



## The Impact of the Human Rights Act 1998 in Scotland: A perspective from legal practice

Written Evidence to the Independent Review of  
the Human Rights Act, March 2021

### About JustRight Scotland

JustRight Scotland is a registered charity (SC047818) established by an experienced group of human rights lawyers. We use the law to defend and extend people's rights, working collaboratively with non-lawyers across Scotland towards the shared aims of increasing access to justice and reducing inequality.

We provide legal advice and representation on human rights and equalities issues across a range of legal areas, including: women's legal justice, trafficking and labour exploitation, EU citizen rights, migration and citizenship, disability and trans legal justice. Whilst our work is specific to Scotland, our work covers both devolved and reserved policy areas, and as such we endeavour to respond to policy consultations across both Scotland and UK, where appropriate.

As public lawyers for people who face systemic inequalities, discrimination and disadvantage, we use the provisions of the Human Rights Act 1998 (HRA) in our work, daily. In addition to providing direct legal advice to clients, we also run outreach legal surgeries and helplines, deliver rights information, training and legal education, and contribute to research, policy and influencing work.

We provide below a brief analysis of the impact of the HRA in Scotland, as well as recent developments which will lead to expansion of the human rights framework in Scotland by way of background to our response, before going on to address the two key themes of the call for evidence to follow.

We give consent for this response to be published along with other consultation responses.

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## The Human Rights Act 1998 (HRA) and Scotland

The HRA applies throughout the UK, including to the devolved Parliament of Scotland as a relevant public authority under the Act. The application of the HRA in Scotland with respect to primary and delegated legislation of the UK Westminster Parliament does not diverge significantly from its application elsewhere in the UK.

However, there are some distinctive aspects to the impact of the current framework as expressed in the HRA to Scotland as a consequence of how it is embedded in the Scotland Act 1998 which implements the devolution settlement. We also discuss below some key developments in the legal framework for protecting human rights in Scotland which will lead to divergence in approaches across the four nations of the UK.

Although we appreciate the current review does not propose to make recommendations with respect to withdrawal from the European Convention on Human Rights (ECHR) or repeal of the HRA, we set out below these key factors with respect to Scotland in order to highlight potential issues that could arise in the devolution settlement if there are amendments to the current framework.

Specifically, we maintain that the current devolution settlement relies, in part, on the unified approach across the four nations to protection offered by our core human rights framework – the ECHR as incorporated through the provisions of the HRA - and that amendment to the HRA may require consequential amendments to the devolution settlement and potentially consent of the devolved authorities.

We also submit that whilst we support divergence where devolved areas might seek to strengthen core human rights protections, as in Scotland, for example, we would oppose any amendment to the HRA which has the effect of weakening judicial oversight of the executive and undermine the practical application of the rule of law. Further, we see difficulties in practice with a lowering of standards through amendment of the HRA or the creation of divergent approaches, for instance, across our court systems in interpreting the same body of (ECtHR) jurisprudence.

### **The HRA and the Scotland Act 1998 (Scotland Act)**

The HRA is embedded into the Scotland Act as follows:

- 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 ECHR rights covered by the HRA as it would be outside the legislative competence granted to the Scottish Parliament by the Scotland Act. Scottish 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.
- Section 31 of the Scotland Act also 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.

- Section 57(2) of the Scotland Act provides that a member of the Scottish Government does not have the power to make subordinate legislation or to do any other act in so far as the legislation or act is incompatible with the ECHR rights
- Section 101 of the Scotland Act requires courts to take a similar approach in relation to Acts of the Scottish Parliament and subordinate legislation as taken under the HRA with respect to UK legislation.

As discussed in a briefing paper by Justice: “[Devolution and Human Rights](#)” (February 2010), unlike the HRA, the Scotland Act does not establish any duty on the Scottish courts to take into account Strasbourg case law. However, in *Clancy v Caird*, 2000 SLT 546, Lord Sutherland stated that it is the duty of the Scottish courts to have regard to the decisions of the European Court of Human Rights (ECtHR) when considering the interpretation of the ECHR. As his Lordship explained, these decisions are not precedents and should not be treated in the same way; but he went on to say that ‘[i]nsofar as principles can be extracted from these decisions, those are the principles which will have to be applied’ (at 549).

Lord Hope has said since the meaning of the ECHR rights is the same under the devolution statutes and the HRA, ‘there is no doubt that the same material must be considered’ (*HM Advocate v R* [2004] 1 AC 462, at 54). As such, the duty to take into account ECtHR case law under Section 2 HRA has been implied by the Scottish courts and the House of Lords to be the same duty when deciding compatibility with ECHR rights as a devolution issue.

Although the remit of the current review falls short of the repeal of the HRA, it is widely accepted that the observation and implementation of the ECHR is a specifically devolved matter, and we believe that pursuance of the HRA’s unilateral repeal by the Westminster Parliament would give rise to complications surrounding Scotland’s devolved settlement.

Further, this could result 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’.

### **Recent Developments in the Human Rights Framework in Scotland**

For the reasons set out above, we submit that proposals to reform UK constitutional statutes which will potentially lead to a significant change in the HRA could lead to harmful divergence between the four nations, and also require to take into account the wider context governing development of differing frameworks within those four nations.

Scotland has been steadily progressing towards significant reform of human rights laws, with the aim to strengthen protections and rights for individuals and more closely align our legal frameworks with global standards. A [Bill to Incorporate the UN Convention on the Rights of the Child \(UNCRC\) into Scots law](#) has been introduced to the Scottish Parliament and is expected to pass in the current session.

This Bill takes a maximalist approach within the devolved settlement, and amongst other things, proposes to make UNCRC rights justiciable in Scots domestic law.

In parallel, a [National Taskforce on Human Rights Leadership](#) is developing recommendations for a broader new human rights statutory framework for Scotland. Set to embed a range of economic, social and cultural rights as well as the right to a healthy environment in Scots law for the first time, the Taskforce is also considering incorporation of the Convention to Eliminate Discrimination Against Women (CEDAW), the Convention on the Rights of Disabled People (UNCRPD) and the Convention to Eliminate Racial Discrimination (CERD).

Taken together, these developments point towards a very different future human rights landscape in Scotland as compared to in the other nations of the UK.

The above said, the HRA remains the bedrock of human rights protection in Scotland. In this context we maintain that any amendments to the HRA and how it operates could have detrimental impacts on these positive advances in Scotland and strain the devolution settlement.

Professor Nicole Busby, in a briefing paper titled: "[Human Rights and Devolution: The Independent Review of the Human Rights Act: Implications for Scotland](#)" (Civil Society Brexit Project, February 2021) states:

*'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.'*

Prof Busby goes on to state:

*'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...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.'*

### **The HRA and Other Devolved Authorities – Northern Ireland**

We submit that the importance of taking into account the impact of amendments to the HRA in the devolved authorities is expressed with greatest clarity and concern with reference to the position of Northern Ireland. The incorporation of the ECHR was a core principle of the Belfast/Good Friday Agreement (GFA), regarded as so important that the Irish Government was also committed by that agreement to

incorporate the ECHR under the 'equivalence' provisions, leading to the European Convention of Human Rights Act 2003.

We refer specifically to the response submitted to this call for evidence by the [Committee on the Administration of Justice \(CAJ\)](#) Northern Ireland, which maintains that any amendment to the HRA insofar as it has effect in Northern Ireland would constitute a flagrant breach of the GFA and could potentially destabilise the peace settlement. Further, we note that the GFA requires any amendment of the HRA to be subject to a process of review between the UK and Irish Governments in consultation with the NI Assembly parties, and submit this strengthens the position that in law and as a matter of principle, the devolved authorities and their legislatures / assemblies must be consulted, and may require to consent with respect to any such proposed amendment.

We now turn to brief analysis of the two key themes of this call for evidence:

### **Theme One: The relationship between domestic courts and the European Court of Human Rights (ECtHR)**

We support the maintenance of the current framework which governs the relationship between domestic courts and the European Court of Human Rights (ECtHR), as set out in the Section 2 duty to "take into account" that jurisprudence (insofar as it is relevant) when determining a question that has arisen in connection with a Convention right.

Specifically, we believe that:

- The duty to "take into account" ECtHR jurisprudence works well in practice and there is no substantial evidence which supports the argument that Section 2 requires amendment.
- When taking into account the jurisprudence of the ECtHR, domestic courts and tribunals have succeeded in striking the correct balance in deciding issues falling within the margin of appreciation, in line with the principles set out in *Handyside v United Kingdom* (1976), *Evans v United Kingdom* (2006), *Hatton v United Kingdom* (2003), *Pretty v United Kingdom* (2002) and other relevant case law.
- The current approach to 'judicial dialogue' between domestic courts and the ECtHR does satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK. Consistent with our views that this is the case, we believe that dialogue can be strengthened and preserved through maintenance of the current framework.

### **A Perspective from Legal Practice**

JustRight Scotland was founded by human rights lawyers, and an important part of how we do our work is ensuring that we raise legal arguments grounded in

international human rights law, where appropriate, and that we share our work with others, in order to encourage greater use of human rights law in securing remedies for individuals, both in and outside of court.

Our lawyers use the HRA to defend people's rights on a daily basis, and we strive in our public engagement and professional training to expand people's understanding of human rights and empower them to use rights-based framing to tackle issues in their daily lives.

We provide legal advice and representation to hundreds of people across Scotland every year, increasing access to justice for groups who are disadvantaged, marginalised, or otherwise vulnerable or at risk of harm – including survivors of gender-based violence, survivors of trafficking and exploitation, asylum seekers and refugees, looked after children in care, people who are destitute or street homeless, disabled people and trans people.

### **Case Studies: Protecting Rights Using the HRA in Legal Practice**

Our **Scottish Refugee & Migrant Rights Centre** relies on Articles 2, 3 and 8 ECHR (right to life, freedom from torture, private and family life) in order to seek and obtain international protection for people seeking asylum and fleeing other forms of harm from abroad. We also use Article 8 ECHR (family life) as the starting point for framing complex refugee family reunion applications, which help to reunite families who have fled harm from abroad and are scattered across different countries. We rely on Article 8 ECHR (private life) to make immigration applications for children in care with irregular migration status, on the basis that their past, present and future lie in the UK and those significant ties constitute a basis for creating a secure route to settlement.

We also see Articles 3 and 8 ECHR as important safeguards to prevent inhuman and degrading treatment in the UK as a consequence of a failure of services to protect and support vulnerable people, including people who require social care and people who are destitute or homeless.

Our **Scottish Anti-Trafficking & Exploitation Centre** (SATEC) also assists people seeking international protection and additionally relies on Article 4 (slavery and forced labour) to protect victims of trafficking from the harms of re-trafficking and further exploitation.

Article 2 (right to life) is an important safeguard which establishes a duty of the state to take appropriate steps to protect people at risk of violence, including gender-based violence, and this is crucial to the work of our **Scottish Women's Rights Centre** and our **Scottish Just Law Centre**.

We also use Article 8 ECHR (private and family life) across all of our centres. This includes challenges to acts by public authorities that violate people's right to privacy, a refusal to accept or recognise an important aspects of an person's stated identity, or because of a breach of rights caused by sharing personal information, without consent.

Our belief that the current framework strikes the right balance in protecting individual rights and maintains a productive dialogue is grounded in our experience in legal practice across the areas of law, in which we see on a daily basis the impact of a consistent and successful approach taken by our courts and tribunals to “taking into account” ECtHR jurisprudence in their work.

### **Wider Benefits of the Application of the HRA in Scotland**

We also maintain this consistency is important to establishing clear understanding of the requirements and limits of human rights protections for Scottish Government, and frontline professionals working within statutory authorities and third sector and private organisations, in providing services and support to the people we assist.

Further, we would add that the positive and constructive dialogue between our courts and the ECtHR has had the benefit of bringing ECHR standards into the mainstream of how the Scottish Government and civil society in Scotland analyse the application of human rights protections in policy and practice in Scotland.

We specifically refer to the response to this call for evidence submitted by the [Human Rights Consortium Scotland](#) on behalf of civil society organisations across Scotland which discusses in greater detail how the HRA has:

- provided vital protection for individuals, particularly those who are most marginalised. If it had not been for the protection of the HRA, their voices would not have been heard, and decisions would have been taken that would have ridden roughshod over their lives, families and dignity;
- helped to increasingly drive the development of human rights decision making in public authorities;
- led to better law and policy making in the Scottish Government and Parliament;
- improved public services.

### **Theme Two: The impact of the HRA on the relationship between the judiciary, the executive and the legislature**

We understand the current review will examine whether the way the HRA balances the roles of the judiciary, the executive and the legislature in protecting human rights in the UK risks “over-judicialising” public administration and draws domestic courts unduly into questions of policy.

We also support maintenance of the framework established by sections 3 and 4 of the HRA and believe that no amendment leading to a narrowing of judicial powers or repeal is necessary to these provisions.

Specifically, we maintain:

- The domestic courts and tribunals seeking to read and give effect to legislation compatibly with the ECHR rights (as required by section 3), do interpret legislation in a manner consistent with the principles of parliamentary sovereignty and judicial deference.
- If section 3 is proposed to be amended or repealed, we maintain that change should not be applied to interpretation of legislation enacted before the amendment/repeal takes effect, in order to support certainty in the interpretation of legislation dealt with in previous cases.
- Under the current framework, courts and tribunals have struck a reasonable balance in dealing with provisions of subordinate legislation that are incompatible with the HRA Convention rights and no change is required to this approach.

### **Declarations of Incompatibility – Limited in Effect**

The discretionary power arising under Section 4 to make a declaration of incompatibility only has the effect of triggering a power under Section 10 HRA to take remedial action and does not bind any party or otherwise affect the continuing operation, validity, meaning or effect of the legislation.

Indeed, evidence shows that there can be a significant period time elapsing between declarations of incompatibility being made and a remedial action taken. For example, in the *Smith v Scott* [2007] CSIH 9, a Scottish case on prisoners' voting rights, a declaration of incompatibility was made following the ECtHR ruling in *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, yet this non-compliance was not remedied until the passage of the Scottish Elections (Franchise and Representation) Act 2002 – some 13 years later.

To that extent, the current framework strikes a conservative balance between the judiciary and the legislature, which preserves and underlines the principles of parliamentary sovereignty and judicial deference.

It is worth noting, in seeking to address this deficiency, the Scottish UNCRC Incorporation Bill proposes to strengthen protections in this area, mandating a Minister to report on what actions their department is taking within six months of issuance of a declaration of incompatibility under the Act.

### **Declarations of Incompatibility – Rarely Exercised**

Further, the evidence establishes that our courts rarely exercise this discretionary power, either in relation to primary or delegated legislation.

The Ministry of Justice's most recent annual report to the Joint Committee on Human Rights: "[Responding to human rights judgments: 2019-2020](#)" (December 2020) lists 43 declarations of incompatibility made from October 2000 to July 2020 (of which 9 have been overturned and 1 is potentially appealable) and sets out that of these, 8

have been corrected by remedial order and 15 by amendments to primary or secondary legislation.

With respect to the approach of our courts to challenges of delegated legislation on the basis of the HRA, we refer to research recently published by Tomlinson, Graham and Sinclair: "[Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?](#)" (UK Constitutional Law Blog, 22 Feb 2021). The findings establish:

- There are not many successful challenges to delegated legislation based on the HRA – just 14 cases in the last seven years.
- The scrutiny a piece of delegated legislation receives when judicially reviewed is not infrequently the first substantial scrutiny it has ever received.
- There is scant evidence of judicial overreach and decision-making is more often characterised by judicial deference.
- When courts do find delegated legislation incompatible with HRA, the discretionary power to “strike down” is used sparingly – and only where the incompatibility cannot be remedied because of a provision of primary legislation. In the 14 cases referenced above the court quashed or otherwise disapplied key provisions in just four of them. Courts more commonly make a declaration of incompatibility which does not affect the continuing validity of the legislation – as in *R (TD) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618.

We would add that the manner in which our courts scrutinise delegated legislation is orthodox and not confined to the HRA – insofar as it is the role of the courts to ensure that government acts within the laws made by Parliament as primary legislation.

Finally, we would note that the approach taken in the Scottish UNCRC Incorporation Bill illustrates an interesting approach to striking this balance. The Bill grants Scottish courts a “strike down” power but provides for measures whereby the courts refer the case to the Lord Advocate and the Scottish Children’s Commissioner for an opportunity to intervene and offer views. This creates formal opportunities for the Scottish Government and the Commissioner to participate in an action, even where raised against another public body. The same principle applies to declarations of incompatibility as set out in [Section 21 of the same Bill](#).

## Conclusion

In summary, we maintain that the current devolution settlement relies, in part, on the unified approach across the four nations to protection offered by our core human rights framework – the ECHR as incorporated through the provisions of the HRA. We raise a concern that amendment to the HRA may require consequential amendments to the devolution settlement and, in some cases, consent of the devolved authorities.

We add that whilst we support divergence where devolved areas might seek to strengthen core human rights protections, as in Scotland, for example, we would oppose any amendment to the HRA which has the effect of weakening judicial oversight of the executive and undermine the practical application of the rule of law.

Further, we see difficulties in practice with a lowering of standards through amendment of the HRA or the creation of divergent approaches, for instance, across our court systems in interpreting the same body of (ECtHR) jurisprudence.

Finally, we believe that the HRA is an effective framework for promoting and protecting individual rights in the UK and that the courts have engaged in a constructive dialogue with the ECtHR. We believe this has helped to embed positive human rights practice in Scottish Government and society, and has had other positive effects, including improving law and policy in Scotland and strengthening connections with good practice in other European jurisdictions.

We believe the courts have played an important role in safeguarding the rule of law and that Government remains accountable for its actions, but see no evidence of judicial activism or divergence from the principle of judicial deference. We note, for instance, there have been only a handful of exercises of the “strike down” powers, in the context of a 20-year period marked by high volumes of delegated legislation.

We add that there are positive examples, including in the Scottish UNCRC Incorporation Bill, of other approaches to striking the right balance between the judiciary and the executive roles in the exercise of their respective powers in the aim of ensuring the rights of children in Scotland.

For the above reasons, we support maintenance of the HRA as currently drafted, and no change to the relationship between the UK courts and ECtHR jurisprudence and or to the current operation of Sections 2, 3 and 4 of the HRA.

JustRight Scotland  
3 March 2021