



Law Society
of Scotland

Joint Committee on Human Rights

Inquiry on 20 years of the Human Rights Act

September 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub-committee welcomes the opportunity to respond to the Inquiry by the Joint Committee on Human Rights: Inquiry on 20 years of the Human Rights Act. The Joint Committee has the following comments to put forward for consideration.

General Comments

1. Has the HRA succeeded in its aims as they were set out in 1997/8?

We believe that the Human Rights Act 1998 (the HRA) is a key component of our society and an effective tool for the protection of our rights through the domestic courts in the UK. The HRA provides an effective means for individuals to challenge the actions of the State and seek redress in a more accessible, timely and affordable way than was possible before incorporation of the ECHR rights. The HRA has had a positive impact on the development of law and policy both in the UK and in Scotland. We therefore support the retention of the HRA as stated in our Priorities Documents for the UK General Election in 2017 and the Scottish Parliament Elections in May 2016.

On the one hand the HRA has succeeded in its aims but we believe that the interpretation of "public body" is too narrow and should be amended to meet current circumstances. We believe the HRA should act as a 'floor' on which rights can rest rather than a ceiling which limits the expansion of rights.

We also believe that the lack of availability of legal aid impedes the achievement of the HRA's objectives, Human Rights Bodies also have variations in powers across the UK which impacts adversely on achieving the objectives.

2. Have any of the concerns raised about the HRA been realised or have there been any unforeseen consequences?

In 1997, the Government proposed incorporating the European Convention on Human Rights (ECHR) into domestic law. In the White Paper, *Rights Brought Home: The Human Rights Bill* the Government argued that national legislation, through the proposed HRA, would allow people in the United Kingdom to raise rights claims without inordinate delay and cost. Prior to the HRA it took on average five years to get an action into the European Court of Human Rights after domestic remedies had been exhausted; and the average cost was around £30,000.

The HRA received Royal Assent in November 1998, and came into effect in October 2000. The HRA incorporated into UK law most of the rights contained in the ECHR and provided a remedy for breach of Convention rights available in the UK courts, without the need to go to the ECtHR. Many supporters of the Act also viewed it as a mechanism for plugging gaps in the UK's common law and statutory system of rights protection.

The HRA modernised British rights protection. The HRA tries to strike a balance between parliamentary sovereignty on the one hand and rights protection on the other. For example, Section 19 provides for parliamentary process, in which the minister in charge of a bill must make a written statement either attesting to the compatibility of the bill with the Convention rights or, if incompatible, stating the Government's intention "to proceed with the bill".

By requiring the Government to certify the rights implications of proposed legislation, the HRA enhances ministerial accountability through Parliament. Furthermore in addition to the parliamentary process, Sections 3 and 4 provide for a rights protection role for the courts. Under those sections the courts require to interpret legislation, and the UK Supreme Court and courts such as the Court of Session in Scotland to declare legislation "incompatible" with the HRA. Such a declaration does not "affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and . . . is not binding on the parties to the proceedings in which it is made". The HRA preserves the classic constitutional position in the UK that the courts cannot strike down Acts of the UK Parliament.

As noted by Laëtitia Nakache of the Constitution Unit in her blog the Equality and Human Rights Commission [report of the Human Rights Inquiry](#), (June 2009) confirmed "engagement with human rights has clear benefits for public services" and that the HRA has been taken seriously by the civil service, the NHS and the police.

The Report to the Joint Committee on Human Rights on the Government's response to Human Rights judgments 2014–16 confirms that the HRA is the basis of litigation and is subject to interpretation by the courts on a frequent basis:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570753/responding-to-human-rights-judgments-2014-to-2016.pdf

Since the HRA came into force on 2 October 2000 until the end of July 2016, 34 declarations of incompatibility have been made.

Some academic and political commentators have criticised the HRA on the basis:

- a. that the ECHR gives too much protection to terrorists and makes decisions by the courts ineffective.
- b. that sections 3 and 4 (duty to interpret in a compatible way and the declaration of incompatibility) undermine the legislative supremacy of Parliament.
- c. that section 2 (the duty of national courts to 'take into account' the decisions of the Strasbourg court) is perceived as making the Strasbourg court dominant over the UK courts.
- d. that the concept of the 'living instrument', or 'living tree' or 'evolutive interpretation' is an approach to interpretation adopted by the European Court of Human Rights which enables it to interpret the Convention in the light of present day conditions and therefore reflect changing social attitudes and changes in the circumstances of society. However this approach is also adopted by domestic courts too.

3. Could the HRA be improved?

We believe that there is room for improvement of the Act by the following amendments:-

- a) by amending section 10 to require corrective legislation (in the light of a declaration of incompatibility) to be amended in a way which permits more thorough scrutiny than the current method; and
- b) by expanding and clarifying the interpretation of the HRA to private bodies exercising public functions or providing public services.

We are of the opinion that any improvements to the Act must build on and enhance the European Convention on Human Rights.

An improved Act could include rights which have commonly been characterised as constitutional, for example, the right to access to justice or the right to have human rights determined by a court;

We are cautious about including other rights which are characteristically considered as rights within one legal system in the United Kingdom, such as, "the right to trial by jury". In Scotland there is no such right as whether a case goes to jury trial is determined by the forum which is at the instance of the prosecutor.

An improved Act could include:-

- a) rights which are currently contained in EU and other UK or devolved legislation;

- b) economic and social rights currently covered in the International Covenant on Economic, Social and Cultural Rights although we accept that some rights maybe the matter of political and social debate.
- c) rights contained in other international treaties, for example the Convention on the Rights of the Child or the International Covenant for Civil and Political Rights; and
- d) rights derived from EU Law.

The Society is of the view that the fundamental purpose of a rights legislation is to ensure that certain human rights are guaranteed and protected against the State's capability to legislate and the court's power to reach final decisions in a way which is contrary to those rights. These rights should be limited only to the extent which it is absolutely necessary in order to protect the common good and the rights of others. Inclusion of responsibilities is fundamentally a political question. Many rights in e.g. ECHR have qualifications which provide a balance of the rights of the individual with competing interests.

4. The future of the HRA

There is a balance to be struck between the political protection of human rights and their judicial protection. The current arrangements under the Scotland Act 1998 provide a much stronger way of dealing with non-compliance with ECHR by Scottish Ministers than that which the HRA provides for the UK Parliament and UK Ministers.

If political protection is needed that requires further debate about the issue of entrenchment of rights. Procedurally entrenching a HRA for the United Kingdom could be done by a special majority voting system for both Houses of Parliament and an amendment to the Parliament Acts requiring both Houses to consent to the Bill subject to the special majority. But ultimately these political and procedural provisions are subject to the understanding that Parliament is sovereign and a previous Parliament cannot bind a future one.

As long as the UK remains a party to the ECHR, the ECHR rights will be binding on the UK, and individuals will be able to take cases to the European Court of Human Rights (ECtHR). If convention rights became no longer justiciable in UK law and the ECHR is no longer directly incorporated into the UK's domestic law, this would mean that individuals would have to go to the ECtHR and would be unable to seek legal enforcement of their ECHR rights through the UK court systems. This was the situation prior to the enactment of the HRA. The application of the ECHR could not be considered and decided on by the UK courts, so the compliance of the UK with the ECHR was decided by the ECtHR once all domestic remedies had been exhausted. The only role the UK courts had in applying the ECHR rights was in statutory interpretation (where a provision was ambiguous and the courts applied a presumption that Parliament did not intend to breach its treaty obligations) and in development of the common law e.g. *Derbyshire CC v Times Newspapers Ltd* [1993] UKHL 18.

Nevertheless, prior to the HRA, following a decision of the ECtHR that the UK was in breach of its obligations under the ECHR, the UK then, as now, would correct the breach to be compliant with its obligations under international law. Pre-HRA, decisions of the ECtHR still had a significant impact on the

policy and law of the UK. For example, the prohibition of corporal punishment in State schools was a direct result of the decision in *Campbell and Cosans v UK* in 1982 which held such practices to be a breach of Article 2 of Protocol 1, and later cases on the issue of corporal punishment of children finding violations of Article 3 (see *Tyrer v UK* (1978) and *A v UK* (1998)). In addition, the decision in *Malone v UK* (1985) on State interception of communications finding a breach of Article 8 resulted in the Interception of Communications Act 1985, with later cases extending protections from public communications networks to private. Other examples of the UK changing domestic law in reaction to decisions of the ECtHR include abolishing the prohibition of homosexuals serving in the military (*Lustig-Prean and Beckett v UK* (1999) and *Smith and Grady v UK* (1999)), and changes to the provision of legal aid for civil cases in response to *Airey v Ireland* (1979).

There were also numerous cases where the ECtHR's finding of a breach by the UK of its obligations under the ECHR lead to a significant change in the policy or procedures of the UK. Finally, it is interesting to note that following the decision in *Brogan v UK* (1988) that detention without any judicial supervision was a breach of Article 5, the UK derogated from Article 5(3) on the grounds of public emergency. These examples suggest that, even though the ECHR was not incorporated into domestic law, the UK government felt obligated to recognise and address the decisions of the ECtHR.

There is one significant exception to this approach: prisoners voting rights. The European Court of Human Rights (ECtHR) ruled in *Hirst v the United Kingdom (No 2)* [2005] ECHR 681 that the blanket ban on British prisoners exercising the right to vote was contrary to the ECHR Article 3 of Protocol 1.

As a matter of general principle the United Kingdom should seek to comply with its international obligations including those under the ECHR. Fundamentally, this was an issue of support for the rule of law – a value which the United Kingdom seeks to uphold.

Therefore it is good that the UK has changed its policy and guidance to make clear that prisoners can register to vote, and can vote, while released on temporary licence. Most eligible prisoners will probably be on short sentences, and will have been granted temporary release, primarily for employment-related reasons.

Consequences in relation to Scotland

The HRA is entrenched within the Scotland Act so that it is expressly outwith the competence of the Scottish Parliament to modify the HRA.

Section 29 of the Scotland Act 1998 concerns the competence of the Scottish Parliament. Law made by the Parliament 'is not law' if it falls outwith the competence of the Parliament. For the present purposes we are focusing on Section 29(d) which provides that a provision is outside the legislative competence of the Parliament 'if it is incompatible with any of the Convention rights...'. 'Convention rights' is defined in Section 126 of the Scotland Act as having the same meaning as in the HRA.

There have been five Scottish cases where the legislation has been found to be outside the legislative competence of the Scottish Parliament on the basis of non-compliance with Convention rights.

In *Christian Institute and others (Appellants) v. The Lord Advocate (Respondent) (Scotland)* [2016] UKSC 51, the Supreme Court found that the information sharing provisions of the Children and Young People (Scotland) Act 2014 were outside the Scottish Parliament's legislative competence. The Supreme Court found that the information sharing provisions of the 2014 Act breached Article 8 of the ECHR on the right to respect for private and family life.

In *Salvesen v Riddell* [2013] UKSC 22, the Supreme Court upheld a challenge to s.72 of the Agricultural Holdings (Scotland) Act 2003 on the grounds that it breached the ECHR right to property (Article 1 of Protocol 1, ECHR). The provision restricted a landlord's right to terminate a tenant's lease. At the time of the challenge, the relevant provision had already been in force for a number of years. The Court made an order under s.102 (2) (b) of the Scotland Act 1998, suspending the effect of the judgement for 12 months to enable the Scottish Parliament and Government to correct the defect. The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 was issued in response.

In *Cameron v Cottam*, [2012] HCJAC 19 the Court found that s.24 of the Criminal Justice and Licensing (Scotland) Act 2010 which amended bail conditions, breached Article 5 ECHR, and was therefore outside the competence of the Scottish Parliament. This meant that the particular provisions were 'not law', even if they were not repealed by another piece of legislation. The Court made a section 102 order limiting the retrospective effect of its decision. The Order provided that cases and appeals which had already concluded would not be affected by the judgment. This prevented existing convictions being challenged on grounds relating to the provision in question.

AB v Her Majesty's Advocate [2017] UKSC 25 this appeal considered whether the High Court erred in holding that the provisions of the Sexual Offences (Scotland) Act 2009, which prevent the defendant from relying on the 'reasonable belief' defence, specifically Section 39(2)(a)(i), are compatible with ECHR, arts 6, 8 and 14. The Supreme Court unanimously allowed the appeal. The Supreme Court held that there was interference with ECHR, art 8, and that this was disproportionate, because prior charges did not give the official warning or notice that consensual sexual activity with children between the ages of 13 and 16 was an offence. Therefore the prior charges failed to alert the person charged to the importance of a young person's age in relation to sexual behaviour, and so could not justify depriving that person, if later charged with a sexual offence against an older child of the reasonable belief defence. As a result, the Court held that s 39(2)(a)(i) was not lawful. Proceedings were remitted to the High Court of Justiciary for it to suspend or vary the effect of the decision.

P v The Scottish Ministers [2017] CSOH 33 a jobseeker was denied employment in a care home following a disclosure check which revealed he had been made subject to a supervision order for the offence of lewd and libidinous practices. He was 14 years old at the time and the matter had been handled in the Children's Hearing system. He petitioned for judicial review, challenging an aspect of the Scottish Government's statutory scheme (under the Protection of Vulnerable Groups (Scotland)

Act 2007) regulating the disclosure of the criminal convictions of persons who wish to obtain employment in 'regulated work'. The Court declared that, insofar as they require automatic disclosure of P's conviction before the Children's Hearing, the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 unlawfully and unjustifiably interfered with the petitioner's right under Article 8 of the European Convention on Human Rights, and Scottish Ministers had no power to make the provisions in terms of section 57(2) of the Scotland Act 1998.

The HRA was stated by Michael Gove MP the then Lord Chancellor and the Secretary of State for Justice to be 'neither devolved or reserved' (House of Lords EU Justice Sub-committee on 2 February 2016). However that is the answer to the wrong question. The question should not be 'Are human rights devolved or reserved?' but rather 'What is the legislative competence of the Scottish Parliament in relation to the HRA?'

Human Rights are not reserved; the Scottish Parliament can legislate, and has done in the area of Human Rights. The HRA is, however, 'Protected Legislation' under Schedule 4 para 1(2) (f) of the Scotland Act 1998. It therefore falls within Section 29(c) of the Scotland Act and making law modifying it is outwith the competence of the Scottish Parliament.

Amendment of the HRA may require the amendment of the Scotland Act 1998 in a way which would affect the competences of both the Parliament and Scottish Ministers.

Since the Scotland Act 1998, the Government of Wales Acts 1998, 2006 and 2014 and the Northern Ireland Act 1998 diversity of rights is more evident. Indeed in the case of the Scottish Parliament, although the Parliament cannot amend the HRA it can and does legislate positively in the field of Human Rights.

Accordingly Human Rights protections apply in different ways across the UK and in its constituent jurisdictions through the twin track approach of the HRA and the various devolution statutes applying to the devolved arrangements in Scotland, Wales and Northern Ireland.



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