

Human rights for all - forwards or back?

Commentary on the future
of the UK's human rights laws

Scottish Human Rights Commission

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The Scottish Human Rights Commission is an independent public body with a remit to promote and protect human rights for everyone in Scotland. Created by an Act of the Scottish Parliament, we are accountable to the people of Scotland through the Scottish Parliamentary Corporate Body.

We are accredited as an 'A Status' national human rights institution within the UN system.

The Commission chairs the European Network of National Human Rights Institutions, one of four regional groups which bring together human rights bodies from around the world.

1. Introduction

In Scotland, we enjoy a greater degree of protection for our human rights than in most other countries. For the past 60 years or so, the quality of our everyday lives has improved as a result of the progressive implementation of human rights laws and treaties that apply not just to the UK and Scotland, but in Europe and the rest of the world.

However, there is no room for complacency.

Against the backdrop of often regressive debates about changing the UK's human rights laws, the Scottish Human Rights Commission and other partners have been working to develop Scotland's National Action Plan for Human Rights (SNAP). SNAP is a collaborative initiative that brings together public bodies and civil society. It enjoys cross-party support across national and local governments. SNAP is a bold roadmap for action to make all internationally recognised human rights a reality for everyone in Scotland.

As we approach the 2015 UK Parliamentary Elections, the Commission calls on all parties to ensure that our human rights laws go forwards, not back; and to commit to building on the progressive approach to realising human rights embodied in SNAP.

Changes to the UK's human rights laws would have a direct impact on the lives of people in Scotland, particularly in reserved policy areas like immigration, defence and some aspects of welfare. Moreover, any regressive changes to the UK's human rights laws would send a damaging message across Europe and beyond, weakening the international system of human rights as a whole.

The Commission's position is that any proposals to change the UK's human rights laws must pass a very simple test: do the changes take us forwards or back? Interrogating proposals against this test involves asking five key questions focused on rights for all, improving lives, accountability, building a better human rights culture and showing international leadership.

As Scotland's national human rights institution, the Commission sets out this test as a framework for informed discussion about realising human rights in our everyday lives. As the UK General Election approaches, the Commission calls on all politicians to ensure that Scotland goes forwards, not back, when it comes to realising human rights.

This is a time to test commitment to the fundamental principles and values enshrined in our human rights laws and international obligations. We must not allow regressive changes to slip through, or opportunities to improve people's lives to be missed. All of us deserve better than that.

Professor Alan Miller
Chair, Scottish Human Rights Commission

2. The UK's current human rights laws

The 1948 Universal Declaration on Human Rights first recognised the inherent dignity of every human being. Since then, the system of international human rights has evolved into a comprehensive set of international laws, treaties and monitoring mechanisms that provide benefits to everyone. In 1951 the UK ratified the European Convention on Human Rights and passed the Human Rights Act in 1998, followed by the Scotland Act the same year. These introduced many of the human rights outlined in the European Convention directly into Scotland's own laws.

The Convention sets a precedent as the most effective regional system of human rights protection in the world. As well as establishing common democratic values, it supports the progressive realisation of human rights across Europe through its function as a 'living instrument' – a practical and effective mechanism whereby the treaty must be interpreted in the light of present day conditions. This means sociological, technological and scientific developments, changing views on morals and ethics and evolving standards in the field of human rights itself, must all be considered when applying the Convention.

The Human Rights Act provides a direct route to justice in domestic courts, rather than the European Court of Human Rights, for individuals whose human rights have been breached by a public authority.

Section 6 of the Human Rights Act makes it unlawful for public bodies to act incompatibly with Convention rights. This has led to improvements in policies and practices when it comes to realising human rights, without the need for individuals to take legal action.

Collectively, the UK's current human rights laws have benefited people in many ways. Here are a few examples:

- **Improving standards in care:** Independent evaluations of The State Hospital and the *Care About Rights?* project in Scotland provide evidence that implementing Section 6 duties contributed to improvements in care settings, including a more individualised and person-centred approach, a move away from 'blanket' policies, reduced complaints and a clearer understanding of shared responsibilities.
- **Challenging the 'bedroom tax':** Several cases challenging the 'bedroom tax' have been brought to courts and tribunals using the Human Rights Act. These have primarily concerned Article 8, the right to a private and family life, and Article 14, which prohibits discrimination. Although the individual cases have varied on the facts, the principle holds that a policy that is manifestly disproportionate in its impact on disabled people and others can be challenged on human rights grounds.
- **Investigating fatal failures in health care:** Between 2005 and 2008 a series of sometimes fatal failures to protect people in hospital took place at Staffordshire Hospital. Patients were left lying in soiled bedding without food and water and without basic privacy. The families of many of those affected used the Human Rights Act to secure compensation and a full public inquiry.

- **Ending degrading prison conditions:** Robert Napier's successful claim against the then-Scottish Executive for the requirement to make him routinely 'slop out' while in prison on remand, led to the practice being changed across the prison estate.
- **Advancing equality**
Jeff Dudgeon brought a successful case in 1975 against the UK Government leading to the lifting of the ban on homosexual acts in Northern Ireland. Forty years on this remains a landmark example of the European Convention being used to advance equality and tackle discrimination where national governments have been unwilling to do so.

3. Forwards or back? The progressive test.

Any proposals to change the UK's human rights laws must pass a very simple test: do the changes take us forwards or back when it comes to realising human rights? Interrogating proposals against this test involves asking five key questions.

- **Rights for all**

Will the proposed change uphold the basic universal principle that each of us has the same human rights simply because we are human?

Human rights are for us all – they are universal. Any changes that erode this fundamental principle would very quickly undermine the whole concept of human rights, both here and around the world.

- **Improving lives**

Will the proposed change lead to positive, tangible improvements in how we all experience our rights in everyday life?

In Scotland, action is taking place to realise human rights in everyday life through Scotland's National Action Plan (SNAP). SNAP is built on the legal bedrock of the UK's current human rights laws and obligations and offers a progressive approach that could be replicated elsewhere.

- **Ensuring accountability**

Will the proposed change ensure that people in power, such as government and public bodies, are held to account?

Human rights are about making sure that individuals, organisations and governments in power, are accountable for how they use that power, and that they fulfil their responsibilities towards us.

- **Building a better culture**

Will the proposed change support or hinder efforts to build a culture where we all understand human rights and can put them into practice?

Awareness and understanding of human rights remain too low, leaving too many people vulnerable to abuse and too few organisations accountable for their actions. Changing this culture involves empowering people, supporting organisations to put rights into practice and increasing accountability.

- **Showing international leadership**

Will the proposed change uphold international standards and provide a strong example to other countries?

International human rights are agreed at the highest levels in the UN, embodying a set of values and principles that people around the world continue to fight for. Scotland has a duty to show international leadership when it comes to promoting human rights around the world.

4. Possible changes to the UK’s human rights laws

Various proposals to change the UK’s human rights laws have been suggested in recent years. These range from proposals to incorporate a wider range of international human rights into domestic law, to proposals to limit the scope of human rights laws, restrict the eligibility of some groups of people to rights or make rights conditional on ‘responsibilities’.

Changes to the UK’s human rights laws would have a direct impact on people in Scotland. Therefore the Commission would examine any detailed proposals during the parliamentary process. Here, we offer initial commentary on some of the issues raised by current debates against the progressive test we have set out.

The UK’s international human rights obligations

Currently, the UK’s domestic human rights law – the Human Rights Act – only incorporates the European Convention on Human Rights. The UK is also a party to other international human rights treaties including the UN Convention on the Rights of the Child, the UN Disability Convention and the International Covenant on Economic, Social and Cultural Rights.

Full incorporation of these international obligations into domestic law would be the single most progressive change that could be made to our human rights laws. It would reinforce and strengthen the importance of the universal human rights set out in international treaties. It would give people greater recourse to realise their rights in everyday life. It would also create stronger accountability on government and public bodies. In turn, this would help to build a better culture for human rights and would send a strong signal to other countries around the world.

The scope of human rights laws

Current human rights laws apply to all public bodies in Scotland. This means they protect people in many areas of everyday life. For example, hospitals have a duty to protect our right to privacy when we’re being treated and cared for. The police have a duty to respect our right to privacy when they carry out their day-to-day operations. If we are detained because of a mental health condition, our right to liberty must be respected as much as possible.

Limiting the scope of human rights laws to particular areas of law, for example to criminal law or property law, or to “the most serious” cases, as is sometimes proposed, would beg several questions. What impact would this have on realising people’s rights in other areas of everyday life such as health and social care or education? Who would be accountable for deciding which cases were “serious”? It appears unlikely that this type of change would pass the key tests of improving people’s lives, ensuring accountability or building a better human rights culture.

For example:

Mary, 81, has been admitted to hospital with pneumonia. The European Convention on Human Rights and the Human Rights Act mean that the hospital has a duty to make sure that she is treated in a way that respects her right to privacy (Article 8) and her right to not suffer from degrading treatment (Article 3). For example, this means making sure that she has enough to drink and eat, that she has privacy when using toilet and washing facilities and that she is given suitable clothing and privacy in bed.

Tony, 14, has been stopped and searched by the police six times on his way home from school. Article 8 of the European Convention on Human Rights and the Human Rights Act protects Tony's right to privacy. Without a clear legal framework behind this police practice, it is open to challenge by Tony and his parents using human rights.

The application of human rights law to the UK's operations overseas

Current human rights laws apply to the UK state's operations overseas, as well as on home soil. This has helped ensure accountability for the protection of people's rights when they are overseas and has reinforced the principle that human rights are for everyone, including UK military personnel serving overseas.

Any changes that attempted to restrict human rights laws in this way would take us backwards as they would fail the test of improving people's lives and ensuring accountability.

For example:

The families of several soldiers killed in Iraq when their vehicles were hit by roadside bombs, sued the Ministry of Defence using the HRA. The UK Supreme Court found that the Government owed a duty of care to properly equip and train soldiers sent to war as part of its duty to protect the right to life. Reversing this would be a backwards step in realising the rights of Scottish soldiers on operations overseas.

Eligibility to rights for different groups of people

Eligibility to human rights for everyone must be protected, regardless of characteristics such as nationality or citizenship. Any other approach would be fundamentally at odds with the core principle that human rights are for all – we have them because we are human.

Restricting eligibility to rights to particular groups of people would send a particularly unhelpful signal in terms of our international leadership and would lead to significant risks in terms of the impact on people's lives.

Rights and 'responsibilities'

People should retain legal protection for their human rights at all times including when, for example, they commit a crime.

This approach recognises that almost all of our human rights are already ‘limited’ or ‘qualified’ in various ways that reflect our mutual responsibilities in society. For example, our right to liberty is restricted when we are convicted of a crime and our right to free speech is limited by our responsibility not to incite hatred.

Any changes that attempt to place conditions on our legal entitlement to protection for our rights would fail the fundamental test that rights are for all.

The European Convention on Human Rights and the European Court of Human Rights

In drafting and ratifying the Convention, the UK reaffirmed its profound belief in the fundamental freedoms which are the foundation of justice and peace in the world, acknowledging that those freedoms are best maintained by both an effective political democracy and a common European understanding and observance of human rights.

It is important that domestic measures are available to prevent violations of rights and that effective remedies are available to people within the UK. However, the rights of individuals to petition the European Court of Human Rights and the Court’s independence are cornerstones of the Convention system.

Proposals to withdraw from the European Convention on Human Rights, or changes that risk the UK’s expulsion from it, would be a significant step back in protecting and realising human rights. In particular, this would be a regressive move when it comes to showing international leadership and ensuring accountability.

For example:

Elaine McDonald, a disabled former Scottish Ballet dancer, brought a case against her local authority when it stopped providing her with a night carer to help her use the toilet. Although she lost her case on other issues, the judgement by the European Court of Human Rights established that a failure to consider a person’s dignity can be a breach of Article 8, the right to a private and family life. This has been seen as an important ruling by disabled people and organisations campaigning for their rights to be realised in practice.

Finally, proposals that would enable the UK Parliament to ignore rulings by the European Court of Human Rights, for example by introducing a ‘democratic override’, would undermine the very concept of collective enforcement of rights. This would have severe consequences for the regional system of protection and for people in countries like Russia, Belarus and Turkey.

For more information

As part of Scotland's National Action Plan on Human Rights, the Scottish Human Rights Commission and other partners are developing a series of case studies illustrating the benefits of human rights in people's everyday lives. These will be published in spring/summer 2015 at www.scottishhumanrights.com/actionplan.

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