



Law Society
of Scotland

Her Majesty's Most Gracious Speech

Briefing on the Government's proposed Bill of Rights

May
2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Law Society of Scotland has considered the terms of Her Majesty's most gracious speech to both Houses of Parliament. The Speech contains a large number of bills. In this briefing we focus on the Bill of Rights which the Government intend will ensure "our human rights framework meets the needs of the society it serves and commands public confidence".

Our comments

The Government consulted on proposals for A Modern Bill of Rights [Human Rights Act Reform: A Modern Bill of Rights - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/human-rights-act-reform). Earlier this year. This consultation sought views on the Government's proposals to revise the Human Rights Act 1998 and replace it with a Bill of Rights. The Government asserted these reforms are necessary in order to restore "a proper balance between the rights of individuals, personal responsibility and the wider public interest".

The Law Society of Scotland submitted a response to the consultation [Human rights | Law Society of Scotland \(lawsociety.org.uk\)](https://www.lawsociety.org.uk/human-rights-act-reform) whilst answering the consultation questions we highlighted issues relating to the situation in Scotland which are contained in our General Comments:

A Modern Bill of Rights and Convention Rights in Scotland

We are reassured that the consultation *Human Rights Act Reform: A Modern Bill of Rights* makes it clear in paragraph 183 that: "Under these proposals, the UK would remain party to the Convention, with the rights in the Convention sitting at the heart of a Bill of Rights" and in paragraph 184 that: "The rights as set out in Schedule 1 to the Human Rights Act will remain." This will go some way to respecting the rule of law and help to ensure that the UK complies with

its international obligations under the ECHR and the Trade and Cooperation Agreement between the UK and the EU articles 524 and 763.

However, the repeal of the Human Rights Act 1998 is likely to cause confusion as to the respect which the UK accords human rights and to create a lack of clarity and coherence in the application of the law. We do not however agree with the conclusion expressed in paragraph 184 that: The key problems have arisen from the way in which those rights have been applied in practice, at both the Strasbourg and domestic levels.

Given that there is no intention to withdraw from the Convention, a major cost of making it harder to secure a domestic remedy, which appears to be an objective of the consultation will be increased recourse to Strasbourg.

Enforcing Convention Rights in Scotland

It is important, however, to point out in relation to the application of Convention Rights in Scotland that questions as to whether Acts of the Scottish Parliament (“ASP”) or subordinate legislation or other Page 3 executive acts by Scottish Ministers are incompatible with Convention rights, are usually not dealt with under the Human Rights Act (HRA) (although they could be) but under the Scotland Act 1998 (SA). Under section 29(1) and (2) (d) of the SA, a provision in an ASP is “not law” if it is incompatible with any of the Convention rights. Accordingly, any challenge to a provision in an ASP on the grounds that it is incompatible with a Convention right is a “devolution issue” and, as such, requires to be brought under the SA. This is so even although an ASP also is included in the definition of “subordinate legislation” in section 21 of the HRA and so could also be regarded as unlawful under section 6(1) of that Act. Similarly, under section 57(2) of the SA, a member of the Scottish Government has “no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights.”

Accordingly, any challenge to such an act on that ground can be brought under the SA even although that act is also unlawful under section 6(1) of the HRA. It was originally held by the Judicial Committee of the Privy Council that the challenge to executive acts by a member of the Scottish Government had to be brought under the SA (see *R v HMA* 2002 UKPC D3 Lord Rodger at para 128) but it was later held by the Appellate Committee of the House of Lords that it could be brought under either Act but, if it was brought under the Scotland Act, it was not subject to the procedural restrictions in the HRA, such as the time bar for claiming damages in section 7(5) of the HRA (*Somerville v Scottish Ministers* 2007 UKHL 44). The specific point in issue of this decision has been resolved by amendment of the SA which has harmonised the time bar provisions between the two Acts. However, the key point is that under the SA the Scottish Ministers have no defence to a breach of Convention Rights under the SA as they do under section 6(2) of the HRA.

There have been five cases to date in which Scottish Parliament legislation has been held to be ‘not law’. These cases all relate to specific provisions within the statutory scheme rather than to the statute itself or the overall policy objectives. Christopher McCorkingdale, Aileen McHarg and Paul Scott in *The Courts, Devolution and Constitutional Review* 36 *U. Queensland L.J.* 289 (2017) identify that this is so because “the Supreme Court has so far adopted something of a ‘dialogic’

remedial approach as opposed to a rigid and final strike down". 18 ASPs have been subject to judicial review. 12 on the basis that incompatibility with Convention rights was the dominant ground of challenge. Five cases succeeded on Convention rights grounds: *Cameron v Cottam* 2013 JC 12; *Salvesen v Riddell* 2013 SC (UKSC) 236; *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29; *P v Scottish Ministers* 2017 SLT 271; *AB v HMA* 2017 SLT 401. In two of the three successful civil challenges, *Salvesen* and *Christian Institute*, the Supreme Court exercised its discretion under section 102(2)(b) of the Scotland Act 1998 to suspend the effect of its decisions (that section 72(10) of the Agricultural Holdings (Scotland) Act 2003 and the information sharing provisions of Part 4 of the Children and Young People (Scotland) Act 2004 respectively) were incompatible with Convention rights. This allowed an opportunity for the Scottish Parliament and the Scottish Ministers to take measures in order to remedy the incompatibilities. *McCorkingdale*, *McHarg* and *Scott* argue that this dialogue between the Court and the devolved institutions is clear in the *Christian Institute* case in which the Court felt it 'inappropriate to Page 4 propose particular legislative solutions' but warned the executive and legislature that minimal amendments that failed to address the breach would run the risk of further judicial sanction.

In the criminal cases *Cameron* and *AB*, each of which raised 'compatibility issues' relating to criminal procedure – the decisions that section 58 of the Criminal Justice and Licensing (Scotland) Act 2010 and section 39(2)(a)(i) of the Sexual Offences (Scotland) Act 2009 respectively were 'not law' were returned to the High Court of Justiciary (Scotland's supreme criminal court) for it to determine whether or not to suspend or to vary the effects of the resulting invalidity.

Legislative Consent

Another feature which the consultation does not address is that of legislative consent. This was referred to in the Joint Committee on Human Rights Third report of session 2021-2022, The Government's Independent Review of the Human Rights Act at paragraph 253 which acknowledges: "It has also been argued that amending the HRA would require the consent of the Scottish Parliament. Section 28 of the SA states that "it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament". This is the statutory expression of what is known as the Sewel Convention. Although in *Miller 1* the Supreme Court found that the convention was not legally enforceable despite its statutory entrenchment, they emphasised that the convention has an important role in facilitating harmonious relationship between the UK Parliament and the devolved legislatures. 254. There is no clear consensus as to the extent to which human rights are a devolved matter. The SA specifically prohibits the Scottish Parliament from amending the HRA. However, whilst the conduct of international relations is reserved, "observing and implementing ... obligations under the Human Rights Convention" is specifically excluded from this. Thus, it is argued that responsibility for the observation and implementation of human rights is at least to some extent devolved to the Scottish Parliament."

We endorse the position that if a Modern Bill of Rights affects the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers the consent of the Scottish Parliament will be necessary.

Impact on the Scottish Courts

There is a further matter to be taken into account, namely that the jurisdictions of the Court of Session and the High Court of Justiciary are matters of constitutional significance. This can be seen from Article XIX of the Acts of Union of 1706 and 1707, whose opening provision states: “That the Court of Session or College of Justice do after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same Authority and Privileges as before the Union subject nevertheless to such Regulations for the better Administration of Justice as shall be made by the Parliament of Great Britain.” And in relation to the High Court “And that the Court of Justiciary do also after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same Authority and Privileges as before the Union subject nevertheless to such Regulations as shall be made by the Parliament of Great Britain and without prejudice of other Rights of Justiciary”.

We take the view that any change to Human Rights law resulting from the Modern Bill of Rights must respect the fundamental precepts of the Scottish Legal System.

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