



## **'Human Rights and the Scottish Parliament'**

### **Submission from the Campaign for Freedom of Information in Scotland to the Equalities and Human Rights Committee Inquiry**

#### **Overview**

The Campaign for Freedom of Information in Scotland (CFoIS) is pleased to submit evidence to inform the Committee's examination of the Scottish Parliament's role in protecting and enhancing human rights. In drafting this submission, we have drawn on our experience of the design, implementation and impact of the Freedom of Information (Scotland) Act 2002 (FoISA) and the Environmental Information (Scotland) Regulations (EIRs). Crucially both laws require an enforcement process by independent, public officials and a free complaints process for individuals and groups. It is useful to point out that the Aarhus Convention, which prompted the requirement for the EIRs, includes in its purpose and articles 'access to justice'.<sup>i</sup> It also requires States to tell people about the rights and actively assist them in exercising their rights.<sup>ii</sup>

Accessing information is a human right under Article 10 of the European Convention on Human Rights (ECHR) as defined in the case of *Magyar Helsinki Bizottsag v Hungary*<sup>iii</sup>, the right to form an opinion by receiving and imparting information, and under Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Accessing information is a tool which helps people exercise their human rights<sup>iv</sup> as detailed in numerous case decisions of the European Court of Human Rights (ECtHR).<sup>v</sup>

CFoIS would be pleased to deliver oral evidence to the Committee to supplement this submission which addresses the inquiry's three main themes and offers further observations and recommendations. Given the remit of the Inquiry, we would also direct you to a range of CFoIS research and reports which can provide more detail<sup>vi</sup> including:

- 'Learning from Others' which was designed to influence the Post Legislative Scrutiny of FoISA, published June 2017<sup>vii</sup>.
- Focusing on human rights '30:10 Reflecting and Protecting Freedom of Information Rights' celebrated 30 years of (CFoIS) and the 10<sup>th</sup> anniversary of the implementation of FoISA, published January 2015.<sup>viii</sup>

#### **Model to Replicate?**

FoI laws exist in over 112 countries, with the first recorded in Sweden in 1766<sup>ix</sup>. When the Scottish Parliament was established in 1999, it was underpinned by the principles of 'openness, transparency and accountability'<sup>x</sup>. Those principles became enforceable rights when FoISA became effective on 1<sup>st</sup> January 2005, as over 10,000 designated bodies were accountable directly to those requesting information. Engagement was built as case decisions were published which in turn informed debate on how our publicly funded services operate. In tandem, the Environmental Information (Scotland)

16<sup>th</sup> March 2017

Regulations 2004 (EIR(S)s) became operational although a framework that had been in place since the 1990s.

The Scottish Parliament decided how FoISA should work: specific organisations must be named in the legislation to be covered and specific categories of organisation need to be listed. This approach contrasts with a more generic approach taken by the UK Human Rights Act 1998 that 'all public bodies and those delivering services of a public nature' have a duty to comply with the ECHR. A Scottish Information Commissioner was required to enforce FoISA, unlike the Scottish Commission for Human Rights Act which specifically prohibits the Commission from advising on or taking cases (S6). FoISA was powerful in allocating rights and responsibilities on designated bodies eg the right to refuse publication under defined 'exemptions', as well as a duty to provide advice and assistance to requestors (S15). FoISA provides direction and continuity eg Section 60 requires publication of a 'Code on the Functions under the Act'.<sup>xi</sup> However FoISA is not perfect and we expect post-legislative scrutiny to commence shortly.

### **Cultural Change**

Scotland's new legal framework had to be underpinned by a culture of openness to be successful. The culture needed to move away from the need for 'official secrecy' to creating a more open, transparent and accountable system across public services to enforce the public's right to know. We have reflected on how culture changed as clearly now FoI is mainstream and a popular concept.

An Ipsos MORI poll conducted in November 2015 for the Office of the Scottish Information Commissioner (OSIC) revealed that at 85%, public awareness of FOI rights in Scotland was at the highest ever recorded level and 77% agreed that FOI gives them more confidence in the decisions of Scottish public bodies. Contrast this positive result with a YouGov poll for the Scottish Government conducted at the same time which revealed that: one in five Scots believe human rights are for minority groups only and two in five Scots (44 per cent) say they have no bearing on their everyday life. More positively two thirds agree they are a positive thing and 68% said they would act if they felt their rights had been violated.<sup>xii</sup>

The introduction of FoISA was accompanied by a sustained programme of information on rights, free training for staff and initiatives to build a culture of openness including high level political statements from the Scottish Executive as well as the Scottish Parliament. The role of the independent Scottish Information Commissioner and his team was particularly important in building a culture of understanding and acceptance within designated bodies.

### **International Human Rights Law**

International human rights law and various regional mechanisms define access to information as a human right as well as a tool to exercise and enjoy other human rights such as the right to respect for private and family life, the right to protest and the right to join a trade union. Freedom of opinion and freedom of expression are inextricably linked with accessing information. A person or organisation needs to access independent and true information and analysis to form an opinion. In the current climate of 'fake news', the provenance of information is more important than ever. Voters, the public generally and NGOs will be concerned that they can access information which is accurate and up to date to evidence their opinions and comments and challenge decision making.

The UN Declaration of Human Rights and Fundamental Freedoms was adopted by the United Nations General Assembly in 1948 'as a common standard for all nations. It sets out, for the first time, fundamental human rights to be universally protected'. Article 19 states: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'<sup>xiii</sup> This right was given further effect through the ICCPR which was adopted by the UN in 1966 and came into force on 23rd March 1976. The UK has ratified the ICCPR meaning that all our laws and policies should comply. Article 19 states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (order public), or of public health or morals.'

The UN Human Rights' Committee provides detail on how states should give effect to Article 19:

- Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights. (Para 3)
- The obligation to respect freedoms of opinion and expression is binding on all branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local ... and may also be incurred by a State party under some circumstances in respect of acts of semi-State entities.<sup>xiv</sup> The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression ...' (para 7)
- To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. ... (Para 19)<sup>xv</sup>

The UK's compliance with the ICCPR is reviewed periodically by the UN Human Rights Committee and concerns and recommendations are contained in 'Concluding Observations'. The latest, published in July 2015, welcomed the 'adoption of Scotland's National Action Plan for Human Rights (SNAP) 2013-2017'<sup>xvi</sup> but:

- Was concerned about the lack of a comprehensive mechanism for reviewing existing gaps and inconsistencies between the domestic human rights legal framework and the rights as set forth in the Covenant' (para 5)
- Recommended the UK should 'engage in consultation with stakeholders at all levels to identify ways to give greater effect to the Covenant' (para 5)
- Recommended the UK should 'introduce new awareness-raising campaigns aimed at promoting respect for human rights and tolerance for diversity' (para 10)
- Recommended the UK should 'disseminate widely the Covenant, the text of its seventh periodic report and the present concluding observations, among the judicial, legislative and administrative authorities, civil society and non-

16<sup>th</sup> March 2017

governmental organizations operating in the country, and the general public.’  
(para 26)

In 1993 the UN appointed a Special Rapporteur on the ‘Right to Freedom of Expression’ to develop understanding and action on this specific human rights theme. The mandate has been repeatedly renewed most recently on 21st March 2017 when the UN Human Rights Council agreed a further period of three years.<sup>xvii</sup> The mandate is rooted in the understanding that human rights are inter-dependent and that access to information is a gateway to the enjoyment of all our rights.<sup>xviii</sup>

Interpreting our access to information rights solely through FoISA is, therefore, a mistake. There have been numerous conversations in Scotland about what the Scottish Parliament and Scottish Government ‘do’ with Concluding Observations from Treaty bodies. CFoIS recognises the separation of powers between Government and Parliament, and the role of the Scottish Parliament in holding the government to account. CFoIS believes in a three step strategy: a specific and public response from the Scottish Government to each Concluding Observation with a timeline for implementation; a debate in the Scottish Parliament informed by General Comments, submissions etc; a Committee of Parliament to monitor implementation and impact.

### **Asserting FoI Rights for Public Good**

CFoIS sought to establish if the process of complying with European and international human rights law was pro-active or reactive in the Scottish Parliament. It appears to sit firmly in the latter category. In an FoI request to the Scottish Parliament in March 2017, CFoIS gained some useful insights into the process. In response to our question ‘is there is a formal procedure which ensures (a) parliamentary staff, MSPs and their staff are updated on judgements of the European Court of Justice and the European Court of Human Rights and (b) how many times MSPs were provided with such information or briefings’, we received the following information:

“there is no formal procedure whereby these issues are disseminated by the Parliament to the three groups highlighted, and this information is not held. However, Parliamentary staff are actively encouraged to undertake continuous professional development training in their field (for example, health and safety or aspects of employment law). Such training will include updates on relevant issues which have recently emerged. Staff also have access to updates and training from their own professional bodies... Since no formal procedure exists, no MSPs received briefings or information under it and the information is not held.

The Parliament went on to explain that ‘SPICe regularly provides individual MSPs and Committees on request with information and /or specific policy briefings on human rights issues, including the implications of European Court of Justice decisions and European Court of Human Rights decisions. Committees may also commission legal advice from OSSP as required to support their work in scrutinising legislation. SPICe also publishes briefings on Bills and other topics... Whether a particular briefing addresses human rights issues will depend on the context of the enquiry and the profile of human rights concerns in that area.

In response to our inquiry about the recent landmark cases at the ECtHR on Article 10, again the issue appears to be reactive. If an MSP finds out about the case, then there may be a briefing. It is useful to note the Parliament advised:

- ‘SPICe has not received any requests for a briefing on *MAGYAR HELSINKI BIZOTTSÁG v. HUNGARY* (*Application no. 18030/11*). No briefing has been

16<sup>th</sup> March 2017

produced and the information is therefore not held. As far as we can ascertain, both the Information Commissioner and the Scottish Information Commissioner have yet to produce briefings on the case.'

- '... no general guidance is provided by the Scottish Parliament to MSPs, their staff or to clerks on how the ECHR impacts on their role. Specific advice is provided, where required, on a case by case basis.'

In response to an FoI request, the Office of the Scottish Information Commissioner (OSIC) advised on 20<sup>th</sup> April that it had taken several specific steps:

- we closely followed the *Magyar* case and are alert to potential implications for our casework
- we commissioned Counsel's Opinion on *Magyar* in January (we expect to receive the draft before the end of the month, and the final version in May)
- we intend to publish guidance on the *Magyar*; our guidance will be informed by both Counsel's Opinion and decisions from the courts
- we have drawn the attention of the Court of Session to *Magyar* in a live appeal and hope that the Court will give some judicial guidance on the issues raised
- we have made the SPCB and the Scottish Ministers aware of the potential significance of *Magyar* for Scottish FOI law.

In response to our request for information on the process used by OSIC to acknowledge and implement judgements at the ECtHR which impact on its functions, we were told that: 'Generally, as with any relevant case law or new legislation, we will aim to make sure that we comply and, where appropriate, issue guidance on it. We alert staff to relevant ECtHR judgements by way of an internal bulletin, All Staff Meetings and Team Meetings. However, we don't have any recorded process which answers this request.'

### **Committees Inquiry Focus**

From our campaigning work and our experience of asserting the law in Scotland we would offer the following comments.

#### **1. Participation and engagement**

The sustained work of the Scottish Information Commissioner (OSIC) to inform people of their access to information rights is a model which should be replicated for human rights. FoI rights are now part of Scotland's culture because of: an initial high profile public information campaign by OSIC and subsequent sustained work; the publication of free Guidance tools and practical assistance for rights holders and duty bearers; the Commissioner's powers to drive up standards on compliance including making good practice recommendations (S44) and issuing enforcement notices (S51); the power to enforce the right to receive information (S 49). This free service improves practice by designated authorities and enables rights holders to equally enjoy their access to information rights. Combined with repeated stories in the press and media of how exercising access to information rights have benefitted individuals, families and communities means that awareness is high amongst the public and there is public understanding of and support for, FoI whether under FoISA or the EIRs.

The Scottish Human Rights Commission (SHRC) is a National Human Rights Institution (NHRI) with Status A accorded by the ICC. It is specifically barred from undertaking casework under Section 6 of the Scottish Commission for Human Rights Act. More positively it does have the power to embark on a national strategy to deliver education or training to duty bearers as well as rights holders<sup>xix</sup>. A dual strategy is required if people are to assert their human rights and be heard by those who are the duty bearers.

**Recommendation 1:** The SHRC's powers should be extended to address the unmet

need for free advice on human rights and be given the power to take forward cases. Consequently, there needs to be an increase in its budget. The Committee should instigate legal reform by bringing forward an amendment to the 2006 Act.

## 2 Parliamentary procedure and process

The Scottish Parliament can take several steps to ensure that people's human rights are being taken into consideration when the Scottish Government and public authorities are creating policies and holding inquiries:

- **Stronger information access rights for MSPs** CFoIS believes that MSPs need to have access to better information to make informed decisions – delivery of their Article 10 right. For example, currently MSPs are not permitted to see the Scottish Parliament's full legal advice on the impact of Bills on the ECHR yet MSPs can only pass Bills which are ECHR compliant. Currently they receive only an edited version that confirms the Bill is compliant despite the subsequent parliamentary process often involving submissions from civil society arguing ECHR issues have not been addressed. Due to FoI requests we know there is no routine system to update and brief MSPs on cases decided at the ECtHR that may impact on the business of the Scottish Parliament. This gap in information and the consequent silencing of informed debate is unhelpful. Therefore, CFoIS welcomes the Scottish Commission for Parliamentary Reform's proposal for 'An enhanced role for individual MSPs to influence, and contribute to, parliamentary business and encouraged to be parliamentarians first.' However, for this recommendation to be effective requires increased information rights for MSPs.
- **Introduce Systems** to ensure that jurisprudence of the ECtHR, guidance and statements from UN Special Rapporteurs, and Concluding Observations and General Comments from UN Committees which have revived UK performance on ratified human rights treaties inform the business of the Scottish Parliament.
- **Impact Assessments** It is a matter of repeated concern that the Scottish Government has published consultations on extending FoISA to Registered Social Landlords (RSLs) and omits to include an Equality and Human Rights Impact Assessment despite RSLs being covered by the Human Rights Act. It is useful to note that it completes a Business and Regulatory Impact Assessment<sup>xx</sup>. The Scottish Parliament should request its own EqHRIA.

**Recommendation 2:** More detailed information needs to be published by the Scottish Parliament about the human rights implications of any Bill/Inquiry and systems in the Scottish Parliament need to be reviewed to incorporate human rights law better.

## 3. Accountability

Accessing information delivers transparency and therefore accountability. The right must be robust, the culture for disclosure needs to be strong and the enforcement mechanism needs to be accessible as well as powerful. CFoIS firmly believes the operation of FoISA and the EIRs are a process to ensure that human rights are respected, protected and fulfilled as well as being the vehicle to deliver a specific human right – the right to form an opinion depends on having access to accurate, informed and up to date information. Information is key to understanding what is and what is not 'fake news'. However, the law in Scotland needs to be reformed to deliver accountability. Additional measures are required to ensure the right to know is robust and effective in enabling people to get the information they want when they need it.<sup>xxi</sup>

**Recommendation 3:** The Scottish Parliament unanimously voted on 21<sup>st</sup> June 2017 for post legislative scrutiny of FoISA<sup>xxii</sup> and that should be commenced without further delay by the Public Audit and Post Legislative Scrutiny Committee. Fundamental to that review and scrutiny should be the drive to reform FoISA to ensure it is compliant, progressively, with European and international human rights law.

## About CFoIS

The Campaign for Freedom of Information in Scotland (CFoIS) was established in 1984 to secure a legal right of access to information so that people could find out about how they are governed and how their services are delivered. We have been involved in all the major developments of the legislation both at UK and Scottish levels. CFoIS is independent of government and relies on donations and income generated through training. For more information on our work go to <https://www.cfoi.org.uk/scotland/>

## Contact:

Carole Ewart, Convener [cfoiscot@gmail.com](mailto:cfoiscot@gmail.com) <https://www.cfoi.org.uk/scotland/>

---

<sup>i</sup> For example, See Articles 1 and 3 at

<https://www.unecce.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

<sup>ii</sup> Article 3(3) Ibid

<sup>iii</sup> For further information on the decision issued on 8<sup>th</sup> November 2016 see

<http://www.iircenter.org/2016/11/15/ecthr-government-obligated-to-impart-information-beneficial-to-public/>

<sup>iv</sup> For example, the case of *Guerra and Others v. Italy* (application no. 14967/89)

<sup>v</sup> Issues are discussed in more detail in our submission to the Scottish Government consultation on extending FoISA to RSLs (17<sup>th</sup> February 2017) available at <https://www.cfoi.org.uk/wp-content/uploads/2017/03/CFoIS-response-extending-coverage-of-FOISA-to-registered-social-landlords.pdf>

<sup>vi</sup> Available on CFoIS website at <https://www.cfoi.org.uk/scotland/>

<sup>vii</sup> Available at <https://www.cfoi.org.uk/wp-content/uploads/2018/03/Post-Legislative-Scrutiny-of-FoISA-learning-from-others-report.pdf>

<sup>viii</sup> At <https://www.cfoi.org.uk/2015/01/3010-reflecting-and-protecting-freedom-of-information-rights/>

<sup>ix</sup> For more information go to the website about Peter Forsskal <http://www.peterforsskal.com/>

<sup>x</sup> Report of the Scottish Consultative Steering Group.

<sup>xi</sup> At <http://www.legislation.gov.uk/asp/2002/13/contents>

<sup>xii</sup> The poll was conducted during 30 Oct – 03 Nov 2015 of 1,026 online interviews & are representative of all adults in Scotland (aged 18+).

<sup>xiii</sup> See the UN website for full list of rights <http://www.un.org/en/universal-declaration-human-rights/index.html>

<sup>xiv</sup> See communication No. 61/1979, *Hertzberg et al. v. Finland*, Views adopted on 2 April 1982.

<sup>xv</sup> See UN Human Rights Committee website for General Comment No 34, adopted in 2011 [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en)

<sup>xvi</sup> Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland pub 17<sup>th</sup> August 2015, Para 3

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=899&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=899&Lang=en)

<sup>xvii</sup> See the UN website at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>

<sup>xviii</sup> Resolution of the UN Human Rights Council 16/4 available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G17/07/1/20/PDF/G1707120.pdf?OpenElement>

<sup>xix</sup> Section 3(1)(d) at <https://www.legislation.gov.uk/asp/2006/16/section/3>

<sup>xx</sup> Latest consultation available at <http://www.gov.scot/Resource/0052/00528413.pdf>

<sup>xxi</sup> See evidence session of 22<sup>nd</sup> March 2018 at the Public Audit and Post Legislative Scrutiny Committee.

<sup>xxii</sup> See Scottish Parliament Official Report

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11021&i=100720>