

Submission: Independent Review of the Human Rights Act, Call for Evidence

Executive Summary

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March 2021

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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“Our aim is a straightforward one. It is to make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home.”¹

Executive Summary

The Human Rights Act (“the Act”) has been in force for over twenty years. The Act made it possible for us to enforce our rights under the European Convention on Human Rights (“the Convention”)² directly in our national courts. Incorporation of our Convention rights through the Act has had a significant positive impact on people across the UK in many areas, including: children, disability, equality, health, justice, privacy, religion and belief, rights at work, seeking refuge, speech and protest and victims of crime.³

The Act’s requirement that all public bodies, and other organisations carrying out a public function, comply with Convention rights has been an essential catalyst in encouraging and promoting a human rights culture in the design and delivery of services across Scotland. It provides important legal accountability for decisions of public bodies which are unfair and unjust and which do not respect the principle of human dignity. For example, it means public bodies like the NHS have a duty to protect our right to life when we’re being treated in hospitals, and that any deaths in care homes must be properly investigated.

The Act, and Convention compliance, are embedded into the Scotland Act 1998. As a result of this, Convention rights have become part of the fabric of Scotland’s laws, judicial analysis, and crucially the legislative competence of the Scottish Parliament. This is widely considered to be a positive dimension to devolution, and the Parliament, duty-bearers and civil society have sought to build on this in developing a rights-based culture.⁴

While there remains much to be done, Scotland is on a progressive path with regard to the enforceability and justiciability of rights and has taken some very notable steps, building on the success of the Act, by initiating the incorporation of other international human rights treaties. Any regression in the realisation of Convention rights would put those rights, largely civil and political, on a backwards trajectory, while Scotland pushes forwards on other internationally protected rights, including economic, social, cultural and environmental rights.

The Independent Human Rights Act Review (“the Review”) has been set up by the UK Government to consider making considerable changes to the Act. The Commission is highly concerned that if the Review panel recommends the types of changes foreshadowed in the framing of the questions posed by the Review, we may lose protection of our Convention rights in significant ways.

The ability to claim our Convention rights in national courts, without having to pursue claims all the way through national courts and then to the European Court of Human Rights (“the ECtHR”), is an essential way of securing access to justice for people in relation to their fundamental rights. In order for this to work effectively, it is vital our courts both take account of ECtHR case law and interpret legislation compatibly with Convention rights insofar as they can do so. Such an approach secures necessary alignment in the protection of our rights with our international obligations. It also ensures maximum clarity and certainty in relation to the standards and better access to justice for all.

In addition, the ability of our national courts to declare that UK legislation is incompatible with our Convention rights provides for a structural approach to remedy where violations occur. For UK legislation, this has almost invariably resulted in the UK Parliament replacing or amending the offending legislation. In the case of Scottish legislation, incompatible legislation can be declared outside the competence of the Scottish Parliament and therefore effectively struck down.

The structural nature of a declaration of incompatibility means a law that breaches the rights of many people can be addressed, rather than a lot of individual rights holders having to pursue claims through the courts.

This avoids the considerable burden on individuals of having to pursue a remedy in court, as well as relieving the courts of a higher volume of claims. Critically, where acted upon effectively it helps secure action by the executive and legislature to remedy incompatible legislation, leading to better outcomes for all.

Making changes to the central mechanisms in the Act risks significantly undermining its central purpose: to make our Convention rights directly applicable here in the UK and enable us to enforce our rights at home. It risks distancing us from our rights, making them harder to realise and enforce, undermining accountability and the development of a rights based culture.

This review has been initiated at precisely one of the most challenging times in UK history: within weeks of the UK's withdrawal from the EU and during the second wave of the largest public health crisis in our shared national experience. This calls into question how sufficient evidence can be gathered in such a short space of time, when individuals and organisations are limited in their capacity to respond. Any review of such a critical piece of legislation should only be carried out with active, direct participation of rights-holders, those who will be most affected by any changes. The Commission is concerned that the timescales set out will not allow for any meaningful participation as would be appropriate.

The Commission is concerned that the framing of the questions of the Review infer the possibility of stripping away accountability, oversight and access to justice. When the foreshadowed outcomes of this Review are considered alongside the UK Government's current review of Judicial Review and any potential review of the powers of the Supreme Court, there appears to be a risk of undermining the effective and appropriate roles of the Judiciary, Parliament and the Executive that are at the heart of the UK's constitutional makeup.

Where the UK Government seeks to limit the reach of Convention rights so that they do not apply to UK activity abroad, this would: remove protection for UK personnel abroad, as well as for non-UK citizens under our control; seriously undermine the Convention system as a whole, and

may encourage other countries to be selective in their recognition of Convention rights.

The impact of the pandemic has been significant on all our human rights, including our right to work, to education, to housing, to private and family life, to liberty, and to due process. COVID-19 has shone a light on the longstanding inequalities we face as a society. It has shown us the gaps and inadequacies in our struggling public services and highlighted the need for strong, participative, transparent public institutions. Now more than ever, we need human rights laws which govern state actions and choices, ensuring that the principles of dignity and equality underpin the decisions taken by governments.

The Commission calls on this Review to recommend that the UK Government comply with its obligations under the Convention, retain the Act in full and ensure that accountability for Convention rights compliance is not diminished in any way. A summary of our key recommendations is set out below.

Recommendations

The Human Rights Act 1998 (“the Act”) is retained in full and accountability for Convention rights compliance is not diminished in any way. In particular:

- The Act is the mechanism through which the UK implements its international law obligations under the Convention, in particular Article 1,⁵ Article 13⁶ and Article 46.⁷ It must be retained in full to avoid breaching our obligations under international law.
- The Act is a pillar of the constitutional framework of devolution in Scotland. Convention rights are protected in Scotland under both the Act and the Scotland Act. Any change to the Act could upset this constitutional arrangement.
- There should be no change to Section 2.⁸ It is integral to the Act, ensuring that the ECtHR’s authoritative interpretation of Convention rights is taken into account by our national courts.

This is essential to the core objective of the Act, to bring Convention rights home, allowing us to enforce the full extent of our Convention rights in national courts.

- There should be no change to the way courts approach matters falling within the UK's margin of appreciation. Courts play a vital role in considering and resolving matters where the ECtHR has decided that national authorities should have the discretion to do so, as they are better placed to balance the interests of the community and individuals. UK courts are exercising their role in an appropriate way.
- There should be no change to the current process of judicial dialogue, which appears to be working well. Judicial dialogue can be an effective method of explaining the UK's specific national context to the ECtHR, leading to development in ECtHR case law.
- There should be no change to Section 3.⁹ It provides an effective remedy for incompatible legislation. Courts apply this with caution where it is possible to read legislation in a compliant way, without going against the purpose of the legislation. It is important that national courts make the decision as to whether or not it is possible to read legislation in a compliant way.
- There should be no change to the courts' discretion to make a declaration of incompatibility under Section 4 if it decides that legislation is incompatible with Convention rights. A declaration does not affect the continuing operation of legislation and it is a matter for Parliament to decide how to address the incompatibility.
- There should be no change to the powers available to courts in considering designated derogation orders. It is essential that we have effective judicial oversight of this executive power.

- There should be no change to the discretionary power of courts to strike down subordinate legislation which is incompatible with Convention rights. The availability of this remedy allows courts flexibility in addressing incompatibilities. Any change may reduce the courts' ability to protect rights.
- There should be no change to the extra-territorial application of the Act. It is essential that the Act applies to UK activity abroad, for the protection of UK personnel, as well as for non-UK citizens who are under the control of UK authorities.
- There should be no change to the Act in respect of remedial orders. The remedial order process enables an incompatibility in legislation to be addressed more urgently than is possible through the full Parliamentary process for primary legislation. In some cases that will be important in order to protect rights.

¹ The UK Government's White Paper, [Rights Brought Home: The Human Rights Bill](#) (Cm.3872, 1997), at 1.19.

² The [European Convention on Human Rights](#) is a [Council of Europe Convention](#), adopted in 1950 and entered into force in 1953.

³ See: [50 Human Rights Cases That Transformed Britain | EachOther](#)

⁴ See for example: '[Getting Rights Right: Human Rights and the Scottish Parliament](#)' (26 Nov 2018), SP Paper 341, 6th Report, 2018 (Session 5), The Equalities and Human Rights Committee, Scottish Parliament.

⁵ Article 1 provides that state parties to the Convention shall secure to everyone within their jurisdiction the rights and freedoms contained in the Convention.

⁶ Article 13 requires the UK to provide people who have their Convention rights breached an effective remedy before a national authority.

⁷ Article 46 requires state parties to abide by final judgments of the ECtHR.

⁸ Section 2 requires national courts to take into account relevant decisions of the ECtHR when considering matters concerning Convention rights.

⁹ Section 3 requires national courts to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights so far as it is possible to do so.