

Human Rights and Devolution: The Independent Review of the Human Rights Act: Implications for Scotland.

A briefing paper for the Civil Society Brexit Project,
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INTRODUCTION

The Independent Review of the Human Rights Act 1998 (IRHRA) commissioned by the UK Government may result in changes to human rights provision across the UK. The implications are not yet known as the Panel tasked with undertaking the review has yet to make recommendations to the UK Government on any proposed reform which will be based on the evidence presented to it. The review is due to conclude by producing a report for the Lord Chancellor's consideration by summer 2021.

This briefing outlines the potential implications of the review on human rights in Scotland, specifically concerning the provisions of the European Convention on Human Rights (ECHR) which, as well as being incorporated into Scots law by the HRA, are also protected by the Scotland Act 1998 which is the legislation which sets out Scotland's devolution arrangements. This briefing, therefore, focuses on the potential consequences of the review for devolution and human rights in Scotland. As it explains, although the reforms proposed by the IRHRA may turn out to be relatively minor, they could have **implications for the way in which**

human rights protections are developed and applied by Scotland's political institutions and interpreted by the courts.

Human rights standards in Scotland currently enjoy a burgeoning and relatively progressive approach by which they are embedded in the development, implementation, operation and enforcement of law and policy which, in recent years, has led to certain improvements in the way in which public services are delivered. The Human Rights Act (HRA) has proved vitally important to the protection and furtherance of ECHR rights in Scotland which are predominantly civil and political in nature. Although by no means complete, this incremental move towards the adoption of a human rights-based approach has gathered momentum in recent years and is set to be bolstered considerably by way of the current Scottish Government's programme of incorporation of international human rights into Scots law. If successfully completed, this process will see the direct incorporation of economic, social, cultural and environmental rights alongside the civil and political rights provided by the HRA. The final section of the paper outlines this agenda and the specific route to improved human rights protection that it offers. It is emphasised that the

incorporation agenda is by no means an alternative to the HRA but, if successfully implemented, it would complement current provision and significantly contribute to Scotland's adoption of a human rights-based approach. This briefing does not speculate on the outcome of the IRHRA but seeks to provide an overview of the relevant area and to highlight potential impacts on Scotland's human rights landscape.

WHAT IS THE INDEPENDENT HUMAN RIGHTS ACT REVIEW?

The establishment of the [Independent Human Rights Act Review](#) was announced in December 2020. This is in line with the commitment contained in the Conservative Party's 2019 [manifesto](#) to update the Human Rights Act 1998 (HRA).

The review will consider how the HRA is working in practice, including its enforcement, and whether any change is needed. In its announcement of the Review, the UK Government stated,

The Human Rights Act has been in force for 20 years, it is timely to undertake a review into its operation. The UK's constitutional framework has always evolved incrementally over time, and it will continue evolving. We need to make sure that our human rights framework, as with the rest of our legal framework, develops and is refined to ensure it continues to meet the needs of the society it serves. We are committed to remaining a signatory to the European Convention on Human Rights.

Two 'key themes' outlined in the review's Terms of Reference are identified as being:

- the relationship between domestic courts and the European Court of Human Rights (ECtHR)
- the impact of the HRA on the relationship between the judiciary, the executive and the legislature

The independent Panel will be chaired by former Court of Appeal Judge Sir Peter Gross and its membership consists of distinguished legal practitioners and academics: Simon Davis; Baroness O'Loan; Sir Stephen Laws QC; Lisa Giovannetti QC; Professor Maria Cahill; Alan Bates. Specific Scottish expertise is provided by Professor Tom Mullen who is an expert in Scots Constitutional and Administrative Law at the University of Glasgow.

The Panel will examine a range of data and evidence in drafting its report which is due in Summer 2021. Following the consideration of the Lord Chancellor, the Government will publish a response. A public [call for evidence](#) was launched in January 2021.

WHAT IS THE HUMAN RIGHTS ACT?

The Human Rights Act 1998 (HRA), which came into force in 2000, sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the ECHR, which are predominantly civil and political in nature, into domestic British law so that they can be relied upon in domestic courts.

The ECHR protects the human rights of people in the 47 member states of the Council of Europe (CoE) which is an international organisation formed in 1949 for the purposes of upholding human rights, democracy and the rule of law. The CoE is completely separate and distinct from the European Union (EU). The UK has signed the ECHR through its membership of the CoE which is unaffected by Brexit.

The fifteen rights and freedoms that the HRA incorporates include the right to life, free speech and protection from inhuman and degrading treatment in care or custody. These provide minimum standards across Europe which were

agreed by the UK and other countries in the post-war era as the basic protections required by modern democracies.

In Scotland human rights are given additional protection through the Scotland Act 1998 which implements the devolution settlement. The HRA is embedded into the Scotland Act which means that the Scottish Government and Scottish Parliament are prevented from acting inconsistently with the Convention. **The repeal of, or substantial amendment to, the Human Rights Act would therefore undermine the current devolution settlement.**

The HRA's three main effects are:

1. Breaches of human rights can be heard by British courts. This means that cases do not have to be taken to the European Court of Human Rights in Strasbourg. This is one route, albeit an important one, to making human rights a reality in people's lives.

2. All public bodies and other organisations which carry out public functions must respect human rights when exercising their duties. This includes local authorities, the police and courts, schools, colleges and universities, hospitals and other health and social care settings. Section 6 of the Act makes it unlawful for public bodies to act incompatibly with the rights contained in the Convention. This has led to positive changes in policies, practices and organisational culture without individuals having to take legal action.

3. New laws should be compatible with Convention rights. In practice this means that laws enacted by Parliament should be compatible with the rights set out in the Convention, although the sovereignty of the UK Parliament means that it can pass laws which are incompatible. Under section 19 of the HRA the Minister in charge of a Bill in either House of

the Westminster Parliament is required to make a statement that the provisions of the Bill are compatible with Convention rights. However, once enacted if those provisions are subsequently declared by a court to breach human rights under section 4 of the HRA, they may continue in force.

In the Scottish context, the Scotland Act provides additional protection for human rights law. Section 29 of the Scotland Act ensures that any Act passed by the Scottish Parliament is not law to the extent it is incompatible with any Convention rights covered by the HRA as it would be outside the legislative competence granted to the Scottish Parliament by the Scotland Act. The courts have the power to strike down any Act or provision of Scots law which is found to be outside the competence of the Scottish Parliament. As a preventative measure, the Scotland Act (section 31) provides that the relevant Minister should make a statement that legislation introduced to the Scottish Parliament falls within its legislative competence which is then endorsed by a statement made by the Presiding Officer.

All courts within the UK are obliged, where possible, to interpret laws in a way which is compatible with Convention rights. Section 3 of the HRA requires courts, when interpreting UK legislation, to enable compatibility with Convention rights as far as is possible. Section 101 of the Scotland Act requires courts to take a similar approach in relation to Acts of the Scottish Parliament and subordinate legislation.

WHAT ARE THE AIMS OF THE REVIEW?

The review's terms of reference (ToRs) provide more detail regarding its aims and remit which are based on the two core themes.

In exploring **the relationship between domestic courts and the European Court of Human Rights**

(ECtHR), the ToRs specify that, the HRA does not bind domestic courts and tribunals to the jurisprudence of the ECtHR, but that they are required (under section 2, HRA) to ‘take into account’ that jurisprudence when determining a question that has arisen in connection with a Convention right. The review will consider how this duty has been applied in practice and whether there is any need to amend it.

States are permitted a degree of discretion when taking the jurisprudence of the ECtHR into account to enable them to ensure that any resulting action is compatible with national legal and cultural traditions. This arises from a doctrine known as the ‘margin of appreciation’ which has been developed by the ECtHR when considering whether a state has breached the ECHR. **This gives the Court the flexibility necessary to balance the sovereignty of member states with their obligations under the ECHR.** The review will consider how the margin of appreciation operates in practice to determine whether any change is required.

The review will also explore what the ToRs refer to as the ‘current approach to ‘judicial dialogue’ between domestic courts and the ECtHR’ to determine whether it ‘satisfactorily permit[s] domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK’. The aim is to consider how such dialogue can best be ‘strengthened and preserved’.

In its consideration of **the impact of the HRA on the relationship between the judiciary, the executive and the legislature**, the review’s ToRs set out a range of associated questions which are focused on the way in which the roles of the judiciary, the executive and the legislature in protecting human rights in the UK are balanced under the HRA, ‘including whether the current approach risks “over-judicialising” public administration and draws domestic courts unduly into questions of policy’.

The review’s attention is focused in particular on sections 3 and 4 of the HRA which provide the framework for ensuring that laws enacted by Parliament should be compatible with the rights set out in the ECHR.

Section 3(1) states that ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’ Accordingly, a court must read any statute passed by parliament so as to uphold ECHR rights, where possible.

Section 4 enables a court to issue a declaration of Incompatibility in relation to a provision passed by the UK or Scottish Parliament if it is satisfied that that the provision is incompatible with a Convention right and that the relevant domestic legislation does not provide for the incompatibility to be removed. Importantly, such a declaration does not affect the validity, continuing operation or enforcement of the provision or bind the parties to the proceedings in which it is issued. Rather, the declaration triggers a power of the relevant government minister, if compelling reasons are found, to make changes to that legislation to remove the incompatibility under section 10 HRA or to amend the legislation through the ordinary legislative procedure. This ensures that parliamentary sovereignty is retained as there is no hard requirement to change the legislation. The Review will determine whether any changes should be made to the framework provided by sections 3 and 4 of the HRA.

WHY IS THE HRA BEING REVIEWED?

The HRA has been the focus of ongoing debate and conjecture by the UK Government for some time. In October 2014, the Conservative Party published a policy document in which it proposed to repeal the HRA and replace it with a new ‘British Bill of Rights and Responsibilities’.¹ This was

followed by an interview in which the (then) Justice Secretary Chris Grayling mooted the possibility that a future Conservative government would withdraw from the ECHR if the changes proposed in the policy document were rejected by parliament, with a particular focus on the proposal to introduce a process to veto judgments of the ECtHR.²

In its manifesto of the following year the Party set out its pledge to 'scrap the Human Rights Act and introduce a British Bill of Rights' which would 'break the formal link between the British courts and the European Court of Human Rights', and make the Supreme Court 'the ultimate arbiter of human rights matters in the UK.'³ The justification for taking such action was framed as being to 'restore common sense to the application of human rights in the UK' and to 'reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society. Among other things the Bill will stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation.'⁴

The HRA's repeal and replacement was not included in the Queen's Speech in May 2015, but the Prime Minister restated in the House of Commons that it was still the Government's intention 'to pass a British Bill of Rights'⁵ In December 2016, it was announced that repeal of the HRA was delayed until after Brexit, and the 2017 Conservative Party manifesto pledged to remain signed up to the ECHR 'for the duration of this parliament.'⁶

Although falling short of suggesting that the HRA will be replaced with a British Bill of Rights, the Conservative Party's 2019 manifesto pledge to update the Act and its subsequent announcement of the current review appears to be tied to the UK Government's commitment to reassert British parliamentary sovereignty following Brexit.

WHAT IMPACT HAS THE HRA HAD ON SCOTS LAW?

In the years before the HRA brought the ECHR into domestic law, the Convention had limited impact on the operation of the Scottish courts. Existing judicial guidance in Scotland stated that the courts were not entitled to have regard to the ECHR as an interpretative aid or otherwise, unless it was given statutory effect.⁷ Where reference was made to it, the Convention served only as an informal source of law.⁸ Latterly, in accordance with the approach of the English courts, there was a presumption that where an apparent ambiguity existed in legislation, Parliament had intended to legislate in conformity with the ECHR rather than in conflict with it.⁹ However, where no such ambiguity existed, there was no requirement to take any account of the Convention either as a relevant source of law or as an interpretive tool.

The HRA introduced a requirement, under section 2, that courts are to take into 'account any judgment, decision or declaration' of the European Court of Human Rights or Commission, thus removing the need for ambiguity in the legislation before the courts are required to engage with the jurisprudence of the ECtHR. This provision has undeniably strengthened the protection of individual rights in domestic law.

Rather than a ceiling, the Convention is intended to provide a minimum level of protection on which member states are expected to improve, with Article 53 of the ECHR providing that,

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

Courts in the UK have nonetheless tended to take a restrictive approach by keeping pace with the ECtHR's jurisprudence rather than engaging with its progressive development.¹⁰

As outlined above, the requirement under section 3 of the HRA that primary and subordinate legislation is to be read and given effect, as far as possible, so as to make it compatible with the rights under the ECHR provides a powerful interpretive tool. Nonetheless, when discharging their interpretive duty, **the courts have tended to take great care to preserve parliamentary sovereignty which is further protected by the lack of a judicial strike down power** in relation to primary legislation of the UK Parliament deemed to be incompatible with the ECHR. In this regard, courts may only issue a declaration of incompatibility. As outlined above there is a difference in relation to the provisions of Scottish Parliament legislation in this respect which courts are able to strike down if it is found to be incompatible with the rights protected by the HRA, and thus outside of devolved competence. Finally, the provision of section 6 which states that, where a public authority acts in a manner which is incompatible with Convention rights, that act is unlawful applies to the courts in Scotland and elsewhere in the UK through their status as public authorities.

Despite the generally cautious approach adopted by the courts in discharging their duties under the HRA, several landmark cases heard in Scotland have had direct and positive impacts on Scots law.

EXAMPLES OF THE HRA'S IMPACT ON CASE LAW INCLUDE:

Independence of the judiciary

Stars v Ruxton 2000 JC 208 challenged the policy that allowed the Scottish Government to appoint temporary sheriffs without renewal on the expiration of a one-year appointment on the

grounds that the resulting lack of security of tenure compromised the sheriffs' independence from the executive. Although the importance of judicial security of tenure had long been recognised in Scots common law, application of the HRA meant that human rights protections could no longer rely solely on conventions which are not legally enforceable. Article 6 ECHR offers additional protection compared to the pre-HRA position concerning judicial independence and impartiality. Its application to the position of temporary sheriffs resulted in a successful challenge and thus strengthened the guarantee of an independent judiciary

PRISONERS' RIGHTS

As a result of the case *Napier v The Scottish Ministers* [2005] CSIH 16 which was brought by a Scottish prisoner, the practice of 'slopping out' was banned in Scottish prisons. Robert Napier successfully claimed that that the conditions in which he was held contravened Article 3 of the ECHR as they were inhuman and degrading. "Slopping out" required the need to manually empty human waste when prison cells were unlocked in the morning because inmates were not provided with access to a flush toilet overnight. This practice had been banned almost a decade earlier in England and Wales. As a result of the *Napier* judgment prisoners who had been subject to slopping out practices were entitled to compensation and the Scottish Prison Service was required to invest in updated toilet facilities.

RIGHT TO A FAIR TRIAL

Prior to *Cadder v HM Advocate* [2010] UKSC 43 suspects in Scotland could be lawfully held for up to six hours and interviewed by the police without a right of access to a lawyer. In this case, Cadder successfully argued that Scots law breached the right to a fair trial under Article 6 ECHR. As a result, reforms were introduced by the Criminal Procedure

(Legal Assistance, Detention and Appeals) (Scotland) Act 2010 to give suspects questioned by the police a right of access to legal advice.

Further important cases in which Article 6 ECHR has been invoked include *Maan, Petitioner* 2001 SCCR 172 and *Holland v HM Advocate* 2005 1 SC (PC) in which Article 6 was used to expand the pre-existing duty to disclose to the accused any evidence and information which would tend to exculpate him or her in criminal proceedings, and *HM Advocate v Little* in which the argument that pre-trial delays could affect the right to a fair trial was successful. In *Little* the delay between charge and indictment amounted to a period of 11 years.

OTHER IMPACTS OF THE HRA ON SCOTS LAW AND POLICY

As well as the direct effect of the ECHR on Scots law through its incorporation by the HRA, the Act has impacted on Scottish law and policy in other ways. Following the courts' engagement with the language of the ECHR and the jurisprudence of the ECtHR, important aspects of Scots law have been led and influenced by the Convention's provisions in various ways. For example, family law has benefited from the provision of Article 8 ECHR which protects the right to respect for private and family life.¹¹ In general terms the HRA has facilitated a more rights-based approach in the case law of the Scottish courts and in the effective protection of rights under the common law.¹²

THE IMPACT OF THE HRA ON THE OPERATION OF THE SCOTTISH PARLIAMENT

As outlined above, the HRA is embedded in the legislation which provides the arrangements for devolution in Scotland. The Scotland Act 1998 (section 29) gives the ECHR enhanced effect in Scotland as Acts of the Scottish Parliament which are incompatible with the ECHR rights listed in the

HRA will be invalid. The ECHR is, thus, 'a pillar of the constitutional framework of devolution' in Scotland,¹³ and, because of relevant specific arrangements in their devolution settlements, of Wales and Northern Ireland.

This requirement for ECHR compliance has had a positive impact on human rights awareness within the Scottish Parliament giving rise to a fledgling human rights culture. Human rights issues have always been considered by the various Scottish Parliamentary committees. However, in 2016 the Equal Opportunities Committee became the Equalities and Human Rights Committee and was charged, as part of its remit, with with a particular responsibility for human rights. In 2016 the Committee launched an inquiry aimed at ensuring the best possible approach to considering human rights across all parliamentary activity, through gathering evidence under three main themes: participation and engagement, Parliamentary procedure and process, and accountability.¹⁴

The Inquiry's report was published in November 2018¹⁵ and set out a human rights road map for the Parliament. As the UK prepared to leave the EU, it was acknowledged that 'our human rights framework in Scotland will change significantly'¹⁶. Several key recommendations were made focusing on the need to 'be bolder and to strengthen our existing procedures and processes, to make human rights more central to our work and how we undertake our scrutiny function and to be an exemplar of international best practice to other parliaments.'¹⁷

The evidence collated during the Inquiry by way of written submissions by the Parliament's various committees illustrated the 'centrality of the protections provided by the HRA/Scotland Act 1998 to the culture of the Scottish Parliament'.¹⁸ This is summed up by the Justice Committee's contribution which concluded that,

The Committee considers that the scrutiny of human rights issues should not be viewed as a “box ticking” exercise but as something fundamental to all the work it takes.” Justice Committee, March 2018.

THE IMPACT OF THE HRA ON SCOTTISH PUBLIC BODIES AND SERVICE DELIVERY

As outlined above, section 6 of the HRA makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. This provision continues to have a positive impact in the development of a human rights culture within public bodies. The Scottish Human Rights Commission has noted that ‘... whilst compliance with the HRA is often only one of many drivers of a human rights culture in the design and delivery of services, it is an essential catalyst as well as providing a backstop of legal accountability.’¹⁹ The work of embedding human rights considerations and ensuring that a human rights-based approach is adopted by public sector organisations in their decision making and service delivery is supported by the Scottish Human Rights Commission in a number of ways, including through Scotland’s National Action Plan on Human Rights which operated between 2013–2017.²⁰

Calls for further improvements to the provision of public services in Scotland are regularly made by civil society organisations which continue to play a critical role in the enhancement and accessibility of rights for those living and working in Scotland. In 2018 the ‘Scotland Declaration on Human Rights’²¹ was launched and has, to date, been signed by around 200 civil society organisations which affirm their support for current human rights protections and call for them to be continually strengthened. Although by no means fully achieved, the HRA has provided a crucial means of making rights, predominantly those of a civil and political nature, directly accessible to individuals in Scotland.

CAN THE UK GOVERNMENT CHANGE HUMAN RIGHTS PROVISION IN SCOTLAND?

Given the integration of the ECHR into Scotland’s law and policy-making processes through the devolution arrangements and the resulting impact on the work of Scottish courts, the Scottish Parliament and the adoption of a human-rights based approach across many areas of devolved policy in Scotland, can the UK Government change human rights provision in Scotland? And, if so, what might the potential effect of the IRHRA be for Scotland?

It is important to note that the remit of the current Review falls far short of the repeal of the HRA and is concerned with the Act’s current operation and supporting structures. Although mooted by previous Conservative administrations, the Act’s repeal and replacement with a British bill of rights now appears to be clearly off the agenda. The reasons for a change of policy in this respect are unknown. Pursuance of the Act’s unilateral repeal by the Westminster Parliament would certainly have given rise to complications surrounding Scotland’s devolved settlement and could have resulted in a violation of the Sewell Convention which provides that the Westminster government will ‘not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament’. Similar arrangements exist in respect of the UK’s other devolved legislatures. Although the status of human rights under the UK’s devolution arrangements is far from straightforward,²² it is widely accepted that the observation and implementation of the ECHR is a specifically devolved matter.²³

In a recent Westminster debate on the proposal to update the HRA,²⁴ several Scottish MPs asked Alex Chalk, the Parliamentary Under-Secretary of State for Justice, whether the UK Government had recently discussed the proposals with the Scottish Government. He replied,

We regularly engage with the Scottish Government, as well as the Welsh Government and the Northern Ireland Executive, on a range of justice-related matters, including human rights. The Government committed to looking at the broader aspects of our constitution, including updating the Human Rights Act. I can assure the hon. Members that, once the work on the Human Rights Act review commences, the implications for the devolved Administrations will be closely monitored.

Mr Chalk reiterated the Government's commitment to the ECHR, adding,

we are also committed to article 13 of the convention, which is the right to an effective remedy. The courts play an important role in allowing citizens to invoke and assert their convention rights. That will continue.

Mr Chalk's responses do not refer to the need for Parliamentary consent in this context and nor is any reference made to it in the Government's announcement of the Review. The only reference to devolution in the announcement is to the HRA's status as an Act which is protected from modification by the Scottish Parliament²⁵ and other devolved legislatures,

The review is limited to consideration of the Human Rights Act, which is a protected enactment under the devolution settlements. The review will not consider the scope of the substantive rights scheduled to the Human Rights Act.

Whilst the scope of the Review appears to preclude repeal of the HRA, it is not known how extensive its recommendations for reform will be. If adopted by the UK Parliament, the current devolution arrangements could prove to be problematic for any such reform, in the most extreme case requiring amendments to be made to the relevant statutes

including the Scotland Act. Perhaps more likely, even in the case of relatively minor amendment, is the potential for any proposed reform to disturb the progressive and ongoing development of a human rights-based approach and corresponding culture within Scotland's political institutions with resulting impacts felt by its wider society. This culture which, to date, has been rooted in the civil and political rights provided by the ECHR as incorporated into Scots law through the HRA is also embedded in the current Scottish Government's agenda which includes plans to enhance and strengthen it through the incorporation of other international human rights standards concerning economic, social, cultural and environmental rights into Scots law.

WHAT IS THE SCOTTISH GOVERNMENT'S AGENDA FOR HUMAN RIGHTS DEVELOPMENT?

The enhancement of human rights protections in Scotland has garnered specific political attention in recent years, with a clear commitment to extend the existing human rights framework. In 2017, the First Minister's Advisory Group on Human Rights Leadership (FMAG) 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".

The FMAG produced a report outlining several recommendations,²⁶ including that that the Scottish Parliament should bring forward an Act which 'will set out for the first time and in the one place the rights belonging to everyone in Scotland'. In addition to restating those rights which people in Scotland already enjoy, it was envisaged that the Act 'will provide 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.' To enable

full and equal enjoyment of these rights, the Act would also 'provide specific rights to children, women, persons with disability and on race' drawn from UN human rights treaties ratified by the UK, and provide corresponding rights protections for older people and LGBTI communities which are not yet explicitly provided for by a UN treaty.²⁷ The National Task Force for Human Rights Leadership (NTF) is in the process of considering how to take forward these recommendations.

Through a parallel process the Scottish Government has introduced a bill aimed at directly incorporating the UN Convention on the Rights of the Child (UNCRC) into domestic law. If enacted the UNCRC (Incorporation) (Scotland) Bill will make it unlawful for public authorities to act incompatibly with the incorporated UNCRC requirements, giving children, young people and their representatives the power to go to court to enforce their rights.

SCOTLAND'S HUMAN RIGHTS FUTURE

Human rights in Scotland are on a progressive path with clear recognition of the need to enhance the protections currently available to produce policies, laws and processes capable of bringing real improvements to people's lives. The IRHRA does not, on the face of it, contain any direct threat to the continuance of Scotland's human rights journey. Indeed, the UK Government's stated commitment to the ECHR is very welcome. However, as this briefing has outlined, the disturbance of any existing arrangements to the current structures within which the HRA operates risks unsettling the complex interaction between devolution and human rights which could give rise to a range of consequences for Scotland and her fellow devolved nations.

Scotland's current incorporation agenda, if completed, will see social, economic, cultural and environmental rights enhanced and made more

accessible and enforceable. These rights are no replacement for those civil and political rights provided by the ECHR which are currently incorporated by the HRA. Together both sets of rights will provide Scotland with a comprehensive human rights framework fully aligned with its international obligations. But the enactment of legislation is only the start of the process – enhanced human rights protection through the realisation of international standards cannot happen in isolation. To be fully effective this framework will require to be explicitly linked to the widest range of interpretive tools for all of those charged with its implementation and ongoing interpretation. This will encourage and aid the development of jurisprudence joining all the rights available under international law and their underlying principles which will ensure coherence across the framework and secure its ability to keep pace with international developments. Without explicit provision in this respect, the take up in invocation of the rights themselves and their broad interpretation could be severely diminished. If Scotland is able to continue to benefit from its dynamic and developing relationship with the international human rights community, including by participating fully in the important dialogue between domestic courts and the ECtHR, it could indeed take its place as a world leader in this respect.

WHAT WILL HAPPEN NEXT?

The review has now launched a public [Call for Evidence](#) which closes on the 3 March 2021. In his introduction, the Panel Chair states,

The Review has no pre-conceived answers and intends to examine all the questions within the scope of the Review comprehensively. In doing so, the panel wants to consult widely and encourages the widest possible range of views from the public and interested parties in its consultations, across all four nations of the UK.

Following the collation of the evidence gathered by way of a short – but nonetheless fairly technical – questionnaire focused on the review’s two themes, the review team will ‘engage with interested parties’ and ‘also intend to hold evidence sessions to ensure the widest possible engagement with the public’.

It is hoped that the specific views of all of those concerned with the HRA’s operation within Scotland and her fellow devolved nations will be fully voiced and taken into account in the Panel’s recommendations to Government.

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Footnotes:

- 1 The Conservative Party, 'Protecting Human Rights in the UK' 2014, available: <https://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document>
- 2 <https://www.theguardian.com/politics/2014/oct/03/tories-plan-uk-withdrawal-european-convention-on-human-rights>
- 3 The Conservative Party, Strong Leadership, a clear economic plan, a brighter, more secure future: The Conservative Party Manifesto 2015, <https://www.conservatives.com/manifesto>, p.60
- 4 The Conservative Party, Strong Leadership, a clear economic plan, a brighter, more secure future: The Conservative Party Manifesto 2015, <https://www.conservatives.com/manifesto>, p. 73.
- 5 HC Deb, 8 July 2015, col 311.
- 6 The Conservative Party, Forward, Together, Our Plan for a Stronger Britain and a Prosperous Future: The Conservative Party Manifesto 2017: <https://s3.eu-west-2.amazonaws.com/conservative-party-manifestos/Forward+Together+-+Our+Plan+for+a+Stronger+Britain+and+a+More+Prosperous....pdf>, p. 37
- 7 See *Kaur v Lord Advocate* 1980 SC 319
- 8 See, for example, *T, Petitioner* [1997] SLT 724.
- 9 *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC.
- 10 See *Ambrose v Harris* [2011] UKSC 43.
- 11 Parental involvement in the relevant processes of the Children (Scotland) Act 1995 have been given greater emphasis through the courts' considerations of Article 8 ECHR - see *Dundee City Council v M* [2004] SLT 640; *C v Principal Reporter*, 2010 Fam. L.R. 14; *NJ v Lord Advocate* 2013 SLT 347; *J, Appellant* 2013 SLT (Sh Ct) 18.
- 12 See Scottish Human Rights Commission, Inquiry: 20 years of the Human Rights Act 1998 Written evidence to the Joint Committee on Human Rights, September 2018: <https://www.scottishhumanrights.com/media/1796/shrc-submission-to-the-ichr-on-hra-1998-13-september-2018.pdf> at pp 8 and 9.
- 13 Scottish Human Rights Commission above, p. 9.
- 14 <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/106453.aspx>
- 15 Equalities and Human Rights Committee, Getting Rights Right: Human Rights and the Scottish Parliament, November 2018, SP Paper 431 6th Report, 2018 (Session 5).
- 16 Above, Foreword from the Convenor, at p. 2.
- 17 Above
- 18 Scottish Human Rights Commission, Inquiry: 20 years of the Human Rights Act 1998 Written evidence to the Joint Committee on Human Rights, September 2018: <https://www.scottishhumanrights.com/media/1796/shrc-submission-to-the-ichr-on-hra-1998-13-september-2018.pdf>, p. 9.
- 19 Ibid.
- 20 See <https://www.scottishhumanrights.com/projects-and-programmes/scotlands-national-action-plan/> For specific case study examples of how public sector organisations in Scotland are incorporating a human rights-based approach into their strategy and operations, see Scottish Human Rights Commission, Inquiry: 20 years of the Human Rights Act 1998 Written evidence to the Joint Committee on Human Rights, September 2018: <https://www.scottishhumanrights.com/media/1796/shrc-submission-to-the-ichr-on-hra-1998-13-september-2018.pdf>, pp 10-12.
- 21 <https://humanrightsdeclaration.scot/>
- 22 For a detailed discussion of the status of human rights under devolution, see Justice 'Devolution and Human Rights' 2010, available: <https://justice.org.uk/devolution-human-rights-2/>
- 23 Justice, 'Devolution and Human Rights', p. 18.
- 24 House of Commons, Human Rights Act 1998: Discussions with Scottish Government: debated on Tuesday 14 July 2020, Hansard Vol 678, col 1359.
- 25 See the Scotland Act 1998, Schedule 4, Part One.
- 26 See First Minister's Advisory Group on Human Rights Leadership, *Recommendations for a new human rights framework to improve people's lives*, Report to the First Minister, 'FMAG Report' (December 2018) available at <http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-post-10th-December-update.pdf>
- 27 FMAG Report, p. 31.