

## **Inquiry: 20 years of the Human Rights Act 1998**

### **Written evidence to the Joint Committee on Human Rights**

**Scottish Human Rights Commission**

**September 2018**

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The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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### **Executive summary**

1. The Human Rights Act 1998 (HRA) has had a significant positive impact on Scots law and the substantive protection of rights.
2. In particular, the HRA has afforded greater protection than that offered by the common law in Scotland pre-HRA. For example, in relation to ensuring the right to a fair trial and developing and expanding the already existing common law protections (see more below).
3. A consequence of the legal duty on public authorities has been the incremental development of a human rights based approach across Scotland.
4. Human rights and the HRA protections are embedded in the Scotland Act 1998 and central to the Scottish devolution settlement.
5. In Scotland, the Commission wants to preserve the HRA and build on it through further legislation to incorporate international human rights standards into Scots law, in particular economic, social and cultural rights.

### **Impact of the HRA on Scots law**

1. Pre-HRA, the Scottish courts were slow to embrace the influence of the European Convention on Human Rights (“ECHR”) in domestic law. In the case

of *Kaur*,<sup>1</sup> Lord Ross stated that the Scottish courts were not entitled to have regard to the ECHR either as an interpretative aid or otherwise, unless it was given statutory effect.

2. Only shortly before the enactment of the HRA did the ECHR begin to have some impact upon the Scottish courts. There became an acceptance of the ECHR as an informal source of law<sup>2</sup> and of the approach taken by the English courts<sup>3</sup> that where, in the event of an apparent ambiguity in the legislation, Parliament is presumed to have intended to legislate in conformity with the ECHR, and not in conflict with it.<sup>4</sup> Nevertheless the use of the ECHR as an interpretative aid was limited; it did not allow the courts to read down a statutory provision where there was no ambiguity present. Therefore, this was a weaker protection of individual rights than that provided under the HRA.
3. The position has been altered significantly by the introduction of the HRA, together with the Scotland Act 1998. Section 2 of the HRA requires a court to take into ‘account any judgment, decision or declaration’ of the European Court of Human Rights (“ECtHR”) or Commission.<sup>5</sup> As compared to the pre-HRA position, the decisions of the Scottish courts in the case law under section 2 of the HRA shows that they are engaging much more consistently and in-depth with ECtHR jurisprudence. The courts are no longer reliant on the existence of an ambiguity in the legislation. This approach is considerably more effective at securing individual rights at a UK level.
4. It is clear the ECHR itself is intended to be of minimum protection, not the maximum protection available<sup>6</sup>. However it is noted that the UK courts have largely taken a restrictive approach, considering their duty to keep pace with Strasbourg jurisprudence rather than engage with the domestic development of human rights.<sup>7</sup> Nevertheless Lord Kerr in the case of *Ambrose* did express the view that it was the duty of the domestic courts to engage with rights in the absence of authoritative ECtHR case law.<sup>8</sup>
5. Section 3 of the HRA requires that primary and subordinate legislation is to be read and given effect, as far as possible, so as to make it compatible with the rights under the ECHR. This is a powerful tool<sup>9</sup> which is only to be used where the principles of ordinary interpretation lead to an incompatibility<sup>10</sup> and where the interpretation to be given would be incompatible with a fundamental feature

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<sup>1</sup> *Kaur v Lord Advocate* 1980 SC 319 (*Kaur*)

<sup>2</sup> *Anderson v HM Advocate* 1996 JC 29, at 34; *T, Petitioner* [1997] SLT 724

<sup>3</sup> *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC

<sup>4</sup> *T, Petitioner* at 734. See further J. Murdoch Reed & Murdoch: *Human Rights in Scots Law* 4<sup>th</sup> ed. London, Bloomsbury, 2017

<sup>5</sup> Section 2, Human Rights Act 1998.

<sup>6</sup> See Article 53 of the ECHR, which reads “*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party*”.

<sup>7</sup> *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20; *Ambrose v Harris* [2011] UKSC 43; *Moohan v Lord Advocate* [2014] CSIH 56, at para 24

<sup>8</sup> *Ambrose v Harris*, at para 128

<sup>9</sup> *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, at para 37.

<sup>10</sup> *Advocate General v MacDonald* [2003] UKHL 34

of the legislation.<sup>11</sup> However, the courts have been mindful to preserve the doctrine of parliamentary sovereignty when discharging this interpretative duty. Crucially, under the HRA, the courts do not have the power to strike down primary legislation of the UK Parliament which they view as incompatible with the ECHR. The courts may only issue a declaration of incompatibility in this regard. This, again, reflects the fact that parliamentary sovereignty is protected as the foundational principle of UK constitutional law. However, it is important to note that the human rights protections under the Scotland Act 1998 mean that the courts can strike down legislative provisions from Scottish Parliament legislation where they are found to be incompatible with the rights protected by the HRA, as they are outside of devolved competence (see below).

6. Another powerful provision of the HRA is section 6, which states that if a public authority acts in a manner which is incompatible with Convention rights then that act is unlawful. The courts are public authorities within the meaning of the HRA.<sup>12</sup> However, it is worth noting, for example, that in the context of the right to life, the Scottish Courts have not imposed an overly onerous burden on these public authorities.<sup>13</sup> However, while the substance of the protection may be mild, the Scottish courts have been receptive to the recognition of positive obligations under ECHR case law, including procedural requirements to investigate loss of life.
7. There has been an increasing and ongoing development of a human rights culture being adopted by Scottish public bodies over the last 20 years since the HRA was enacted (see below).
8. There have been numerous high profile cases in the Scottish courts which are illustrative of the impact the HRA has had on the Scottish legal landscape. A few of these are highlighted as case studies below.

### **Case Study 1- impact on Scots law and practice**

#### *Robert Napier v. The Scottish Ministers [2005] CSIH 16*

Napier was a remand prisoner in HMP Barlinnie, Glasgow. He brought a petition for judicial review seeking a determination that the conditions in which he was held were inhuman and degrading, in contravention of Article 3 of the ECHR. The conditions were known as “slopping out” and involved the manual emptying of human waste when prison cells are unlocked in the morning. Inmates did not have access to a flush toilet in the cell and had to use other means while locked in during the night.

<sup>11</sup> *S v L* [2012] UKSC 30

<sup>12</sup> Section 6(3), Human Rights Act 1998.

<sup>13</sup> Equally, in *Mitchell v Glasgow City Council* [2009] SC (HL) 21 the House of Lords overruled the Inner House and ruled that a landlord had no reason to anticipate a ‘real and immediate risk to the life’ of their tenant from another tenant – a test taken directly from the ECtHR case of, *inter alia*, *Osman v UK* [1998] ECRR 101, para 116.

At first instance the court found and declared that the Scottish Government as operators of the prison had acted unlawfully in terms of section 6 of the 1998 Act and awarded damages to Napier on that basis.

The practical implications of the *Napier* case were hugely significant as the practice of slopping out was banned in prisons across Scotland, almost a decade after the practice was banned in England and Wales. Prisoners who were subject to slopping out practices are entitled to compensation. Moreover, the Scottish Prison Service has had to invest in the infrastructure of many Scottish prisons in order to provide prisoners with the necessary facilities to avoid the need for slopping out.

## **Case Study 2- impact on Scots law and practice**

*Cadder v HM Advocate [2010] UKSC 43*

Cadder was detained by the police on suspicion of serious assault and cautioned in line with Sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”). He was told that he was entitled to have a solicitor informed of his detention but he did not exercise that right and so he was interviewed without a lawyer being present. During the interview, Cadder made a number of admissions which were later relied on by the Crown at trial. Cadder was subsequently convicted.

The 1995 Act allowed a police constable to detain a person whom s/he had reasonable grounds for suspecting had committed or was committing an offence punishable by imprisonment. Detention could last for up to six hours and during detention, the police officer was able to put questions to the detainee. The detainee was entitled to have a solicitor informed of his detention. However, in terms of the statute, the detainee had no right of access to a solicitor.

In a previous Scottish criminal case, the High Court of Justiciary held that it was not a violation of Articles 6(1) & 6(3)(c) of the ECHR for the Crown to rely at trial on admissions made by a detainee while being interviewed without having had access to a solicitor. This was because the guarantees otherwise available in the Scottish legal system (and, in particular, the requirement that there be corroborated evidence in order to convict) were sufficient to provide for a fair trial.

Cadder sought to challenge this ruling on the basis of a number of arguments, one of which was that the actions of Lord Advocate breached the s.6 duty in terms of the 1998 Act. It was confirmed on appeal to the Supreme Court that the ECHR requires that a person who has been detained by the police has the right to have access to a lawyer prior to being interviewed, unless in the particular circumstances of the case there are compelling reasons to restrict that right. It was thus held that the law in Scotland breached the right to a fair trial under Article 6 ECHR. Following this, reforms were introduced in Scotland to include a right of access to legal advice for suspects being questioned by the police. (The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010).

## **Case Study 3- impact on Scots law and practice**

*Stars v. Ruxton 2000 JC 208*

In the early case of *Stars v Ruxton*, the use of temporary sheriffs in Scottish sheriff courts was successfully challenged. It was held that the ability of the Scottish

Government to appoint and by extension not to renew the position of temporary sheriffs after their 1-year tenure expired meant that the sheriffs could not be said to be independent of the executive due to the lack of judicial security of tenure. In the view of the court, there was no requirement for the executive to have actually influenced or sought to influence the temporary sheriffs for this to apply.

In the case, the court considered the jurisprudence of the ECtHR in-depth whilst also referring to the case law of other common law jurisdictions.

The court noted that the critical importance of judicial security of tenure has been recognised in Scots law since the Claim of Right and additionally that it is an important principle of the common law nature of judicial office that its tenure should not be precarious.

However, the court went on to note that the effect of the HRA on the point of security of judicial tenure in the case represents a very important shift in thinking about the UK constitution and that it is fundamental to that shift that human rights are no longer dependent solely on conventions which are not legally enforceable.

It is clear that Article 6 ECHR offers additional protection compared to the pre-HRA position concerning independence and impartiality of the judiciary. While the court expounded the importance of the principle of judicial independence, it was specifically under Article 6 principles that the position of temporary sheriff was successfully challenged as lacking sufficient independence.

#### **Case Study 4- impact on Scots law and practice**

*HM Advocate v Little* 1999 SCCR 625

The significance of the Article 6 ECHR approach to a fair trial can be seen clearly in *HM Advocate v. Little*. In challenging pre-trial delays the common law challenge of oppression employed by the accused was unsuccessful whereas the Article 6 challenge was successful.

The traditional conception of oppression in Scots law is any one of a wide variety of situations in which prosecution (or continued prosecution) of an accused will give rise to unfairness. The Scots common law rule was that the accused would be brought to trial within a reasonable time period and not subject to unreasonable delay. If the commencement of the trial ran over this period, the prosecution may be considered oppressive. However, before oppression could be established it was also necessary to show that the accused had suffered some form of prejudice as a result of the delay, or in other words that the delay has put the accused in a less favourable position than he would have been in but for the delay.

Contrary to prior domestic case law but in line with the ECHR, the court held in

*Little* that the relevant time period for the purposes of assessing whether the trial was fair ran from when the accused in the case in question was charged by the police even though they were not the competent authority to proceed with court proceedings. Relying on ECtHR jurisprudence, the High Court of Justiciary held that a pre-trial delay of 11 years between charge and indictment was ‘unreasonable’. The court held that there was, unlike the common law test of oppression, no requirement to demonstrate specific prejudice beyond that inherent in the infringement of that right and the unreasonable delay itself.

The importance of this development with respect to the ECHR is significant. Unreasonable delay cases have composed the largest number of cases brought under the HRA or Scotland Act 1998 in the Scottish courts. The benefits of the Article 6 approach are made clear in *Little*, in particular with the incorporation of the lack of prejudice. The common law test of oppression is one that relies upon the existence of prejudice so severe that it would be oppressive to proceed with the trial. Post-HRA the courts are provided with greater flexibility in redressing violations of individual ECHR rights, as it is not necessary for the courts to find there has been a specific prejudice against the accused but the mere fact of the breach is sufficient. This demonstrates the ability of the HRA to provide domestic protection for ECHR rights.

### **Case Study 5 – Scots law and practice – Evidence – The Failure to Disclose**

Historically, under Scots law, there was a duty to disclose to the accused any evidence and information which would tend to exculpate him or her in criminal proceedings. This duty was expanded under Article 6 ECHR to include information bearing directly on the guilt or innocence of the accused, as well as information tending to undermine the credibility of a Crown witness. This was held in the case of *Maan, Petitioner* 2001 SCCR 172. In addition, the duty was further expanded in the case of *Holland v HM Advocate* 2005 1 SC (PC) 3 to include the previous convictions of any witness to be led at trial.

Moreover, the impact of Article 6 through the HRA has also been to introduce a more holistic analysis to disclosure. The Crown is required to disclose all disclosable material of which they become aware or to which their attention is drawn, while diligently carrying out their core duties. The courts cannot place an undue burden on the prosecuting authority.

The HRA and its incorporation of Article 6 ECHR domestically have also led to the adoption of a more holistic analysis to this area of law. The courts must consider

all the relevant elements together, including disclosure of evidence, when seeking to answer the question of whether the trial as a whole was fair. The material question is whether there was a real possibility that the jury would have arrived at a different conclusion if the evidence in question was withheld.

More broadly, as these cases demonstrate, the introduction of the HRA has clearly increased awareness of Convention rights generally and their importance in the minds of Scottish judges.

9. It should be noted that, in some areas of the law, the UK courts have been less willing to rely so heavily on the ECHR through the HRA or to impose strong obligations on public bodies. For example in relation to Article 2 and the protection of life<sup>14</sup>, Article 5 and control orders,<sup>15</sup> Article 6 and legal aid provision,<sup>16</sup> and Article 8 and a recognition of a freestanding right to privacy.<sup>17</sup>
10. That being said, overall it can be seen that the HRA has had a significant impact upon the use of Strasbourg-style language and jurisprudence in Scots law.<sup>18</sup> The courts have clearly demonstrated this increased engagement with Convention jurisprudence. This has had an impact in a range of areas for example, procedural obligations to investigate deaths under Article 2 and the right to life,<sup>19</sup> Article 6 and fair trial requirements (see more detailed case studies above), Article 8 and a private, home and family life and the resulting procedural requirements in a family law context<sup>20</sup> and a rights based approach to the disclosure of information in human rights cases taken under the Scotland Act 1998.<sup>21</sup>
11. Taken more broadly, the introduction of the HRA has incorporated a more general rights-based approach in the case law of the Scottish courts. The HRA has also aided in the effective protection of individual rights at a domestic level by encouraging and permitting the development of the common law alongside the jurisprudence of the Strasbourg court. The HRA has permitted the

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<sup>14</sup> *Mitchell v Glasgow City Council* [2009] SC (HL) 21, *Osman v UK* [1998] ECRR 101, para 116, *Thompson v Scottish Ministers* 2013 SC 628

<sup>15</sup> *MacDonald v Dickson* [2003] SCCR 311

<sup>16</sup> *Buchanan v McLean* [2002] SC (PC) 1; *Vickers v Buchanan* 2002 SCCR 637

<sup>17</sup> *Martin v McGuinness* [2003] SLT 1424, where the court did not accede to the submission of the appellant that *actio iniuriarum* would provide a means to establish a freestanding right to breach of privacy. *Lord Advocate v Scotsman Publications* 1989 SC (HL) 22: such a right only exists where there is a previous duty of confidence, such as between formerly sexual partners

<sup>18</sup> J. Murdoch Reed & Murdoch: *Human Rights in Scots Law* 4<sup>th</sup> ed. London, Bloomsbury, 2017

<sup>19</sup> *Kennedy v Lord Advocate* [2008] SLT 195, *Emms, Petitioner* 2011 SC 433

<sup>20</sup> *NJ v Lord Advocate* 2013 SLT 347; *J, Appellant* 2013 SLT (Sh Ct) 18, under section 51 of the Children (Scotland) Act 1995 Cases demonstrate greater emphasis on the participation of parents in the relevant process.

*Dundee City Council v M* [2004] SLT 640, where it was held that the natural parents had been given the opportunity to make their views known to the local authority and had been involved in the decision-making process and so was not a breach of article 8. See also, *C v Principal Reporter*, 2010 Fam. L.R. 14 where a child was subject to a supervision requirement under the condition that contact with the mother was at the discretion of the child did not violate article 8 either, given the act's extensive rights of review and appeal

<sup>21</sup> *Christian Institute v Lord Advocate* [2016] UKSC 51; *P v Scottish Ministers* [2017] CSOH 33

strengthening of the common law alongside the incorporation of the jurisprudence of the Strasbourg court into domestic law.<sup>22</sup>

## The Human Rights Act 1998 and devolution in Scotland

12. The Scotland Act 1998 has given the ECHR increased effect in Scotland, giving the effect of invalidating Acts of the Scottish Parliament if incompatible with the ECHR rights as listed in the HRA. The effectiveness of the HRA is therefore inextricably linked to that of the Scotland Act 1998 in Scotland.
13. The ECHR is a pillar of the constitutional framework of devolution in Scotland, Wales and Northern Ireland. In Scotland, the HRA, and specifically Convention compliance, is embedded within the Scotland Act 1998.
14. Section 29 of the Scotland Act 1998 imposes restrictions on the Scottish Parliament in relation to legislative competence. S. 29(2)(d) makes clear that it is beyond the competence of the Scottish Parliament to pass a law which infringes the Convention rights. For the purposes of the Scotland Act 1998, the Convention rights are given the same definition as the definition of Convention rights under the HRA, which encompasses most of the rights guaranteed under the ECHR. In this way the Scotland Act 1998 and the HRA are closely interlinked.
15. The Scotland Act 1998 and its accompanying Parliamentary procedures provide a variety of mechanisms by which the competence of Acts of the Scottish Parliament can be tested for example, statements of competence by the Presiding Officer and by the person in charge of the Bill. Whilst the Commission believes these and other parliamentary processes should be strengthened, they nevertheless currently inform the development of a human rights culture within the Scottish Parliament.<sup>23</sup>
16. The centrality of the HRA/Scotland Act 1998 protections to the culture of the Scottish Parliament has been evidenced in the recent written submissions to the Equalities and Human Rights Committee Inquiry into the Parliament as a human rights guarantor. For example, as below:

*"The Committee agrees that the work of the Scottish Parliament: legislating; conducting inquiries; adopting the budget and; overseeing the Scottish Government; addresses civil, cultural, economic, political, and social rights and has a direct and immediate impact on the enjoyment of those rights. The Committee also agrees that collectively we should be focused on ensuring the Scottish Parliament is an effective human rights guarantor."<sup>24</sup>*

**Environment, Climate Change and Land Reform (ECCLR) Committee,  
March 2018**

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<sup>22</sup> For instance the traditional common law approach to bias having been adapted to fit the requirement of Article 6.

<sup>23</sup> SHRC Submission to the Commission on Parliamentary reform, February 2017

<sup>24</sup>[http://www.parliament.scot/S5\\_Equal\\_Opps/Inquiries/Response\\_from\\_ECCLR\\_on\\_Human\\_Rights\\_Inquiry\\_2\\_0180306.pdf](http://www.parliament.scot/S5_Equal_Opps/Inquiries/Response_from_ECCLR_on_Human_Rights_Inquiry_2_0180306.pdf)

*"There is a policy direction in Scotland of ensuring that policy is child/young person centric and public bodies take a rights-based approach.<sup>25</sup> **Education and Skills Committee, March 2018***

*The Committee considers that the scrutiny of human rights issues should not be viewed as a "box ticking" exercise but as something fundamental to all the work it takes." **Justice Committee, March 2018***

### **HRA as a key driver of a human rights culture in Scotland**

17. The HRA is an important part of the implementation of the human rights standards contained in the ECHR in Scottish public life. Beyond the court rooms, the HRA has had a positive impact in the development of a human rights culture in public bodies. The Commission believes that whilst compliance with the HRA is often only one of many drivers of a human rights culture in the design and delivery of services, it is an essential catalyst as well as providing a backstop of legal accountability.
18. Section 6 of the HRA states that it is unlawful for a public authority to act in a way which is incompatible with Convention rights. A "public authority" in this context includes a court or tribunal and any person certain of whose functions are functions of a public nature, with the exception of either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
19. Whilst the Commission considers that the courts have not imposed strong obligations on public bodies by virtue of section 6, a consequence of the legal duty on public authorities has been the incremental development of a human rights based approach across Scotland. Although there are a number of drivers for these organisations choosing to adopt a human rights based approach, such as providing legitimacy and accountability for reasoned and person-centred decision making, the Commission believes based on its experience of the last 10 years, the HRA has contributed significantly to the encouragement and development of a human rights culture in public bodies in Scotland. Whilst there is still much work to be done to ensure full compliance both in the spirit and the letter of human rights law, the HRA has been the bedrock of the development of a human rights culture in public services.
20. The Commission has supported a range of public bodies and providers of public services to embed human rights considerations and a human rights based approach into their decision making and delivery. This has ranged from local authorities<sup>26</sup>, the police<sup>27</sup>, health and social care providers<sup>28</sup> and

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<sup>25</sup>[http://www.parliament.scot/S5\\_Equal\\_Opps/Inquiries/Response from ESC on Human Rights Inquiry 2018 0309.pdf](http://www.parliament.scot/S5_Equal_Opps/Inquiries/Response%20from%20ESC%20on%20Human%20Rights%20Inquiry%202018%200309.pdf)

<sup>26</sup> See for example, <http://eqhria.scottishhumanrights.com/eqhriapilotstudies.html>

<sup>27</sup> See Commission work on stop and search, armed policing, and investigation of police complaints

<sup>28</sup> See for example, <http://www.scottishhumanrights.com/health-social-care/care-about-rights/#care-about-rights-3877>

monitoring and inspection bodies. This work has been further strengthened through Scotland's National Action Plan on Human Rights.

21. For example, Her Majesty's Inspectorate of Prisons for Scotland (the "Inspectorate") reports itself as taking a human rights based approach to the inspection and monitoring of prisons.<sup>29</sup> The Inspectorate explicitly recognises the connections between human rights and the proper use of imprisonment. Recently the inspectorate has adopted, in its revised Standards and their associated Quality Indicators, an approach underpinned by the principles of a human rights based approach (Participation, Accountability, Non-discrimination and equality, Empowerment and Legality). This aims to mainstream human rights considerations throughout the expectations of a well-run prison and the monitoring and inspection of prisons through regular inspection and the system of Independent Prison Monitors.
22. Similarly, Scotland's new Health and Social Care Standards, began implementation from April 2018. They explicitly "seek to provide better outcomes for everyone and to ensure that individuals are treated with respect and dignity and that the basic human rights we are all entitled to are upheld."<sup>30</sup> The development of new Standards recognised the impact of the HRA together with the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child and sought to take a proactive approach to embedding human rights in expectations of the delivery of services. The difference in this approach has been described thus:

*"The NCS [National Care Standards – the pre-existing standards] reflected a residual position, setting out the information about rights that care providers were expected to issue to people, while new Standards adopt a proactive position, with providers expected to work alongside people and stand up for their rights"<sup>31</sup>*
23. A further example is NHS Health Scotland which has recently tested improvement approaches to embedding human rights in their work and has produced a range of resources setting out how the right to health and a rights based approach can strengthen work to reducing health inequalities. It also uses a tool known as a Health Inequalities Impact Assessment which is used during any planning to assess the potential of any policy, plan, proposal or decision to reduce or increase health inequalities.<sup>32</sup>
24. Audit Scotland explicitly recognises the connection between financial accountability for public funds and the protection and promotion of human rights in Scotland. It has ten steps to improve how it audits and reports on equality and human rights issues.

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<sup>29</sup> [https://www.prisonsinspectoratescotland.gov.uk/sites/default/files/news\\_attachments/What%20next%20for%20prisons%20in%20Scotland.pdf](https://www.prisonsinspectoratescotland.gov.uk/sites/default/files/news_attachments/What%20next%20for%20prisons%20in%20Scotland.pdf)

<sup>30</sup> <http://www.newcarestandards.scot/>

<sup>31</sup> H. Mathias, 'Scotland's Health and Social Care Standards', (2018) Care Inspectorate

<sup>32</sup> [http://www.parliament.scot/S5\\_Equal\\_Opps/Submission\\_from\\_NHS\\_Health\\_Scotland.pdf](http://www.parliament.scot/S5_Equal_Opps/Submission_from_NHS_Health_Scotland.pdf)

*"The public bodies we audit are primarily responsible for the protection and promotion of human rights in Scotland. Central and local government, health boards and other bodies are duty bound to use public funds in order to ensure that people are able to access health services, education, housing and other publicly provided facilities which relate to the rights covered by the International Covenant of Social, Cultural and Economic Rights. Protection of these socio-economic rights feeds into civil and political rights covered by a number of international frameworks, most notably the ECHR, as they have direct and indirect impact on, for instance, an individual's enjoyment of their right to private and family life, and freedom from discrimination."*<sup>33</sup>

### **Case studies- the value of human rights in the delivery of services driven and supported by the HRA**

#### **Human rights in social care delivery:**

In a follow up survey to the Commission's training of older persons social care services, **97%** of respondents felt that a human rights based approach can help care providers develop positive relationships with service users and their families.<sup>34</sup>

**Care services manager:** *"staff are working in an industry that is rife with people who all feel they are acting in the best interest of the resident – doctors, social workers, regulators and families. [Human rights training] "Care about Rights" provides a framework for staff to speak up for older people ... and has given staff the confidence and ability to get their point across".*

#### **Human rights in a local authority:**

#### **David Martin, Former Chief Executive, Renfrewshire Council:**

*"I think across the full range of services that we provide we need to address human rights and equalities thoroughly, early and in a meaningful way so we avoid unintended consequences, comply with the law and, importantly, we just provide better outcomes for people."*

#### **Human rights in healthcare improvement:**

#### **Steven Robertson, Programme Manager, Scottish Patient Safety Programme – Mental Health**

*"A human rights based approach puts the service user or the patient as well as the carer at the centre of everything we do. It refocuses the mind and keeps us away*

<sup>33</sup> [http://www.parliament.scot/S5\\_Equal\\_Opps/Submission\\_from\\_Audit\\_Scotland.pdf](http://www.parliament.scot/S5_Equal_Opps/Submission_from_Audit_Scotland.pdf)

<sup>34</sup> <http://careaboutrights.scottishhumanrights.com/evaluation.html>

*from being too bureaucratic and too number-crunching. It is very much about putting people first.*<sup>35</sup>

## **Further protection of economic, social and cultural rights and international human rights standards in Scots law.**

25. As discussed above the HRA has proved vitally important to the protection and furtherance of ECHR rights in Scotland. The recent ‘Scotland Declaration on Human Rights’, signed by around 155 civil society organisations, affirms support for current human rights protections and calls on them to be continually strengthened. This is testament to the HRA and broader human rights protections in Scotland.
26. In Scotland, the Scottish Human Rights Commission aims to complement and build on the HRA protections, of a predominantly civil and political nature, and build on it to incorporate other international human rights standards into Scots law, in particular economic, social and cultural rights.
27. It is notable that the courts are increasingly recognising, most recently in the case of *McLaughlin*, that the further range of international human rights protections “*inform the interpretation of the guarantees contained in the ECHR even though they have not been directly incorporated into United Kingdom law*”<sup>36</sup>
28. Building on the success of the HRA, a dialogue has been taking place in Scotland for a number of years around the importance and role of international human rights standards, particularly economic, social and cultural rights. Although economic and social issues can fall within the scope of the ECHR, the Convention is not primarily designed to deal with such issues and the Commission has long advocated for the incorporation or domestic justiciability of international human rights standards, over and above those protected by the HRA.
29. In response to the current UK political context, for example the UK withdrawal from the European Union and considerations around the repeal and/or dilution of the HRA, there has been increased interest in exploring what human rights protections can be advanced within the devolved competence of the Scottish Parliament. International human rights standards beyond the ECHR are increasingly referenced, understood and embedded in law and policy making, on a cross party basis, and by civil society organisations.
30. Increased focus on international human rights standards is also reflected in recent trends towards increasing references to international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights, in Scottish domestic legislation. Examples include the

<sup>35</sup> [http://www.scottishhumanrights.com/media/1408/shrc\\_case\\_studies\\_report.pdf](http://www.scottishhumanrights.com/media/1408/shrc_case_studies_report.pdf)

<sup>36</sup> Case of McLaughlin [2018] UKSC 48, August 2018

Community Empowerment (Scotland) Act 2015; the Land Reform (Scotland) Act 2016; and the Social Security (Scotland) Act 2018.

31. In 2017, the First Minister's Advisory Group on Human Rights Leadership, of which the Commission is a member, was established with a remit to "make recommendations on how Scotland can continue to lead by example in human rights, including economic, social, cultural and environmental rights". It is widely anticipated that the group will make recommendations around expanding the legal framework in Scotland. There is also a commitment from the Scottish Government to "enshrining children's rights by incorporating the principles of the UN Convention on the Rights of the Child into law."<sup>37</sup>
32. In conclusion, the Commission considers the HRA has had a significant impact in the Scottish courts and case law, as well as the broader human rights culture in Scotland, in the Scottish Government, Parliament and public bodies as well as in civil society and beyond. The impact of the HRA has been felt by people in many settings, sectors and spheres, from prisons and police custody to the media and safeguards on personal data. As the UK has not signed up to individual or collective complaints procedures under UN or the Council of Europe, there are few other routes for human rights redress. In an era of new and evolving challenges, including the potential ongoing loss of protections emanating from the EU Charter of Fundamental Rights and broader EU law,<sup>38</sup> the protections of the HRA to ensure domestic realisation and protection of ECHR rights will be all the more vital going forward.

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<sup>37</sup> Programme for Government 2018-19

<sup>38</sup> Subject to the EU European Union (Legal Continuity) (Scotland) Bill in Scotland