

## Short guide for Scottish civil society organisations on responding to the Independent Human Rights Act Review

### Introduction

The [Independent Human Rights Act Review](#) was announced in December 2020. We are very concerned that, whilst this Review does not suggest scrapping the Act, changing key elements of it could nonetheless have **serious consequences for the way it can be used to hold the government to account on human rights**. This also comes at the same time as an Independent Review of Administrative Law which looks at court processes and accountability – a briefing on this separate review is available [here](#).

This short guide provides some helpful points to consider in response to the Review questions. This is written specifically to highlight both the Scottish context of human rights, and on areas where civil society could bring their expertise. For more general UK-wide information around the Human Rights Act and the review, read this helpful Unofficial Guide from BIHR [here](#).

The Human Rights Consortium Scotland will be submitting joint evidence to this Review – we will be contacting our members to ask for signatories. Contact us to discuss at [info@hrcscotland.org](mailto:info@hrcscotland.org)

### About the Human Rights Act

**The Human Rights Act 1998 (HRA) sets out the fundamental rights and freedoms that everyone in the UK is entitled to.** It incorporates the rights set out in the European Convention on Human Rights (ECHR), which are mainly civil and political rights, into British law so that they can be relied upon in UK courts.

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 that it is incompatible with any ECHR rights covered by the HRA. This is because any such incompatible law is outwith the competence of the Scottish Parliament, and courts have the power to strike down any Act which is found to be so.

## The HRA does 3 main things:

**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 part of the Act is described as “making rights real” because being able to rely directly on Convention rights in all cases before British courts, made enforcement of these rights much more accessible to the British people, and therefore a greater reality in people’s daily lives.

**2. All public bodies and other organisations which carry our 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 HRA makes it unlawful for public bodies to act incompatibly with the rights contained in the ECHR. 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 the UK Parliament should be compatible with the rights set out in the ECHR - the Minister in charge of a Bill is required to make a statement that the Bill is compatible with ECHR 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 – it is up to the UK Parliament whether to amend them. This is a lesser impact than that of the ‘strike down’ power for Scottish Parliament Acts that are incompatible with the ECHR.

There is more information about the Human Rights Act here:

- The British Institute of Human Rights’ [Responding to the Independent Human Rights Act Review](#): what is the HRA and how does it work? – this is a really useful summary of the Act and what it is all about!
- Text outline of each element of the HRA from Leigh Day [here](#).
- Range of articles and sources related to the HRA on the [Consortium website here](#).

## Responding to the Review

The HRA Review is **not** considering the UK’s membership of the ECHR; it is also **not** considering the substantive rights set out in the Convention. However, it is looking at two significant parts of the Act and how it works. You can read the [Terms of Reference](#) of the review, and the [Call for Evidence](#) which closes 3<sup>rd</sup> March 2021. In addition, the Joint Committee on Human Rights at Westminster is also looking for [evidence around the HRA](#), closing 22<sup>nd</sup> March.

The Consortium has published an in-depth briefing on the HRA review and the potential implications for human rights in Scotland, written by Prof Nicole Busby, [available here](#).

Below are some of the points you may want to consider including alongside some questions about the types of examples that could usefully add weight to your evidence:

**Theme 1: the relationship between UK courts and the European Court of Human Rights (ECtHR).** Under the HRA, UK courts and tribunals are **not bound** by case law of the ECtHR, but are required by section 2 HRA to “**take into account**” that case law (in so far as it is relevant) when determining a question that has arisen in connection with a ECHR right.

The panel are looking for general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change. They also have a number of detailed questions which you can read in the [Call for Evidence](#).

You may want to respond with some or all of the following points:

- Case law from the ECtHR has helped to clarify what ECHR rights mean in practice. This has helped to provide detailed application which has helped courts, policy makers and those taking part in policy discussions to apply the principles of the ECHR to Scottish law and policy. Whether in bringing clarity and understanding of HRA application within the legislative process, or in policy making or in public authority duties under Section 6, the ECtHR jurisprudence strengthens and improves our human rights system.

\* Can your organisation include examples of where you, or your networks, have used ECtHR case law or details of implementation of the Human Rights Act in practice in any of your influencing work, in representing your members/service users, or in discussions with policy makers?

- The requirement on courts to take into account case law from the ECtHR has helped to provide greater legal certainty which has enabled greater clarity in how ECHR rights apply to individual circumstances and to the services that we deliver. In particular, this means that we are able to work with, and learn from the expertise and resources, of similar organisations and networks across Europe. We share mutual understanding of ECHR rights and what they mean in practice, including in evolving circumstances, because of our common relationship to the ECtHR and its case law.

\*Is your organisation part of Europe-wide networks that benefit from shared understanding of human rights? Have you drawn on cross-border models to enhance your own practice or to support your campaigns etc?

- The ECtHR has been a very positive force for good on the progression of human rights in Scotland. The Section 2 requirement on courts means that we can draw on this significant body of case law and benefit from best practice drawn from across Europe to ensure that we continue to protect and advance human rights to the greatest extent. We are concerned that any UK distancing from ECtHR jurisprudence could risk unhelpful divergence and reduction in rights standards for people in the UK.

\*Can you give examples in your area of work where case law from the ECtHR has helped to push on rights or maintain rights standards?

- The benefits of consistency in European approach to ECHR rights is particularly evident in areas where all European neighbours are tackling applying human rights law to shared new or evolving challenges. For example, all European countries need to make a rights response to issues such as COVID-19 impacts, to climate change and environmental protection issues, to digital innovation. We need to continue to reap the benefits of being fully part of the ECHR rights framework to evolve and progress our rights standards.
- The ECHR is a base minimum of standards, not a ceiling – we want our human rights framework in the UK to continue to reinforce and work out those minimums making good use of ECtHR case law, so that we can ensure that we go beyond that minimum to see more human rights protected and realised for more people. Far from forcing our courts to make judgments that are out of step with the UK norm approach, our UK human rights standards are higher in several areas.

\*Are there any examples where in your area of work, human rights standards in Scotland have gone beyond the baseline Convention rights?

- In developments around incorporating more of our international human rights into Scots law (as discussed below), the policy direction is to include international rights instruments such as from the UN Committee on the Rights of the Child, as interpretative tools to help Scottish courts to use this body of law to clarify and progress rights standards. This is reflected both in the current United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill and in the recommendations of the First Minister's Advisory Group on Human Rights. We support this use of international instruments to bring clarity and progress on human rights in Scotland.

## **Theme 2: the impact of the HRA on the relationship between courts, the government and Parliament.**

This is a broader theme and looks at the whole role of the courts around the HRA. The panel welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. Again, they welcome views on any strengths and weakness of the current approach and any recommendations for change. They also have a number of detailed questions which you can read in the [Call for Evidence](#).

You may want to respond with some or all of the following points:

- Judicial review is crucial in the protection of rights because Parliament makes laws for everyone, but how the law will be applied, particularly across such a wide range of services and changing circumstances, is uncertain.
- Courts can therefore ensure accountability for any ways in which **the law as applied falls short** and thus impacts fundamental human rights. This impact could be for example, on individuals who are particularly vulnerable, or who are facing multiple and overlapping forms of discrimination or disadvantage. (An example of this is where judicial review of the bedroom tax considered the impact on disabled people who needed an extra bedroom because of their care needs.) Judicial review in court is therefore also an important mechanism for identifying unintended or unfair consequences of seemingly neutral law that breach rights in practice.
- We know from our work that too often, people feel powerless and have their sense of agency and dignity damaged by decisions where they feel that no consideration has been taken of the impact upon their lives – judicial review is an important feature of our human rights framework which gives an **avenue to individuals to raise issues** around implications for their human rights. It also can give confidence to individuals and disadvantaged communities that, due to this ultimate role of the courts, the **preventative** and proactive building-in of human rights into public authority decision-making is improved.

\*Are there individuals who are your members or contacts who have used the HRA in court and would be happy to have their 'story' included?

- Under the HRA, the courts play a crucial role in examining law and policy from a human rights perspective, applying measured careful consideration of the impact on individuals or particular groups, within a clear and limited/well-tested framework. Far from making judgments which serve to contradict the

legislature's intention, they make our law better by providing a route to cautiously test, clarify and sharpen the law in its application.

\*Can you provide examples in your area of work where the courts have not found there to be human rights issues, or they have made very measured judgments?

## **The Human Rights Act Review and Scotland**

You may want to specifically highlight the potential impact of this Review on human rights developments in Scotland.

Scotland is on the precipice of major human rights reform and progression. The UNCRC Bill is currently making its way through the Scottish Parliament, world-leading in its approach to directly incorporating the UNCRC into Scots law. Meanwhile, a National Taskforce on Human Rights Leadership is considering next steps around incorporating economic, social and cultural rights, a right to a healthy environment and specific rights for women, disabled people and on race.

This progression is firmly built on the foundation of the Human Rights Act. Prof Nicole Busby writes:

“The IRHRA [Independent Review of the Human Rights Act] does not, on the face of it, contain any direct threat to the continuance of Scotland’s human rights journey...However, 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.’

You can read more on some of the potential consequences of any change to the Human Rights Act on human rights within devolution in Prof Busby’s briefing for the Consortium [here](#).

To discuss this Guide further or be part of the upcoming joint Consortium evidence, contact: [info@hrcscotland.org](mailto:info@hrcscotland.org); @HRCSotland