

**Briefing to the EU Justice Sub-Committee Inquiry into Rights After Brexit**

**Scottish Human Rights Commission**

**May 2019**

The Scottish Human Rights Commission (the Commission) welcomes the EU Justice Sub-Committee’s inquiry examining the future framework for, and potential risks to, rights after Brexit.  We also welcome the Committee’s visit to Scotland to further understand the devolution implications in this regard.

The Commission wants to see a clear and strong commitment to human rights protections taken forward by both the UK and Scottish Governments and Parliaments over the coming period of significant constitutional and legal change.

Brexit related law reform, the securing of a re-negotiated relationship with the EU, and the positioning of political leaders and parties at both the UK and devolved levels, have the potential to have a profound and long lasting impact on our human rights laws and culture.

**1. Overarching principle - Forwards not Back**

Throughout this period of change the Commission stands by its position that any changes to the laws which protect our fundamental human rights must progress forwards not regress back in protecting everyone’s rights and building a stronger society.

To guide us in progressing forwards and guard against backwards steps the Commission would like to see commitment from all actors to seek to ensure non regression of standards for protected rights, to take measures which ensure we keep pace with progressive developments across the EU and globally and, finally to lead the way in advancing the international collective commitment to human rights.

**No regression. Keep pace. Be a leader.**

In order to advance the 3 principles of 1. No regression 2. Keep pace and 3. Be a leader[[1]](#footnote-1), aimed at taking human rights protections in the UK forwards not back, the Commission believes the following recommendations must be advanced at a UK and devolved Scottish level.

**No regression**

* Strong commitment to the Human Rights Act 1998 and European Convention on Human Rights, as well as all other international human rights obligations of the UK.
* Effective scrutiny of all legislative changes affecting human rights following Brexit.
* Rights protections upheld in future trade and investment agreements.

**Keep pace**

* Maintaining a link to the European Union’s progressive development of standards.

**Be a Leader**

* Advancing accountability through the incorporation in law of international standards.
* Investment in best practice implementation, monitoring and accountability mechanisms.
* Engaging internationally with the progressive development of standards.

In this briefing the Commission will focus on our position on human rights legal structures, namely, loss of the Charter of Fundamental Rights (the Charter) from domestic law, retention of the Human Rights Act 1998 (HRA), the UK’s adherence to the European Convention on Human Rights (ECHR), and progress in Scotland towards the incorporation of international treaty standards in Scots law. However the Commission also has concerns around the impact of the loss of EU funding, such as the European Social Fund and the Rights, Equality and Citizenship Programme on the implementation of rights in practice and the broader economic impacts of Brexit on the realisation of, in particular, the economic, social and cultural rights, of people across the UK.

**2. Impact of Brexit on Rights protections**

The Commission is concerned that the EU Charter of Fundamental Rights (the Charter) will no longer directly apply to the UK or to Scotland as a consequence of the EU (Withdrawal) Act 2018 (the Withdrawal Act). It is notable and of concern that the Charter has been singled out as the only aspect of EU law not to be retained upon the UK’s withdrawal from the European Union.

Whilst in the most part, EU law recognised in UK law immediately prior to Brexit will ‘continue on and after exit day to be recognised and available in domestic law’ this does not extend to the Charter. Clause 5 of the Withdrawal Act, removes the Charter from UK law and prevents it from applying to ‘retained’ areas of EU law following Brexit.

Despite the governments stated position that removal of the Charter from UK law “will not affect the substantive rights that individuals already benefit from in the UK”[[2]](#footnote-2).“ it is clear that the removal of Charter from retained EU law does indeed result in a reduction in the protection of substantive rights[[3]](#footnote-3).

The removal of the Charter means a reduction in ever evolving human rights protections and remedies in areas within the scope of current EU law such as privacy, data protection and a fair hearing. Furthermore, without the Charter there is a loss of potential for the fuller protection of social rights, or principles, contained in the Charter such as workers’ rights, access to social security and healthcare.

Even where current standards go beyond the Charter in areas such as anti-discrimination, environmental protections and consumer rights and the wider social protection are replicated in domestic law[[4]](#footnote-4) they remain vulnerable to future repeal or regression and will not necessarily keep pace with progressive development at an EU level.

This concern of diminution of rights protection over time is further increased by the Withdrawal Act provisions allowing ministers to manage legislative change to retained EU law and any other legislation impacted by Brexit, by statutory instrument.[[5]](#footnote-5) These “Henry VIII” powers allow for changes to rights protections without Parliamentary scrutiny and with no other mechanisms through which to protect retained rights from amendment.

Finally, EU membership, and the application of the Charter, have acted as a deterrent to withdrawal from the ECHR. This means the European Convention on Human Rights (ECHR), incorporated through the Human Rights Act and enshrined in the Scotland Act, is more vulnerable to withdrawal by the UK.

In Scotland the Scottish Government attempted through the European Union (Legal Continuity) (Scotland) Bill (the Continuity Bill) to retain the Charter in Scots law following the UK’s exit from the EU. The Commission welcomed this step taken by the Government. We further welcomed the principle that Scottish Ministers should be empowered to keep pace with progressive developments at an EU level following the UK departure from the EU.[[6]](#footnote-6)

The Supreme Court found aspects of the Continuity Bill, including the retention of the general principles of EU law and the Charter, to be outside of the legislative competence of the Scottish Parliament. The Court ruled that, as a result of the inclusion of the Withdrawal Act in Schedule 4 of the Scotland Act, which protects it against modification, and s5(4) of the Withdrawal Act, which explicitly provides that the Charter is no longer part of domestic law and the provision that there is to be no right of action or powers based on a failure to comply with any of the general principles of EU law, s5 of the Continuity Bill retaining the Charter, alongside a number of other provisions, were outside of the legislative competence of the Scottish Parliament.[[7]](#footnote-7)

We recognise however that in any event the effect of the retention of the Charter in Scotland would be limited, given it would only apply in as far as devolved retained EU law is concerned; and where a Scottish authority is deemed to be implementing that devolved retained EU law. For current standards of rights protection to be maintained the Westminster Parliament would have had to mirror Scotland’s approach and retain the Charter.

The move by the Scottish Government both to retain the Charter in Scots law and to keep pace with progressive new EU developments reflect the substance of the Scotland Declaration on Human Rights[[8]](#footnote-8), whereby around 155 organisations from across civil society expressed their united support for ensuring Scotland is a world leader in rights protection and implementation as we embark on leaving the European Union.

**3. Human Rights Act 1998 and the European Convention on Human Rights**

The Commission believes we should maintain in full the protections provided for by the Human Rights Act 1998 (HRA). We areopposed to any changes that are regressive when it comes to protecting human rights. The Commission has expressed long-standing concerns about the regressive nature of many elements of proposals to repeal the HRA and replace it with a British or UK Bill of Rights.[[9]](#footnote-9)

Recent concerns picked up by this Committee with regard to changes to the wording in the drafts of the political declaration on the future relationship between the UK and the EU[[10]](#footnote-10) with regard to the UK’s commitment to the ECHR, as a Council of Europe and not EU instrument, are well founded and shared by the Commission. The stated position that “this difference in wording does not represent a change in the UK’s position on the ECHR” and that the “UK has no plans to withdraw”[[11]](#footnote-11) is insufficient reassurance in this regard and leaves open the possibility of weakening accountability for rights through changes to the Human Rights Act 1998. The Conservative party manifesto commitment with regard to the HRA and ECHR was as follows:

*“We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes. We will remain signatories to the European Convention on Human Rights for the duration of the next parliament.”[[12]](#footnote-12)*

The Commission’s position is that the protection of human rights across the UK must not only maintain full commitment to the ECHR but also its full enforcement at the domestic level. Further analysis of this can be found in our evidence to the European and External Relations Committee in 2015 when proposal for a British Bill of Rights were being discussed.[[13]](#footnote-13)

The Commission would apply the following tests in assessing any new proposals which are to be put forward[[14]](#footnote-14):

* ***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?*

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 HRA and maintain current levels of protection and accountability. This means, for example, all of the rights contained in section 1 of the HRA, 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.

Many of the plans that have been mooted in previous years (for example, a British Bill of Rights which limits the application of the ECHR, reduces extraterritorial effect and limits the role of the European Court of Human Rights) would undermine the basic principle that each of us has the same rights. Furthermore any attempt to weaken our human rights protections or withdraw from the Council of Europe would send a highly damaging message across Europe and beyond, in turn weakening the international system of human rights protection as a whole as well as the UK’s influence within it.

The Commission considers the HRA has had a significant positive 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 in the lives of individuals. 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.[[15]](#footnote-15)

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 loss of protections emanating from the Charter and broader EU law, the protections of the HRA to ensure domestic realisation and protection of ECHR rights will be all the more vital going forward.

**4. Incorporation of international treaty standards**

In Scotland, the Scottish Human Rights Commission has long advocated for the HRA to be built upon and complemented through the further incorporation of international human rights standards into domestic law, in particular economic, social and cultural rights.[[16]](#footnote-16) Brexit and the loss and imperilling of legal protections as described above has given impetus and urgency to exploring what can be done within devolved competency to strengthen our human rights laws.

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 and children’s rights not set out in the ECHR. International human rights standards beyond the ECHR standards are increasingly referenced, understood and embedded in law and policy making, on a cross party basis, and by civil society organisations.[[17]](#footnote-17)

In response to the current UK political context, in particular Brexit and debate over the HRA, there has been increased interest, and commitment by the Scottish Government, in exploring how human rights protections can be advanced within the devolved competence of the Scottish Parliament.

Most recently, and significantly, the First Minister has committed that “by the end of this Parliament we will have incorporated the UN Convention on the Rights of the Child into Scots law.“[[18]](#footnote-18)

Additionally, in 2017, the First Minister’s Advisory Group on Human Rights Leadership, of which the Commission was 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”.[[19]](#footnote-19)

The recommendations of the group were published in December 2018[[20]](#footnote-20) and related to different potential post-Brexit scenarios of current devolution, further devolution and independence. Of particular interest to this Committee will be the following recommendationsof First Minster’s Advisory Group:

* Recommendation 1: An Act of the Scottish Parliament which provides human rights leadership

The recommendation of the group is that there should be an Act of the Scottish Parliamentwhich restates those rights already provided under the HRA and provides for further rights drawn from UN human rights treaties ratified by the UK but not yet incorporated, including economic, social and cultural, as well as environmental rights. It is also recommended the Act provide specific rights to children, women, disabled people and on race. These will be drawn from UN human rights treaties ratified by the UK but not yet incorporated into Scottish law. Furthermore it is recommended additional rights are provided for older persons, LGBTI communities as well as for protection against poverty and social exclusion.

All of these further rights would apply and be exercised only within those areas that fall within the responsibility of the Scottish Parliament. Following this Act, the Scottish Parliament would give further effect to these rights through subsequent primary legislation.

* Recommendation 4 of First Minster’s Advisory Group: A Scottish Government National Mechanism for Monitoring, Reporting and Implementation of Human Rights

It was recommended the Scottish Government should establish a National Mechanism for Monitoring, Reporting and Implementation of Human Rights, aligned with general UN recommended good practice.

The proposed function of such a mechanism would be:

1. Coordinating Scottish Government engagement with European and UN human rights systems, including reporting to and implementation of recommendations within the devolved context.

2. Monitoring the UK Parliament and reporting to the Scottish Government, Scottish Parliament and the public on any developments as regards the continued effect of rights “returned” from the EU to the UK Parliament.

3. Monitoring the EU and reporting relevant rights developments to the Scottish Government, Scottish Parliament and the public for consideration of adapting any such developments within devolved areas of competence.

This mechanism would therefore act as a body to draw attention to changes to our rights protections as a result of Brexit.

The First Minister welcomed the report stating that she would establish a National Taskforce, early in 2019, to progress these plans.[[21]](#footnote-21)

In conclusion the Commission reiterates its concern about the loss of rights protections as a result of Brexit and the ongoing threat the HRA and our membership of the Council of Europe which is more vulnerable as a result of Brexit.

**May 2019**

1. These principles are echoed in the work of the Minister’s Standing Council on Europe and in the joint positioning of the Joint statement from the UK’s four statutory bodies for human rights and equality, see here- <https://www.equalityhumanrights.com/en/our-work/news/joint-statement-uks-human-rights-and-equality-bodies-brexit> [↑](#footnote-ref-1)
2. HM Government, Legislating for the United Kingdom’s withdrawal from the European Union (2017) Cm 9446, para 2.23. [↑](#footnote-ref-2)
3. For example see EHRC published legal advice received from senior independent counsel Jason Coppel QC. <https://www.equalityhumanrights.com/sites/default/files/eu-withdrawal-bill-legal-advice-jason-coppel-qc.pdf> ; and Discussion Paper on Brexit Colin Murray, Aoife O’Donoghue and Ben Warwick; <http://www.nihrc.org/uploads/publications/Discussion_Paper_on_Brexit.pdf> [↑](#footnote-ref-3)
4. See research paper, The Human Rights Implications of the European Union referendum, Authored by Dr Tobias Lock, University of Edinburgh for the Scottish Human Rights Commission, May 2016 <http://www.scottishhumanrights.com/media/1720/16_05_26_lock_eureferendum.doc> [↑](#footnote-ref-4)
5. S7 (4) EU (Withdrawal ) Bill [↑](#footnote-ref-5)
6. Joint statement in response to the European Union (Legal Continuity) (Scotland) Bill by the Scottish Human Rights Commission, the Equality and Human Rights Commission, the Human Rights Consortium Scotland, the Scottish Council for Voluntary Organisations and Together, Scotland’s Alliance for Children’s Rights- <http://www.scottishhumanrights.com/news/joint-statement-welcoming-intention-to-retain-the-eu-charter-of-fundamental-rights-in-scots-law/> [↑](#footnote-ref-6)
7. The UK Withdrawal From The European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (Scotland), para 102 <https://www.supremecourt.uk/cases/docs/uksc-2018-0080-judgment.pdf> [↑](#footnote-ref-7)
8. Scotland Declaration on Human Rights, <https://humanrightsdeclaration.scot/> [↑](#footnote-ref-8)
9. See here- <http://www.scottishhumanrights.com/other-issues/human-rights-act/> [↑](#footnote-ref-9)
10. Draft political declaration setting out the future relationship between the European Union and the United Kingdom (22 November 2018), [↑](#footnote-ref-10)
11. Letter from Edward Argar MP, Parliamentary Under-Secretary of State for Justice in response to Lord Boswell, Chairman of the EU Committee, <https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/CWM/EAtoLB-PolDeclationReferencetoECHR040119.pdf> [↑](#footnote-ref-11)
12. The Conservative and Unionist Party manifesto, 2017 [↑](#footnote-ref-12)
13. See SHRC evidence to the European and External Relations Committee, November 2015, <http://www.scottishhumanrights.com/media/1261/shrcresponse-to-human-rights-inquiry17nov2015final1.docx> [↑](#footnote-ref-13)
14. See Human rights for all - forwards or back?, Commentary on the future of the UK’s human rights law March 2015, <http://www.scottishhumanrights.com/media/1438/human-rights-for-all-forwards-or-back.pdf> [↑](#footnote-ref-14)
15. See Inquiry: 20 years of the Human Rights Act 1998 , Written evidence to the Joint Committee on Human Rights Scottish Human Rights Commission, September 2018; <http://www.scottishhumanrights.com/media/1796/shrc-submission-to-the-jchr-on-hra-1998-13-september-2018.pdf> [↑](#footnote-ref-15)
16. See, for example, published report of the SHRC, authored by Dr Katie Boyle, [Models of Incorporation and Justiciability for Economic, Social and Cultural Rights](http://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf)*,* November 2018, <http://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf> [↑](#footnote-ref-16)
17. E.g. References to international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights, in Scottish domestic legislation included in the Community Empowerment (Scotland) Act 2015; the Land Reform (Scotland) Act 2016; and the Social Security (Scotland) Act 2018 [↑](#footnote-ref-17)
18. <https://www.snp.org/nicola-sturgeons-address-to-conference/> [↑](#footnote-ref-18)
19. <https://humanrightsleadership.scot/> [↑](#footnote-ref-19)
20. Recommendations for a new human rights framework to improve people’s lives, First Minister’s Advisory Group on Human Rights Leadership, Dec 2018 - <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> [↑](#footnote-ref-20)
21. <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-post-10th-December-update.pdf> [↑](#footnote-ref-21)