

Briefing note: Debate on the Practical Impact of the Human Rights Act 1998

14 July 2022

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.

The Commission is accredited as an “A Status” National Human Rights Institution within the United Nations (UN) system.

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The Human Rights Act and the ‘Bill of Rights’

The Commission welcomes Baroness Whitaker’s debate in the House of Lords on the ‘practical impact of the Human Rights Act 1988’.

The Commission has consistently voiced its opposition to the UK Government’s project to replace the Human Rights Act (HRA) with a new Bill of Rights.

We consider the project is based on false premises, employs a flawed consultation process and will deliver primarily negative outcomes for the people and institutions of the UK, including Scotland.

We are clear in our view the HRA works well as it stands, an opinion shared by others across UK and Scottish human rights organisations, the UK Joint Committee on Human Rights, civil society and the UK Government’s own Independent Human Rights Act Review, which concluded there is no case for widespread reform.

You can read more on our website in our [consultation response](#).

SUMMARY

1. We consider the UK Government’s proposals threaten to damage Scotland’s progress in developing a human rights culture, by undermining the European Convention on Human Rights (ECHR) protections available under the Scotland Act, unsettling Scottish devolution and introducing confusion and uncertainty for Scotland’s public authorities;
2. The Bill of Rights and its supporting publications fail to acknowledge the complex implications of the proposed measures for Scotland;
3. The Bill of Rights undermines the UK’s international obligations. We note recent comments from the Council of Europe’s Commissioner for Human Rights that the UK risks ‘backsliding’ on human rights;

4. Having largely ignored the findings of its own Independent Review, which concluded there was no case for widespread reform, the UK Government has still to produce evidence to support the claim that the HRA needs to be replaced;

5. The Bill of Rights will create additional hurdles for rights holders and restrict their access to justice. It will also designate some breaches of Convention rights as insignificant or undeserving, diluting protections and undermining the universality of human rights;

6. The overall objectives as set out by the UK Government are at odds with the UK's international obligations and domestic support for the HRA, particularly in Scotland;

7. The UK Government states it is committed to the UK remaining party to the ECHR but wants the UK Supreme Court to be the ultimate judicial arbiter. This risks a situation in which rights holders will no longer be able to exercise their Convention rights in full in UK courts;

8. If national courts interpret Convention rights distinctly from the European Court of Human Rights (ECtHR), this will create legal conflict, confusion and uncertainty, and a likely subsequent increase in referrals to Strasbourg.

The Human Rights Act 1988

The European Convention on Human Rights is seen as one of the most effective systems of human rights protection in the world. The UK signed and ratified the Convention over 50 years ago and when the HRA came into force in 2000, Convention rights finally became part of UK law.

Ensuring that people could enforce their rights in national courts was transformative, but the purpose and effect of the Act went far beyond individual court decisions. By making Convention rights directly enforceable at home, decisions would be issued by national courts

clarifying the scope of our rights and holding organisations carrying out public functions accountable. This would in turn promote a human rights culture, increasing awareness and developing a human rights based approach to policy and decision making.

While there is still much to be done, significant progress has been made as a consequence of the incorporation of Convention rights through the Act, particularly in Scotland.

The Scotland Act 1998

1. The Human Rights Act is a pillar of the constitutional framework of devolution in Scotland, where Convention rights are protected under both the Human Rights Act and the Scotland Act 1998 (SA). Where a human rights issue arises, claims may be taken under either or both Acts. While the Scotland Act provides a greater degree of human rights protection for the people of Scotland (see Annex 1), this is to a degree contingent on the Human Rights Act, which has been described as a 'dictionary' for certain phrases of the Scotland Act¹.

2. Where the Bill of Rights proposals 'water down' the protections provided in the Human Rights Act², this changes the parameters of the competence of the Scottish Government and Scottish Parliament, significantly undermining rights protection for people in Scotland under the SA, as well as under the HRA.

Progressive incorporation of human rights culture

The HRA has contributed significantly to fostering an ever evolving human rights culture in Scottish public bodies over the last 20 years. For example, it has encouraged those bodies to mainstream human rights considerations throughout their decision making, in order to ensure fairer outcomes for people (see Annex 2).

The Scottish Parliament has acknowledged the requirement to embed human rights across its work. In 2018 the Equalities and Human Rights Committee of the Scottish Parliament set out a 'human rights roadmap' for the Scottish Parliament.³

Work is now well underway in Scotland to incorporate into law the human rights contained in a number of other international human rights treaties, covering: economic, social, cultural and environmental rights, and stronger protections for the rights of women, disabled people, black and ethnic minority people, older persons and children. Following detailed work by the First Minister's Advisory Group on Human Rights Leadership and the Scottish National Taskforce on Human Rights Leadership, the Scottish Government has committed to introducing a Bill during this term of the Scottish Parliament, incorporating these rights into Scots law.⁴

There has been considerable progress in the development of a human rights culture in Scotland. The HRA and the SA have together played a key role in that progress. **It is critical that this progress is not undermined by proposals to reduce Convention rights protection, unsettling Scottish devolution and introducing confusion and uncertainty for Scotland's public authorities.**

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ANNEX 1

Under the HRA, actions of public authorities that are incompatible with Convention rights are unlawful and can be subject to Judicial Review.⁵ Where UK legislative provisions are found to be incompatible with Convention rights they can be declared as such, providing Ministers with the opportunity to amend the incompatible provisions.⁶

However, under the Scotland Act, the Scottish Government, Scottish Ministers and the Scottish Parliament do not have the power to act inconsistently with Convention Rights. To do so is beyond their competence, or ultra vires. Acts which are ultra vires have no legal effect. An Act of the Scottish Parliament is therefore "not law" so far as it is incompatible with any of the rights contained in the Convention.⁷ An Act of the Scottish Parliament that is found by a court to be incompatible with Convention rights can be, in effect, struck down or prevented from coming into force under the Scotland Act.

Therefore, in relation to legislation and Acts of the Scottish Government, the Scotland Act affords greater rights protection for the people of Scotland than is available under the Human Rights Act, where court declarations of incompatibility have no effect on UK legislation, and it is a matter for the UK Parliament to decide if it will replace or amend the legislation. The Bill of Rights proposals threaten to undermine that additional protection.

ANNEX 2

- Her Majesty’s Inspectorate of Prisons for Scotland reports itself as taking a human rights based approach to the inspection and monitoring of prisons.⁸
- Scotland’s Health and Social Care Standards, implemented from April 2018, explicitly “seek to provide better outcomes for everyone, to ensure individuals are treated with respect and dignity and that the basic human rights we are all entitled to are upheld.”⁹
- NHS Health Scotland has tested improvement approaches to embedding human rights in its work and has produced a range of resources setting out how the right to health and a rights based approach can strengthen work to reduce health inequalities.¹⁰

¹ [Somerville v The Scottish Ministers \[2007\] UKHL 44](#) per Lord Hope at paragraph 22

² For example, the provisions contained in Clause 3 concerning the *Interpretation of the Convention rights* are intended to make Convention rights a less stringent constraint on legislative or executive competence than under HRA.

³ [‘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.

⁴ See ‘A fairer, greener Scotland - Programme for Government 2021-22’ at page 35, available at [fairer-greener-scotland-programme-government-2021-22 \(3\).pdf](#)

⁵ [Human Rights Act 1998](#), Section 6.

⁶ *Ibid.* Section 4.

⁷ [Scotland Act 1998](#), Section 29(1).

⁸ [‘What next for Prisons in Scotland? Reflections on five years as HM Chief Inspector of Prisons for Scotland’](#) (2018) David Strang, HIMPS, referenced in [‘Inquiry: 20 years of the HRA 1998 Written evidence to the Joint Committee on Human Rights’](#) (2018), Scottish Human Rights Commission.

⁹ See: [New Care Standards | Review of Scotland's National Care Standards](#)

¹⁰ See: [Submission from NHS Health Scotland.pdf \(parliament.scot\)](#)