

# The use of Social Care Emergency Powers in Scotland: BIHR Response to the Second Two-monthly report to Scottish Parliament

In June, 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 consent. The Scottish Parliament also passed the Coronavirus (Scotland) Act on 6 April 2020 which introduced a range of further powers. They are often referred to as Emergency Powers.

## What are Social Care Emergency Powers?

Emergency Powers are powers granted to public authorities to meet emergency needs. The Scottish Government [described](#) the switching on of the Coronavirus Act powers as necessary to help protect the public, maintain essential public services and support the economy.

In social care in Scotland, the powers within the Coronavirus Act include a relaxation of assessment duties, aftercare duties, duties to involve the individual in decisions about their care and responsibility to prepare carer support plans and statements.

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). These powers remain **switched on** as of 21 August 2020. You can read about the powers in more detail [here](#).

## What are the progress reports to Scottish Parliament?

After the Coronavirus Act (2020) and the Coronavirus (Scotland) Act became law, the Scottish Government made a [commitment](#) that they would report to Scottish Parliament every two months on the use of Emergency Powers. The idea behind this is that Parliament has an oversight of how the powers are being used and the government is held to account by the Parliament.

The first report to the Scottish Parliament was [published](#) on 9 June 2020. When this was published BIHR and partner organisations [wrote](#) to the Scottish Parliament raising our concerns that the first report, instead of offering much needed clarity and democratic oversight actually raised further human rights concerns.



On 11 August 2020, the Scottish Government published [Coronavirus Acts: second report to Scottish Parliament](#).

## Which human rights concerns were raised in our response to the first report?

As mentioned, after the first report was released BIHR and partners wrote to the Scottish Parliament Equalities and Human Rights Committee raising a number of human rights concerns. These included:

- 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 of the Coronavirus Act there is no transparency about which Local Authorities are implementing these easements.
- The 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.
- The monitoring and review mechanisms explained in the report are themselves of concern. Crucially, they do not offer any way of monitoring whether or not Emergency Powers are being used compatibly with 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.

We also included a number of recommendations on how the Emergency Powers could be used in a more rights respecting way. You can read the full briefing and letter which cover our concerns and recommendations in more detail [here](#).

## Which concerns have been addressed in the second report?

The second report, [published](#) on 11 August 2020 directly deals with some of the concerns BIHR and partner organisations raised stating:

*“We have, in the development of this second report, reflected on the views and publications of key stakeholders with an interest in the areas of human rights, children’s rights and equality impacts, including (but not limited to) the Scottish Human Rights Commission, the British Institute of Human Rights, the Children and Young People’s Commissioner Scotland, and the ‘Human Rights Leadership Advisory Note to the Scottish Government.’”*

Concern	Rights at risk	What’s changed
The First Progress Report did not state which 6 Local Authorities in Scotland were	When rights are restricted, the public service must ensure this is lawful,	The second report names the local authorities that said they were using the powers



<p>using the Emergency powers</p>	<p>legitimate and proportionate. For something to be lawful, it must be accessible to the people it impacts. If people and families are unaware which laws the public authority they are interacting with are bound by this is a human rights concern.</p>	<p>during the second monitoring period.</p> <p><i>“Dundee, East Renfrewshire, Highland and South Lanarkshire.”</i></p>
<p>Following the publication of the first report we were concerned that the review mechanism did not offer any way of monitoring whether or not Emergency Powers are being used compatibly with human rights law.</p>	<p>For human rights law to be upheld, public officials must be supported to recognise and respond to a situation in which a person’s legally protected human rights are at risk. Leadership should have oversight of these human rights risks, and use this to support nondiscriminatory and proportionate service-level and strategic decisions in responding to the pandemic.</p>	<p>The second report states:</p> <p><i>“Local Authorities using the powers were asked to explain what arrangements were in place to ensure that these powers are being used in a way that protects human rights.”</i></p> <p>Asking this question of the local authorities goes some way towards monitoring whether or not Emergency Powers are being used compatibly with human rights law.</p>

### What human rights concerns remain?

We welcome that the Scottish Government has listened to the to the concerns that we have raised, drawn from our work with people and groups in Scotland and are taking action based on this. The changes above put in place by the Scottish Government are a step in the right direction in terms of protecting people’s human rights.

Yet, it remains the case that we are concerned to see that the powers remain switched on. The second progress report states that, *“It is therefore appropriate at this time to maintain the flexibility for Local Authorities to use these powers in limited circumstances where it is essential that they do so in order to provide urgent care without delay. This will be subject to further monitoring and review.”*

We know from our evidence gathering that these powers which exist to ensure urgent care is provided are having unintended consequences for people and their families across Scotland.



People accessing (or trying to access) care and support in Scotland who responded to our evidence call identified experiencing or being aware of the following rights issues during Covid-19. This data has been collected between April and August 2020 to capture people's experiences and the human rights implications of government(s) actions.

**Right to Life (Article 2 HRA)**



**Right to be free from inhuman and degrading treatment (Article 3 HRA)**



**Right to liberty (Article 5)**

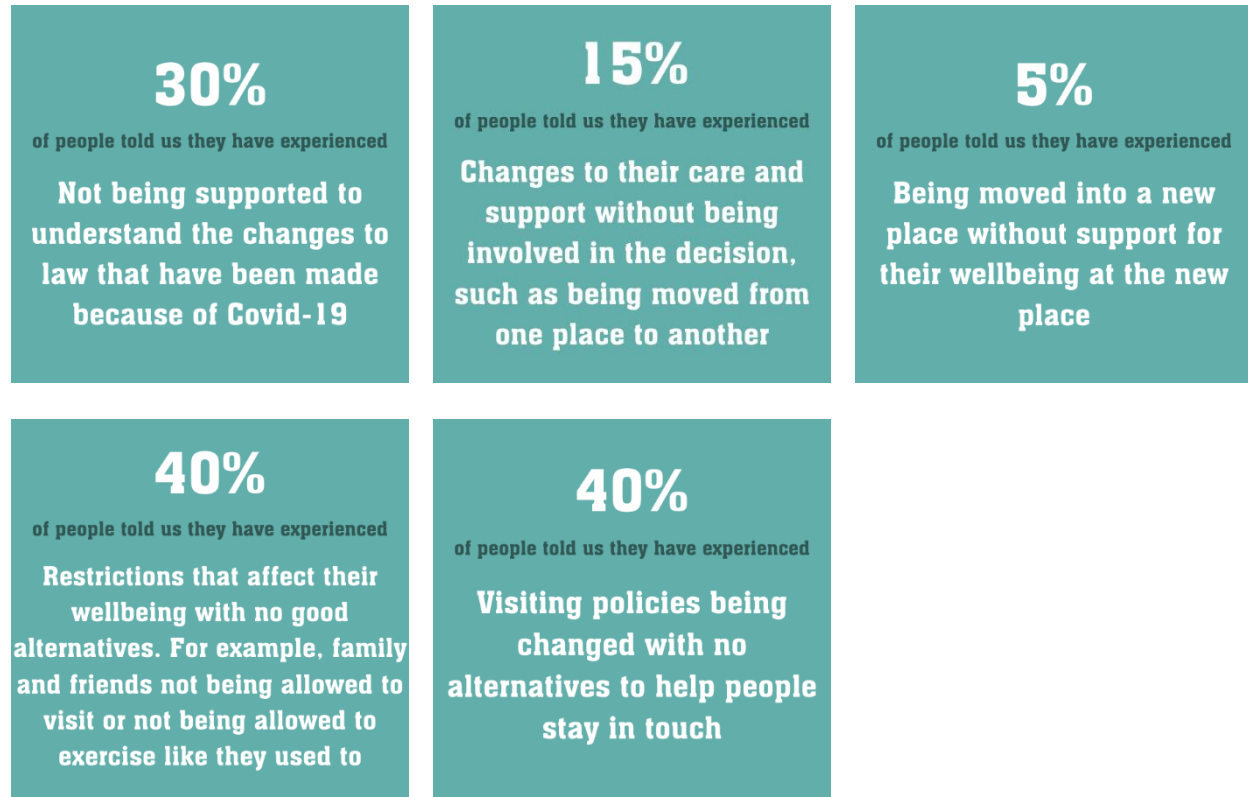


**Right to a fair trial (Article 6 HRA)**





Right to private and family life, home and correspondence (Article 8 HRA)



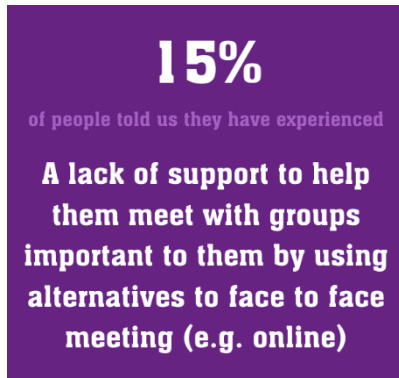
Freedom of thought, conscience & religion (Article 9 HRA)

Freedom of Expression (Article 10 HRA)



Freedom of assembly and association  
(Article 11 HRA)

Right to non-discrimination (Article 14 HRA)



Right to education (Article 2, protocol 2 HRA)

Peaceful enjoyment of possessions (Article 1, protocol 1 HRA)



There is a real concern about the human rights implications of these powers, we went into depth on this in our briefing which you can read [here](#). A concern for many who access or are trying to access health and carer services is that the removal or relaxation of duties becomes the new normal.

## Our Call to Action

Although the second report shows that some of the concerns of BIHR and others have been taken on board, there is still much more to be done to ensure that people accessing (or trying to access) care and support in Scotland have their human rights protected, respected and fulfilled.

We reiterate and build upon our recommendations of our letter to the Scottish Parliament in June which are yet to be addressed:

- Frontline staff must be supported to recognise and respond to a situation in which a person's legally protected human rights are at risk. This is necessary during Covid-19

and beyond. According to our evidence gathering from people who work in health and social care in Scotland, 65% of those who responded told us that they have received no training or clear information on the use of Emergency powers under the Coronavirus Act. Of those who responded, 65% also told us that they had not received training or clear information on human rights law since the start of Covid-19.

- Leadership should have oversight of these human rights risks, and use this to support nondiscriminatory and proportionate service-level and strategic decisions in responding to the pandemic.
- The second progress report remains vague about how the powers are being used; *“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.”* There must be more clarity around which duties are being dispensed with. This information must be accessible for people and their families, as well as for staff who will be using the powers.
- The 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.
- There must be transparency around which Local Authorities are using the Emergency Powers, and which are not. This information must be easy to access, enabling 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. At the moment, we have only been able to find this information in the Progress Report. We would recommend keeping a register of this information in a clearly publicly accessible and publicised place, such as the Coronavirus sections of the Scottish Government’s website.

## **What are our Next steps?**

At BIHR we continue to work directly with people with care and support needs across Scotland. Over the next 6 weeks we have arranged partnership sessions with:

- The Health and Social Care Alliance
- Down’s Syndrome Scotland
- Carer’s Scotland
- Scottish Autism
- Tide (Together in Dementia Every Day)

These sessions will give people practical information on how to use human rights as a tool to create change in their lives, or the lives of the people they support. We will use our learning from these sessions to continue our policy work in Scotland, ensuring that human rights are at the centre of the “recovery” from Covid-19.



We are continuing to gather information from people who access services, their carers and loved ones, staff working in health and care and advocacy and campaign groups on how Covid-19 has impacted their human rights or the human rights of those they support. We will submit this evidence to the Scottish Parliament Equalities and Human Rights Committee inquiry into the impact of the COVID-19 pandemic on equalities and human rights.