

## HRCs Conference – 25 June 2015

- Thanks – Tressa, Carole, Cabinet Secretary
- This part of the day comes under the heading “the view of the National Human Rights Institutions”: suspect that we will share many of the same concerns and priorities. Nevertheless, the EHRC’s unique perspective as a cross-border NHRI, with a duty to promote and monitor human rights and advise government in England Wales and Scotland may be useful. (Of course we share our human rights mandate in Scotland with our colleagues in the SHRC.) We are also the National Equality Body for Scotland, England and Wales. This brings another useful perspective on the extent to which policy development and decision-making in government and public authorities is – or isn’t – being shaped by existing legal and regulatory frameworks. I’ll return to this point at the end.
- I also want to place the debate on the future of the Human Rights Act in the wider context of the UK’s changing constitutional architecture, in particular the Scotland Bill currently being considered at Westminster. The EHRC has been

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working on the equality and human rights implications of constitutional reform in Scotland for the last 18 months or so, engaging with stakeholders in Scotland and with ministers and Parliaments in Edinburgh and London. Our work has been framed by two fundamental principles: maintaining a coherent framework for the protection and promotion of equality and human rights, and – at the very least - no regression from current powers and protections.

- So, inevitably, there's an element of speculation to today's discussion. As you know, a British Bill of Rights was not part of the recent Queen's Speech. We don't yet know precisely what the UK Justice Secretary is planning. But of course, that doesn't mean that we can't consider some of the likely issues and challenges.
- The Human Rights Act incorporates into domestic law the European Convention on Human Rights, and of course the distinguished Scots-born lawyer David Maxwell-Fyfe was one of the Convention's principal drafters. The Human Rights Act has provided essential protection to all of us, enabling us to access our rights in the domestic courts.

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- The Human Rights Act has shown its value by providing an essential safeguard in areas such as protecting older people who are receiving care, defending the right of servicemen and women fighting abroad to have the appropriate equipment, and safeguarding disabled people's right to liberty.
- The Act has enabled people to make claims in domestic courts rather than having to go through the costly and time-consuming process of going to Europe. So the mechanisms for enforcement of any substitute legislation would have to be accessible and effective. Unless this is ensured, rights set out in any new Act will be without real remedy. This would breach a core legal principle and constitute a regressive step in the protection of fundamental rights.
- We also believe that any change to how Convention rights are given form in domestic law should not water down the protections contained in the Human Rights Act. Nor should it weaken the mechanisms for securing redress for breaches of human rights. However, we would welcome the opportunity afforded by this debate to consider the case for bringing additional rights (such as those protected by the UN treaties on economic, cultural and social rights, women's rights and

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disability) into domestic law, and for strengthening arrangements for the enforcement of current rights.

- What of the criticisms offered of the Human Rights Act? One of the most common is that human rights are now interpreted in ways that go far beyond what the Convention drafters envisaged. However, seeking to eliminate the ‘living tree’/‘living instrument’ doctrine is inconsistent with long-standing doctrines of constitutional law and common-law interpretation. Such a change would mean that changing social norms (such as changing perceptions of the roles of women, or attitudes towards same-sex relationships) and new challenges as a result of technological or lifestyle changes (such as challenges to respect for private life caused by ‘big data’ and the internet) might not be capable of being addressed within the framework provided by a British Bill of Rights. By contrast, under the doctrine of the margin of appreciation, the European Court of Human Rights will not find a violation of the Convention in circumstances where there is no common law or practice across the Council of Europe, in particular where to do so would violate the constitutional traditions of a particular state.
- Another common criticism is that ‘domestic courts, not Strasbourg, should have the final say in interpreting Convention

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rights as clarified by Parliament'. But this is already the case in national law, although widely misunderstood and misreported. Judgments of the European Court of Human Rights are not binding on the Supreme Court or any other domestic court as a matter of national law – they merely have to be taken into account (section 2 of the Human Rights Act) and the courts do not universally follow Strasbourg decisions. In fact, strengthening section 2 in order for judgments of the European Court of Human Rights to be binding on national courts was expressly considered and rejected during the parliamentary passage of the Human Rights Act.

- One of the most important factors in this debate, as I mentioned earlier, is the complex ways in which the ECHR is hard-wired into the devolution settlements in Scotland Wales and Northern Ireland. Any change to the Human Rights Act would immediately invoke the Sewel Convention, and if you were in any doubt about whether Scottish Ministers are prepared to give consent, you won't be after the Cabinet Secretary's speech. It would be constitutionally extremely difficult for UK Ministers to disregard the Sewel Convention in such a high profile circumstances, especially when the Scotland Bill currently before the Westminster Parliament contains provisions to enshrine the convention in law.

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- I want to end though by looking closer to home. It's great to be part of today's event, and contribute to discussions on how human rights can be better reflected in domestic law and policy. But let's be clear about the challenges that remain, and the extent to which current law and regulation on equality and human rights is – or isn't – being used to shape public services and deliver better outcomes for the people of Scotland.
- Later this year, the EHRC will publish its five yearly report on progress on equality and human rights across a range of domains – such as health, education, personal safety and security, agency and participation. I don't think anyone will be surprised if the report suggests that there remain many areas where individuals and groups experience markedly different outcomes when it comes to the enjoyment of civil and political rights, but also of the economic, social and cultural rights which underpin individuals' ability to thrive. From site provision for Gypsy/Travellers, to ensuring dignity and agency in health and social care provision, to the gender pay gap, occupational segregation and discrimination still experienced by many women in the labour market, the challenges remain multiple and deep-rooted.

- This is despite law and regulation that, in some cases, has been in place for many years. So, as well as campaigning to protect existing powers and duties, can I suggest that we also take stock of whether we are using these existing powers as effectively as we could?
- Unfortunately, too often policy is developed, or Bills are introduced, without timely and comprehensive equality impact assessment, despite this being a requirement of the devolved specific equality duties. Combined equality and human rights impact assessments are even rarer, even where the policy area is clearly relevant, and despite the guidance available from the EHRC and SHRC. This wastes time and resources, and works against delivering positive outcomes.
- I'm sure everyone in this room shares the EHRC's belief that equality and human rights provide the framework for designing and delivering better services, using finite public funds more effectively, and ultimately delivering better outcomes for everyone. So, as we make the case for ensuring that we maintain a coherent and effective human rights framework, let's also remember that we have yet to fully realise the transformative power of the tools currently at our disposal.