, to ensure that they can influence a positive culture of human rights.³⁹
- The Commission be given the statutory function and resources to offer dispute resolution for disputes under the Charter.⁴⁰

³⁴ Ibid, Pg iii

³⁵ For full report see the Victoria State Government – Justice and Regulation website <https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights>

³⁶ Ibid, Recommendation 1

³⁷ Ibid, Recommendation 2

³⁸ Ibid, Recommendations 12-13

³⁹ Ibid, Recommendation 6

⁴⁰ Ibid, Recommendation 23

- The human rights analysis in statements of compatibility be improved ...⁴¹
- The principles in the Preamble to the Charter be amended to recognise the need for public authorities to take steps to respect, protect and promote human rights.⁴²

Delivering human rights across public services is not easy even when there are positive frameworks in place. Changing culture, improving knowledge, providing effective tools and maintaining momentum in change are global issues.

Conclusion

Scotland faces the same problems as other countries in making human rights manifest and tangible across its public services. The State of Victoria offers an example of an alternative approach from which we can learn. There will be others too. However until we accept there is a problem, that the public sector is not actively mainstreaming human rights in the design and delivery of public services in Scotland, then human rights will not fulfil their potential of making Scotland fairer.

Section 4 - Conclusions and Recommendations

“Trade unionists are alarmed at the blatant attack on their trade union rights, which are fundamental human rights such as the right to peacefully protest. Workers also value the human right ‘to an adequate standard of living’ which is often at the heart of what trade union action is designed to achieve.”⁴³

The premise of this paper is that too few people, particularly those in difficulty, enjoy their human rights in Scotland and that the State must do more to mainstream human rights in the design, delivery and funding of public services. Given the Scottish Government’s repeated commitments on complying with international human rights standards, endorsed by the Scottish Parliament, we need to agree definitions of human rights and focus on how the State via its publicly funded services will respect, protect and fulfil human rights. A single strategy will not work. Rather, we need a menu of actions so that existing ambitions are realised by deliberate and concrete actions which are transparent and ensure accountability.

In respect of the ECHR, the Scottish Parliament has acknowledged “its constitutional responsibility to uphold the principles and values expressed in the convention and to respect, protect and realise the rights and freedoms that it enumerates; further acknowledges the importance of that work not only in relation to Scotland, but also in establishing and maintaining standards of best practice, which provide a benchmark for human rights elsewhere in the world”.⁴⁴

The UN Human Rights Committee reporting in July 2015 reminded the UK that it should “ensure that any legislation passed *in lieu* of the Human Rights Act 1998, were such legislation to be passed, would be aimed at strengthening the status of international human rights, including the provisions of the Covenant, in the domestic

⁴¹ Ibid, Recommendation 41

⁴² Ibid, Recommendation 48

⁴³ Professor Gregor Gall, Director of the Reid Foundation commenting on the 3rd Jimmy Reid Memorial Lecture

⁴⁴ Debate in the Scottish Parliament 11th November 2014.

legal order and provide effective protection of those rights across all jurisdictions.⁴⁵ Whatever the UK Government decides, Scotland can deliver what the UN recommends, in respect of its devolved powers.

In 1972 Jimmy Reid emphasised the benefits of "...Restructuring of the institutions of government and where necessary, the evolution of additional structures so as to involve the people in the decision making processes of our society. The so called experts will tell you that this would be cumbersome or marginally inefficient. I am prepared to sacrifice a margin of efficiency for the value of the people's participation anyway, in the longer term, I reject this argument. To unleash the latent potential of our people requires that we give them responsibility."

That reasoned argument is still true. So what next? The Scottish Government and Scottish Parliament need to focus on the culture and behaviour of public sector bodies and those delivering services of a public nature. Monitoring progress could be taken up by a newly established Scottish Parliamentary Committee on Human Rights. Such a committee may also decide that a charter, similar to that in the State of Victoria, would be a helpful mechanism to ensure the public sector in Scotland fulfils existing obligations. A consultation on defining additional rights could be undertaken too but should not be a device to delay action on enforcement.

The UK government's plans to abolish the HRA and the consequent barrage of negativity about human rights are likely to breed more distrust of and disrespect for human rights. All the more reason to define human rights more extensively in Scotland and give them practical effect by requiring and monitoring public sector delivery. As we approach the election of MSPs to Holyrood, each political party is encouraged to adopt a five step programme to mainstream human rights in Scotland by establishing a clear and transparent human rights framework:

1. Agree to improve human rights protection in Scotland regardless of what the UK government decides on the future of the HRA and ECHR.
2. As a priority in May 2016, ensure the newly elected Scottish government requires public authorities in Scotland to explicitly promote and comply with existing human rights law via regulations or legislation.
3. Agree to support the setting up a Human Rights Committee at the Scottish Parliament to provide scrutiny of all Bills, inquiries etc.
4. Agree measures which ensure that the delivery of SNAP is compulsory on public sector bodies and those delivering services of a public nature.
5. Support a public consultation on what human rights should be added to those which are currently enforceable in Scottish domestic courts. Subsequently a Charter or a Bill of Rights should be presented to Parliament which incorporates the enforcement mechanisms which have been introduced so that we all equally enjoy our human rights.

Copies of Jimmy Reid's full rectorial address are available from the Reid Foundation at a cost of £2 plus postage contact@reidfoundation.org

⁴⁵ UN Human Rights Committee – Concluding Observations on the UK, published August 2015