

**The Scottish Human Rights Commission**

**Human Rights Inquiry**

**European and External Relations Committee**

**November 2015**

**Introduction**

1. The Scottish Human Rights Commission (the Commission) welcomes the opportunity to provide its views on the proposed repeal of the Human Rights Act 1998 and its replacement with a British Bill of Rights.
2. Although the details of the shape of a British Bill of Rights are unclear, it seems likely that, among other things, the Bill will be intended to replace the Human Rights Act and *“break the formal link between British courts and the European Court of Human Rights”*.[[1]](#footnote-1) The details of proposed changes will have to be further analysed, however the debate to date and the case for replacing the Human Rights Act have been regressive. The proposals specifically matter to Scotland as they will have a direct impact on the legal protection and the practical realisation of people’s rights in Scotland. Not only would regressive moves have an adverse impact on the people of Scotland, they would also send a highly damaging message across Europe and beyond, in turn weakening the international system of human rights protection as a whole.
3. The Commission believes that any proposed changes to human rights law, which are of constitutional and social importance, should be considered as part of a broad and participative public process and cannot be rushed. Debates about human rights are not only about matters of law. They are about social values, democratic renewal and, ultimately, the recognition and protection of the human dignity of all.

**What is your general view on the UK Government’s proposal to introduce a British Bill of Rights to replace the Human Rights Act 1998? Do you think changes need to be made to the current human rights regime in the UK?**

1. The Human Rights Act has made a great difference to the people of Scotland. The Human Rights Act introduced many of the human rights in the European Convention on Human Rights (ECHR) directly into Scotland’s own laws. These fifteen well-established fundamental rights and freedoms – like the right to life, free speech and protection from inhuman and degrading treatment in care or custody – are minimum standards across Europe, agreed by the UK and other countries in the post-war era as the basic protections needed in modern democracies.
2. The Human Rights Act provides a direct route to justice in domestic courts, rather than the European Court of Human Rights (ECrtHR), for individuals whose human rights have been breached. This is one important element of making rights a reality in people’s lives. The Human Rights Act also places duties on public bodies in respect of human rights by making it unlawful for them to act incompatibly with ECHR rights (section 6 HRA). This gives rise to a compliance duty that has led to positive changes in policies, practices and culture without the need for individuals to take legal action including, for example, in hospitals and other health and social care settings.
3. The Commission is opposed to any changes that are regressive when it comes to protecting human rights. Our human rights law must go forward not back, building on the progressive approach to realising human rights embodied in Scotland’s National Action Plan on Human Rights. The Commission has expressed long-standing concerns about the regressive nature of many elements of proposals to repeal the Human Rights Act and replace it with a British or UK Bill of Rights.
4. Many of the plans that have been mooted in recent months and years would undermine the basic principle that each of us has the same rights simply because we are human. Such plans include reducing the scope of human rights laws so that they only apply to the “the most serious” cases or to particular areas of law. This begs several questions such as who would be accountable for deciding which cases were ‘serious’? What impact would this have on people’s rights in areas of everyday life like health and social care, education and the workplace? Other proposals suggest restricting the eligibility of rights on the basis of nationality or citizenship, which could clearly undermine the very concept of human rights belonging to each of us as human beings.Changes of this type would not lead to positive, tangible improvements in how we all experience our rights in everyday life. They would limit government accountability for the exercise of power and undermine efforts to build a culture where we all understand human rights and put them into practice. They would also set poor examples to other countries, undermining the UK’s international reputation and standing. The Commission therefore believes we should maintain in full the protections provided for by the Human Rights Act.

**What rights, if any would a British Bill of Rights have to contain? How would a British Bill of Rights interact with Scotland’s separate legal system?**

1. The Commission’s position is that any changes to the Human Rights Act would only be acceptable if they maintained and enhanced current human rights protection. The Commission would apply the following progressive test in assessing any new proposals:

* ***Rights for all*** *– Will the proposed change uphold the basic universal principle that each of us has the same human rights simply because we are human?*
* ***Improving lives*** *– Will the proposed change lead to positive, tangible improvements in how we all experience our rights in everyday life?*
* ***Ensuring accountability*** *– Will the proposed change ensure that people in power, such as government and public bodies, are held to account?*
* ***Building a better culture*** *– Will the proposed change support or hinder efforts to build a better culture where we all understand human rights and can put them into practice?*
* ***Showing international leadership*** *– Will the proposed change uphold international standards and provide a strong example to other countries?*

1. In accordance with these tests the Commission believes any changes would, at a minimum, require to fully replicate all of the rights contained in the Human Rights Act and maintain current levels of protection and accountability. This means, for example, all of the rights contained in section 1 of the Human Rights Act, not curtailed in any form, and including the protections contained for example, in section 2 for the courts to take into account Convention rights, section 3 for the courts to interpret and give effect to legislation in a manner compatible with Convention rights and section 6 which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, would require to be maintained in full to meet the above progressive tests.

**Arguments have been made that the current system does not sufficiently respect the sovereignty of the UK Parliament. What are your views on this?**

1. The Commission does not agree that the current system does not sufficiently respect the sovereignty of the UK Parliament. Under the current system, any changes to law are the ultimate responsibility of the UK Parliament Section 4 of the Human Rights Act allows certain courts to make declarations of incompatibility where it is determined that legislation is incompatible with the ECHR. Section 4(6) expressly states that a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision in question. In practice where a declaration of incompatibility is issued by the courts a dialogue is created with the legislature on how to render the legislation compatible with the Convention.
2. Furthermore, the requirement contained in the ECHR to implement treaty obligations and abide by decisions of the ECrtHR does not challenge the notion of parliamentary sovereignty as decisions of the ECrtHR do not have automatic effect in UK law. Similarly, the ECrtHR has no ability to require the UK to amend laws, nor to mandate the detail of any legislation. Making and amending legislation remains entirely and uniquely within the competence of the UK Parliament and the devolved legislatures. It is wholly at the discretion of those institutions to find a way to change legislation so that judgments of the Court are implemented in a manner which reflects our unique legal, institutional and social landscape.

**In addition, it has been suggested that the European Court of Human Rights has developed “mission creep” expanding the European Convention on Human Rights into area which it should not cover. What views do you have on this argument?**

1. Suggestions that the European Court of Human Rights has developed “mission creep” expanding the ECHR into areas which it should not cover are unhelpful and misleading. The Convention was drafted in 1950, as a direct response to the atrocities of World War II. The world we live in is constantly evolving and is a very different place to what it was seventy five years ago when the Convention was drafted.
2. The ECHR is a ‘living instrument’. This means that, if the Convention is to continue to be practical and effective, the rights enshrined in the Convention must be interpreted in light of present day conditions. Technological, sociological and scientific changes together with evolving standards in the field of human rights and changing views on morals and ethics must be taken into account when applying the Convention. This is not “mission creep”; it is the only way for the European Court of Human Rights to ensure the Convention remains effective and relevant. This means that the court has been able to address issues such as criminalisation and discrimination based on sexuality, corporal punishment of children in schools and discrimination against “illegitimate” children in light of changing social norms and expectations.

**What do you think the practical impact of the proposals will be in individual cases, for example as regards immigration policy, criminal law, or decisions made by public authorities?**

1. Without knowing the detailed plans for the repeal of the Human Rights Act and the provisions that a UK Bill of Rights would contain, it is difficult to comment on the practical impact of the proposals for individual cases. The Commission reiterates that any such plans would undermine the fundamental principle that every person has the same rights, simply by virtue of being human. If the duties on public bodies to act compatibly with human rights is removed it will undermine efforts to create a human rights culture in the design and delivery of public services. Further detail linked to this question is set out below.

**What impact do you think any changes will have on Scotland more generally? Would the Scottish Parliament have to consent to any changes under the Sewel Convention? Could the UK Government act without the consent of the Scottish Parliament?**

1. The Human Rights Act is embedded into the Scotland Act. This means that the Scottish Government and Scottish Parliament are prevented from acting inconsistently with the European Convention on Human Rights. Repealing the Human Rights Act would therefore undermine the current devolution settlement.
2. There would also be direct and adverse consequences for people in Scotland in reserved policy areas like immigration, defence, some aspects of social security, employment and privacy. This would directly affect people in all sorts of ways – disabled people looking to challenge policies like the bedroom tax; the families of Scottish soldiers whose rights are not upheld whilst operating outside of the UK; people and communities affected by immigration detention practices; employees seeking to challenge unfair employment practices; people concerned about the excessive collection of personal data.
3. When the Scotland Act was passed, the Human Rights Act was considered so important that it was protected from modification by the Scottish Parliament. It was also used to define the Parliament’s powers to legislate. The UK Parliament retained the power to legislate on devolved matters in Scotland, but the Sewel convention represents the constitutional agreement that it will only do so with the consent of the Scottish Parliament. The Sewel convention will apply if the repeal of the Human Rights Act affects devolved matters. The Commission would urge the Scottish Parliament to withhold consent to any moves to repeal the Human Rights Act and replace it with a regressive Bill of Rights.

**Do you think it would be possible to have different human rights regimes with the United Kingdom?**

1. It is possible to vary the human rights regimes within the UK. (Indeed to a limited extent this is already the case as Acts of the Scottish Parliament which are not in compliance with the Convention are outside of legislative competence and therefore unlawful whilst Acts from Westminster are subject to declarations of incompatibility where they found to be in non-compliance with the Convention.) However, it is undesirable for human rights standards or protections to be restricted or curtailed in any part of the UK, or indeed regionally or globally, as to do so undermines the very concept of the collective enforcement of universal human rights.
2. If the Human Rights Act is repealed and/or replaced with a new Bill of Rights that offers less protection for people’s rights in Scotland, it is within the competence of Scottish Parliament to introduce new laws which maintain and enhance the current levels of protection offered by the Human Rights Act in devolved areas.
3. However, there is no room for complacency; Scotland could not mitigate against the adverse consequences in people’s lives in reserved policy areas. Even if Scotland introduced new laws maintaining or enhancing human rights protection in devolved areas, this would almost certainly still leave a gap in protection for people’s rights in reserved policy areas.

**What impact do you think the UK Government’s proposals will have on the UK and Scotland at an EU and international level, for example within the Council of Europe?**

1. Any proposal to enable the UK to pick and choose which judgments to accept from the European Court of Human Rights would be highly regressive. It would undermine the rule of law and accountability within the UK and would also undermine the system of protection for human rights throughout Europe. Regressive measures weakening accountability for human rights is likely to have implications for the observance of human rights both for European countries such as Russia, Belarus and all over the world.
2. The United Nations High Commissioner for Human Rights, Zeid Ra’ad Al Hussein has expressed concern that “If Britain- a key member of the Human Rights Council, a founding member of eth UN and a privileged, permanent member of the Security Council- is considering a move that will potentially weaken a vital regional institution upholding fundamental human rights guarantees, this would be profoundly regrettable; damaging for victims and human rights protection; and contrary to this country’s commendable history of global and regional engagement.”
3. Repealing the Human Rights Act would not automatically mean that the UK would cease to be a member state of the Council of Europe. The UK government has said it would seek reassurances from the Council of Europe that the Bill of Rights was an acceptable way of implementing the ECHR into national law, however that this assurance will be forthcoming is by no way guaranteed. Article 46 of the European Convention on Human Rights requires member states *“to abide by the final judgment of the Court in any case to which they are parties.”*  Debated proposals to date appear to be inconsistent with this basic tenant of the treaty and therefore may call into question the UK’s on-going membership of the Council of Europe.

**Scottish Human Rights Commission**

**November 2015**

1. Conservative Manifesto, 2015 [↑](#footnote-ref-1)