

Campaign for
Freedom of
Information
in Scotland



UPR of United Kingdom of Great Britain and Northern Ireland Submission from the Campaign for Freedom of Information in Scotland (CFoIS)

About CFoIS

CFoIS was established in 1984 campaigns for robust, accessible and enforceable access to information rights. CFoIS believes that policy and practice on transparency and accountability should keep pace with the needs of a modern democracy. CFoIS offers comment and scrutiny on law and policy, as well as encouraging people to be 'rights aware'. In September 2021, CFoIS became a Scottish Charitable Incorporated Organisation (SCIO), number is SC051263. CFoIS is independent of government. CFoIS receives funds from donations and project grants.

1. Introduction

CFoIS welcomes this opportunity to declare what actions the UK has taken to improve human rights and to fulfil its human rights obligations across two themes for action identified by the Human Rights Council in 2017: the domestic human rights framework and access to justice.

2. Territorial Application

The UPR is examining the United Kingdom of Great Britain and Northern Ireland. CFoIS is concerned about transparency and accountability for the delivery of rights and fulfilment of responsibilities to 'the peoples of territories under its jurisdiction'.ⁱ The UK has responsibility for the British Overseas Territories and the Crown Dependencies. The Committee on Economic, Social and Cultural Rights regretted the limited information available on the enjoyment of economic, social and cultural rights in the British Overseas Territories and the Crown Dependencies (art. 2).ⁱⁱ As the administering power, the UK has ultimate responsibility for the implementation of human rights in all and across its jurisdictions including the Cayman Islands.

Affluent investors can put their money offshore in places such as the Cayman Islands, which is a Non-Self-Governing Territory. The absence of transparency and accountability in the process, is an established domestic concern. Annually, the UN General Assembly adopts a resolution registering its concern that the territory is still not independent as well as what happens there and its global impact.ⁱⁱⁱ On 10th December 2020, the UN General Assembly passed a resolution:

- "Expressing concern that 60 years after the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 3 there still remain 17 Non-Self-Governing Territories, including the Cayman Islands,

- “Concerned by the use and exploitation of the natural resources of the Non-Self Governing Territories by the administering Powers for their benefit, by the use of the Territories as international financial centres to the detriment of the world economy and by the consequences of any economic activities of the administering Powers that are contrary to the interests of the people of the Territories ...”^{iv}

The impact of the financial regime permitted by the UK in the Cayman Islands is a human rights issue. The opaque/secret financial setup directly impacts on transparency, accountability and economic and social rights.

Scotland’s care service reform should place human rights compliance at its centre as recommended by the independent review into adult social care led by Derek Feeley.^v How the Government contracts with parties to deliver public and publicly funded services of care matters. In ‘Death, Deception & Dividends’, CICTAR explains that the business of care can afford good pay and conditions and high quality of care, it is a question of choice and business focus.^{vi} Yet Scotland’s current commissioning system is a significant contributory factor to low pay and poor service.^{vii} An additional £18.9m in government payments for COVID-19 costs allowed the owners of the UK’s largest care home operator to continue to ‘siphon’ millions in tax free profits to the Cayman Islands. In 2020 alone, £4.8m in dividend payments were shifted to the Cayman Islands. Related party interest payments of £17.7m and £24.7m in lease payments also flowed offshore in 2020. These figures follow from years of even larger dividend payments and other forms of financial extraction.”^{viii}

Additional research^{ix} and work by journalists^x have exposed who owns and profits from care. The risk to human rights in outsourcing a critical public service is clear and evidences the need to mainstream human rights for service users and workers whoever delivers the service.

Recommendation 1 The UK takes all necessary measures to institutionalise and legislate for transparency in the Territories serving as international financial centres to the detriment of the world economy. The UK should ensure the full enjoyment of economic, social and cultural rights by all persons under its jurisdiction.

3. Acceptance of International Norms

The UK Freedom of Information Act 2000 (FoIA), the Environmental Information Regulations^{xi}, The Freedom of Information (Scotland) Act 2002 (FoISA)^{xii}, and the Environmental Information (Scotland) Regulations 2004 (EISRs)^{xiii} establish the ‘right to receive’ information and place a duty on the holder of information to provide it unless it is subject to one of the numerous exemptions and exceptions. Whether the information relates to devolved or reserved matters defines the legislative choice. There are also duties to pro-actively disclose which are assisted by separate statutory duties such as publishing local housing plans and policy initiatives such as on ‘Open Government’. Given the established legislation which delivers an enforceable right to access information and duties on pro-active publication, CFoIS is puzzled that the UK has so far resisted signing and ratifying the The Council of Europe Convention on Access to Official Documents^{xiv}, known as the Tromsø Convention. Although that process is a reserved matter, the Scottish Government

can ensure that FoISA's reform complies (see below). Tromso's preamble sets a useful context for rights:

"Considering that exercise of a right to access to official documents: (i) provides a source of information for the public; (ii) helps the public to form an opinion on the state of society and on public authorities; (iii) fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy".^{xv}

CFoIS believes the UK should show leadership on this issue.

Recommendation 2: The UK should sign and ratify the Tromso Convention without further delay.

4. Compliance with UN Treaties

The UK has established a pattern of delaying submissions to UN periodic Treaty reviews and consequently postpones independent assessment of its compliance with ratified Treaties. For example its State Party report on ICESCR was due on 30th June 2021 and the UK Government Minister wrote to civil society in December 2021 and assured us it would happen 'soon'. However the matter remains outstanding. Another example is CRPD.

Repeated delays with submissions and the UK Government's declared intent to replace the Human Rights Act 1998 and retreat into domestic standards are evidence of a worrying trend. The UK Government appears to shun external and expert scrutiny on the domestic enjoyment and delivery of human rights.

Recommendation 3: The UK should commit to comply with the dates set by UN Treaty Review process.

5. Engagement with Civil Society

CFoIS organises meetings of the Scottish Public Information Forum (SPIF) to increase engagement with rights holders and duty bearers. SPIF is included in the Scottish Government's six FoI principles published in 2007:

"...maintains effective relationships with the Scottish Information Commissioner and other key stakeholders. We ensure the effective operation of the Act by fostering and maintaining good working relationships on Freedom of Information with stakeholders such as other public authorities and the Scottish Public Information Forum."^{xvi}

CFoIS wishes to record its thanks to the Scottish Government for its participation in this process. Members of the public, designated bodies under FoISA, civil society and the Scottish Information Commissioner meet to discuss the practice of rights and best practice in the delivery of duties. This collaborative and accountable forum enables engagement with stakeholders.

6. SLAPPs

A growing body of evidence, over many years, has identified abusive legal threats and strategic lawsuits against public participation (SLAPPs) as a key issue of concern for freedom of expression and the right to information in the UK. The impact

goes beyond those directly subject to these legal tactics, posing a wider challenge to society and the principle of public participation and accessing accurate up to date information as a human right and as a counter to fake news. These legal actions are directed against individuals and organisations - including journalists, media outlets, whistleblowers, activists, academics and NGOs - that speak out on matters of public interest. SLAPPS have been gaining wider recognition as an issue in several jurisdictions. However, there is also a significant concern regarding the 'hidden problem' of UK law firms sending threatening legal communication prior to any official filings, which can have a similar effect to SLAPPs. These legal threats are particularly effective when emanating from the UK, which is seen as a more plaintiff-friendly jurisdiction and where mounting a defence is a particularly costly and lengthy process.

CFoIS welcomes the UK Governments emergency consultation on the use of SLAPPs in the UK, launched on 17th March 2022 which will end on 19th May.^{xvii} The legacy of current law and practice also needs to be assessed to ensure the public interest in accessing accurate information is respected and protected and if necessary, enabling the release of information that should have been made public.

Recommendation 4: The UK and Scottish Governments urgently legislate to ensure legislative, regulatory and procedural reforms deliver a rights respecting regime across the UK, Northern Ireland and all territories under its jurisdiction.

7. NHRIs

The Scottish Human Rights Commission has A status. However the Scottish Commission for Human Rights Act 2006, section 6, specifically prohibits the SHRC from advising, undertaking or funding casework^{xviii}. This weakens the standing and impact of the SHRC to ensure there are consequences for failure to comply with human rights law. CFoIS believes the Scottish Government should amend the SHRC's powers as a matter of urgency. In 'Getting Rights Right: Human Rights and the Scottish Parliament', 6th Report of the Equalities and Human Rights Committee of the Scottish Parliament published in November 2018, recommendation 15 was '...Investigate strengthening powers of the Scottish Human Rights Commission.' This action was to commence between 1-3 years after publication of the report but no visible progress to date.^{xix}

Recommendation 5: The Scottish Government brings forward a Bill that repeals section 6 of the Scottish Commission for Human Rights Act and funds the SHRC to undertake case work in the public interest.

8. Freedom of Expression

The Public Audit and Post Legislative Scrutiny Committee (PAPLS) of the Scottish Parliament published a detailed report in May 2020 which recommended significant reform of the Freedom of Information (Scotland) Act 2002^{xx} (FoISA):

'... there is a clear need to improve the legislation, particularly in respect of the bodies that it covers and in relation to proactive publication.'^{xxi}

The Scottish Government committed to consulting people on access to information rights, in February 2021, but has not committed to reforming FoISA. That consultation is not yet published.

CFoIS is frustrated by inaction and has drafted the Freedom of Information (Scotland) (No2) Bill along with Explanatory Notes.^{xxii} which is subject to public consultation. The Bill reforms FoISA and has received positive coverage.^{xxiii} The Committee recommended consultation 'on the detail of the proposed changes before bringing forward the necessary legislation.'^{xxiv}

FoISA is 20 years old and covers information processing and public service delivery which have changed radically and continue to do so. The law on rights and duties needs to keep up with everyday operations so reform is urgently needed to update the law, address legal loopholes and introduce duties to prohibit practices which undermine legal rights and improve implementation.

The Sustainable Development Goals (SDGs) have influenced the CFoIS Bill. Goal 16 assists the process as it sets two relevant targets for the Scottish Government: to develop effective, accountable and transparent institutions at all levels (16.6) and to ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements (16.10). Compliance has increased in importance and in 2019, the UN upgraded the status of an indicator to measure access to information within the SDGs. Scotland has its own declared ambition that its 'National Performance Framework (NPF) and the Goals share the same aims.'

Recommendation 6: The Scottish Government agrees to amend FoISA as a matter of urgency and agrees to ensure that legislation now complies with human rights law, jurisprudence at the European Court of Human Rights, the SDGC, UNGPs and the Tromso Convention.

9. Business and Human Rights

In 2021, the UN marked 10 years of the 31 Guiding Principles on Business & Human Rights (UNGPs). The UK was the first country to adopt a 'National Action Plan on Business and Human Rights', in 2013, based on the UNGPs which has been updated and progress reports issued such as in May 2020^{xxv}. However the Government emphasises the voluntary nature of the regime. There is no separate Scottish document despite a published baseline assessment^{xxvi} and a statement of commitment from the Scottish Government.^{xxvii} The Scottish Parliament hosted a global conference, in October 2010, to discuss the issues which was attended by over 80 countries as well as UN staff.

The UNGPs promote the UK's duty to protect human rights and the corporate responsibility to respect human rights^{xxviii}. Remedies must also be available to prevent and address human rights abuses by state and non-state actors. So far, progress has been slow on mainstreaming the UNGPs across the UK's territorial jurisdiction

Recommendation 7: The Scottish Government should move from a voluntary commitment on Business and Human Rights and delivery of the UNGPs, to providing a transparent and accountable framework in the new Human Rights Bill for Scotland.

Recommendation 8: The adoption of the National Action Plan on Business and Human Rights is welcome but it is regrettable that there is a continued lack of a regulatory framework to ensure that companies operating in the State party, as well as companies domiciled under its jurisdiction acting abroad, fully respect economic, social and cultural rights. The UK should legislate for a robust regulatory regime underpinned by transparency which enables informed scrutiny.

10. Transparency and Accountability in Public Services

How the public sector and public companies perform on the 31 UNGPs, especially numbers 4 - 6, is a matter requiring greater transparency, accountability and scrutiny in Scotland. Government response to the global pandemic and deaths from COVID19 have highlighted the importance of public procurement in the delivery of services of a public nature. A freedom of information request to the Scottish Government in March 2021 revealed that during the 2016-2021 parliamentary session :

- 1) Contracts awarded by the Scottish Government - **2987**
- 2) Companies based outside Scotland awarded contracts by the Scottish Government - **735**
- 3) Non-UK companies awarded contracts by the Scottish Government - **39**
- 4) Value of contracts awarded by the Scottish Government - **£3,209,786,818**.^{xxix}

CFoIS has sought, so far unsuccessfully, to obtain the names of 'publicly owned companies' in Scotland. We requested specific information on names, using FoISA, after we discovered tables in a Scottish Government statistical publication 'Business in Scotland 2018'. As the total number was given, we requested the names used in the statistical analysis. The case went to the Scottish Information Commissioner (SIC). The SIC has issued his judgement and Scottish Ministers do not have to disclose the information. The result of our FoI requests is that two separate lists now exist: a statistical list of 245 companies (35 + 210) which the Scottish Government has published and a list that was separately provided by the SIC, after an FoI request, that names 146. There is a gap in accountability as well as transparency. This information should be publicly available^{xxx}.

Recommendation 9: The UK and the Scottish Governments should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe, the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

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- ⁱ Preamble to the Universal Declaration of Human Rights
- ⁱⁱ **Para 7**, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, 16th July 2016.
- ⁱⁱⁱ [Cayman Islands | The United Nations and Decolonization](#)
- ^{iv} Pages 1 and 2 at [A/RES/75/111 - E - A/RES/75/111 -Desktop \(undocs.org\)](#)
- ^v [Independent Review of Adult Social Care - gov.scot \(www.gov.scot\)](#)
- ^{vi} [Death-Deception-Dividends-Dec-3.5.pdf \(cictar.org\)](#)
- ^{vii} [Fair-Work-in-Scotland's-Social-Care-Sector-2019.pdf \(fairworkconvention.scot\)](#)
- ^{viii} [Death-Deception-Dividends-Dec-3.5.pdf \(cictar.org\)](#)
- ^{ix} IPPR at [Who cares? Financialisation in social care | IPPR](#)
- ^x [Scottish care homes owned by the Chinese state in tax havens \(theferret.scot\)](#)
- ^{xi} At [What are the Environmental Information Regulations? | ICO](#)
- ^{xii} The Act is available at <http://www.legislation.gov.uk/asp/2002/13/contents>
- ^{xiii} At <https://www.legislation.gov.uk/ssi/2004/520/contents/made>
- ^{xiv} [Council of Europe Convention on Access to Official Documents](#)
- ^{xv} Text and Explanatory Notes at [16809f5c1a \(coe.int\)](#)
- ^{xvi} [Guide to information published by the Scottish Government - gov.scot \(www.gov.scot\)](#)
- ^{xvii} [Strategic Lawsuits Against Public Participation \(SLAPPs\) - GOV.UK \(www.gov.uk\)](#)
- ^{xviii} [Scottish Commission for Human Rights Act 2006 \(legislation.gov.uk\)](#)
- ^{xix} [Getting Rights Right: Human Rights and the Scottish Parliament \(azureedge.net\)](#)
- ^{xx} The Act is available at <http://www.legislation.gov.uk/asp/2002/13/contents>
- ^{xxi} At [Post-legislative Scrutiny : Freedom of Information \(Scotland\) Act 2002 - Parliamentary Business : Scottish Parliament](#) and at Para 5 at [PAPLS052020R2.pdf](#)
- ^{xxii} On CFoIS website at [Bill/Publications – CFoIS](#)
- ^{xxiii} <https://theferret.scot/freedom-of-information-scottish-government-stalling/>
- ^{xxiv} Ibid
- ^{xxv} At [UK National Action Plan on implementing the UN Guiding Principles on Business and Human Rights: progress update, May 2020 - GOV.UK \(www.gov.uk\)](#)
- ^{xxvi} Advertised in May 2015 at [National Baseline Assessment on Business and Human Rights \(government-online.net\)](#) and progress at [Business and Human Rights – Scotland's National Action Plan for Human Rights \(snaprights.info\)](#)
- ^{xxvii} [Business and Human Rights – Scotland's National Action Plan for Human Rights \(snaprights.info\)](#) and [Human rights and business - Human rights - gov.scot \(www.gov.scot\)](#)
- ^{xxviii} At [GuidingPrinciplesBusinessHR_EN.pdf \(ohchr.org\)](#)
- ^{xxix} [Contracts during 2016-2021 parliamentary sessions: FOI release - gov.scot \(www.gov.scot\)](#)
- ^{xxx} Briefing provides more detail at [Briefing-on-Public-Company-Case-Final.pdf \(cfois.scot\)](#)