



UNISON Scotland response:

## The Impact of the COVID-19 pandemic on Equalities and Human Rights

UNISON is Scotland's largest trade union with members across the public, private and voluntary sectors. Our members in the NHS, Local Government and social care have been the heart of Scotland's response to the coronavirus pandemic. For the purpose of illustration, however, this response focuses on human rights in social care where Scotland's human rights deficit had the greatest impact on avoidable infections and deaths. We welcome this opportunity to contribute to the committee's work.

### Summary

- The absence of human rights in social care is a major cause of avoidable infections and deaths during the ongoing pandemic. This has a profoundly disparate effect by gender, ethnic origin, age and disability.
- Workplace hygiene and safety arrangements are inadequate. Workers lack the voice to challenge unsafe work through union membership. Poor pay and working conditions such as inadequate sick pay and employer negligence compel employees to attend work when infected or symptomatic. These are human rights issues.
- Some private employers have presided over the worst record of infections and deaths while leaking valuable social care investment to offshore tax havens through complex corporate structures. Tax evasion is a human rights issue.
- These human rights failings in social care were observed by the UN in 2016 and will be the clear focus of further UN inquiry when Scotland submits its state compliance report in June 2021.
- This submission therefore focuses on the need to incorporate and enforce the UN Convention on Economic, Social and Cultural Rights (ICESCR) as a means of securing human rights in social care, for workers and service users.

### 1. Scottish Government & Human Rights

Scottish Government has a binding obligation to uphold human rights obligations.<sup>1</sup> Although the Scotland Act states that Government cannot break human rights law, UN treaties require more. Compliance with human rights law requires positive measures to progressively improve human rights in Scotland.

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<sup>1</sup>s.57 Scotland Act 1998

This obligation is not being met. And when workers and service users die in avoidable circumstances, that is a human rights failing.

In the context of “progressively realising” human rights, UNISON welcomes the proposed incorporation of the UN Convention on the Rights of the Child and the commitment to incorporate equivalent UN standards for women and disabled people.

However, there are other vital human rights norms that also bind Scottish Government. These rights are not, as yet, incorporated into Scottish Law. Additionally, the lack of enforcement, regulation, or other effective remedies leave a large gap between human rights rhetoric and practical reality for both social care workers and service users. This human rights deficit degrades living and working conditions and puts lives at risk during the pandemic.

## 2. UN Compliance as at July 2016

The last report by the UN on economic rights in Scotland and the UK was issued in 2016.<sup>2</sup> Key UN recommendations and subsequent implementation in social care are summarised below:

UN Recommendation 2016	Action since 2016
Fully incorporate UN economic rights into domestic law. (para 6)	No action
Ensure that human rights should be enforceable in domestic courts. (para 6)	No action
Create a clear regulatory framework for companies to ensure that their activities do not negatively affect the enjoyment of economic rights. (para 12)	Human rights are embedded in social care contracts, but compliance is neither monitored nor enforced
Take strict measures to tackle tax abuse to maximise the resources available for protecting and fulfilling economic rights. (para 16/17)	No action on tax evasion prior to the exclusion of EU listed tax havens from the Covid Relief Fund in 2020. <sup>3</sup>
Ensure that the living wage is increased to a level that ensures a decent standard of living. (para 36/37)	Living wage increased
Ensure full and effective protection against discrimination on socioeconomic grounds, comparable to that provided on other equality grounds. (para 22/23)	The new socioeconomic duty is limited to strategy development rather than “decision making”. Applies to IJBs but not to social care providers.

<sup>2</sup> [UN Economic & Social Council: Concluding Observations 2016](#)

<sup>3</sup> [Schedule 4, Part 12, Coronavirus \(Scotland\) \(No.2\) Act 2020](#)

Adopt effective measures to eliminate the persistent gender pay gap (para26/27)	Gender Pay Gap Action Plan is unlikely to impact in social care where pay discrimination is rife and existing Fair Work obligations are neither monitored nor enforced.
Take all necessary measures to ensure that, in line with its obligations under article 8 of the Covenant, all workers enjoy their trade union rights without undue restrictions or interference. (para 39)	High level commitments to Fair Work and collective bargaining coverage are not matched by any growth in joint working in social care services.

### 3. General ICESCR Obligations

In addition to individual human rights (fair work, safety, equality etc) the charter has important additional obligations:

- Scottish Government is required to work towards the gradual improvement of economic rights. Progress must be monitored and reported to the United Nations.
- The charter bans the “destruction” of existing rights or any backtracking on established human rights protections;
- Economic rights must be free from discrimination;
- Government investment in improved economic rights should be the “maximum” that can be achieved with available resources; and,
- Full compliance with UN human rights, such as CDESCR rights, means workers must have a practical way of enforcing real rights.

### 4. Human Rights & Fair Work

The individual rights of particular relevance to social care during the pandemic are as follows:

#### (a) Working Conditions (Art 7)

ICESCR requires the right to “just and favourable working conditions”. This includes fair wages, equal pay, a decent standard of living, safe and healthy working conditions, equality of opportunity, rest, reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

#### (b) The Right to Health (Art 12)

ICESCR recognises “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

The steps required by the United Nations include measures to ensure:

- The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

It is important for social care workers and service users to know that safe work during a pandemic is a fundamental human right that is binding on Scottish Government and all employers contracted and funded by Government to deliver care.

### **(c) Trade Unions (Art 8)**

ICESCR protects the right to join and be active in a trade union to protect working conditions.

### **(d) Discrimination**

All the core rights (above) should be free from any form of discrimination and workers have a freestanding protection against discrimination including, specifically, the right to equal pay for equal work.

## **5. Existing Arrangements for Human Rights in Social Care**

The human rights obligations under the Scotland Act only apply to devolved issues. The commissioning, funding, provision and regulation of social care in Scotland is a devolved issue.

Human rights observance in social care is intended to be guaranteed by safeguards embedded in contracts for commissioned services. Any organisation that contracts for the delivery of public services has a duty to uphold human rights.

In addition to extensive evidence from social care workers, UNISON has gathered evidence from members with experience of commissioning and monitoring social care contracts. The overwhelming evidence is that human rights compliance is ignored during the commissioning, performance, monitoring and enforcement of contracted services. Furthermore, UNISON members severe obstacles when seeking basic protections.

These shortcomings in social care were highlighted to Parliament by UNISON prior to the pandemic.<sup>4</sup>

The inadequacy of existing human rights protections in social care pre-dates the pandemic (see UN Report 2016) and was then a major factor in the prevalence of avoidable infections and deaths. The existing system requires a radical overhaul.

## **6. Human Rights Failures During the Coronavirus Pandemic**

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<sup>4</sup> [The Future of Social Care, UNISON Scotland February 2020](#)

UNISON has documented many examples of unfair work during the pandemic. This is a short summary of how these shortcomings can be seen from a human rights perspective:

- Widespread shortages of PPE were a major contributor to avoidable infections and deaths in social care.<sup>5</sup> This is a breach of Articles 7 (Safety) and Article 12 (Health)
- UNISON has extensive evidence of the refusal of employers to pay sick pay to infected workers or workers required to isolate in accordance with Covid rules. Many employers continue to refuse to honour Government directions to pay sick pay and have set out that refusal in writing to UNISON<sup>6</sup>.
- Workers have no effective legal remedy when denied sick pay. Failure to ensure adequate sick pay contributed to infections and deaths and is an ongoing breach of Article 6 (Pay), Article 7 (Safety) and Article 12 (Health)<sup>7</sup>
- Testing is a vital part of safe work and infection control. UNISON has been campaigning for an extension of testing to Care at Home Staff. A commitment to testing was made in October but, as of December, Care at Home staff visit vulnerable clients without knowing if they are carrying an infection risk. The failure to test Homecare staff is an ongoing breach of Article 7 (Safety) and Article 12 (Health)<sup>8</sup>
- The widespread failure of employers to conduct risk assessments and implement measures based on risk assessments is a breach of Article 7 (Safety) and Article 12 (Health)
- The widespread failure to establish and maintain effective infection controls at work is a clear breach of Article 12 (Health)
- While some employers welcome joint working with unions, many are deeply hostile to any effective voice at work. In one instance the employer referred UNISON to a London based PR company to explain why the company would not engage in a dialogue about infection risks. The failure to establish arrangements for trade union protection and the obstruction of trade union safety work on behalf of members is a breach of Article 7 (Safety) Article 8 (Trade Unions) and Article 12 (Health)
- UNISON has contributed to the wide body of published evidence on the discriminatory impact of Covid<sup>9</sup>. The virus doesn't discriminate, it has a disparate and often fatal impact in workplaces where safety practices and trade union voice are weak. The systemic discrimination in social care and

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<sup>5</sup> For example "[New guidance for home and social care staff in Scotland puts home care staff at risk](#)" and "[Promises of PPE Won't Keep People Safe](#)". And see [UNISON Scotland Press Releases](#) for other instances.

<sup>6</sup> <https://www.unison-scotland.org/claim-covid-cash-10-excuses-for-non-payment-by-private-sector-employers/>

<sup>7</sup> [UNISON-Scotland-evidence-Social-Care-Staff-Support-Fund-Regs](#)

<sup>8</sup> [UNISON Scotland: Care at Home Workers and Covid 19](#)

<sup>9</sup> [Underlying Inequalities & Infection Risk: Black Workers & Covid19; UNISON Scotland](#)

the failure to address the discriminatory impact of Covid is a breach of Article 2 (Equality)

The challenge we face is to build a better social care system that respects the equality and human rights of workers and service users as the foundation for better care.

## 7. Human Rights and Tax Evasion

Many of the worst experiences of the pandemic occurred in private care companies. Excess deaths were more common in the private sector than the not-for-profit sector.<sup>10</sup>

One consequence of contracting with private care companies is that valuable social care investment leaks to private investors through excess profits, dividends, internal “charges” for rents or loans and tax evasion. This leaked investment is then concealed by complex corporate structures. These are funds that could be used to improve working conditions and to keep service users alive and free from infection.

ICESCR requires that national governments improve human rights compliance in social care by “progressive realisation to the maximum of available resources”. The UN position on tax evasion is that a nation is not maximising the resources available for human rights compliance if money is leaking away to tax havens when it could be spent in building a fair society.

The UN has placed a specific obligation on Governments to adopt regulations and legal remedies that force companies to reveal how money is drained from social care and to adopt measures that prevent human rights compliance being denied by tax evasion, transfer pricing and other forms of financialisation.<sup>11</sup>

Chillingly, the UN saw fit to impose the following obligation on states: “The Committee has regularly come across accounts of threats and attacks aimed at those seeking to protect their own or others’ Covenant rights. In addition, trade union leaders, leaders of peasant movements, indigenous leaders and anti-corruption activists are often subject to the risk of harassment. State parties should take all measures necessary to protect human rights advocates and their work”.

## 8. Disparate impact: Black Workers & Covid 19

The failure of human rights at work was felt most acutely by our black and minority ethnic (BAME) members. As it became clear that BAME infection and death rates

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<sup>10</sup> [Discharges from NH Scotland hospitals to care homes 1st March to 31st May 2020; Public Health Scotland, Oct 2020](#)

<sup>11</sup> [General comment No. 24 \(2017\) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities; United Nations 2017](#)

were higher than in the white population<sup>12</sup> we carried out survey work amongst our BAME membership.

The Black members responding to UNISON's survey reported they experienced 'unfair work' more often than their white colleagues. Compared to their white colleagues they were:

- more fearful of infection,
- more concerned about PPE access,
- more fearful of onward infection to family,
- less likely to get sick pay,
- more fearful of losing their job,
- more worried about reduced income and
- more concerned about meeting living costs<sup>13</sup>.

Workers living in fear do not use sick pay rights or challenge unsafe work. As in the UK, Scotland has been painfully slow to accept the simple and obvious truth – Black workers tend to be segregated into less secure forms of unfair work that have more frequent and sustained close contact with patients in health and care settings. That demographic correlates with many forms of disadvantage, but in a pandemic, it links to an increased risk of infection and death. Similar observations can be made about the adverse consequences of the occupational segregation of women into low paid and unsafe care roles.

## 9. Human Rights Issues Requiring Immediate Action

UNISON welcomed the two joint statements on Fair Work during the pandemic. The circumstances in social care require an additional and urgent statement that targets the shortcomings highlighted in this paper that drive the rate of infection and death in social care.

**Step 1:** All social care providers should be compelled to embark on joint safety work with trade unions focusing on risk assessments, infection control measures, equalities and routine joint workplace inspections.

**Step 2:** Measures should be taken to penalise employers who persistently refuse to follow Covid guidance such as the requirement to pay sick pay for Covid related absences.

**Step 3:** Testing and vaccination must be extended to all social care workers as a priority group.

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<sup>12</sup> [Interim Guidance for health and social care employers on staff from Black, Asian and Minority Ethnic Backgrounds, Scottish Government May 2020](#)

<sup>13</sup> <https://www.unison-scotland.org/wp-content/uploads/UNISON-Scotland-Black-Workers-and-Covid-19-x.pdf>

**Step 4:** HSCP's or delegated commissioning bodies should be empowered **and** compelled to apply robust human rights enforcement measures.

**Step 5:** The welcome prohibition on Covid bail outs to companies linked to tax havens should be strengthened and extended to cover all tax havens, not just those set out in the EU list of tax havens. Not all tax havens are tropical islands or UK Crown Dependencies. There are several tax evasion jurisdictions within the EU.

**Step 6:** All provider companies should be compelled, as a matter of contract compliance, to publish the full detail of their corporate structures and the flow of cash between linked companies within complex global corporate structures. To help achieve this goal, all care contracts should require transparency and the Freedom of Information Act should immediately be extended in scope to include all state-funded providers of contracted public services.

## 10. Longer Term Human Rights Reform

UNISON welcome the independent review of Adult Social Care. This review is the perfect opportunity to address human rights shortcomings in the sector.

**Step 1:** The Feeley review and the Government response should be founded upon a transformation in human rights observance in social care.

**Step 2:** Government should incorporate ICESCR into Scottish law, with fully enforceable remedies, at least insofar as ICESCR affects the terms on which social care services are funded by Scottish Government. To do otherwise would be a breach of the Scotland Act 1998.

**Step 3:** Scotland should commit to the radical transformation of working conditions, employment relations, career progression and care standards by establishing sectoral bargaining for all working arrangements including the delivery of training and skills. In doing so Scotland would fulfil all the economic rights required by the UN.

**Step 4:** Equality in pay and all working conditions should be a central principle and overriding objective of social care bargaining. This equality commitment should be reflected in the remit, constitution, processes and, crucially, the monitored outcomes of sectoral bargaining arrangements.

**Step 5:** If a market for mixed provision of social care is retained, then human rights will only be realised if competitive tendering is replaced by ethical commissioning whereby the human rights of service users and workers are embedded in service specifications through a process of co-design and bids evaluated against criteria that place "people before profit".

**Step 6:** Quality social care must meet diverse needs and cannot be based on uniformity of provision. However, consistency in the fundamental standards of human rights for service users and workers is vital and can only be guaranteed through a national system built on the measures above. For meaningful human rights compliance Scotland therefore needs a National Care Service – robust in

protection of fundamental rights but flexible in its response to service user need. The design of a National Care service might fall outside the scope of the committee's inquiry. However, the need to call for radical change in response to the brutal evidence of human rights failings is firmly in scope. No competent committee could do otherwise.